THE GROWTH OF ENGLISH LAW.

BY THE SAME AUTHOR.

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THE GROWTH OF ENGLISH LAW.

BEING

STUDIES IN THE EVOLUTION

OF

LAW AND PROCEDURE

IN ENGLAND.

BY

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PREFACE.

THE object of the following pages is to describe some phases in the growth of English law and procedure, and to indicate influences which have affected their development. The field is so immense that if one reviews particular epochs and events in connection with this subject in anything like detail a book may appear inconsecutive, because it is impossible to present a complete narrative in a reasonable space. On the other hand, in order to appreciate any important phase of legal history it must be considered at some length, and especially in relation to contemporaneous political and social movements. It is from this latter point of view more particularly that the several subjects discussed in this book are regarded. There is yet another thing to be said, however regrettable, it is natural that those whose interest in law is professional should give but little attention to the manner in which jurisprudence and procedure have in the past changed and grown, or to the personal influence of jurists and judges, for they are fully occupied with its daily action. Those again who are engrossed either in the study of

political events, or are partakers in them, are apt to forget how intimately the growth of municipal law is connected with the progress of the nation, and that the Common Law of England is also the basis of the jurisprudence of the United States, and of many of the Dominions of the Crown beyond the Seas. It is therefore one of my objects in the following chapters to endeavour to stimulate greater interest in the history of English Law, and with this view to place before those who are anxious to know more of some phases of it in the past, information which I have from time to time collected from various sources and authorities, and systematized in a convenient form.

I must take this opportunity of expressing my thanks to Messrs. Longmans & Co. for their courtesy in allowing me to make use of material which has been published in the *Edinburgh Review*, and to the proprietor of the *Law Magazine* for the same permission. I am likewise indebted to Miss Helen Clergue for perusing the material of this book before going to press, and to Mr. H. M. Robertson for reading the proofs.

E. S. R.

June, 1911.

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THE GROWTH OF ENGLISH LAW.

CHAPTER I.

THE BEGINNINGS OF ENGLISH LAW, 1000—1272.

BEFORE the time of Edward I. English law did not exist: Anglo-Saxon, Danish, Norman, and Roman law then partially prevailed, and Norman, ecclesiastical, and Roman influences were each at work. By the year 1272, however, English law, as we now understand it, had attained a definite shape, numerous changes, as well in its substance as its form, thereafter occurred from century to century, and from this date we witness not so much the gradual creation of a national law and judiciary, which is the characteristic feature of the previous period, as variations, co-extensive with the growth of England, of a national jurisprudence. Metaphorically speaking, from this time the various streams from different sources are united into one, which, widening, varying in aspect, broken in one place and diverted in another, has yet one unmistakeable and complete individuality. The metaphor, it is true, must not be pressed too far; it must not be supposed that English law from the time of Edward I. contained streams themselves clearly defined at that date, for it is a mixture of several systems, each being gradually modified during the course of time. "The picture of two streams

of law meeting to form one river would deceive us, even could we measure the volume and analyse the waters of each of these fancied streams. The law which prevails in the England of the twelfth century—this one thing we may say with some certainty—cannot be called a mixture of the law which prevailed in England on the day when the Confessor was alive and dead, with the law which prevailed in Normandy on the day when William set sail from Saint Valery. Nor can we liken it to a chemical compound which is the result of a combination of these two elements. Other elements which are not racial have gone to its making. Hardly have Normans and Englishmen been brought into contact, before Norman barons rebel against their Norman lord, and the divergence between the interests of the king and the interests of the great feudatories becomes as potent a cause of legal phenomena as any old English or old Frankish traditions can be. Nor, to take but one other example, dare we neglect, if we are to be true to our facts, the personal characters of the great men who accomplished the subjection of England, the characters of William and Lanfranc. The effects, even the legal effects, of a Norman conquest of England would assuredly have been very different from what they were, had the invading host been led by a Robert Curthose. And in order to notice just one more of the hundred forces which play upon our legal history, we have but to suppose that the Conqueror instead of leaving three sons had left one only, and to ask whether in that case a charter of liberties would ever have been granted in England. We have not to speak here of all these causes; they do not come within the history of law; only we must protest against the too

common assumption, that the English law of later times must in some sort be just a mixture, or a compound, of two old national laws" (*a*).

This protest is necessary against a too stringent application of the metaphor, but with the qualification to be found in the passage which we have quoted it makes the character of the early growth of our law more comprehensible.

But in a brief review of the growth of English law during the first three centuries after the Conquest, one cardinal point needs at the outset to be emphasised, and that is the connexion of the law with the political and social state of the country. Nothing has tended more to divert men from a study of English law than the regarding it as a separate science; for it can never be properly studied unless it is considered in its relations to the nation generally and to national life. Law in some way is constantly affecting the daily affairs of each member of the community, and yet there is no subject which has been considered in a more detached manner and with less reference to its social or political effects.

The means of obtaining justice are of the first importance in every community, and we may therefore at once direct our attention to the subject of judicial institutions. Of Anglo-Saxon law the evidence is necessarily

(*a*) The History of English Law before the Time of Edward I. By Sir Frederick Pollock, Bart., M.A., LL.D., Corpus Professor of Jurisprudence in the University of Oxford, of Lincoln's Inn, Barrister-at-Law, and Frederic William Maitland, LL.D., Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-Law. In 2 vols. Cambridge, 1895. Vol. I. p. 58.

obscure, and in such a state of society as existed in England prior to the Norman Conquest elaborate institutions of any kind are not to be expected. But, on the other hand, there may exist in rude communities a simplicity which may well be the envy of more advanced societies. And this was the case in the England of the Anglo-Saxons. The ordinary courts of public justice "were the county court and the hundred court, of which the county court was appointed to be held twice a year, the hundred every four weeks. Poor and rich men alike were entitled to have right done to them, though the need of emphasising this elementary point of law in the third quarter of the tenth century suggests that the fact was often otherwise" (*b*).

We should be wrong, however, if we allowed our ideas of courts of law in modern times to govern our minds in regard to those of such a primitive age as the tenth century. The courts were then held in the open air. Of their procedure we know nothing; indeed, procedure scarcely existed. The judges were, of course, the leading men of the county and the hundred respectively: there was the ealdorman; the bishop too sat in the county court, since the Church claimed for him a large share in the direction of even secular justice. Probably the bishop was often the only member of the court who possessed any learning or any systematic training in public affairs. The means of enforcing judgements were rude; the subjects of these judgements were offences and wrongs common in every simple state of society—homicide, theft, more especially cattle-stealing. "The law of contract is

(*b*) History of English Law before the Time of Edw. I., Vol. I. p. 18.

so rudimentary as barely to be distinguishable from the law of property." In later years above and below the local courts are the king's courts and the private courts of lords, spiritual and temporal, of various degree. Of the latter next to nothing is to be seen in Anglo-Saxon times. That there were rights of private jurisdiction is a matter of surmise rather than of proof. It is possible, it may even be probable, that to a limited extent they existed before the Conquest. It is sufficient, however, to assume such a possibility from subsequent facts without direct evidence at an earlier date.

Of the preservation of the peace, and of the punishment of offences by the king, there is as little evidence as of private jurisdictions; but that it existed is nevertheless not a matter of doubt, though the extent of it is unknown. But what we have to bear in mind is that in these early times "the king's peace" does not represent a general royal jurisdiction. The phrase comes from a time "when the king's protection was not universal but particular, when the king's peace was not for all men or all places. Breach of the king's peace was an act of personal disobedience, and a much graver matter than an ordinary breach of public order: it made the wrongdoer the king's enemy." In fact a sanctity attached to the king's house, arising from the respect which belonged to him individually. His attendants and those over whom he threw his protection were entitled to be kept from hurt by means of his authority. Thus the particular protection of the early king grew into the general jurisdiction of later monarchs.

When we reach the times of the Norman and the

Angevin kings we are on both firmer and more interesting ground. The jurisdiction of the king, however, to which we have just referred, was long in forming itself into what we call courts of law under the Norman kings. "The king's justice was still extraordinary; the local courts were those to which men went; the king's court was not in permanent session." "Under the two Williams the name *curia Regis* seems to be borne only by those great assemblages that collect round the king thrice a year when he wears his crown, on the great festivals of the Church. It was in such assemblages that the king's justice was done under his own eye, and no doubt he got his way; still it was not for him to make the judgements of his court. Under Henry I. something that is more like a permanent tribunal, a group of justiciars presided over by a chief justiciar, becomes apparent. Twice a year this group, taking the name of 'the exchequer,' sat round the chequered table, received the royal revenue, audited the sheriffs' accounts, and did incidental justice. From time to time some of its members would be sent through the counties to hear the pleas of the crown, and litigants who were great men began to find it worth their while to bring their cases before this powerful tribunal. We cannot say that these justiciars were professionally learned in English law: but the king chose for the work trusty barons and able clerks, and some of these clerks, besides having long experience as financiers and administrators, must have known at least a little of the new canonical jurisprudence. But for all this when Henry died little had yet been done towards centralising in one small body of learned men the whole work of justice" (*c*).

(*c*) History of English Law, Vol. I. p. 86.

We have to go forward for more than half a century before we can really find national and recognised courts of justice; for it is in what is sometimes termed, perhaps a little fancifully, the age of Glanville—in other words, in the reign of Henry II.—that the system of English justice becomes visible in distinct and clearly defined forms.

Glanville was, indeed, a conspicuous figure in the reign of Henry II., but it is doubtful if he wrote the book—"A Treatise on the Laws and Customs of England, composed in the time of Henry the Second, while the Honourable Ranulph Glanvill held the Helm of Justice"—which is associated with his name. Indeed, the probabilities are in favour of the work being that of some clerk who had followed Glanville's decisions, rather than of a man who was a statesman and a soldier, as well as a lawyer—if lawyer even a chief justice may be called in the twelfth century. Glanville came of an old Suffolk family. In 1163 he was made sheriff of Yorkshire; eleven years later, being then sheriff of Lancashire, he defeated the Scots near Alnwick, capturing their king. "From that time forward he was a prominent man, high in the King's favour, a man to be employed as general, ambassador, judge, and sheriff. In 1180 he became chief justiciar of England—prime minister, we may say, and viceroy." He went with Richard to the crusades, and died at Acre in 1190. The book which has been called after him seems to have been composed before the death of Henry II. in 1189. It is highly improbable that a man with the important duties which were cast on Glanville would have the time, even if he had the inclination, to carry out a task more fitted for the scholar and the clerk than the man of

action and the judge. On the other hand, nothing is more likely than that some competent secretary or clerk should associate such a book with the name of his master—"cujus sapientia conditæ sunt leges subscriptæ," says Hoveden. That legal wisdom it would be the natural desire of an industrious subordinate to perpetuate. And some one has done so, leaving us a notable landmark in the history of English law—a book in which we see procedure and substantive law gradually emerging out of an early legal obscurity. The elementary divisions of what we now term civil and criminal law also become apparent. It is a book, however, which helps us to realise the importance of the reign of Henry II. in the history of our law, rather than one which perpetuates the fame of a jurist.

We must resume, however, our review of the legal history of the time, and we may say shortly that at the end of the above reign we find—still somewhat uncertain in its character, but yet clearly established—a central and permanent court, wherein the king dispensed justice through the agency of skilled men, and also a system of courts held by itinerant justices who were acting for the king. The number and *personnel* of these justices was uncertain, the procedure of the courts was not established, but yet "we may say that before the end of the reign there is a permanent central tribunal of persons expert in the administration of justice—of sworn judges. It can be distinguished from the courts held by the itinerant justices, for though every such court is *curia Regis*, this is *capitalis curia Regis*. It can be distinguished from the exchequer, for though it often sits at the exchequer, and though its principal justices will be also the principal

barons of the exchequer, it has a seal of its own and may well sit away from Westminster, while the fiscal business of the exchequer could hardly be transacted elsewhere. It can be distinguished from those great councils of prelates and nobles that the king holds from time to time; questions too great for it are to be reserved for such councils. Probably it is already getting the name of 'the bench,' and its justices are justices residing at the bench. Though it is *curia Regis* and *capitalis curia Regis*, it is not necessarily held *coram ipso Rege*. Apparently the writs that summon litigants before it bid them appear 'before the king or before his justices,' that is to say, before the king if he happens to be in England and doing justice, and if not, then before his justices. No doubt when the king is in this country he will sometimes preside in court, but whether the justices will then follow the king in his progresses we cannot say for certain; as a matter of fact during the last eight years of his reign the king's visits to England were neither very frequent nor very long. On the whole Westminster seems to be becoming the fixed home of this tribunal; but as yet all its arrangements are very easily altered" (*d*).

When we arrive at another period—"the age of Bracton," which coincides with the beginning of the reign of Edward I.—we have reached a time when the courts of law had taken that final form which they were to retain for six centuries, until by modern lawyers they were thrown back into that cumbrous whole from which by the necessities of advancing civilisation they had gradually evolved themselves. The

(*d*) History of English Law, Vol. I. p. 133.

reforms of 1873 were carried out with perhaps too little regard to the course of history and the modern tendency to specialisation, and in the present Supreme Court of Judicature we see the form of the ruder age of the twelfth century.

If we look at what were formerly called the courts of common law, we note at this time three distinct tribunals. The Exchequer was in a less defined state as a legal tribunal than the other courts to which we shall presently refer. It was "in part a judicial tribunal, in part a financial bureau." Its duty as a government department, if we may use a modern phrase, was the real reason for its action as a court of law, though it is a curious fact that the dual character which the Court of Exchequer afterwards came to possess as the forum in which disputes about the revenue were settled and as an ordinary court of law was already becoming apparent. Its duty was primarily to find what was due to the king, and to compel the payment of it. It was natural that from this rather limited jurisdiction should grow a correlative one—namely, of adjudicating on claims against the king. Thus, when a man "thinks that he has a claim against the king, either in respect of some debt that the king owes him or in respect of some land that the king has seized, he will (this is the common practice of Edward I.'s day) present a petition to the king and council, and a favourable response to this petition will generally delegate the matter to the treasurer and barons, and bid them do what is right" (*e*).

(*e*) History of English Law, Vol. I. p. 171.

Under such circumstances the barons of the Exchequer were requested to obtain legal assistance from the judges of the other courts. This tribunal was resorted to by ordinary suitors for obvious reasons. It was doubtless regarded as a kind of tribunal of arbitration: it was trusted in its special disputes; it was without the drawbacks of the local courts, and those who composed it were quite willing to enlarge their special jurisdiction. In spite of the fact that attempts were carefully made to prevent this trenching on the province of the other tribunals, the general jurisdiction of the Court of Exchequer by means of some legal fictions became an accomplished fact. In the age of Bracton this Court existed, but under difficulties, though it had reached a definite form as a special and a general tribunal. But the Exchequer was not in theory the king's court; it was not the court in which justice was dispensed by the sovereign, or, in his absence, by his own selected judges. That court had by the time of Edward I. grown into two distinct tribunals, with two distinct court rolls—the Common Bench, "the appropriate tribunal for ordinary civil suits between subject and subject," and the King's Bench, which was, strictly speaking, "the court of our lord the king held before the king himself."

There is always a danger in formulating very definite descriptions of institutions which have a gradual growth, and in some respects it would be misleading to speak of the King's Bench at the end of the thirteenth century as if it were a simple municipal tribunal for the decision of ordinary disputes, for at any moment the king might be present, and its resemblance to a modern law court would

then be lost in the return of the archaic and picturesque personal jurisdiction of the sovereign. This royal presence was, however, fast disappearing: it had appeared in a fluctuating manner for years, so that at times the Bench had been non-existent; while the Common Bench, as during the minority of Henry III., had been the king's court. Nor has the distinction between the king's court as we understand it and the king sitting with his council become altogether clear. "There remain in suspense many questions as to the composition and jurisdiction of this the highest of all tribunals. . . . The fourteenth century has to answer these questions; the thirteenth leaves them open." It is enough, however, that at this particular period we are able to see in defined form the courts of law which for several centuries were to exist in the same shape and to exercise the same powers. Again, we are able to see with reasonable distinctness the despatch of justice in the king's name in the country districts. But though the itinerant judges, whether for the purpose of the trial of criminals or for the decision of civil disputes, were partly justices from the king's court, the exclusive duty had by no means yet devolved on them. Early in Henry III.'s reign "this work was often entrusted to four knights of the shire; at a later time one of the permanent justices would usually be named, and allowed to associate some knights with himself." In nothing is the ubiquity of the law more noticeable than in these species of jurisdiction. In the second year of Edward I.'s reign "two thousand commissions of assize were issued"; in other words, the king's courts had jurisdiction in the remotest corner of the realm. But, again, we must not carry into our survey of this mediæval jurisdiction our

ideas of the assize of the twentieth century. The eyre, or iter, was much more than what we should now term a court of assize. Let us give the picture as it is presented to us in the History of English Law:

"If we suppose an eyre in Cambridgeshire announced, this has the effect of stopping all Cambridgeshire business in the bench. Litigants who have been told to appear before the justices at Westminster will now have to appear before the justices in eyre at Cambridge. There is no business before the bench at Westminster if an eyre has been proclaimed in all the counties. Then, again, the justices are provided with a long list of interrogatories (*capitula itineris*) which they are to address to local juries. Every hundred, every vill in the county must be represented before them. These interrogatories—their number increases as time goes on—ransack the memories of the jurors and the local records for all that has happened in the shire since the last eyre took place some seven years ago; every crime, every invasion of royal rights, every neglect of police duties must be presented. The justices must sit in the county town from week to week and even from month to month before they will have got through the tedious task and inflicted the due tale of fines and amercements. Three or four of the permanent judges will be placed in the commission; with them will be associated some of the magnates of the district; bishops and even abbots, to the scandal of strict Churchmen, have to serve as justices in eyre. Probably it was thought expedient that some of the great freeholders of the county should be commissioned, in order that no man might say

that his judges were not his peers. An eyre was a sore burden; the men of Cornwall fled before the face of the justices; we hear assertions of a binding custom that an eyre shall not take place more than once in seven years" (*f*).

The view which we thus obtain is one of a wide-spreading justice, of courts of law as yet unfettered by technical rules. For what in more recent times has been known as "equity" as distinguished from "law"—in other words, a justice more rational because less technical—had not yet come into being, for the very simple reason that it was not yet required. The Chancery was, therefore, not a judicial tribunal at all. "The need of a separate court of equity is not yet felt, for the King's Court, which is not yet hampered by many statutes or by accurately formulated case law, can do equity." The non-existence of this "equitable" jurisdiction indicates not only the absence of complex disputes for decision and of harassing legal technicalities, but also shows us that the functions of judges were more in the nature of those now exercised by men whom we should term arbitrators. We have reached, in fact, a period of some definiteness of jurisdictions combined with much indefiniteness of technical law and procedure. A greater complexity of civilisation was followed by a remarkable increase in the technicality of English law, and the age of Bracton was in some respects an Arcadian period, when a universal justice was dispensed without costs and without the encumbrance of legal formalities.

(*f*) History of English Law, Vol. I. p. 180.

Equally noticeable and important is the change which has now become apparent in the character of the judges of the king's courts: ecclesiastics are giving place to laymen, and among laymen a body of professional lawyers is becoming evident who are either advisers of or advocates for suitors. The change was gradual; the king's judges were not drawn exclusively from the laity for many years, and of Edward I.'s judges not a few were clerks. But even before the end of Henry III.'s reign "the lay element is beginning to outweigh the ecclesiastical," and we have, therefore, passed out of that archaic period of society in which the priest is the judge. This is, of course, a social phenomenon of considerable importance; it marks a distinct epoch, for the more elementary a society the stronger is the religious influence in the sphere of law. The causes of this are diverse; with them, however, we are not concerned here. What has to be noted is the appearance of professional judges and of a professional class of lawyers, of precedents which begin to be of validity, of technical forms having later a frequently unreasonable importance, and of judicial decisions based on a general body of recognised and substantive law rather than on an uncertain mixture of moral and religious rules, customs, and common sense. Of these three features the work of Bracton, which has been well described in a single phrase as being "Romanesque in form, English in substance," is illustrative. The influence of the canon law and of Roman law is obvious not only in its breadth of view, but in some classical pedantries, occasionally also in some actual rules which supply the absence of authority arising either from English dicta, practice, or custom. But "the main matter of his treatise is genuine English law, laboriously col-

lected out of the plea rolls of the King's Court." Some of these decisions may have been grounded in the first instance on principles of the Roman law, but as they existed when Bracton took them in hand they were the gradual results of the judicial enunciations of the King's Court during the preceding periods. We must be careful, however, to guard ourselves against supposing that the modern system prevailed by which certain cases formed precedents which are binding authorities on the Court. Decisions in this mediæval age were illustrations of the custom of the King's Court, which "is the custom of England and becomes the common law." They constitute a body of recognised law, but they do not individually govern and conclude judges in regard to certain states of facts, nor were they known to all the judges or to all their clerks. They formulate the opinions of those who had had to administer the law upon all manner of subjects; these had been regarded from an essentially English point of view (*g*). So far as Bracton was concerned, he only used his intimacy with canon and Roman law to enunciate opinions, gathered with exceptional industry from these decisions, in an orderly and ample form and with keen point. He produced a treatise, and not a mere collection of notes and cases. His work focussed with amplitude and clearness the national law which had been growing up since the Conquest, and it enables us to realise with some distinctness the real beginnings of the English common law, and to define it in this particular age. The

(*g*) In the exceedingly important case raising the question whether a palatinate can be partitioned, the magnates reject foreign precedents, "nec voluerunt judicare per exempla usitata in partibus transmarinis." (History of English Law, Vol. I. p. 162, note 3.)

term "common law" is a vague one: it has, even in the minds of lawyers, a considerable indefiniteness, it is regarded as something opposed both to statute and to case law, whereas this work of Bracton shows us that its elements are largely composed of judicial decisions. The book was a basis also for the works of future writers and for many judicial decisions in later years, as the subject-matter of English law expanded with the advance of population and civilisation. It is, in fact, a kind of legal vantage-ground, dividing two periods, from which we can look into the past and the future.

Bracton's career is illustrative of that characteristically hybrid personality of the time, the ecclesiastic who is half a lawyer, and who is the product of the combination of two ages. He can be described in a few words. His name was Henry of Bratton; he was a Devonshire man, and probably began his career as clerk to William Raleigh, a justice of the Common Bench and later Bishop of Norwich. From a justice in eyre he became a justice of the King's Court, from which position he appears to have retired about the year 1257, though to the day of his death, in 1267, he continued to act as justice of assize in the West. If this were all that could be said of him, he would be regarded simply and solely as a lawyer; but soon after he ceased to be judge of the central court he became rector of Combe, near Teignhead, and subsequently rector of Bideford, archdeacon of Barnstaple, and chancellor of Exeter Cathedral. Thus he was both a lawyer and an ecclesiastic. He reached a judicial position, after the manner of the French judges of to-day, by subordinate official work. The best portion of his life he seems to have

passed as a purely legal judge, and he ended it while acting as a judge of assize and as a Church dignitary of some importance. He is typical of an age of transition, in which, though nominally an ecclesiastic, he was, while performing legal duties, practically wholly a lawyer. He took up clerical functions as the easy occupation of the later days of life, not as the work of his youth and prime. Both Bracton and his predecessor Glanville are remarkable figures in the history of English law, and while the works associated with their names enable us to understand the state of English law at the time when they were composed they cannot be regarded as books which influenced it in substance or in form, and they are indicative rather than formative.

In reviewing the growth of the legal tribunals we are almost insensibly led to a consideration not only of the forms by which their assistance was obtained and of the means by which their judgements were enforced, but of the substantive law which formed the subject-matter of their decisions. Such a study of details would, however, plunge the reader into too large a mass of legal technicalities; but one feature in relation to this growth is obvious above all technicalities—that is, the native character of both English law and procedure. No doubt here and there Continental influences may be traceable, due to the learning of some ecclesiastics; but such features are isolated, and the progress of both law and procedure is marked by an individuality which has made the English common law a system of its own, not adopted from the codes or decisions of the Continent, but bearing on every part of it the impress of the national movements among which it arose

and of the ruling men among whom it had its growth. Of this native character there is to be found a noticeable instance in the forms of actions—that is to say, that the nature of the relief to be given to a person who was aggrieved was shown by the writ which he obtained from the royal Chancery. This was essentially a practical proceeding; the writ was issued not in consequence of any juristic theory, but to meet an everyday want: it was the act of the sovereign, essentially the fountain of justice, standing above all his nobles and willing a right to his subjects. The system was one characteristic of a period of legal growth, during which time the writs must have embraced most of the ordinary causes of action and would thus tend to become fossilised.

"The age of rapid growth is that which lies between 1154 and 1272. During that age the Chancery was doling out actions one by one. There is no solemn *actionem dabo* proclaimed to the world, but it becomes understood that a new writ is to be had, or that an old writ which hitherto might be had as a favour is now a writ of course. It was an empirical process, for the supply came in response to a demand: it was not dictated by an abstract jurisprudence: it was conditioned and perturbed by fiscal and political motives; it advanced along the old Roman road which leads from experiment to experiment" (*h*).

It took nothing essential from the highly organised legal procedure of Rome; it went on its own way, administering to the needs of the people as they arose. "Tot erunt formulæ brevium quot sunt genera actionum,"

(*h*) History of English Law, Vol. II. p. 557.

writes Bracton—that is to say, in other words, there was a distinct remedy, clear in its form, for every wrong. The modern lawyer is familiar with some writs, but the comprehensive character of this formulary system is scarcely to be appreciated without a reference to the table of writs printed in Pollock and Maitland's "History of English Law." It shows the forms of actions brought before the justices who in the years 1256, 1269, and 1279 made an eyre in Northumberland, and also the actions on the roll of the Common Bench for Easter Term in 1271. They number sixty-one different forms in all and comprehend a list of remedies for the ordinary wrongs of everyday life. They include such writs as those of *De Nativo habendo* and *De Libertate probanda*—that is, writs for affirming villenage and negatory of it. Thus in the so-called age of Bracton there existed a legal system very special in its character, but conducive to the welfare of the people, since it gave them a recognised series of remedies which no kind of judicial discretion could alter. It was a system, however, which, beneficial during its growth and early period of maturity, was certain to degenerate into one of undue technicality when society became more complex. In later ages it conduced sometimes to a denial of justice and required adaptation to the needs of modern times by the administration of what is termed equity. But the same power which in the twelfth and thirteenth centuries sent forth writs in various forms was that which later was to soften the rigour of the common law by a species of judicial discretion and common sense.

A class of professional lawyers is now also becoming

pretty clearly defined. Such a growth is in some respects a subject rather for the student of sociology than of legal history; but it is so connected with the latter that it cannot be passed over in any view we take of English law at the end of the thirteenth century. Before the end of it "there already exists a legal profession, a class of men who make money by representing litigants before the courts and by giving legal advice. The evolution of this class has been slow, for it has been withstood by certain ancient principles. The old procedure required of a litigant that he should appear before the court in his own person and conduct his own cause in his own words. For one thing, the notion of agency, the notion that the words or acts of Roger may be attributed to Ralph because Ralph has been pleased to declare that this shall be so, is not of any great antiquity. In the second place so long as procedure is very formal, so long as the whole fate of a law-suit depends upon the exact words that the parties utter when they are before the tribunal, it is hardly fair that one of them should be represented by an expert who has studied the art of pleading: —John may fairly object that he has been summoned to answer not the circumspect Roger, but the blundering Ralph; if Ralph cannot state his own case in due form of law, he is not entitled to an answer. Still in yet ancient days a litigant is allowed to bring into court with him a party of friends and to take 'counsel' with them before he pleads. In the Leges Henrici it is already the peculiar mark of an accusation of felony that the accused is allowed no counsel, but must answer at once; in all other cases a man may have counsel. What is more, it is by this time permitted that one of those who 'are of counsel with him' should speak for him.

The extreme captiousness of the old procedure is defeating its own end, and so a man is allowed to put forward some one else to speak for him, not in order that he may be bound by that other person's words, but in order that he may have a chance of correcting formal blunders and supplying omissions. What the litigant himself has said in court, he has said once and for all, and he is bound by it; but what a friend has said in his favour he may disavow. The professional pleader makes his way into the courts, not as one who will represent a litigant, but as one who will stand by the litigant's side and speak in his favour, subject, however, to correction, for his words will not bind his client until that client has expressly or tacitly adopted them. Perhaps the main object of having a pleader is that one may have two chances of pleading correctly. Even in the thirteenth century one may see the pleader disavowed. One John de Planez in his pleading for William of Cookham called Henry II. the grandfather instead of the father of King John; William disavowed the plea and the advocate was amerced for his blunder. And so before any one is taken at his pleader's words it is usual for the court to ask him whether he will abide by those words. Just because the pleader makes his appearance in this informal fashion, as a mere friend who stands by the litigant's side and provisionally speaks on his behalf, it is difficult for us to discover whether pleaders are commonly employed and whether they are already members of a professional class. The formal records of litigation take no notice of them unless they are disavowed" (*i*).

History of English Law, Vol. I. p. 190.

We have here a clear and graphic description of the position of the advocate: he is just ceasing to be, to use a legal phrase, "the next friend" of the litigant or the prisoner, and is becoming a professional and paid agent, skilled in one particular kind of work and retained for a particular purpose—namely, of acting as counsel in court. As the right of obtaining the assistance of a representative before the judges became recognised and common, the growth of a class of men to act as advocates is part of the ordinary and natural evolution of particular classes, of an advance into a more artificial state of society. As soon as we find, as is the case in the reign of Edward I., that the king has a number of pleaders who are known as his servants or "serjeants" at law, we may at once accept the fact as evidence of the existence of this particular class and of the completion of the period of growth.

A curious and interesting point in regard to this subject is the fact that, even at this early period in the history of English law, the class of attorneys was not the same as the class of advocates. The attorney was at first merely an agent *ad hoc;* he was not a man of one profession; he was placed by the litigant as his "agent" to gain or lose in some particular plea; the abbot appointed a monk and the baron his steward. If a more extensive agency was required, a man had to obtain the power of delegation by means of a royal writ, and he had to show some reason for his demand; the grantee of the writ must be going abroad on the king's business or be incapacitated by age or sickness. In time the same names begin to appear; it is easy indeed to understand how, in a particular locality, two or three persons should get into

the habit of acting as attorneys when the justices in eyre came round, and how in time there should thus be found a number of persons familiar with the increasing formalities of the law, and willing, for a recompense, to save a litigant the trouble of attending to legal matters. But the reason for the growth of two separate classes of lawyers is not visible. In 1280 the corporation of London directed as to the civic courts that "no countor was to be an attorney." Of the cause of this direction we are ignorant, nor does the History of English Law give us any help. "We see a group of counsel, of serjeants and apprentices on the one hand, and a group of professional attorneys on the other, and both of them derive their right to practise from the king, either mediately or immediately." Such was the state of things at the end of the thirteenth century, and if we were to hazard a suggestion as to this remarkable and long-continued division of the legal class in England it would be that it sprang from the same spirit of exclusive trading which produced the various gilds for commercial purposes, and from the same spirit of exclusiveness, of which self-interest was at the bottom, which gave in the mediæval times various rights to certain classes of the community, which, while they benefited those who possessed them, were a corresponding detriment to those who were without them.

Whilst justice was found throughout the country there were here and there some exceptions to its equal incidence. One instance is to be found in regard to serfdom. This subject belongs in some respects to the social as much as the legal history of our country, but in some respects also it has an important bearing on the state of English law in

the Middle Ages. In legal phraseology all men were either freemen or slaves; the latter were called *servi*, *villani*, or *nativi*—the three terms representing one and the same idea. But this serfdom was not absolute, it was relative, and in fact may well be called prædial:—

"In the first place, it rarely, if ever, happens that the serfs are employed in other work than agriculture and its attendant processes; their function is to cultivate their lord's demesne. In the second place, the serf usually holds more or less land, at least a cottage, or else is the member of a household whose head holds land, and the services that he does to his lord are constantly regarded in practice as the return which is due from him in respect of his tenement. . . . In the third place, his lord does not feed or clothe him; he makes his own living by cultivating his villein tenement, or, in case he is but a cottager, by earning wages at the hands of his wealthier neighbours. In the fourth place, he is seldom severed from his tenement, he is seldom sold as a chattel, though this happens now and again: he passes from feoffor to feoffee, from ancestor to heir, as annexed to the soil" (*k*).

The villein was thus in relation to his lord a slave, he had no proprietary right as against him, he was in theory as much his chattel as the goods in his castle; but the serfdom was a link between two persons: it was essentially relative, for as regards persons other than his lord, the serf had nearly all the rights of a freeman. When the lord was not concerned, the criminal law made no difference between bond and free. "A blow given to the

(*k*) History of English Law, Vol. I. p. 397.

serf is a wrong to the serf." The serf might, as regards men in general, "have lands and goods, property and possession, and all appropriate remedies." But the position was essentially anomalous, for the serf could enforce an agreement made with a person other than his lord; yet if this person endeavoured to enforce a contract against the serf it was a good plea that he was the villein of X. when the agreement was made, and all that he had belonged to him. By degrees this plea seems to have become limited in its force, and while constantly urged in actions for land was not set up in purely 'personal' actions. The result of this singular position of the villein was, as is obvious, actually to place him in a better position than a freeman, for even when the villein could be sued, as in regard to chattels, yet, as the latter just as much as the serf belonged to the lord, it was hardly possible "to prevent collusion between villeins and friendly lords." His state of villeinage gave the serf what must also be regarded as other privileges, for he was exempt from onerous and unpleasant duties. "He could not sit as a judge in the communal courts, though he often had to go to them in the humbler capacity of a 'presenter.' So too he could not be a juror in civil causes: this he probably regarded as a blessed exemption from a duty which fell heavily on freemen." On the other hand in the manorial courts full duties fell on the serf, he could be a presenter, a juror, an affeerer of amercements, and he was commonly the reeve of the township. To discuss here how a man became a serf, and how he could be emancipated, would carry us beyond our present subject; what we must bear in mind is the relativity of serfage in England in the age of Bracton. It is a juristic curiosity,

produced possibly by the desire of lawyers to simplify the state of the law, possibly by other motives which are mere matter of conjecture. The lawyers recked "little of the interests of any classes, high or low; but the interests of the State, of peace and order and royal justice, are ever before them." In the transformation of a more rigorous system of slavery into the relative serfdom of the Middle Ages it is probable that motives of statesmanship had some influence. The change, while producing a social benefit to the class of villeins, created a striking and peculiar feature of English law.

If we turn from the village to the town, from agriculture to commerce, we at once meet with the Jews, the bankers of the mediæval world. At the age of which we are now writing the Jew was a person of the first importance. Though he was in a position of relative servility to the king, that relation gave him, like the serf, some positive advantages. Everything that he acquires, says Bracton, is for the king, and for that very reason it was to the advantage of the sovereign to protect the Jew. Thus a department of the Exchequer was organised for the supervision of the business of loans, which was in the hands mainly of the Jews. It was "a financial bureau and a judicial tribunal." It "acted judicially not merely as between king and Jew, but also as between king and Gentile when, as very often happened, the king had for some cause or other 'seized into his hand' the debts due to one of his Jews by Christian debtors. Also it heard and determined all manner of disputes between Jew and Christian. Such disputes, it is true, generally related to loans of money, but the court seems to have aimed at and

acquired a competence, and an exclusive competence, in all causes, whether civil or criminal, in which a Jew was implicated, unless it was some merely civil cause between two Hebrews, which could be left to a purely Jewish tribunal" (*l*).

Thus we have here two notable exceptions to the ordinary incidence of the law, which, except in criminal cases, removed the Jew almost entirely from the jurisdiction of English law; though a slave to the king, he was free in relation to all other persons. When Hebrew went to law with Hebrew each appealed to his own tribunal, and when Hebrew and Christian could not agree the dispute was settled by a special tribunal, where the Jew was certain of a favourable audience. In the society of the thirteenth century, immediately before their expulsion from England, the Jews take a foremost place; they are necessary to the king, to the landowner, and to the merchant; they are helping, without the goodwill of the English people, in the development of the English nation, and, what is more to our immediate purpose, they are for the time being producing a marked effect on the course of English law by causing the establishment of special tribunals and the withdrawal of a large and important class of persons from the jurisdiction of the ordinary courts. But whether these special tribunals affected the substance of our modern law is doubtful. Be that, however, as it may, no review of English law in the age of Bracton, as it has been termed, is complete which does not take some notice of the relation of the Jew to the laws of the age.

(*l*) History of English Law, Vol. I. p. 453.

If we turn from laymen to Churchmen we find in clerks and monks a third class of persons, to some extent not subject to the general law. The exception is the more remarkable because it was from among ecclesiastics that judges and attorneys in legal affairs were mostly drawn. A monk, though civilly dead, and unable to hold any property of his own, "was fully capable of acting as the agent of his 'sovereign,' and even in litigation he would often appear as the abbot's attorney." The great place which he held in worldly affairs in mediæval days is too well known to be here insisted on, but nevertheless in the eye of the law he bore the same relation to the abbot as the villein to his lord; he could neither sue nor be sued without his lord. He was, in fact, in relation to his superior in the same position as the villein to his lord. "Every monk was the absolute subject of some 'sovereign' —normally an abbot, but in some cases a prior or a bishop." The sovereign was an absolute monarch, and so long as he did not deprive his subjects of life or limb the temporal power in no way interfered with him. In criminal matters the position of the monk was anomalous. For small offences, *transgressiones*—or, in modern legal language, "misdemeanours"—he could be punished in the temporal courts. In respect of graver crimes he enjoyed that benefit of clergy which was also the privilege of the clerk. In theory it can scarcely be called a privilege, since under it a clerk could be indicted before two tribunals. For the permission by the secular power to the ecclesiastical power to try clerks who were accused of grave crimes in the ecclesiastical courts cannot be regarded as a relinquishment of the right of trial; it was merely the recognition of a co-ordinate and permitted

jurisdiction. For it has to be remembered that at the time of which we are now speaking a preliminary investigation into the alleged offence was held, and if the jurors found that the accused was guilty he was delivered to his bishop for trial in the episcopal court. It is said that the procedure in the bishop's court at the end of the thirteenth century was "little better than a farce." Thus the preliminary inquiry, though it may sometimes by the acquittal of a prisoner in the first instance have prevented unjust verdicts in the bishop's court arising out of personal motives, was much more a safeguard against the escape of ecclesiastical offenders who were really guilty of the crimes alleged against them. While in some respects it was an unrecognised protection of the monk and the clerk from episcopal or abbatical tyranny, it was more especially a check on the absolute immunity from punishment of those entitled to the protection of the Church, for the tendency of this privilege of the benefit of the clergy was to "breed crime and impede the course of reasonable and impartial justice." The temporal power, in fact, could and did declare that there was a *primâ facie* case against an accused clerk: it could not and did not cause him to be punished. It asserted its theoretical right over him as an ordinary citizen, but in most cases its action allowed him to escape altogether from punishment, or only to suffer from the mild judgement of an ecclesiastical court. At the same time the admitted right and the practice of the temporal courts to punish forest offences and "transgressiones" committed by clerks or monks was a tacit surrender by the Church of the whole claim to the exclusion of monks and clerks from the jurisdiction of the sovereign. It put these men on the same

legal level in regard to the lighter offences of daily life as the common layman, and was a continual reminder that the clerical caste was within the limits of the municipal law. The permission of the privilege of the benefit of clergy in respect of graver crimes, even under the limitations already mentioned, was a concession to the Church of a substantial kind, and was also an admission for the time that the Church was too powerful for the withholding of all exceptional privileges from it. It was a curious compromise, imperfect, no doubt, but tending to prevent friction between the Sovereign and ecclesiastical authorities, for we have only to recollect the quarrel between Henry II. and Becket to understand the practical gravity of such disputes. The position was illustrative of an essentially transitional period in the history of English law, which is to some extent also the conclusion of a conflict of many years between the king and the Church, from which neither the temporal nor ecclesiastical powers were able to obtain a decisive advantage.

CHAPTER II.

THE FORESTAL LAWS AND FORESTS OF THE MIDDLE AGES.

In mediæval England the existence of definite tracts of land which were royal forests, and within which a particular body of law was enforced, vitally and daily affected the lives of large numbers of the people. With the forests came into being forest laws, which occupy a considerable place in the earlier annals of English law. They were special in their nature and limited geographically, and were, therefore, variable in their application. They were enforced by officers of the forest, and recognised by the King's Courts, though the main link between the minor courts of the forest with its laws and the king as the fountain of justice, were the justices in eyre.

These itinerant justices were appointed by the sovereign to hear and determine pleas of the forest, as other justices—in some instances the same men—were appointed every seven years to hear pleas of the Crown and common pleas. Of this elaborate system we are now able to take an accurate survey, for the publication in 1901 of a volume on "The Select Pleas of the Forest" (*a*) supplied the requisite material.

(*a*) The Select Pleas of the Forest. Edited for the Selden Society by G. J. Turner, M.A., Barrister-at-Law. London: Bernard Quaritch. 1901.

Before the publication of this book, the Treatise of Manwood, first published in 1598 and continued through various editions, was the authority to which it was always usual to refer for information on the forest laws. That work is an instance of the way in which a legal imagination can create legal fictions. Manwood constructed an ingenious but altogether fanciful and untrue theory of a contract between monarch and people. In return for the continual care and labour which he gave to the preservation of the whole realm, the king was presented by his subjects with the prerogative of having places of recreation and pastime wherever he might desire, and so he could make a forest at his will and pleasure for the shelter of beasts of the chase. Bracton long before Manwood's time had evolved the theory that as no private person had a property in wild animals they must therefore be the property of the king. If one could imagine a royal right over, we need not say property in, a red deer or a wild boar, it was easy to construct a theoretical right in the sovereign to have places where certain animals might be secure from the pursuit of any man except the sovereign and of one who was authorised to hunt by him. But Bracton also formulated the doctrine that occupancy was the basis of the right to property, and it was this doctrine which the Norman kings carried into practice. But something more than this was needed to justify many of their acts, for they were not careful at all times to respect private rights when afforesting land, often including towns and villages within a newly created forest with its indefinite metes and bounds. A specious theory, such as that of Manwood, was needed to give even a semblance of legal propriety to their conduct.

But the prerogative of the king to have and to enjoy royal forests rose, in fact, from simple causes, partly because he was the only distinct representative of the State, and partly from superior individual power. The property of the Saxon sovereign in wastes and forests, which appears to have taken the place of an equally vague communal right, indefinite enough in its extent as it must have been, passed to the Conqueror when he was crowned at Westminster. From his own strength, from the weakness of his subjects, and from the disturbance, resulting from the Conquest, of the old order both of property and of government, he had the opportunity of increasing the number of places within the forestal jurisdiction of the sovereign. The king could, in fact, assert an actual forestal right over any part of the country which was not clearly the undoubted property of one of his subjects, and even then some excuse might be made for its forfeiture to the Crown. As he moved about his kingdom, passing from castle to castle and from town to town, opportunities constantly arose for him to gratify his desire for the extension of his territorial influence and power, and his passion for the chase. Thus in an inquiry as to the right to the bailiwick of the forests of the counties of Leicester and Rutland, we meet with an instance of what appears to be purely arbitrary afforestation:—

"Upon a search among and an inspection of the rolls of the eyre of Geoffrey of Langley and his fellow-justices in eyre for pleas of the forest at Oakham in the thirty-third year of the lord king who now is, it is found that it was presented and proved before the same justices in their

eyre by twenty-four sworn knights and loyal men of the county of Rutland that when King Henry I., the son of king William the Bastard, was on his way towards northern parts, he passed through a certain wood, which is called Riseborough, in the county of Leicester. And there he saw five hinds. And he forthwith ordered a certain servant of his by name Pichard, to tarry in those parts until his return from the parts aforesaid, and in the meantime to guard the said hinds for his use. But it happened that in that year the said king did not return there; and in it the said Pichard associated himself to a certain serjeant of the same country who was called Hasculf of Allexton, whose house he frequented much. But when the year was passed, after the aforesaid king had returned from the northern parts, the said Pichard came to the king aforesaid, saying that he was unwilling to be custodian of the aforesaid bailiwick any longer. And on being then asked by the same king who would be a fit person to be custodian of the said bailiwick, he replied, the said Hasculf, who had lands near there, and was resident in the same bailiwick. And then the said king entrusted to the aforesaid Hasculf the custody of the said bailiwick, to wit, the forestry of the county of Leicester and also of Rutland; and he was custodian of it all his time, and he lived for a long time, that it is to say till the time of king Stephen, and was then killed in his own house by Bartholomew de Verdun. And after the death of this Hasculf, a certain Peter, his son, received the custody of the aforesaid bailiwick from king Henry, the grandfather of the lord king who now is" (*b*).

(*b*) Select Pleas of the Forest, p. 45.

How picturesque and suggestive is the glimpse which the old roll gives of the mediæval monarch journeying with knights and retainers through the strong growing woodlands of the midlands, the herd of shy deer suddenly perceived in some opening in the forest, and the quick inquiry as to who was the warden of the wood. There was doubt and hesitation as to the ownership of the property, which was soon ended by the king giving to Pichard—probably a Frenchman—the bailiwick, and charging him, partly in jest and partly in earnest, to guard the five hinds till he again came south. A district could be afforested in a moment by the mere word of the monarch, while it took centuries to free it from the royal dominion. By a simple act indicative of his right to occupy it, the king could take possession of acres of unowned land; but whilst he took the land as the supreme head of his people, he forgot both their wants and their natural feelings. What the peasant or the villager resented was not so much the assertion of a royal title to the forest, the woods, and the waste, even the mere pleasure of the chase, as the fact that this assertion prevented the enjoyment by the people of property of which the king was no more than a trustee, but which he treated as the gift of heaven to an anointed and beneficent autocrat, not seldom exercising his prerogative so as to cast his dominion over cultivated land, hamlets, houses, and small towns which up to that time had been free from the restrictions of the forest laws.

In Norman England were great tracts of almost uninhabited country, and nothing, as the instance just presented shows, was easier than for the king, as the chief

personage in the land, to assert his paramount right to these portions of his kingdom in the simple manner which the chronicle describes. It was a right which appealed to the natural instincts of a man who enjoyed the pleasures of the chase; and had also to consider the few but necessary demands of his exchequer. Far, however, from there being any kind of contract between governor and governed in regard to forests, the whole course of mediæval politics shows a steady endeavour by the sovereign often to enlarge and always to retain his forestal jurisdiction against the will of his subjects, and equally constant though fluctuating efforts on the part of the barons and of the people to lessen both the power of the Crown and the territorial extent of the royal forests. But though all classes were united in a common animosity to the forestal dominion of the king they had no common sympathies. A baron was as harsh a lord of the forest as a king; indeed, when, as in parks, the baron had his own miniature forest, the penalties against trespassers were more severe than in the king's forest. The aristocratic poacher who made deer traps in the bounds of his park as near to the royal forest as possible, sometimes so close that he was summoned before the justices for a nuisance, for an offence against the forest law, had no mercy for the peasant who, within the bounds of the park, killed one of the truant deer or cut a limb from an oak or an elm. Another point should be noted in this connexion. We must not regard the king in the assertion of his prerogative as an unreasonable tyrant; it is useless to apply theories suitable to highly-civilised communities in regard to the right to unoccupied land to a ruder age. There was no reason why the king, as repre-

sentative of the nation, should not become the owner of waste land as much as a baron or a peasant; nor should it be forgotten that the payments received from the forest were not always employed by the sovereign for his mere personal pleasure. For as in the royal forests there were special courts and special laws side by side with the ordinary tribunals and jurisprudence which were applicable to the rest of England, so too the forests formed a special source of revenue having no relation to scutage and carucage and feudal dues, a revenue which could be collected by the king's officials without the consent of the national council.

This contest between Crown and people is observable from the moment of the Conqueror's death. William Rufus made the practice of the forest custom "burdensome to baron and villein alike," but in the very year of the accession of his successor Henry I., the latter secured a general ratification of his title. "I retain," he says in the Charter (*c*) of 1100, "by the common consent of my barons, my forests as my fathers had theirs." Henry I. was a mighty hunter, and he increased the royal forestal possessions so that Stephen was obliged to promise, by the Charter of 1136, to relinquish the land afforested by Henry. But the undertaking made to his people was not kept, and again, in 1184, we perceive in

(*c*) The Charter of the Forest of Canute was a forgery: this, though often surmised, seems now to be certain; see Liebermann, "Ueber Pseudo-Cnuts Constitutiones de Foresta." Halle, 1894. This writer ascribes this document to the year 1184, and as being the work of a layman. Dr. Stubbs and Dr. Freeman each doubted its authenticity, but many writers have accepted it with naïve simplicity.

the Assize of Woodstock of Henry II. an attempt by the barons to modify the severity of the forest laws, and to render them more definite. These struggles, indicative of the social importance of the forests and of the forest laws, were to a certain degree ended by the Charter of the Forest of 1217. But these continual edicts would have been constitutionally absurd if the king had a theoretical and prerogative right to make forests where he pleased, since he would have been endowed with an undisputed personal power which could be employed not only for the exaction of all sorts of fines and aids, but for the increase of the actual property of the sovereign.

In those troubled ages, and when might was largely right, it is easy to realise the continual extension of the forestal dominion of the king, a dominion which was primarily obnoxious to the barons, not from any love of the common people, but because it necessarily lessened their own power. To counteract this increasing dominion of the Crown was the motive which obtained from the infant Henry III. in 1217 the Charter of the Forest, a necessary sequel, in the then existing polity and social condition of England, of the Great Charter. It marked the end of the unlicensed forestal power of the sovereign, it defined the extent of his dominion—it was a constitutional landmark, a document the vague limitations of which the sovereign was for a long time constantly trying to evade and the people to enforce. The king had often to confirm Magna Charta—"these repeated confirmations tell us how hard it is to bind the king by law. The pages of the chroniclers are full of complaints that the terms of the charter are not observed. . . . This theoretical

sanctity and this practical insecurity are shared with the great Charter of Liberties by the Charter of the Forest" (*d*).

The Charter of the Forest by its very terms reveals the evils under which the country had suffered in the two preceding reigns, and more especially under the rule of John. His despotism, his exactions, and his antagonism to his barons had made his power as chief lord of the forests a national curse, and so all the woods which had been made part of the royal forests either by Richard or by John were to be summarily disafforested: "Omnes autem bosci," runs the third section of the Charter, "qui fuerunt afforestati per regem Ricardum avunculum nostrum, vel per regem Johannem patrem nostrum usque ad primam coronationem nostram, statim deafforestentur, nisi fuerit dominicus boscus noster." This declaration was a recognition on the part of the young king's advisers—for the charter was issued with the seals of William Marshall, Earl of Pembroke, and of Gualo, the papal legate—of a multitude of illegalities in the stormy reign which was lately ended. Contrast it with the first section, and the difference between them is at once obvious. In the one case there is to be absolute relinquishment, in the other there is to be inspection, and, if need be, disafforestation, when woods have been taken to the damage of their owners; a direction which is suggestive rather of mistakes in uncertain boundaries than of downright royal rapacity:—

"Imprimis omnes forestæ quas Henricus rex avus

(*d*) Maitland, Hist. of English Law, Vol. I. p. 158.

noster afforestavit, videantur per bonos et legales homines; et si boscum aliquem alium quam suum dominicum afforestaverit ad dampnum illius cujus boscus fuerit, deafforestentur. Et si boscum suum proprium afforestaverit, remaneat foresta, salua communa de herbagio et aliis in eadem foresta illis qui eam prius habere consueuerunt."

That the king's forests, even those which may, by something like a misuse of language, be termed his property, should need delimitation is not remarkable when we bear in mind the actual nature of a mediæval royal forest. It was assumed to be a definite tract of land within which a particular body of law was enforced, a district including both woods and open country. Within this boundary private persons might have lands, though in them they could neither cut wood nor kill certain wild animals, yet, in many instances, both woodland and open land belonged to the king. It is difficult enough in times of advanced civilisation for men to know accurately the limits of landed property; to suppose that in the thirteenth century, in an often uncultivated, uninhabited, and roadless district, the bounds of the king's possessions could be definitely fixed, even though some metes and bounds were stated, is obviously absurd. This very uncertainty rendered the royal forests an easy source of revenue, sometimes by means of fines justly levied, more often than not by demands which were simply illegal exactions. But, though vexatious imposts, these were not severe punishments; no feature, indeed, of the forest laws is more to be noted than the comparative mildness of the punishments. They were lenient for a very good reason:

fine a man to-day and he lived to be fined to-morrow; kill him, and in those days of sparsely inhabited counties a taxpayer had been destroyed. Thus the forest—although Manwood, as we have seen, had invented an agreeable theory of a social contract, pleasure given in return for work—was usually regarded by the mediæval monarch from the same point of view as that of a modern Chancellor of the Exchequer who looks upon this piece of property or that as a fruitful source of revenue.

But as the Charter of the Forest marks the conclusion of the period of unlicensed forestal dominion, so it commences the period of the inevitable decay of a system which was antagonistic to the beneficent growth of national civilisation.

The immediate effect of the charter was to cause great disturbance to forest administration, since in order to carry out its provisions perambulations of the bounds were necessary to ascertain with accuracy the forests which ought to remain under the dominion of the king.

The perambulations themselves and the awards, as they may be called, which were a consequence of them, as might be expected, in the case of districts the boundaries of which were so uncertain, were satisfactory neither to the people nor to the sovereign, and on February 11, 1225, the charter was again issued, "spontanea et bonâ voluntate nostrâ," but in return for this favour a grant of a fifteenth of all movables was obtained from the nobles. The moment, however, that Henry came of age he challenged some of the disafforestments made during his legal infancy, drawing no distinction between rich and poor,

layman and ecclesiastic, as when the Abbot of Abingdon was ordered to produce the charters of the king's predecessors under which he claimed liberties in the forest and the disafforested districts. Throughout Henry's reign and that of his son the same effort on the part of the sovereign to retain his forests under a cloak of legality continued, for the charter was constantly confirmed. But as such confirmation did not settle local disputes, or define boundaries, it did not prevent the king from asserting his existing rights sometimes by the silent but effective method of preventing or not directing perambulations and inquiries.

On the other hand the people had no scruple about making use of the same vagueness of bounds to diminish the property of the king. "In most forests," the reference is to the end of the reign of Edward I., "the jurors paid no attention to the boundaries made at the beginning of the reign of Henry III. They put out of the forest vast tracts of land which had been forest for a century and a half, alleging that they had been afforested by Henry II., or his sons Richard and John, and disregarding the distinction between districts which had been afforested for the first time, and those which had been reafforested as ancient forests by Henry II." Such a conflict was inevitable, and that it should be conducted under the semblance of legality by each side was equally natural, but it could have only one result—the gradual diminution of the royal forests under the influence of an advancing civilisation. A system of forestal administration and law was altogether incompatible and impossible as agriculture and population increased.

That the English forests could by any possibility be generally used by the king for the purposes of sport, though in theory and practice they were his preserves, is obviously impossible when we bear in mind their number and size, though these two characteristics serve to emphasise their importance from a legal point of view. "King John, when in England, spent much of his time in visiting the forests of Sherwood, Rockingham, Essex, and Clarendon, and it was from these that Henry III. usually made presents of game to his friends." These particular wastes and woodlands, however, were mere selections from the numerous royal forests. To state with any degree of accuracy either the extent or the number of the whole is as yet impossible, and will probably remain so. But "it is almost certain that none of the kings of England possessed any forests in the counties of Norfolk, Suffolk, and Kent . . . it may be considered as probable that there were either no forests in Cambridgeshire, Bedfordshire, and Hertfordshire, or forests of a small extent only"; while in Lancashire they were granted by Edward I. to his brother, Edmund Crouchback, who was allowed to enforce the forest laws over the forests which it contained.

On the other hand, all Northamptonshire and all Rutland were a tract of forest, while "one vast forest stretched from Stafford to Worcester, and from the Wrekin to the Trent" (*e*), and certainly at the time of Domesday a densely wooded district—broken later doubtless in the fertile Vale of Aylesbury—extended from Brill on the

(*e*) Pearson, Historical Maps, pp. 47—52.

borders of Oxfordshire across the Chilterns to Burnham and the Thames, of which in the still wooded heights of the chalky uplands of Buckinghamshire the picturesque traces are to this day visible. The New Forest is, however, at the present time the most striking example of the mediæval forest which has preserved its continuity as a royal forest from the time of the Conqueror. It has undergone changes in form and size, but it is with us to-day the same beautiful tract of woodland, heath, and cultivated spaces as in the time of Edward I. It has continued to be part of the royal demesne—in modern language, of the property of the Crown—century after century, whereas in Epping we have a forest the soil of nearly the whole of which was granted before the reign of Henry II. in the form of manors to private persons or to religious houses, though over the entire district a particular prerogative of the Crown was maintained, and it was a royal forest subject to the forestal laws, to the preservation of the venison, the vert and the waste within its bounds.

But the absence of royal forests did not mean that the country was necessarily completely cultivated. Where they were not to be found, the chase, the park, and the warren—the private preserves of noblemen where the forest laws did not exist—covered hundreds of acres except in those parts of England, such as the great district between Stamford in the North-East and Oxford in the West, where by means fair or foul the king had established a recognised forestal dominion.

When we call to mind the variety of beasts which are to

be found in half-civilised districts in various parts of the world one is struck with the limited number of animals which were preserved in the royal forests of the thirteenth century. The writer of the Introduction to the "Select Pleas of the Forest," after a careful examination of many documents relating to forests in various parts of England, thus sums up his researches on this point:—

"Thus it may be confidently asserted that there were in general four beasts of the forest, and four only—the red deer, the fallow deer, the roe, and the wild boar, the only exception being that in a few districts the hare was also made the subject of the forest laws."

The hare was indirectly preserved by the Assize of Worcester (1184), which prohibited greyhounds and dogs from being brought into the forest, not because they were likely to pursue the hares, but because their presence was dangerous to the deer. Why the hare should have been preserved in some places—as, for example, in the warren of Somerton—one cannot guess, but that it was is clear by more than one entry in the Somerset Eyre of 1257:—

"It is presented," says the record, "by the same persons and proved that on Monday in Christmas week in the forty-first year a certain hare was found dead. An inquisition was made thereof by the four townships of Somerton, Kingsdon, Pitney, and Wearne, who say that the said hare died of murrain, and that they know of nothing else except misadventure. And because the said townships did not come fully, &c., therefore they are in mercy" (*f*).

(*f*) Select Pleas of the Forest, p. 42.

There is something rather suggestive of the comic opera in four townships sitting in judgement on the body of a dead hare. Probably it was the insignificance of the creature, as well as the serious consequences resulting to the neighbouring districts from the death of an animal of the forest, that practically prevented the hare from being a beast of the forest. Why, we repeat, there should have been some exceptional districts where the hare was preserved is a question now impossible to answer.

The mediæval forest was in fact essentially a deer forest. The nearest likenesses to it in these days are, as well as the New Forest (*g*), the districts in Devon and Somerset where the red deer is still protected and strays unharmed over a picturesque country, woodland, moorland, and hill pasture. The wild boar was to be seen too, but already, by the middle of the thirteenth century, it had become scarce. There are entries in the Gloucestershire Rolls of 1258 which tell of its preservation and unlawful slaying, but from a point which may be taken at this particular date the wild boar is scarcely mentioned.

The wolf, as one can well believe, was as much a poacher as any hungry outlaw, and it is surprising that Manwood should have included it in the list of beasts of the forest. For the object of those in charge of the royal forests was, from an early date, to destroy an animal which in the winter was as injurious to the deer as to the men who lived in the cottages or hamlets adjacent to a

(*g*) For an account of Wolmer Forest see Rural Life in Hampshire, Chap. IV., "The Royal Forests," by W. W. Capes. London: 1901.

forest. Thus from the thirteenth year of the reign of Henry II. a hunter received an annual allowance, charged upon the Sheriff's farm, for hunting wolves in the county of Worcester, and by letters patent issued in 1281 the king directed a hunter named Peter Corbet to take and destroy all wolves in the counties of Gloucester, Worcester, Hereford, Salop, and Stafford. These are but two instances; they show, however, systematic endeavours to exterminate a noxious animal.

Another beast, harmless in itself, occupies a somewhat curious place, and that is the roe deer. It was a beast of the forest during the thirteenth century, but at this time it was decided that it ought not to remain in this category because it drove away other kinds of deer. In the eye of the forester it occupied the same position as the harmless chub does in a well-managed Hampshire trout fishery. The most suggestive point about this exclusion is that it was arrived at by a legal decision, so that no example could better indicate the importance of the law of the forest. In the Middle Ages, the decision was given in the reign of Edward III. by the Court of King's Bench. Henry de Percy put forward a claim to have woodwards carrying bows and arrows in his woods in his manor of Seamer, which was within the forest of Pickering, and also to have the right of hunting and taking roes, as well within the covert of the forest as outside. The Earl of Lancaster, to whom the king had granted the forest and all his rights over it, opposed the latter of these claims on the ground that the roe was a beast of the forest, and that the right demanded was against the assize of the forest. The justices in eyre adjourned the claim for con-

sideration to the Court of King's Bench. This tribunal, after consultation with the great officers of state, and after diligent deliberation, delivered its judgment, with the conclusion: "Caprioli sunt bestie de warenna et non de foresta eo quod fugant alias feras de foresta." Roe were not beasts of the forest but of the warren, and for the practical reason that they caused other kinds of deer to leave the woods.

The protection of the deer in the royal forests necessarily involved the indirect protection of other wild animals, such as hares, and of numerous kinds of wild birds; for a man who wandered in the woods of a royal forest to net a partridge was likely to disturb the deer, and so could be stopped by the foresters. Such indirect protection, as time passed on, produced a general preservation of game—to give it the modern name—sufficient to cause the writers of an age later than the thirteenth century often to suppose that such birds as the partridge or the mallard were birds of the forest. But all the creatures other than those already enumerated were beasts or fowls of warren, a place wholly distinct from a forest, and neither under the jurisdiction of the forest laws nor the supervision of the officials of the forest. Over every portion of the waste of the countryside or of the unenclosed demesne land of a private individual the poorest peasant could roam in pursuit of animals at will until a grant of warren was made by the king. From the moment, however, that by virtue of his royal prerogative the king granted the sole right to hunt other than forestal animals to a private individual within the bounds mentioned in the grant, a

warren was brought into existence, giving to private persons either a new property or a privilege in addition to the ordinary right of ownership, which they did not before possess. Out of unenclosed land the king could of course create a warren for himself, and sometimes he would indirectly nullify the effect of the Charter of the Forest by creating warrens in a disafforested district. One, indeed, of the articles of the barons' petition in the Parliament of 1258 demanded a remedy because out of the disafforested districts warrens were created which were contrary to the public rights granted by the Charter. That a warren was wholly distinct from a forest is shown also by a suggestive decision which is recorded in the Rolls of Hilary Term, $12\frac{8}{8}$, in which, in an action of assault against a warrener, the latter pleaded that the plaintiff's men were hunting in the abbot's warren. The plaintiff in his reply to this defence averred that he was in pursuit of a buck in a place where all the country could hunt. In the result, though it was proved that the spot was a warren, it was held that the defendant should be in mercy because the buck was not a beast of the warren. But we must repeat that this difference necessarily became obscure in course of time, and was undoubtedly affected by local circumstances. For the king could grant away one of his forests or a part of it to a private individual; thereupon a chase was created—in other words, a tract of country once part of a royal forest, but free from the forest law, yet at the same time a preserve of deer and of woods, for the pleasure and the benefit of the king's grantee. In some places warrens may have become united with forests; in others as the royal authority over the forests grew weaker, deer would be

preserved by private persons in their warrens, with the result that a local historian might very well state that other animals and birds were forestal which originally were not really forestal creatures.

The existence of a forest brought into being a host of officials, to each of whom the forest meant his own continuance in power and prosperity. They were the civil servants of the Middle Ages, conspicuous over a large part of England, and constant reminders both to the secular and the ecclesiastical lords, as well as to every peasant, of the power of the Crown. We may almost regard them as in the same position as the Government officials in modern France, who are to be found in every country town. Nothing was easier than for them to become petty tyrants and to extort money for themselves as well as for the king. Norman Sampson, the riding forester, under Geoffrey of Childwick, steward of the forest of Huntingdon in 1255, was one of this kind, and he thus figures in the Huntingdon Eyre of 1255. It is "presented" that he "took a certain man at Weybridge who was with the parson of Colworth, . . . and he took the said man to Houghton to the house of William Dering his host, and he put him upon a harrow, and pained him sorely, so that William gave to him twelve pence that he might be released from the said pains, and afterwards he gave to him five shillings that he might by his aid be able to withdraw quit. It is also presented by the same persons of the same person that a certain Norman, his page, and he himself were evildoers to the venison of the lord king, and that Norman Sampson sold three oaks in Weybridge and com-

mitted many other trespasses while he was a forester" (*h*). And so, after various proceedings, Norman Sampson is fined two marks. Imagination is not needed to picture this little drama—the poor man brought to the farm and cruelly and ingeniously tortured, the money paid to the brutal forester, who, unpopular among his fellows, is himself brought before the justices in eyre and fined in his turn. There were many grades of forest officials, and one may be sure that there were not lacking official disagreements and personal jealousies.

In 1238 England, for the purpose of forest administration, was divided into two provinces—one north and one south of the Trent, and over each of these two departments there was placed a justice of the forest. The title is a little misleading, since it suggests a legal rather than a ministerial officer. These personages were, in fact, head foresters. Mathew Paris actually speaks of one of these men as *summus anglie forestarius*, as well as *summus justiciarius foreste*, and the first description better explains their functions; for except that it was part of their duty to release on bail prisoners who were in custody, they had no judicial functions, and "in general carried out all the executive work relating to the forests." For a time, at the beginning of the fourteenth century, these men seem to have been called wardens, but by the year 1377 the old designation was resumed. To manage a tract of country so immense as that over which their jurisdiction extended was obviously beyond the power of two officials, and deputies were therefore appointed, either by the justice himself or by the king.

(*h*) Select Pleas of the Forest, p. 20.

The justices "were usually men of considerable political standing. . . . By the end of the fourteenth century the office evidently became a sinecure, being then usually held by a nobleman of rank. But though a sinecure the income attached to it was certainly not derived solely from an official salary, for from the close of the thirteenth century the justices of the forest south of the Trent received from the king an annual payment of a hundred pounds only, and the salary of the justices of the forest north of the Trent was only two-thirds of that sum."

Whether the lieutenants of these men were not also called wardens seems not to be so certain as the editor of the Selden Society's volume considers. In a state of society so rude as that of mediæval England, and in country districts, a strict division of offices is difficult, and the editor remarks that the wardens, whom he places as next in authority to the justices, "were variously described in official documents, and seldom expressly as wardens; but the word may conveniently be used to avoid ambiguity." A desire to avoid ambiguity sometimes tends to false impressions, and as the warden was the person who had the custody of a single forest it is not clear why he could not have also been the local deputy of the head forester. Sometimes in documents he was called steward or bailiff or chief forester; sometimes he was appointed for life, sometimes his office was hereditary, but whatever his title he was the local as distinguished from the general ministerial representative of the king. Their position often made these men tyrannical to the last degree, and nothing made the laws of the forests and their administration more hateful to the general body of the English

people—for there was scarcely a district where they had not some jurisdiction—than the misdeeds of these officials. In the Rutland Eyre of 1269 a long description is given of the wrongdoings of Peter de Neville, who seems to have been one of the worst behaved of these men:—

"The same Peter imputed to Master William de Martinvast that he was an evil doer with respect to the venison of the lord king in his bailiwick (balliva), and he imprisoned him at Allexton on two occasions, and afterwards he delivered him for a fine of one hundred shillings which he received from him; for which let him answer to the lord king, and to judgement with him because he delivered the aforesaid Master William without any warrant. . . .

"The same Peter charged Henry Gerard with a certain trespass to the forest, and took his beasts and detained them until he had paid him half a mark for their delivery and five shillings for their custody" (*i*).

In fact, the said Peter de Neville acted dishonestly by his lord and unjustly to his neighbours, and the long tale of his many crimes gives a complete picture of individual forestal tyranny. He had his herd of three hundred pigs digging in the enclosure of the king, and he took money and kind from those who dwelt about him, and actually made a gaol at Allexton, in Leicestershire, which, says the roll in question, "is full of water at the bottom, and in which he imprisoned many men whom he took, lawfully and unlawfully, by reason of his bailiwick in the county of Rutland, and he delivered many

(*i*) Select Pleas of the Forest, p. 49.

of them at his pleasure and without warrant." Such were the evil doings of Peter de Neville—*capitalis forestarius Foreste comitatus Roteland*—at the end of the reign of Henry III.

The active work of the forest was entrusted to men who safeguarded the venison and the vert, the deer and the greenwood, the timber and the underwood, who prevented poaching and watched for encroachments on the dominion of the king, and collected dues—the foresters, the verderers, and the agisters.

There were riding foresters and walking foresters, and pages, all appointed and paid by the warden, the custodian of the forest, if they were remunerated at all, but more often than not they actually paid the custodian of the forest for their place. The result was the existence of another rapacious class, who made their living from their poorer and less powerful neighbours, and accentuated what, in the Middle Ages, was an extreme social grievance of the people. Of this state of affairs we obtain a picture, the truth of which is undoubted, in the complaints against the Charter of the Forest, which were formulated by the men of Somerset:—

"3. Although the charter says that view of the lawing of dogs ought to be made every third year when the regard is made, and then by view of loyal men and good, and not otherwise, yet the foresters come through the towns blowing horns and making a nuisance with much noise to cause the mastiffs to come out to bark at them; and so they attach the good folk every year for their mastiffs

if the three toes be not cut and a little piece from the ball of the right foot, although the charter says that the three toes are to be cut but not the ball of the fore foot.

"4. Although the charter says that by view and by oath of twelve regarders, when they make their regard, as many foresters are to be set to guard the forest as to them shall seem reasonably sufficient, yet the chief forester sets foresters beneath him, riding and walking, at his pleasure without the view of anybody, and more than are sufficient to guard the lawful forest, in return for their giving as much as they can to make fine for having their bailiwicks, to the great damage and grievance of the country because of the surcharge of them and their horses and their pages, although the king has no profit and no demesne, except one wood which is called Brucombe in Selwood; and he takes there for herbage of that wood from the neighbouring towns sometimes two shillings, sometimes three shillings, or sometimes four shillings, although no money ought to be taken for herbage according to the charter.

"5. Although the charter says that no forester or beadle shall make scotale, or collect sheaves, or oats, or other corn, or lambs, or little pigs, or shall make any other collection, yet the foresters come with horses at harvest time and collect every kind of corn in sheaves within the bounds of the forest and outside near the forest, and then they make their ale from that collection, and those who do not come there to drink, and do not give money at their will are sorely punished at their pleas for dead wood, although the king has no demesne; nor does anyone dare to brew when the foresters brew, nor to sell ale so long as the foresters have any kind of

ale to sell; and this every forester does year by year to the great grievance of the country.

"6. And besides this they collect lambs and little pigs, wool, and flax, from every house where there is wool a fleece, and in fence months from every house a penny, or for each pig a farthing. And when they brew they fell trees for their fuel in the woods of the good people without leave, to wit, oaks, maples, hazels, thorns, felling the best first, whereby the good people feel themselves aggrieved on account of the destruction of their woods; nor does any free man dare to attach any evil doer in his demesne wood, unless it be by a sworn forester. After harvest the riding foresters come and collect corn by the bushel, sometimes two bushels, sometimes three bushels, sometimes four bushels, according to the people's means; and in the same way they make their ale, as do the walking foresters, to the great grievance of the country" (*k*).

The zealous forester was no respecter of persons, and his duty sometimes brought him into conflict with the Church and with noblemen. A quaint tale in the Huntingdon Eyre tells how the suspicion of the foresters fell on one Gervais, of Dene, who was seized by them and placed in Huntingdon gaol. Presently there came to the foresters several chaplains of Huntingdon, and the bailiff of the Bishop of Lincoln, with book and candle, intending to excommunicate them; they also demanded the prisoner, as a servant of the bishop, but the foresters, in this dilemma, declared that once the man was im-

(*k*) Select Pleas of the Forest, p. 126.

prisoned they had no power to release him. Still, they all went to the prison, and took off the man's cap, and "he had the crown of his head freshly shaven, whence the foresters suspected that it was shaved that day in prison. And the said Gervais went to his harness, and took it and went home," and so the Church prevailed. In this simple narrative we see abundant elements of strife, of sharp conflicts between delegated royal power and delegated ecclesiastical power, of the subjects which engaged the minds of men in rural England in those far-off days when the great cathedrals were rising over the land, and two forces -for the instance given is but one of many—were constantly in collision.

Besides the king's foresters there was a co-operative official, the woodward, appointed by the owner of land within the bounds of the forest, who, while he safe-guarded his master's interests, had also to be a game-keeper for the king—a private forester sworn to protect the king's rights. The ranger we may pass over; his duties are obscure, and it was only when the forest system was in process of dissolution that he came into notice. Probably the word was intended to denominate some particular individual, and not a class.

The verderer was in many respects the most important official of the forest, since it was his business to keep watch and ward over the timber; he was responsible to the king and not to the wardens, and he was appointed by the county court, the elections being made upon receipt by the sheriff of the writ *de viridariò eligendo*. The position, as can be well understood, for the verderer was the direct link between the royal exchequer and a great

body of taxpayers, was one of responsibility, and was usually filled by a knight or a landed proprietor, while the numbers allotted to the forest varied according to its size and importance. "The chief work," says the editor of the "Select Pleas," "in which the verderers were engaged was that of attending the forest courts." This description hardly does justice to the importance of these officials: it might be supposed that they were merely spectators; but the verderer attended at the forest assemblies to report and to justify his conduct in his office. In the Nottinghamshire Eyre of 1334 there are some suggestive entries in regard to verderers:—

"Of the same verderers," runs the roll, "because they did not produce the rolls of the attachments of Linby, Bulwell, Calverton and Edwinstowe for the same year; in mercy, ten shillings. . . . Of the verderers of the eighteenth year of the same king for the price of the vert of the attachments of Bulwell, &c. . . . seventy-two shillings and ninepence" (*l*).

In the same roll we find numerous entries such as this: "Of Ralph the son of Reynold of Edwinstowe for an oak of the price of tenpence wherewith the verderers are charged in the roll of the price of the vert"; and in the Nottinghamshire Eyre of 1287 it is told how William de Vesey and his fellow justices in eyre in 1286 found that in the forest of Sherwood the king had sustained losses of many kinds, and so they provide that all the verderers of Sherwood are to assemble every forty days "to

(*l*) Select Pleas of the Forest, p. 68.

hold, as is contained in the Charter of the forest, attachments both concerning the vert and the venison." The functions, indeed, both of verderers and foresters, appear by no means always to be distinct. Thus in the same document the justices direct that if anyone fells a green oak to the ground he is to be bound over to come to the next attachment, and his mainour is forthwith to be appraised by the foresters and verderers, and he is to pay the price to the "verderers in full attachment." It is therefore by no means surprising that as time went on, the forest officials became somewhat confused, both in nomenclature and in duties, which varied according to local needs and local habits.

Three important sources of forestal revenue were from assarts, purprestures, and wastes—in other words, from payments in respect of acts which became more necessary and more numerous every year. To uproot the trees and reduce a piece of wilderness to cultivation, to sow it with wheat and oats, was an offence against the forest laws if such space was within the bounds of a forest. It became an assart, and not only for the original trespass a fine had to be paid, but also for each succeeding crop, and as the justices in eyre came round the forests the tenants who were under this obligation brought to them what were in fact rents. But a mere payment did not always suffice, and the labour of reclamation might be destroyed. Roger de la Holte, says a roll, assarted a piece of land of certain dimensions, and he enclosed it with a ditch and a low hedge; therefore he is in mercy. Let the land be taken, the hedge and ditch removed. To the destruction of industry was oftentimes added the punishment of a

fine. Sometimes a man within the bounds of the forest would enlarge an enclosure, even though the land appropriated was not part of the king's demesne, or he would make a fishpond, or build a mill. William de Berdeley without warrant enlarged his enclosure at Barndeleye by ten perches in length and ten feet in depth, and he enclosed it by a little ditch and a low hedge, so he was in mercy and the enclosure demolished. This was a purpresture, and, like the assart, the king generally derived from it a more or less continuous revenue. In the same way, if a tenant desired to protect his arable land against wandering deer, and enclosed it with a fence, this again was a purpresture. Richard Carettarius, the carter, who lived near Evesham, made a hedge and ditch around his field. "Clausum prosternatur" concludes the roll. Robert de Mep occupied half an acre of land, and he guarded it with a hedge and a ditch without the leave of the king, and he died, and Alice his wife held the land after her husband, and again we read the suggestive and despotic words "Terra capiatur, clausum prosternatur." Tenants of woods within the forest had a right to cut wood for fuel and for the repair of their property, the extent and manner of the right varying according to custom in different localities, but any infringement of it, however vague might be the original right, was an offence against the laws of the forest. It was waste, and for this the offender could be fined.

These three kinds of trespasses it was the business of the regarders to note. Twelve knights chosen for the purpose made the inspection, the *visitatio nemorum,* once in every three years. Their report, in the form of answers to

certain questions, the Chapters of the Regard, was duly enrolled, and when the justices in eyre came round, among those who had to appear before them were the regarders with the regards.

The agister may perhaps be called the rent collector, who collected "money for the agistment of cattle and pigs in the king's demesne, woods, and lawns," receiving it after he had counted the beasts which had entered the forest.

But officials of the forest were only a part of the extended forestal system of mediæval England. A complete and elaborate series is visible of what, for convenience, may be called courts. For the purpose of protecting the venison there were forest Inquisitions, Special or General, the former being inquiries into the death of a beast of the forest, held immediately after the finding of the animal, or into any presumed infringement of a forest law. To these the four neighbouring townships had to answer, common responsibility for the acts of the inhabitants resting on the whole district. An example will show the working of the practice, which is remarkable for the stubborn pretence of ignorance which was constantly shown by the commune; the popular interest was always adverse to that of the king. The first is from Essex:—

"On the Saturday next before the Nativity of the Blessed Virgin in the twenty-sixth year of the reign of Henry William Wayberd came into Horsfrith, and saw there Hawe le Scot and three others with him with bows and arrows; and he did not recognise them; and he left

them and went to Roger of Wollaston the forester, and showed him how he found them. And he, taking his men with him, searched the aforesaid wood, and could find nothing. And upon this the foresters and verderers assembled, and made an inquisition thereof by four neighbouring townships, to wit: Fingrith, Abbess' Ing, Queen's Ing, and Writtle.

"Fingrith comes and says that it knows nothing of malefactors to the forest nor of persons harbouring them.

"Abbess' Ing says the same.

"Queen's Ing says the same.

"Writtle comes and says that it heard from William Wayberd that on the Friday next after the Nativity of the Blessed Virgin in the same year he saw two dogs running after a buck, which they worried to death, one being black, the other brindled, and he pointed this out to Roger of Wollaston the forester" (*m*). Here is yet another picture:—

"In the thirty-second year of the reign of King Henry on Ash Wednesday, an inquisition concerning a fawn, which was found dead and wounded with an arrow in the wood of Brampton, was made by four townships, to wit, Brampton, Ellington, Grafham, and Dillington, which all say that they knew nothing thereof.

"In the same year on the Thursday next after the feast of Saints Tyburcius and Valerian an inquisition concerning a certain beast, which was taken in the meadow, and of which the entrails were found, was made at Weybridge by four townships, to wit, Alconbury, Woolley,

(*m*) Select Pleas of the Forest, p. 79.

Ellington, and Brampton, which all say that they know nothing thereof" (*n*).

The desire for uniformity of description may well incline us to consider the General Inquisition, or the swanimote as it was sometimes called, as distinct from the Special Inquisition, because it was held for the purpose of inquiring generally into trespasses against both the venison and the vert, and was held also at intervals. But it appears to have been the natural concomitant, for the purposes of convenience, of the Special Inquisition, and of the Attachment Court—a court which, for its own particular purpose, that of protecting the vert only, may be regarded as subsidiary to the Special and General Inquisitions. The Attachment Court was a tribunal "which, sitting at regular intervals, usually every sixth week, was chiefly concerned in trying cases of small trespasses to the vert," as for cutting saplings under the value of fourpence, or branches from oaks, hazels, and similar trees. When the case was too serious to be decided by the Special or General Inquisition, the offender was bound over to appear before the Justices in Eyre; but the gravity of the act of which he was accused depended often on locality, and sometimes on the position of the offender. In the extracts from the Sherwood attachments there are many instances of the working of this portion of the forest laws. A man is fined eighteenpence "pro uno stubbe"—for a pollarded tree—doubtless carrying some of it away for firewood; in another part of England and in another court a man is fined threepence "pro una

(*n*) Select Pleas of the Forest, p. 74.

blestrone"—a sapling: whether he cut it down or whether he merely damaged it we cannot tell, but in most cases we surmise the injury was partial rather than complete.

These lesser courts, however, all led up to that which was supreme in the forest, the court of the Justices in Eyre, who, as stated at the beginning of this chapter, were itinerant justices appointed by the king's letters patent to hear and determine pleas of the forest in a particular county or group of counties, seven years, as in the case of pleas of the Crown and common pleas, being the normal period which elapsed between eyre and eyre. The justices sat in some important town not far from a forest region, as at Oxford, for Shotover and Bernwood, and at Northampton, for Pakingham and Cliffe. They formed not only a court of law, but a court of supervision. This tribunal considered the conduct of foresters and verderers, and if necessary punished them, as well as those who had offended against the forest laws; it dealt with the more serious offences against the vert, as the Attachment Court did those which were of smaller moment; and it fined those wrong-doers who lay in prison awaiting its decision. According to the Charter of the Forest, if a man were seized and convicted of taking venison, he was to be ransomed in a heavy sum, and if he had no means of paying a fine, he was bound to lie in prison for a year and a day; if after that period had elapsed he could find pledges he was to be allowed to come out of prison, but if he could not, then he was to abjure the kingdom. It seems that the question of ransom was a matter for the Justices in Eyre, and that on being first seized

and convicted an offender must either remain in prison until the itinerant justices should arrive in the locality (unless, which often happened, he died), or find pledges for his future appearance.

Of the general course of procedure of these supreme forestal courts, we have a picture in one of the rolls of Surrey. This is obviously a mere précis of proceedings, but its brevity enables the different steps to be followed, though in reading it we must allow for the lapse of spaces of time. "It is presented and proved," begins the roll, "by the verderers and by twenty-four good and loyal men of the town of Guildford or of the parts adjacent to it, and by many sworn townships that Robert King, Peter Long, William atte Hedge, who is dead, Ralph atte Slough, who likewise is dead, and John, the son of Henry atte Down, who were workmen in the park aforesaid repairing the paling of the same park, felled several oaks for making palings thereof. And when the deer of the lord king came to browse on the little branches of the aforesaid oaks, they stretched snares for taking them. And on the morrow of All Saints in the fourty-fourth year, Bartholomew the parker came up and found the aforesaid evil doers with the aforesaid snares stretched: and he took them and delivered them to William la Zouche who was then sheriff of Surrey for imprisonment. And afterwards by the order of Thomas of Greasley, then the justice of the forest, they were delivered on bail until the next pleas of the forest. The aforesaid William and Ralph, who are dead, were essoined the first day of death; therefore their pledges are quit. And the aforesaid Robert, Peter, and John came, and being convicted of this are detained in prison. Afterwards the aforesaid

John atte Down, being brought out of prison, made fine by half a mark by the pledge of John of Garkem . . . and William, the son of Clement of Worplesdon. Afterwards came Robert le King, and, being brought out of prison, made fine by half a mark by the pledge of Robert of the park and William of Apecroft. And the aforesaid Peter, being brought out of prison, made fine by half a mark by the pledge of Richard of Aldbourne and Andrew atte Hook" (*o*).

Here again is a shorter story. "It is presented (June 25, 1269) by the same persons (the chief forester, and the verderers of the County of Rutland) and proved, and also by the regarders and twelve knights and other free and loyal men that when the lord king gave James of Pauton two does in the forest aforesaid, the same James took six does, whereof four were without warrant. And by reason of the noise which he made by beating drums (taborando) when he beset the does many beasts came out of the forest and were taken to the loss of the lord king and the detriment of the forest. And the aforesaid James comes, and being of this proved, is detained in prison" (*p*).

As we have seen in describing the regarders, one duty of these officers was to bring their reports before the Justices in Eyre for them to take action. In the Huntingdon Eyre has been bequeathed to us a little tale of a purpresture and its consequences, which in its simple narrative is more instructive than are pages of comment:—

(*o*) Select Pleas of the Forest, p. 55.
(*p*) *Ibid.* p. 14.

"It was ordered by Robert Passelewe and his fellow-justices last in eyre here for pleas of the forest that the houses of Vincent of Stanley which had been raised to the nuisance of the forest should be pulled down; and the doing of this was hindered by certain persons, Colin of Merton and Richard of Toseland, the bailiffs of Philip of Stanton the sheriff of Huntingdon. And the verderers witness that when they and the foresters came to pull down the said houses, as they were ordered, the said Colin and Richard of Toseland prohibited them from pulling them down. And when the foresters laid their hands on the said houses to unroof and pull them down, the said Colin and Richard forcibly drove them back, saying that they would not in any way allow them to pull them down, because they had the precept to that effect of Philip of Stanton, who was then the sheriff of Huntingdon. And the verderers and foresters went to the same sheriff, and told him the nature of their precept concerning the houses to be pulled down, and how they were hindered by his bailiffs aforesaid by his precept. And the said sheriff said that they had no order thereof from him, and disavowed their deed entirely; whereby the order of the justices and what was for the king's advantage concerning the aforesaid houses to be pulled down remains undone. And therefore the sheriff is ordered that he cause the said Colin and Richard to come from day to day. Afterwards Richard came; and he could not deny that he impeded the said foresters and verderers as is aforesaid, and this without warrant; therefore he is in mercy" (*q*).

(*q*) Select Pleas of the Forest, p. 18.

The names of some of these courts and officials are familiar to many; some years ago indeed, when public rights over the remnants of English forests were in dispute, they were often on men's lips. But they had become mere fragments of a great system, little more than useless relics of a once living past—a past which was most perfect and complete in these respects after the passing of the Charter of the Forest. The system at its zenith was at once elaborate and effective. Its inferior and superior criminal courts differ little in symmetry from those of modern days, and the justice which was administered in them was in the eyes of the people essentially important, touching the interests of every man in the realm from the king to the poorest peasant.

The striking feature of the forest laws was the manner in which they harassed every class of the community in the rural districts. It was not, however, their harshness which offended the people. That there were cruelties in their administration before the Charter of the Forest is undoubted, but it was a rude age, and life was held cheap. In their zenith—as we have already said—they were not cruel laws, and they were not generally harshly administered, for the higher officials were often themselves men of position in a locality, and in sympathy with some at any rate of its inhabitants; to brand them with severe epithets is to show ignorance of facts. Their sting lay in the way in which a dweller in the country was met by them at every turn, even the smaller towns were not free from the intrusion of the forester, and the traveller peacefully passing through a forest district might be arrested on suspicion. That the forests needed guardian-

ship and regulation was undoubted, for they were at once the depôt, not only for fuel, but for timber for every purpose, for the building of ships and the erection of houses. This care would not in itself have caused a popular dislike of forest laws and officials; but it produced—necessarily perhaps—a multitude of offences against the laws of the forest and continual intrusions into the daily life of the humblest peasants, which became more vexatious as the population of rural England increased in numbers and in wealth.

In a sketch of the elaborate forestal system of mediæval England, one can but glance at its laws, its courts and its officials at the time when it was strongest and most clearly defined, and suggest its effects on the domestic politics and the society of the age. But the longer it is considered, the more important it appears. For the preservation of the forests and of the animals which roamed in them there grew up courts and judges great and small, as well as laws and rules which occupy a large space in the law and procedure of a remote age, and of which remains are to be found to this day. The system interfered with two of the chief necessaries of life among the rural population—their food and their firing. It placed the sovereign and his servants in constant antagonism to all classes of the community, whether lay or ecclesiastic, whether they lived in a castle or a cottage, in county towns or villages, which lay near the margins of his forest, and it was a continual barrier to the extension of agriculture, and so of civilisation. It emphasises the character of individual right to property in land in mediæval England as distinguished from the right of the

commune which prevailed in some parts of Europe—for the king was the chief landowner in the country, and when he parted with his right over a forest it devolved, not on a body of the people, but on a nobleman only less powerful than himself; and it demolishes altogether the idea which yet sometimes is evident in political discussion on modern land tenure—a theory so completely at variance with historical truth—of the inherent right of every individual to a portion of the land of the kingdom. In a word, from the time of the Conqueror to the nineteenth century, the royal forests have been the cause of a conflict between two opposing systems of land tenure. The right of the individual and the corporate right of the community to the forests have been in constant antagonism, the right of the individual prevailing everywhere; for in the places where others than the king and his grantees have obtained rights in the forest by virtue of custom, it has been as individuals, and not as members of a community which was capable of enjoying rights of property. The only way in which the village or the township was recognised by the forest laws as having a corporate existence was in the unpleasant form of a liability of a township for offences committed by individual inhabitants against the forestal law. Nor have the effects of the forest laws yet disappeared from the social life of England. For the game laws, by which the killing of certain birds and animals is a criminal offence, apart altogether from the offence of trespass on land, are the offspring of the mediæval laws of the forest, and they have continued to estrange classes in the rural districts, and have ruined the life of many a peasant.

CHAPTER III.

THE LAW REFORMS OF THE COMMONWEALTH.

Among the remarkable features of the epoch of the Commonwealth not one is more deserving of attention than the important place which law reform suddenly occupied in the midst of great political and social events. By the constitutional changes which had previously occurred, the municipal law was not affected. Yorkists succeeded Lancastrians, and Tudors followed Yorkists; the Reformation transformed the national religion, but the fabric of English law remained unaltered. The period, however, of the Rebellion and the Commonwealth is in striking contrast in this respect to the larger portion of English history, and from 1648 to the Restoration of Charles II. in 1660 is a strange epoch in the tranquil legal annals of this country. Several important changes and improvements actually occurred, and a far larger number were proposed but never completed. An eagerness for this kind of reform was visible, and a vague activity in the Legislature to fulfil the national wish, stimulated as it was by the strong will of Cromwell. The lay element in the nation was determined, if possible, to improve the law of England whether lawyers liked it or not; and the foremost man of the time not only heartily sympathized with the national desire, felt as it was by all classes of the community from In-

dependent colonels to Tory Devonshire squires, but, in the maturity of his opinions and from the thought which he had given to the subject, was prepared at once to lead and to guide the more headstrong and less thoughtful multitude. So that law reform, far from being the object of a few specialists or a knot of advanced thinkers, became a political object of unusual popularity and of constant importance.

No doubt, this wish for a more equitable system of law and procedure arose partly from the existing defects of English law, especially in regard to matters of procedure. Thus, in his speech at the opening of the Second Protectorate Parliament, on September 17, 1656, Cromwell said: "There are some things which respect the Estates of men; and there is one general Grievance of the Nation. It is the Law. Not that the laws are a grievance, but there are laws that are, and the great grievance lies in the execution and administration" (*a*).

In other words the feeling for legality so strong in the English race was offended by technicalities in the administration of justice. It was a time when a spirit of unrest and a determination to improve the religious and political state were in the air, and it was impossible that the law could escape reform in the general overhaul. But the way in which it was to be accomplished was characteristic of the English people. They had no theoretical or visionary reforms in view, but whilst preserving the existing system, they wished to rid it of abuses.

(*a*) Oliver Cromwell's Letters and Speeches. London: 1871. Vol. IV. p. 209.

It ceases, therefore, to be a matter of wonder that this particular epoch stands alone, remarkable for unusual activity and progress in the matter of law reform. It is equally noteworthy, however, that, in spite of this favourable current of circumstances, but few reforms were actually carried out, compared with the number of projects which were discussed. This arose from two causes. The first was certainly the inherent difficulty of the question; for no subject is less capable of hasty alterations than the law, and there is not one which opens out more vistas of difficulties and doubts, as progress is made, than a reform of even a single branch of the law. Secondly, it was caused by the conservatism of the lawyers, who, not being in sympathy with change, could act as a most effectual drag upon the progress of law reform. So that while one may sympathize with Cromwell's lament over the slowness with which law reform proceeded, it is scarcely possible to lay this delay to the doors of the Long Parliament as he did, probably for political reasons, in a memorable speech at the opening of the Convention or Little Parliament on the 4th of July, 1653. "I will not," he exclaims, "say that they (the members of the Long Parliament) were come to an utter inability of working reformation, though I might say so in regard to one thing: the reformation of the law so much groaned under in the posture it is now in. That was a thing we had many good words spoken for; but we know that many months were not enough for the settling of one word 'Incumbrance'" (*b*). And even those much-needed changes which these years of turmoil witnessed were

(*b*) Cromwell's Letters and Speeches, Vol. III. p. 211.

blotted out at the Restoration, the actual results were lost, the labours of vigorous law reformers were thrown away, and the English nation had to wait for another century before the ideas of the parliamentary reformers at length improved and popularized the body of English law. But even as this period stands, barren of permanent results, it is deserving of some study in detail, if only for the exceptional place it takes when compared with other parts of our legal annals.

The distinctive character of the law reforms of this part of the seventeenth century was that they consisted almost wholly of attempts to improve procedure, and not to change the body of the law. As we have already seen, Cromwell distinctly stated to the Parliament of 1656 that it was not the laws which were a grievance, but their execution and administration. Some of the more thoroughgoing of the reformers, it is true, advocated very wholesale measures—such as the abolition of the Court of Chancery (*c*); but the English people never desired anything so revolutionary, and would have been satisfied if legal redress could be easily and cheaply available. It was such practical objects as that for which the grand jury of Devon petitioned (*d*)—that all legal proceedings should be in English and not in Norman-French or cramped Latin—which were the aim of the people, not drastic changes in the jurisprudence of the country. The people understood clearly enough that procedure might be either an assistance or a stumbling-block to suitors;

(*c*) Whitelock's Memorials of English Affairs. Ed. 1853. Vol. IV. p. 29.

(*d*) *Ibid.* Vol. III. p. 249.

and overwhelmed as English law was in the seventeenth century with innumerable technicalities in its procedure, the improvement of the latter was clearly the main object for which law reformers had to strive.

One of the first of these changes was of a thoroughly practical character, to which allusion has already been made—namely, a law that all the reports and other books of the law should be translated into English, and that all future reports should be in the mother tongue. Moreover, by the same Act, it was ordered that all writs, pleadings, and other proceedings should be in English, and should be written in a legible hand (*e*). To modern minds this would seem a reform which required no advocacy; but it did not pass through Parliament without considerable discussion, the Bill being supported by Lord Keeper Whitelock, second only to Sir Matthew Hale among the parliamentary lawyers, in a speech which contains many sensible sayings, but a vast deal more of ponderous and wearisome learning. But the history of this single measure exemplifies with singular distinctness the character and fate of the parliamentary law reforms. It was a law useful in its scope, wholly unrevolutionary in its nature; but yet, after being in force for some ten years, it was repealed at the Restoration, and the nation had to wait for nearly seventy years after the return of the Stuarts before this desirable measure was re-enacted in words almost identical with those which were passed by the Long Parliament (*f*).

(*e*) Scobell's Acts and Ordinances, 1650, c. 37.

(*f*) The repealing Act was 12 Car. II. c. 3, s. 4, 1660; the re-enacting Act, 4 Geo. II. c. 26, 1731.

Another very desirable Act was placed on the statute-book to put an end to the delays and mischiefs which arose by reason of writs of error. Thus, no writ of error was of itself to stay or to supersede any execution, nor was any judgment to be arrested on account of a matter of form, but only for a substantial reason. A further clause, almost too stringent in its character, was aimed against unnecessary appeals, for by it double costs were to be awarded against a suitor who prosecuted a writ of error against a judgment which was affirmed by the appellate tribunal (*g*). When we consider these reforms by the light of those which were enacted by the Judicature Act of 1873 we must give all due praise to the lawyers of the Commonwealth; for the principle of these reforms was similar to those of our own day, and in some respects was nearly identical in details (*h*).

But another noticeable measure was passed in the same year as that ordinance upon which we have just touched. It is one of which all humane men will approve, and which again shows a clearer appreciation of the relations of the law to debtors than any measure until the merciful reforms of Sir Samuel Romilly and his successors became accomplished facts. Its object was the relief of poor prisoners, being to the effect that prisoners who have not 5*l*. over and above necessary wearing apparel shall be discharged from durance if the plaintiff cannot show good cause to the contrary (*i*). Here we have a measure based on principles which the nineteenth century only has seen

(*g*) Scobell's Acts and Ordinances, 1649, c. 75.
(*h*) See Ord. LVIII. r. 16.
(*i*) Scobell, 1649, c. 56.

established, and which did not receive their full development until the year 1869 (*k*). We may say therefore either that the law reformers of the Commonwealth were two centuries ahead of their contemporaries in an enlightened knowledge of some of the true objects of a system of law, or we may, on the other hand, assert that the Restoration threw English jurisprudence back by 200 years. Be that as it may, it cannot be said when we regard these measures that the schemes of the parliamentary chiefs were revolutionary or Utopian; for these must be acknowledged to be practical and useful changes. Nor can Cromwell's reproach—which has been already mentioned—against the Long Parliament be wholly justified, any more than the criticism of a popular modern historian can be deemed quite accurate, when he states that "the Parliament appointed Committees to prepare plans for legal reforms, but it did nothing to carry them out" (*l*); for each one of these three measures was a distinct and substantial reform.

Besides these miscellaneous improvements, as they may be termed, two important and distinct reforms remain to be noticed. These are the changes introduced into the Courts of Admiralty and of Chancery, which had two objects. In the first case, the intention was to enlarge and to settle the extent of the jurisdiction of this maritime tribunal. The common law and the civil law practitioners and judges had for centuries disputed over this question, and it had been a constant trouble to suitors, who no sooner placed their causes before the judge of

(*k*) The Debtors Act, 32 & 33 Vict. c. 71.

(*l*) Green's Short History of the English People, p. 561.

the Admiralty Court than their opponents obtained prohibitions in the King's Bench on the ground that, except in some very limited cases, the Admiralty Court had no jurisdiction over the subject-matter of the dispute. Attempts had constantly been made to settle these differences, and an agreement had in 1632 been drawn up before King James I. and his Privy Council, which it was hoped would have brought peace; but it was unavailing, and the contest had gone on much as before (*m*). As regards the Court of Chancery the object of the reformers was equally plain and simple; it was to put an end to the delays which even then made this Court a byword among the people, to lessen troublesome technicalities of procedure, and to make it at once a cheap, a just, and an expeditious tribunal.

The enlargement of the jurisdiction of the Court of Admiralty was carried out in the first instance in the year 1648 by an Act which was from time to time renewed by subsequent legislation. It was so much in advance of any other attempted settlement, it put an end so boldly to the troublesome conflicts which had so long existed, even since mediæval days, that it is worthy of brief notice. It is termed "The jurisdiction of the Court of Admiralty settled" (*n*), and it began by reciting that many inconveniences daily arose in relation both to the trade of the kingdom and to the commerce with foreign parts, through the prevailing uncertainty as to the jurisdiction

(*m*) Orders were made that Admiralty causes lying under prohibitions should be tried. (Commons Journal, September 23rd, 1648, Vol. VI. p. 29.)

(*n*) Scobell (1648), c. 112.

of the maritime courts. It was therefore ordered that the Court of Admiralty should have jurisdiction in all causes which concerned the repairing, victualling of ships, and the furnishing them with provisions. Its jurisdiction was also extended to cases of bottomry, and, what is more noticeable, to all contracts made beyond the seas concerning shipping or navigation, and to questions as to damages arising on board ship or on a voyage. Moreover, disputes as to charter-parties, or contracts for freight, bills of lading, mariners' wages, damage to cargo, or by one ship to another, or by anchors, or arising through an absence of buoys, were to be within the jurisdiction of this tribunal, which was thus immensely and apparently permanently enlarged. This was done not by any mere agreement, but by a legislative enactment, which dealt with this matter in a more comprehensive and simple spirit than any other Act before or since that day. The obvious intention of those who framed it was that the Court of Admiralty should be the chief, if not indeed the sole maritime tribunal, dealing with all disputes arising from matters connected with shipping. And the reasons upon which this reform was based were very clearly expressed by Sir Leoline Jenkins in his speech before the House of Lords (*o*), on behalf of his bill to ascertain the jurisdiction of the Court of Admiralty. It is at once a justification of the measure of the Long Parliament and an indication of the loss which the mercantile community sustained by the abrogation at the Restoration of the enactments of the Commonwealth. For not only was the bill which this diplomatist and lawyer brought forward

(*o*) Life of Sir Leoline Jenkins, Vol. I. p. lxxvi.

in the reign of Charles II. identical with those ordinances which, to use the judge's words, were "vacated by his Majesty's most happy return," but petitions came from various quarters in favour of re-establishing the Court of Admiralty as it existed during the Commonwealth. The merchants of London were so far from considering his Majesty's return happy in this respect, that more than one hundred sent up a petition to renew the system inaugurated by the Commonwealth. And it must be borne in mind that this maritime tribunal was not to supersede, but to be an addition to the ordinary courts of the realm; for, said Sir Leoline—and his speech, as we have said and as he acknowledged, was really in defence of proposals which had existed as law during the Commonwealth—"if mariners will go for their wages, owners for their freight, merchants for their damages, material men for their money to the common law, we shall not in the least regret it, as certainly they will not, unless they find the dispatch quicker, the proceedings less chargeable, the methods of judgment and execution more suitable to their business. We desire leave to receive them and do them justice without the danger of a penal statute and without the interruption of prohibitions when once we are possessed of the cause."

Moreover, the Admiralty jurisdiction was to be executed according to the laws and customs of the sea, and three judges were appointed to deal with the expected and unrestrained business. But the vacating of the Acts of the Commonwealth by the return of Charles II. left it for the legislators of the latter half of the nineteenth century to establish permanently those parts of maritime

jurisdiction which had been given to the Court of Admiralty by the men of the seventeenth century. So that the laws of the Commonwealth which touch the Admiralty Court remain an instance of beneficial legislation which laid unseemly judicial disputes to rest for ten years, forming this short period into an epoch standing quite apart by itself in the history of maritime jurisprudence in this country.

The reform of the Court of Chancery was a very different matter to the settling of the jurisdiction of the Court of Admiralty; it was not an attempt to enlarge the powers of a tribunal not only with the goodwill but with the aid of a certain body of legal practitioners, but it was an endeavour to simplify procedure and put an end to delays which were regarded by lawyers as an essential part of the legal system of the country. In the one case the garrison of the legal stronghold was favourable, in the other it was quite antagonistic to the proposed changes. Partly, it is true, this arose from a feeling which scarcely exists at the present day, and which, if it did continue until our time, has been largely broken down by recent legal changes—what may be termed an *esprit de cour*. The Chancery judge looked upon the courts of common law as antagonistic tribunals, and the common law judge regarded the Admiralty Court as an objectionable institution which he would do all in his power to destroy. Hence any diminution of authority, any change which would lessen the lucrativeness of a judicial post or the importance of the court—at least in the minds of the holders of the judicial offices in such court—was regarded as an attack which

must be repelled by every means, legitimate or illegitimate. Thus it was with the Court of Chancery. We have seen how Whitelock supported impersonal reforms in the shape of turning the law books into English, but when it came to improving the Court of Chancery he regarded reform as quite a different matter. Cromwell was not a revolutionary law reformer; but when in 1654 he and his Council were endeavouring to frame a reasonable measure of reform for the Court of Chancery, Whitelock, then still holding office as one of the Commissioners of the Great Seal, showed how the Protector's schemes were appreciated by himself and the body of lawyers in general by writing in his diary that "the Protector and his Council were very busy in framing new ordinances to please the people; among them they had one in consideration for regulating the proceedings in Chancery, which caused doubtful thoughts in the Commissioners of the Seal, who knew that the authority of this court was designed to be lessened" (*p*). The sneer at the reasons for the Protector's ordinances is fully explained by the knowledge of his power and the result which, rightly or wrongly, Whitelock imagined would in this instance be the consequence of its exercise.

But when we mention the ordinance of 1654 we have passed over a period of time the events in which have to be noted before this ordinance itself can be properly touched upon. For the attempts at reform begin with the appointment of a parliamentary Committee in 1650 (*q*), composed partly of lawyers, partly of political

(*p*) Whitelock's Memorials, Vol. IV. p. 188.
(*q*) October 25th, 1650: Commons Journals, Vol. VI. p. 488.

persons. Whitelock was quite the most noticeable of the former, the elder Sir Henry Vane of the latter class. One of its duties was to prepare the Act by which English should become the recognized legal language of the country; another of equal importance, was to consider the amount of the salaries of the judges and other legal officers, the posts which should be abolished, the various delays and necessary charges which existed in the system of English law; and then finally to bring in a bill to put an end to a state of things which caused complaints to arise from the nation. But, when the ideas and the position of the lawyer are considered, it need not be a matter of wonder that the duty of preparing a bill to change the law books from French into English was carried out in quite a different spirit from that which characterized the proceedings of the committee in regard to the latter part of this task—one which to Whitelock and Lisle must have seemed very like an attempt at professional suicide.

In the following year we find another Committee appointed (*r*)—this time comprising others than members of the Legislature—of which Sir Matthew Hale was the head. Its labours resulted in an elaborate series of draughts of proposed Acts, which were communicated to the Long Parliament and were ordered to be printed by its successor. They cover a wide field, and had they been carried into effect, and continued to exist, they would have given a wholly different character to the subsequent portions of English law. They give evidence of a determination to grapple with existing faults, and to gratify

(*r*) Whitelock, Vol. III. pp. 381, 385.

popular wishes with a boldness which has since hardly ever been equalled, and which must be accounted for by the fact that the lay members of the Committee, representing as they did popular opinion, were more than a match for Conservative lawyers. Any one who will spend an hour or two over the sixth volume of Somers' Tracts (*s*) will be surprised at the extensive changes which were proposed. For we find drafts of bills to ascertain and abolish arbitrary fines upon the descent and alienation of copyhold estates, to regulate pleaders—that is, advocates—and their fees, whose maximum remuneration was to be 5*l*. for a case. There is a vigorous attempt to introduce purely local tribunals for small local causes by an Act for the more speedy and easy recovery of debts and damages not exceeding 4*l*. In these courts the judges were to be "five sufficient honest and understanding persons of the county;" and among other provisions in this same draft was a curious one that a defaulter in payment of a debt might be made to do work for his creditor to the value of the sum which he owed. There were also provisions to prevent fraudulent conveyances by means of voluntary settlements, to make debts assignable by writing after notice to the debtor, to establish a registry of deeds and a county judicature, to improve the criminal law, and to establish a court of appeal consisting of seven laymen and two lawyers. Finally, an attempt was made to reform the Court of Chancery by an Act which was afterwards the basis of Cromwell's well-known ordinance.

Meanwhile, however, the Barebones Parliament let its zeal outrun its discretion. It determined to be destruc-

(*s*) Somers' Tracts, Vol. VI. p. 177.

tive. It did not possess the constructive power which was necessary not only to prevent its efforts from becoming simply revolutionary, but also to produce satisfactory remedial measures. Thus it voted, after a single day's discussion, that the Court of Chancery should be abolished; but when this piece of legislative insanity was performed, ineffectual debates ensued for the purpose of preparing a measure to put some better tribunal in the place of that which it was proposed to exterminate. It was easy enough, too, to pass a motion that a committee be appointed to consider of a new Body of the Law, but it was quite another thing for the committee—especially one consisting wholly of lower middle-class laymen, such as Colonel West, Mr. Barebones, and others—to revise the laws of England. No doubt, in the abstract, it was a highly meritorious work to proceed to "a reducing of the wholesome, just, and good laws into a body, from them that are useless and out of date," taking note during the process of the "nature of them, and what the law of God said in the case;" but the manner in which it was set about, the persons by whom this boundless undertaking was to be performed, and the very nature of the task itself, combined to make the whole matter a piece of buffoonery in the eyes of all sensible men (*t*). This was not what the people wished; it was the dream of a few unpractical fanatics; and when Colonel Sydenham immediately before its dissolution upbraided this short-lived Assembly with their desire to overturn the structure of English law and English society he did no more than give voice to the opinion of the majority of the nation.

(*t*) Whitelock, Vol. IV. p. 29; Commons Journals, Vol. VII. pp. 296, 304; Somers' Tracts, Vol. VI. p. 275.

Thus it was left for Cromwell himself to further reform the law. And in his ordinance, "The Jurisdiction of the High Court of Chancery limited, and proceedings therein regulated" (*u*), we see a reasonable attempt to satisfy the wishes of the people, which is the sole fruits of Sir Mathew Hale's Committee. To describe this statute in detail would not be a little wearisome; it is wholly one to simplify the procedure of the court, and its sixty-seven sections contain means solely for this end.

But it was not a success: it was, in fact, the cause of the resignation of Whitelock and Widdrington, two of the three Commissioners of the Great Seal; for, says the former, "in this Easter Term we proceeded in Chancery according to the former course of that court, and did not execute the Protector's new ordinance" (*x*). Cromwell could not brook an open refusal to obey his laws; but it is pretty evident that he did not regard this want of obedience on the part of Whitelock with any strong displeasure, since a month after he had accepted his resignation he appointed him one of the Commissioners of the Treasury. There still remained, however, Lenthal, the Master of the Rolls, who with the other judges seems to have done his best to carry out the Protector's ordinance. That it was acted upon to some extent is evident from Whitelock's own account, since he writes that the Master of the Rolls "was as forward as any to act in the execution of it, and thereby restored himself to favour" (*y*). On the other hand, it may be noticed that elsewhere in his

(*u*) Scobell, Acts and Ordinances (1654), c. 44.
(*x*) Whitelock's Memorials, Vol. IV. p. 204, June 6th.
(*y*) Memorials, p. 627.

Memoirs he mentions that "they (his and Widdrington's successors) were connived at in the non-execution of it" (*z*). Of course, after making all sorts of objections to the possibility of its fulfilment, he would naturally wish to see it fail. But we may well believe that, like many legal measures in our own day, it would partially work, at any rate. While some portions became the existing practice others were found to be scarcely workable. Their non-execution was wisely and prudently passed over by the Protector as unavoidable, for if, as Lord Morley writes, he had shown more zeal than discretion at the inception of these legal changes, he had the good sense to appreciate the difficulties of the task, and to make the best of a troublesome position.

With this ordinance the effectual reforms of the Commonwealth end; but up to the very year of the Restoration projects for the improvement of the law were continually under discussion. In 1656, 1657 and 1659 (*a*), changes in the law were the subject of debate in the Commons, and as has already been pointed out, they were referred to with much force in the Protector's opening speech at the meeting of his second parliament in 1656. Nor was Cromwell undesirous of improving the criminal law of the country, though we do not find that the wishes he expressed ever bore fruit in his time. "To hang a man," he exclaims, in his own peculiar style, "for six and eightpence and I know not what, to hang for a trifle and acquit murder, is in the ministration of the law through the ill-framing of it," and he concluded this

(*z*) Memorials, Vol. IV. p. 201.

(*a*) Commons Journals, Vol. VI. p. 485; Vol. VII. pp. 256, 734.

part of his address, after dilating somewhat more upon the subject, with an almost passionate appeal to his Legislature, "I hope it is in all your hearts to rectify it" (*b*). Cromwell, indeed, stands alone among the rulers of England as the one who endeavoured systematically to alter for the better his country's laws, and who felt a personal interest in the improvement of English jurisprudence. In his individual influence on legal reforms he resembles another great general—the first Napoleon. Each perseveringly urged on the desired changes, but Cromwell controlled the impracticable schemes of visionary enthusiasts by his strong will and equally strong common sense; while Napoleon, on the other hand, sought in these reforms for his own personal glorification and for personal advantages, hampering rather than forwarding the plans of the jurists by his intervention in the legal discussions. The politicians, too, who in the Barebones Parliament voted the abolition of the Court of Chancery have their counterpart in the democrats who on the 3rd Brumaire of year II. reduced the whole of the civil procedure of France to seventeen short articles. But in this comparison it must also be noticed that, while Cromwell's reforms did not remain part of the law of the land after he passed away, those with which the name of Napoleon is for ever connected form the beginning of a new epoch in French legal history, and have, in form at any rate, influenced the legal systems of a great part of Europe.

A fair consideration, therefore, of the law reforms of

(*b*) Cromwell's Letters and Speeches, Vol. IV. p. 209.

the Commonwealth must lead to the conclusion that Cromwell made an honest endeavour to improve a part of the national system essential to the welfare of the people. His position in this respect was not a little difficult. By urging reforms in the law he would obviously gain the goodwill of the people in general and of the army in particular; but by so doing he would with equal certainty incur the dislike and the opposition of the lawyers, who could put many difficulties in his path, and whose support both for personal and dynastic reasons it was his interest to gain. That Cromwell's own sympathies were in favour of vigorous law reform his whole career goes to prove, and it is eminently a proof of the broad and statesmanlike views which he took of things that until the very end of his career the Protector was urging on the Legislature the necessity of introducing changes in the law which should be comprehensive and thorough, but not destructive of its fabric.

But, apart from Cromwell's personal attitude to law reform, we cannot fail to see how in this period there stands out with clearness the effect upon the law of strong political and social movements; while equally apparent is the vigorous common sense of the English people, who were sincerely anxious to improve their legal system, but with the exception of a few extreme men were wholly averse to revolutionary projects. We see the lawyers as a body opposing, as they have so often done in modern times, all changes in the slightest degree likely in their estimation to lessen their influence or their incomes. We are struck, too, with the fact that, considering how favourable were the times for reforms, yet—making all due allowance for

the really substantial measures which became law—the projects actually executed were comparatively few. But, regarding this epoch in all these aspects, it yet remains one of the most noticeable in the history of English law; and a study of the legal events which mark it is necessary for the full appreciation of the history of the Commonwealth.

CHAPTER IV.

THE GENESIS OF THE HIGH COURT OF ADMIRALTY.

It is now well recognized that in studying the history of a nation, its legal system and the relations of the body of law to the people are of the first importance. For it is the law by which the daily conduct of a people not wholly barbarous is governed, and we must examine it if we would fully understand the ideas and the feelings of an age. Thus the history of the maritime courts and of the maritime jurisprudence of England reveals pictures of its social and political past, and introduces us to unexpected sources of law and procedure. Moreover, the early history of English maritime law has an interest beyond the boundaries of the British empire, for the beginnings of it are equally the beginnings of the maritime law of the United States. These points stand out prominently when we come to examine the genesis of the High Court of Admiralty, and of its jurisdiction during the growth of the English people. That court has been, since 1873, merged in the Supreme Court of Judicature; it now oddly enough as it seems, forms a part of the Probate, Divorce, and Admiralty Division (*a*), but of

(*a*) The cause of the incorporation of two totally different Courts in one Division was that neither the Admiralty nor the Probate Courts were Common Law or Chancery Courts. They were Courts which sat at one time at Doctors' Commons, and the practitioners in them were at one

necessity there exists under this guise of nominal consolidation a practical separation which is inevitable, since there can never be a real consolidation of tribunals without a community of interests, and this does not exist by reason of the differences of the subject-matter of the jurisdiction of this Division.

But we are concerned now, not with this comparatively recent transformation of a tribunal which existed in a separate form for many centuries and still exercises important functions and is almost international in its character, but with its beginning and with its early growth.

It is obvious that there cannot be a Court of an Admiral unless such an officer exists, and such an appointment indicates a systematic, though it may be a rough and ready management of the naval affairs of a nation. In the first place, therefore, we should know something definite in regard to the creation of the office of Lord High Admiral, and of the duties with which he was entrusted, since in them are to be found the germs of a later maritime jurisdiction.

Of the origin of the High Court of Admiralty we are now much better informed since the publication by the Selden Society of the two volumes known as *Select Pleas in the Court of Admiralty* (*b*). The Introduction to them

time also civilians, as distinguished from practitioners in the Common Law and Chancery Courts.

(*b*) Select Pleas in the Court of Admiralty. Edited for the Selden Society by Reginald G. Marsden. 2 vols.

is so lucid and simple that it has a tendency to minimize the amount of valuable and careful research which was bestowed on this work by the editor.

From the Introduction and from the body of this work it is possible to obtain some interesting light on the beginning of the High Court of Admiralty. The following pages will be chiefly confined to one subject, namely, the paramount influence which mediæval piracy had on the creation of what at first was a rude and unsystematic jurisdiction. To professional lawyers it matters not at all how a particular jurisdiction or court came into existence; indeed, we are all too ready to forget that the history of a nation can never be properly understood without a clear perception of the connection between political and social movements and the growth of the law. But before we consider in detail the subject of piracy in the early ages of England, we must for a moment refer to the word "admiral."

The term "admiral" was first used in England in the fourteenth century: in 1300 one Gervase Alard is called "Admiral of the Fleet of the Cinque Ports." That may be considered, at present at any rate, as the first English use of the word, though it occurs at an earlier period in connection with the French possessions of the English kings. In a Vascon Roll of Edward I., in 1295, "Berardo de Sestars (or de Sestas) is appointed Admiral of the Baion fleet—'Admirallum maritime Baion et capitaneum nautarum et marinariorum nostrorum in ejusdem villa.'" The following year De Sestas is again mentioned with the same title, whilst in another Vascon Roll of the same

year, William de Leyburn and John de Butetort are described as "Amiraux de nostre navire D'engleterre."

Mr. Marsden is therefore obviously right when he says that "the word 'admiral' came by way of Gascony to England," but whether it came in the first place from the east or from Genoa, as he suggests, does not seem so clear. It is sufficient for English historical purposes that we find at the beginning of the fourteenth century a maritime leader who bears the title and, as such, is the deputy of the king and is the captain and judge of the fleet.

The question, however, suggests itself, Why should the leader of a naval squadron be the judge of matters which concern private individuals? why should he exercise functions wholly different from those of a naval commander responsible only for the discipline and conduct of his fleet?

We have grown so accustomed to the fact that the High Court of Admiralty was originally the Court of the Lord High Admiral of England, that one feels almost surprised when such a question suggests itself. But a moment's reflection will show that without some sound historical explanation it is not easy to answer it satisfactorily. The admiral of a fleet is not a lawyer—he is a naval commander; he is not to be found in one place; on the contrary, his duties would naturally take him to sea. He is not, for example, as was the Lord Warden of the Cinque Ports, a high local official within his jurisdiction supreme, who would give judgment upon every matter on which he could lay his hands, criminal or civil, maritime or muni-

cipal. Judicial fictions, which have so often taken the place of historical knowledge, will not give the required explanation; we must seek for it in facts.

At present, however, we are a long way from anything in the nature of a regular court of law, or even from a jurisdiction other than one merely disciplinary over the sailors of the fleet; it is in the first instance therefore necessary to understand to some extent the state of affairs on the seas around England in the fourteenth century.

The burning question of the day was that of piracy: the seamen of England preyed upon the ships of France, and the seamen of France seized the merchandise and the ships of Englishmen. The business was of the simplest kind: a ship which was larger than another could seize it and carry off spoil, or a ship in distress could be boarded and robbed. Nor were the so-called pirates particular about nationalities, and Englishmen were not above taking advantage of the distress of their own countrymen, or of their continental allies.

We must not, however, be led away by the popular modern idea of the word "piracy"; we must not imagine an organized body of men, exceptions to the mass of ordinary citizens, sailing in a particular ship with their hand against every man and every man's hand against them. What we see is, in truth, society in an elementary state, in a particular region of the world; that is to say, law had not yet extended from the land to the sea: the idea of property, of anything in the nature of international comity, stopped at the seashore, and the right

to property on the seas was vested in the strong man. Throughout the latter half of the thirteenth and the first half of the fourteenth century, there is conspicuously visible a struggle between barbarism and civilization on the seas, a conflict between lawlessness and law, and attempts, weak and ineffectual but constant, to protect private property on the ocean.

These attempts were various. In some instances the sovereign, at the request of private and injured persons, himself intervened, in which case the question was referred to the chancellor, or to the judges, or the king was the actual judge. Thus, in 1294, "a case of spoil was tried 'coram ipso domino rege—coram domino rege et concilio suo'" (*c*). In other instances, the ordinary tribunals of the country were invoked for the purpose of bringing justice to bear on those who had seized property at sea. "The Assize and Coram Rege Rolls furnish many instances of trials, both criminal and civil, of pirates and spoilers, according to the common law. . . . Sometimes the whole matter was disposed of by the chancellor, and sometimes issues as to piracy or no piracy, and as to the ownership of property and ships spoiled, were directed out of chancery to the King's Bench, or to commissioners of Oyer and Terminer. Such issues, returnable into Chancery, were tried by juries taken from the county in which the spoil was committed, or from the county to which the spoiled property was brought or the spoilers came, and the juries were sometimes of good and lawful men and sometimes merchants

(*c*) Vol. I. p. 17.

and mariners. The Commissioners directed the trial to be either 'secundum legem et consuetudinem regni Angliæ,' or 'secundum legem mercatoriam' or 'maritimam.' The granting of letters of reprisal and marque was also within the jurisdiction of the chancellor" (*d*).

It is clear, however, that while appeals, whether to the King or the chancellor, bore witness to the existence of a legal system, however slight, the practical strength of the law was unworthy of notice. Throughout the first half of the fourteenth century piracy flourished, and the law when it was invoked was, in most cases, powerless. An instance of this may be seen from an occurrence in the year 1339. Some Englishmen had committed piracy on goods belonging to Spanish, Portuguese, and Catalan merchants in Southampton Water. We can only surmise that the goods of these merchants were there in vessels ready to be landed. A commission was, at any rate, issued to three gentlemen, probably of the locality, to inquire into the matter, commanding them to seize the spoiled goods and restore them to their owners. The names of the spoilers were ascertained with the goods that had come into their hands. But the record relates that as to the pirates there was a return of "non sunt inventi," and, adds the editor, with some grim humour, "it does not appear that the plaintiff received anything." The king, the chancellor, the judges, and every one else, were, in fact, powerless. It was impossible, in other words, for legal sentences to be enforced at sea. Pirati-

(*d*) Vol. I. p. 16.

cal persons, however well known, had only to go to sea to escape from legal punishment.

Side by side with the demands of private individuals for redress we find important public and, as they may be called in modern phraseology, diplomatic expostulations. There was nothing to choose, however, between the French and English pirates, and the complaints of the sovereigns of the two countries were mutual. "In 1321, and again in 1323, Edward II. complains to the King of France of the capture of an English ship by one Berengarius Blanchus, guardian or admiral of certain ships—'custos seu admirallus quarundam navium' of Louis, late King of France, and of the denial of justice by France" (*e*). Against this complaint may be set a complaint by the King of Arragon in 1324. It is the more noticeable since it shows us the perfect willingness of Edward II. to give redress and, at the same time, a certain respect for law in England, which may, perhaps, have been an actual difficulty in the way of the prevention of piracy. "Edward II., in answer to complaints made by the King of Arragon of delay in obtaining justice in the matter of piracy, says that the merchant who was spoiled, one Peter Jacobus, had failed to give the names of the spoilers, and that although he has appointed justices to try the case, it is still undecided by reason of difficulties which have intervened, and that the law of England does not allow any one to be condemned for a crime unless he is convicted of it. He refused to adopt the practice of Spain, which was that reprisals by way

(*e*) Vol. I. p. 23.

of arrest were granted upon proof in the Spanish courts of the spoil complained of" (*f*). In some instances, however, the spoiled merchant obtained more solid satisfaction, since from time to time the English sovereign appears to have paid for losses out of his own purse. "In 1350 he had paid £152 to the Bardi for the spoil of a cargo of wool in a ship sailing from Southampton to Flanders; and in 1336 he had compromised another claim of Genoese merchants by a like payment out of grace" (*g*).

Piracy, in fact, in the middle of the fourteenth century was one of the most important questions of the time; it affected merchants and shipowners of every maritime country; it was a constant cause of annoyance and of expense to the sovereign himself. An increase of civilization and of wealth in England and the Low Countries, in France, and on the shores of the Bay of Biscay, only made the impotence of the law on the high seas more keenly felt. Without commerce there is no prey for pirates, and the increasing outcry for a stronger maritime law shows how important had become the commercial trans-marine intercourse of England and Europe. And we have yet another illustration of the manner in which the growth of law is influenced by and reflects the progress of the people.

A marked change, however, occurs in the middle of the fourteenth century, another instance of the influence of

(*f*) Vol. I. p. 25.
(*g*) Vol. I. p. 28.

sea power on history. In 1340 was fought the battle of Sluys, a factor as determining as the Nile or Trafalgar. It made the English monarch for the time being sovereign of the narrow seas, king not only of England, but also of the sea. "Touz les pays tenoient et appelloient nostre avan dit seigneur le Roi de la mier," such are the terms of a petition to Parliament in 1372, when Crecy and Poitiers had followed the sea victory of Sluys. It reduced to reality a shadowy claim which the kings of England had from time to time put forward. The power and the prestige of the English sovereign now gave him the right and the means of enforcing some kind of law on the sea. But the legal jurisdiction of the admiral did not spring up fully armed immediately after the battle of Sluys; some years of further growth were necessary. We see it uprising in 1342, when we find that to Robert de Morley, admiral of the northern fleet, and to two others had been assigned the duty of making inquisition by the oaths of jurors from the county within the jurisdiction of the admiral concerning the spoil of a ship of Flanders called the *Tarryt*. The spoilers were tried before the justices. But five of them were pardoned "upon their producing the certificate of the admiral that they had equipped ships and gone to serve the King in his expedition to Brittany." The power of the admiral was thus distinctly recognised, though the actual trial was before justices. Other instances might be given of the growth of the admiral's jurisdiction for the twenty years after the battle of the Sluys.

At length, in 1360, John Pavely is appointed "capitaneus et ductor" of the fleet, with disciplinary powers

as had been not uncommon, but, for the first time, he is given a legal jurisdiction, the patent —as translated from its Latin meaning—"giving to him full power by the tenor of these presents of hearing plaints of all and singular the matters that touch the office of the admiral and of taking cognizance of maritime causes and of doing justice and of correcting and punishing offences and of imprisoning and of setting at liberty prisoners . . . and of doing all other things that appertain to the office of admiral as they ought to be done of right and according to the maritime law" (*h*). Here we have the first distinct and clear grant of a maritime jurisdiction to the admiral. It was a recognition by the Crown of a jurisdiction which, in a tentative and uncertain manner, had been already asserted from time to time by the admirals of the north, west, and east, a jurisdiction which was so indefinite that it cannot be regarded as a legal fact, and which had not been admitted by the King's Courts. Thus in the year 1296, in an action in the Common Pleas, objection was taken to the jurisdiction by the counsel for the defendant on the ground that there is assigned on behalf of the king upon the sea an admiral to hear and determine (oyer and terminer) complaints of matters done on the sea. The Court, however, denied that it had any knowledge of the admiral's legal power. Points such as these indicate some kind of readiness in the admiral to decide disputes, but he was in fact more of an arbitrator in such instances than a judicial officer. The appointment of Pavely was followed a few months later by the entrusting of the command of the three fleets of the north, south, and west to one admiral, Sir John de Beauchamp, who "was succeeded in

(*h*) Vol. I. p. 43.

1361 by Sir Robert Hearle, also admiral of all the fleets." Each of the patents of those two admirals "contains, in addition to the usual disciplinary powers, a grant of maritime jurisdiction secundum legem maritimam" (*i*).

In these two patents is also found for the first time a power for the admiral to appoint a deputy, and other patents from this date to the end of the century are in the same terms.

There is, therefore, clearly visible in these last sixty years of the fourteenth century a group of interesting and suggestive facts,—the supremacy for the time being of the English sovereign on the seas, the appointment of a single high official, an admiral of the English fleet, to whom is granted not only the ordinary disciplinary powers of a naval commander, but the jurisdiction of a judge of maritime matters. As a necessary consequence, he had the right to appoint a deputy, which would, probably, be a lawyer, and whose sittings constituted a court of admiralty which was primarily intended to check piracy. It was not, however, until the year 1482 that there is clear evidence of the appointment of a judge, for the patent of William Lacy, the first which is extant, is dated in that year. Thenceforward follow a succession of regularly-appointed judges, showing that the Court of Admiralty had become a recognised municipal tribunal, although it was one regarded with no little jealousy by the other courts of the realm.

From 1360 to the year 1536, cases of piracy, both

(*i*) Vol. I. p. 42.

criminal and civil, were usually tried in the Admiral's Court with or without a jury. But piracy flourished in spite of it, and continued to do so throughout the fifteenth century. Excellent illustrations of French piracy are given in a paper by M. Alfred Spont in the *Revue des Questions Historiques* (April 1, 1894), entitled "La Marine Française sous le règne de Charles VIII." "Nos corsaires poursuivent indifferement Anglais, Espagnols, Portugais, ou Italiens." It is not necessary to give more than two of the instances stated by M. Spont: "Deux navires Français sont arrêtés à Sandwich, et par represailles, le Maréchal d'Esquerdès fait emprisonner quelques Anglais. Hesdin. (Mai 1483.)" Again, in 1484: "Jean Darrompel, seigneur du Lac, Capitaine de la *Marie d'Ecosse*, est pillé par les Anglais et reçoit 600 livres de récompense sur le domaine de Normandie (21 Août)."

This state of things was not surprising, since the prevention and punishment of lawlessness on the high seas is rather a matter of police than of jurisdiction. It was all very well to establish an Admiral's Court, but such a tribunal could not alter the habits of the people, nor destroy the sympathy of the coast men for those of their number who had taken a prize. It was easier to get a judgment against a so-called pirate than it was to find the man himself to punish him, and it was not difficult for those whose duty it was to bring a pirate to justice to fail to obtain the evidence necessary to ensure his conviction. The failure of the Admiralty Court for the main purpose for which it was created became so obvious in the beginning of the sixteenth century that Henry VIII. concluded a treaty with Louis XII. in 1509, and with

Francis I. in 1518, by which it was agreed that both in England and in France special tribunals should be established for the trial of pirates. Something very much like martial law was to be administered. For the procedure was to be speedy and informal, "summarie et de plano sine strepitu et figurâ judicii . . . sola facti veritate inspecta."

So things went on until 1536, when the criminal jurisdiction of the Admiralty Court over piracy was handed over to the common law courts (*j*) for the reason as the statute recites, and this should be carefully noted, that pirates, thieves, robbers, and murderers on the seas, escape unpunished.

It is easy to understand the position of affairs when we read a document which is printed in the first volume of the *Select Pleas of the Court of Admiralty* (*k*). It bears the simple heading of "Re Shenew," and it is stated to be a petition to the admiral of a French ship by Englishmen; the petition being subsequently referred to the judge of the Admiralty Court. It gives us a quaint and lifelike picture of maritime and commercial life and of the comparative impotency of the arm of the law.

"In the most humble wise piteously complaining," it begins, Piers Shenew of St. Malo in a time of peace together with two other merchants of St. Malo sailed from Bordeaux in the *Mary of St. Malo*, of 28 tons, with a cargo of wine, for Ireland. Here they sold the wine and

(*j*) 28 Hen. 8, c. 15.
(*k*) Page 73.

bought salt, hides, and herrings, and having loaded their ship in Carlingford, they made sail for their own country. Contrary winds drove them to an anchor in the haven of Skerys. There, on the 6th of February, Walter Soly, an Englishman, and many sailors in a great ship with two tops came with staves and swords, carried the sailors off to his own ship, and kept them for ten days below deck. Then he landed them on the Isle of Man, and left them there robbed and spoiled of the ship and her cargo to their utter undoing. The matter was referred—as we have said—to the Judge of the Admiralty Court, so that proceedings should be taken against this turbulent Englishman. But how the suit ended we know not; probably the Frenchman had to put up with the loss of his ship and of his goods. But the facts of the case, stated nakedly in a legal document, show how intolerable was the existing state of affairs on the seas. The growing commerce of England, which was contemporary with the increasing prosperity of the English towns and seaports, was hampered by lawlessness on the seas just as was that of the towns of Flanders and of France.

But though the Admiralty Court failed in what was its most important object, it had yet obtained by the end of the sixteenth century jurisdiction as a municipal maritime tribunal. Here was a tribunal in touch with seamen and the business of the sea, and so, with the practical sagacity which has always characterised Englishmen, the Admiral's Court became a court for the decision of purely maritime disputes. Some seaport towns had "port" or marine courts, in which local mercantile disputes could be tried, but, where these were not to be found, no special

tribunal was available but the court of the admiral. That a conflict should arise between local jurisdictions, such, for instance, as that of Yarmouth, and the admiral's jurisdiction is not surprising, nor as regards purely maritime causes is it surprising that the latter jurisdiction should ultimately prevail. Neither the admiral nor his deputy ever forgot that it is the business of a good judge to enlarge his jurisdiction, and however jealous the common law courts might be of the Admiral's Court, suitors must have found it convenient. But to discuss the conflicts which continued for so many years between the Admiralty Court and the other High Courts of the kingdom would take us outside the particular scope of this chapter.

Fixity and certainty of jurisdiction is altogether inconsistent with the growth of a tribunal or with the development of society. It is only after civilization has come to a particular point that the law courts of a nation can be regarded as having settled functions, and the early history of the Admiralty Court is noticeable for periodical fluctuations. Limitations placed on the Court, and never very strictly enforced, were relaxed by Henry VIII., and thus, with the jurisdiction at one period expanding, at another contracting, it has gradually attained a distinct and limited, but well recognised, maritime jurisdiction.

With the later part of the history of the High Court of Admiralty we are not now concerned. The object of this chapter is to emphasise the historical point which stands out so prominently in the *Select Pleas of the Court of Admiralty* that the extent of piracy in the Middle Ages was in a great degree the cause of the genesis of the

Court of the Lord High Admiral. "The origin of the Admiralty Court can be traced with tolerable certainty to the period between the years 1340 and 1357. It was instituted in consequence of the difficulty which had been experienced in dealing with piracy or 'spoil' claims made by and against foreign sovereigns." This is a concise summary of the evidence which has now at length placed this portion of our legal history on a sound historical footing, and removed it from that region of uncertainty in which, from an absence of detailed research, so many of our legal institutions have remained. But we should hesitate to adopt the above conclusion without qualification. For as already pointed out, the Lord High Admiral seems from time to time to have acted as a judge in criminal and civil matters in the thirteenth century. The truer view is that the subject of piracy in relation to the Admiralty Court is of great importance, because by reason of its being an international question, it caused this court to be sanctioned and protected in order to be of use for a particular purpose. Without this protection it is possible that the admiral's jurisdiction would have languished and expired, or have been crushed by the opposition of other courts. The legislation in the reign of Richard II. (*l*), though intended to limit the jurisdiction of the Admiral's Court to things done upon the sea, was an express recognition of a special jurisdiction, and though the admiral and his deputies did not acquiesce in this limitation, it was in fact a very efficient safeguard of a jurisdiction which had come into being in a haphazard and unusual manner.

(*l*) 13 Ric. 2, st. 1, c. 5; 15 Ric. 2, c. 3.

CHAPTER V.

SOME SOURCES OF ENGLISH MARITIME LAW.

THERE is a natural tendency among those who are concerned with the administration of the law to criticise its results and its form, and to trouble little about its sources. This is especially the case with maritime law, which now consists largely of decisions on the construction of mercantile documents, and on the interpretation of commercial customs. Amidst this structure of case law primary principles are almost lost. It is to some—and to an important extent among early European collections of sea law, that we must look for some foundations of English maritime law, collections also which bring before us vividly illustrations of mercantile and maritime life in the Middle Ages. Of these collections of enactments, decisions, and customs, the most ancient is the Rhodian Sea Law (*a*), which connects mediæval times with Byzantine jurisprudence. For centuries the so-called Rhodian Sea Law has formed a groundwork for learned commentators and for erudite scholastic criticism. According to the best authorities it appears that the portion containing forty-seven chapters is the most ancient and most authentic part, and was "probably enacted by one of the Isaurian Emperors Leo or Constan-

(*a*) For information on the Rhodian Sea Law the reader is referred to Mr. Walter Ashburner's learned and exhaustive work, The Rhodian Sea Law. Oxford, at the Clarendon Press, 1909.

tine Copronymus." Further, this code has no connection with Rhodes, and was only given the title it bears in order to add weight to its authority. The portion which has been often called Part II. is somewhat in the nature of an appendix, probably compiled at the same time as the forty-seven chapters, and was placed in this form because it was concerned with matters of small importance. The so-called Prologue appears to be of much later date than the two other parts—when and by whom it was compiled is a matter of complete uncertainty, and it has even been suggested that it was "an exercise composed in the law school which was established at Constantinople in the middle of the eleventh century" (*b*). Speaking broadly, the essential part of the Rhodian Sea Law regulates the relations of the owner, the master, and the merchant who is freighter of a vessel, as well as the conduct of the crew. It is somewhat surprising that a code which is concerned with maritime business at a time when commerce on the seas was in a very primitive and simple condition, should have been regarded with so much respect in England even as late as the end of the eighteenth century. For the Rhodian Sea Law appears now to be more interesting as a legal relic than as a chapter of ancient jurisprudence which can affect modern law.

In mediæval times, the two bodies of sea laws which deserve the closest attention are the Judgments of the Sea or the Laws of Oleron, on which the Laws of Wisbuy and the Purple Book of Bruges are substantially founded, and the Customs, which are part of the Consulate of the

(*b*) The Rhodian Sea Law (Ashburner), p. 74.

Sea. Though these codes are foremost in interest, there are other collections of maritime rules which cannot be ignored, such as the so-called Amalphitan Table or the Ordinances of the City of Amalphi, as well as the Ordinances of Trani, and the several statutes of Pisa, Venice, and other southern maritime towns. In these collections is certainly to be found the source of much of English maritime law. Nothing is more noticeable than the comparatively advanced state of development both in matter and in form of maritime law on the Continent when it was exceedingly meagre in this country. It follows almost as a matter of course that commercial intercommunication would cause maritime rules which definitely existed in one city or country to have an influence on the law of another, which was merely in process of formation and which was never embodied in anything like a code. It is true, indeed, that to some extent maritime law, from the nature of its subject-matter, is more alike in all countries than any other branch of municipal law, and is less affected by national customs and habits of thought. But it does not therefore follow that where the maritime law of one country is formulated, it will not be imported from that country to one in which jurisprudence is in a less precise state and where principles have not been definitely fixed.

The Judgments and the Consulate of the Sea are, as already indicated, the most interesting of the mediæval collections, and are the most representative codes of the merchants and mariners of Northern and Southern Europe in the Middle Ages. They were not merely codes accepted in one or two places but had a general application

in the ports of the North Sea and on the shores of the Mediterranean. From the little island of Oleron on the Western Coast of France came, it is supposed, the Judgments of the Sea: obscure as their origin is, we can scarcely be surprised to find that the date and place of their promulgation has caused lively and learned disputes among legal writers on the Continent. Even the judicial Hallam ventured to aver with some emphasis that the Judgments of the Sea "were a set of regulations chiefly formed from the Continent, and they have been denominated the laws of Oleron from an idle story that they were enacted by Richard I. while his expedition to the Holy Land lay at anchor in that island." But though, as Sir Travers Twiss in his introduction to the several volumes of the Black Book of the Admiralty has shown, it is impossible to fix with certainty any particular year as that in which either of these codes were formulated, it may be assumed with some reason that the Judgments of the Sea must have been promulgated towards the end of the twelfth, and the Consulate about the end of the fourteenth century. Neither can there be much doubt that the Judgments of the Sea had their origin as a distinct code at Oleron, in those days a port of some importance. The story of their enactment by Richard I. may rest, perhaps, on some basis of fact, and it is possible at any rate that they received the official approval, if it may be so called, of that monarch. The island and seaport of Oleron passed into the possession of the British Crown on the marriage of Eleanor, daughter and heiress of William Duke of Guienne, with Henry II. of England. Long before these Judgments were drawn up, a floating, yet to some extent a regular body of law

must have been in existence; for judgments such as these in an age such as the twelfth century would not have been thrown into a somewhat symmetrical form until the principles enshrined in them had been generally accepted and acted on. If these judgments had not been long in existence in the form of a code at the time of Richard's stay at Oleron, it would not be improbable that he should be asked to approve of them.

Coming to a later period, two circumstances in the reign of Edward III. point to the authority of the Laws of Oleron, and to the influence of the early maritime law of the Continent on that of England. In an inquisition taken at Queenborough by command of Edward III. on April 2nd, 1375, before the Admiral of the King and a jury, it is stated in regard to a question of pilotage that "the aforesaid jurats do say it seemed to them in that case that they know no better advice or remedy, but that it be from this time used or done in the manner which is contained in the law of Oleron." In the same way and for the same purpose these laws are further alluded to in this same inquisition, showing that when doubts existed the Laws of Oleron were referred to as containing the guiding rule of maritime conduct. There is also an important allusion to the Judgments of the Sea in a case cited in Prynne's Animadversions (*c*), and tried in the twenty-fourth year of the reign of Edward III. It was an action in the Mayor's Court of Bristol, and was brought against the master of the ship *La Graciane*, of Bayonne, for damages done to the plaintiff by a servant

(*c*) Page 117.

of the master. The actual cause of action is not that which is noteworthy; the remarkable fact in the case is that both the plaintiff and defendant appealed, so to say, to the Laws of Oleron, with the result that judgment was given for the plaintiff, who had argued that the defendant was liable "quod secundum legem et consuetudinem de Oleron, unisquisque Magister navis tenetur respondere de quâcunque transgressione per servientes suos incadem fact." Both these instances are remarkable because the precedents referred to in these cases are not to be found in the twenty-four articles of the Laws of Oleron as they seem at first to have been drawn up. They are part of the subsequent ten articles which in the English MSS. are classed together with the first twenty-four as the Laws of Oleron. The origin of these ten additional articles is uncertain, but their very addition to the earlier articles shows the authority which attached to the original Laws of Oleron. For their classification under the title of Laws of Oleron was clearly intended to add to their weight, and to give them a value and an importance which in themselves they possibly might not possess. At the same time, this addition to the original articles shows how easily subject-matter of laws may be in reality wrongly named, and its origin misunderstood. The citation of the Laws of Oleron, additional articles and all, in two instances is, however, clear evidence to show the sources to which in the fourteenth century Englishmen who were concerned with maritime law were wont to turn for guidance.

The noticeable feature in the Judgments of the Sea as they have come down to us, and indeed of all the collec-

tions which have been preserved, including the Rhodian Sea Law, is their inartistic but practical form. No attempt is made to arrange the subject-matter in consecutive order, and the internal evidence is strong to show that they are neither more nor less than is implied by their name—judgments on certain points of maritime law, which arose from time to time, and which as they occurred have been adjudicated upon by the prudhommes of Oleron. No theoretical subjects which had not been raised in actual maritime affairs are touched on, so that these twenty-four fragmentary articles are very far from being in any way a complete and harmonious code of maritime jurisprudence. Thus we see here in its barest form the creation of law by judicial decisions sealed as it were by the force of custom.

On the other hand, the Customs of the Sea are more important, because a fuller and more complete work. These, say the compilers (we quote from Sir Travers Twiss' translation of the Catalan version known as "MS. Espagnol 56" in the Bibliothèque Nationale in Paris), "are the good constitutions and good customs which regard matters of the sea which wise men who travelled over the world composed therewith books of the science of good customs." They form a part only of the Consulate of the Sea, which was compiled, it would seem, for the use of the Consular Court at Barcelona. The commencement already quoted cannot be considered as doing more than indicating very vaguely that it was partly composed of customs reduced into writing, especially as it does not appear in all the extant MSS. The Consulate, it is more likely, was collected from

various sources, actual decisions of the consuls, opinions of the prudhommes of the Strand, and received customs. The whole—we now speak only of the Customs of the Sea—thus form a full but at the same time an unscientific collection of maritime law as administered at Barcelona at least as early as the fourteenth century. It needs but little imagination to understand how, when once these laws were formulated, they should have an application beyond a particular seaport—should be copied by other maritime towns, should be given in evidence in other countries, and even quoted as customs prevalent at Barcelona, and acceptable to all mariners and merchants in the South of Europe—"utque Rhodias olim, ita plerique nunc per orbem Barcinoneas leges appellant." So speaks a writer of these laws in 1491. It is not here intended in any way to describe—even with an approach to minuteness—either the form or the substance of the five hundred and fifty odd sections in which they are contained; suffice it to say that they deal somewhat confusedly as regards form with various matters connected with the carriage of merchandise, the hiring of ships, the relations of owners and seamen and the duties of pilots. "And if," we read in the 205th section, "that person who shall be taken as pilot does not know these parts in which he has said and promised and agreed to pilot the ship or vessel, he who has been taken as pilot, and who has promised this to the managing owner of the ship or vessel, and cannot fulfil anything of what he has promised in such case 'deu perdre le cap encontinent sans tot remey et sans tota merce'", should in fact be summarily and without mercy beheaded. The rest of the article regulates the capital punishment of pilots, which

in those times answered to the forfeiture of his bond to pilotage authorities, which is about the worst fate which can nowadays befall an incompetent pilot.

Writers on jurisprudence have had less influence in England on the substance and the form of municipal law than in other European countries, but it is important to note that in the introduction to the first edition of his famous work on the Law of Merchant Ships and Seamen (1802), Lord Tenterden writes: "The Ordinances most frequently quoted are those of Oleron and Wisbuy, the two Ordinances of the Hanse Towns, and the Ordonnance de la Marine du Mois d'Aoust, 1681. The Ordinances of Oleron and Wisbuy and the first Hanseatic Ordinance are in the hands of every lawyer; and whenever the Hanseatic Ordinance is mentioned generally, the reader will understand this to be spoken of. The Hanseatic Ordinance of the year 1614 was published with a Latin translation and commentary by Kuricke in a small quarto, at Hamburg, in the year 1677." The value placed on the mediæval codes in Lord Tenterden's time is well illustrated by his remark that the Ordinances of Oleron and Wisbuy "are in the hands of every lawyer." To-day (1911) it is probable that not a single English or American practitioner possesses them or would ever refer to them if he owned them. But the importance of Lord Tenterden's reference to the mediæval collections of sea laws in his classical work on the Law of Merchant Ships lies in the fact that he eventually became Lord Chief Justice, and that in this capacity he was able to give practical effect to rules which, though they might be approved by him as a text-writer and influence his opinion

as a mere jurist, carried in the pages of his book no weight as legal precedents. But after he had reached the Bench, the words which he wrote obtained an exceptional authority, and in this way could affect the judgment of those who succeeded him as judges. This statement is well illustrated by Lord Tenterden's dictum in his book that where a ship has met with a disaster the master is at liberty to procure another ship to transport the cargo to its destination, but if his ship can be repaired he is not bound to send the cargo forward in another ship. His action must depend on the circumstances of the case. This statement of the law accords with that of the Rhodian law (*d*), the Laws of Oleron, and the Law of Wisbuy, and is opposed to that of the old French ordinance, which makes the duty of the master to tranship obligatory. This rule as to liberty to tranship, as stated by Lord Tenterden, was approved by the Court of Queen's Bench in 1838 (*e*), and we may, therefore, fairly say that on this point the connection between the mediæval codes and modern English law is reasonably traceable.

Some of the judgments of Lord Mansfield, again, show how much the jurists of modern times relied for guidance on the mediæval sea laws of the Continent. This eminent judge must be regarded as one of the first founders of maritime law in this country, and the debt which he owed to the mediæval codes is visible in a decision which laid down the rules which govern the right to freight pro ratâ itineris. The rule of English law is that

(*d*) The Rhodian Sea Law (Ashburner), Chap. XLII. p. 116.
(*e*) *Shipton* v. *Thornton*, 9 Adolphus & Ellis, 314.

if the voyage is not completed, the shipowner is not entitled to freight for goods delivered at some point short of the agreed destination. If, however, the voyage comes to an end through some peril of the sea at an intermediate port the shipowner is bound to carry on the goods in his own vessel when she has been repaired, or to tranship them to another craft for this purpose, if he desires to obtain the original stipulated freight. But, on the other hand, if the owner of the cargo accepts it at this intermediate port, it is said that the law of England implies a contract to pay a freight in proportion to the length of the voyage which has been actually performed. In 1738, the House of Lords gave judgment to the effect that full freight was due on goods carried only to an intermediate port when the shipowner was willing to carry them to their destination. In 1759, however, the first fully reasoned decision which can be said to exist in the reports was delivered by Lord Mansfield in the case of *Luke* v. *Lyde* (*f*), which laid down the law as has been stated. This decision has long been a household word in connection with maritime law. That the main ground of it was found in the maritime law as formulated in the Rhodian Sea Law, the Judgments of the Sea, and in the Consulate of the Sea, is apparent on the face of the judgment itself. That there were all the necessary elements present on which to base the fiction of an implied contract is equally clear. It is certain that this judgment formed the foundation for the subsequent superstructure of case law on this subject, in which the liability to pay freight pro ratâ is treated as being based on the doctrine of an implied contract. But

(*f*) 2 Burrows, 882 (1759).

however convenient this fiction may be, it is impossible to doubt that the true origin of the cargo owner's liability is the equitable right, or, more popularly speaking, the just claim of the shipowner, to receive payment for the partial carriage of the goods, for the work which his ship and sailors have done for the cargo owner, who by accepting his goods at a particular spot short of their original destination has received a service from the shipowner for which he is in justice bound to remunerate him. It may be well to give an instance of the judicial use of this convenient and frequently used fiction. In the case of *Mitchell* v. *Darthey* (*g*), Chief Justice Tindal spoke these plain words: "The claims of the shipowner must therefore rest upon an implied contract to remunerate him for services performed not according to the agreement, but a service from which the freighters have received a benefit." Let us contrast this right so based, with the words of the Fourth Article of the Judgments of the Sea, as they appear in the translation by Sir Travers Twiss in the Rolls Series of the Black Book of the Admiralty (*h*): "A ship departs from Bordeaux or elsewhere; it happens sometimes that she is lost, and they save all that they can of the wines and other goods. They may well have them paying their freight for such part of the voyage as the ship has made if it pleases the master. And if the master wishes, he may properly repair his ship, if she is in a state to be speedily repaired; and if not he may hire another ship to complete the voyage, and the master shall have his freight for as much of the cargo as has been saved in any manner. And this is the judgment in the case."

(*g*) 2 Bingham N. C. 555.
(*h*) Vol. III. p. 8.

Neither in this passage, nor in the authorities cited by Lord Mansfield in support of his judgment in *Luke* v. *Lyde*, is there a single indication of the doctrine of implied contract; it is treated as a simple right arising from work done for another, and the judgment itself is rather based on mediæval expressions of maritime law and custom than worked out from first principles.

If we turn to another branch of jurisprudence, that which is administered in the Admiralty Court, we shall find that in the leading case of *The Gratitudine* (*i*), which was decided by Lord Stowell in 1801, and settled the right of the master of a ship to hypothecate cargo for the cost of the repair of a ship when in distress, the mediæval codes of the Continent were cited in the arguments of counsel, and referred to in the judgment as fortifying the opinion of the Court so far as it rested on broad principles. The Consolato del Mare, the Laws of Wisbuy, and the Ordinance of Antwerp were all relied on; "the passage," said Lord Stowell, "which has been cited from the Consolato, Art. 104, is applicable. There it is said that a merchant, being on board with his goods (which was the custom according to the simplicity of ancient commerce), having money, was obliged to advance it for the necessities of the voyage; and if he had not money, the master might sell a part of his lading. The Ordinance of Antwerp, likewise, seems expressly to recognise it." It may be said that these ancient authorities were only used to show the propriety of the general principle enunciated by the Court, and not being judicial precedents cannot be regarded as forming a basis for the

(*i*) 3 C. Robinson, 240.

decision. Whilst no doubt this is so, a part of an ancient collection which starts as it were a principle, has by the mere fact of thus stating it made it available as an influence on the mind of the Court. When, as in England, judicial decisions only are regarded as actual precedents to be followed, it is not easy to know the exact value which, in the formation of a branch of jurisprudence, should be given to the ancient statements of a principle which is obviously adopted or followed by a Court of a different nationality at a later period of time as happened in the case of *The Gratitudine*.

Again, one of the most fixed principles of law as administered in the High Court of Admiralty was that the seaman had a lien for his wages on the vessel on which he served. This is one of those principles which is said to be based on general maritime law: the seaman was not only to have a remedy against the owner, but a right against the vessel, to use Lord Stowell's words, "as long as a single plank remained." But it is laid down in the 93rd and 94th sections of the Customs of the Sea, that the mariner has a right against the ship if he is not paid by the owner - "if there shall only be preserved a bolt it ought to be employed to pay the wages of the mariner," and "it is incumbent that the mariners should have their wages *si la dita nan se n'sabia vendre*, even if the ship should have to be sold." Here, then, is to be seen the right of the seaman against the ship; in other words, in the fourteenth century, the seaman's right of a maritime lien is expressly recognised. Even allowing for the obvious justice of such a right the source from which it found its way into the law as administered by the High

Court of Admiralty seems obvious. From this point of view, therefore, the Judgments of the Sea and the Consulate of the Sea have a direct interest in regard to the history of English law, since it is clear that many of the principles of maritime law in this country—the earliest and now the most firmly accepted—were formulated in these and similar collections, and were transplanted from them into the case law of England, often without any open recognition, except now and again, as in the historic judgment in *Luke* v. *Lyde*—a judgment which enabled Lord Mansfield to exhibit his knowledge of general maritime law, in other words, of maritime law as formulated in the mediæval collections of various European countries.

CHAPTER VI.

LORD STOWELL AS A CREATOR OF MARITIME AND PRIZE LAW.

If we look back over the years during which English law has been in process of continual growth and seek to ascertain some effects of judicial influence upon it, unquestionably that of Lord Stowell is the most remarkable. He may be regarded as the creator of two different bodies of law—that which is administered in the Admiralty Court, and that which is administered in the Prize Court. It was by a mere fortunate chance that he who was the judge of the High Court of Admiralty became also the judge in time of war of the Prize Court. The genesis of the High Court of Admiralty has been described in some preceding pages of this book (*a*). The Prize Court, which is the Admiralty Court exercising a peculiar jurisdiction in time of war, has also its source in the disciplinary powers vested in the Lord High Admiral in mediæval times. The growth of jurisdiction is always obscure, and for many years anything in the nature of a prize jurisdiction was of an exceedingly elementary kind. The first case of judicial proceedings to decide the legality of a prize occurs in 1357. "In

(*a*) *Ante*, p. 92.

that year the King of Portugal complained that an Englishman had spoiled Portuguese goods from a French ship that had previously captured them. The answer of Edward III. is that 'our admiral has judicially and rightly determined the ownership of the goods claimed by your merchants'—*i.e.* in favour of the captors. This is the first mention that has been found of judicial proceedings before the Admiral; it marks the beginning of the Court of Admiralty as a prize tribunal" (*b*). In 1360 a single Admiral—Sir John Beauchamp—was appointed to command the fleets of the North, South and West, and by his commission he was given, in addition to disciplinary, judicial powers, to be exercised secundum legem maritimam. But prize causes, it would seem, were brought for many years more frequently before the King's Council, or before Commissioners specially appointed, than before the Admiral, and it was not until the sixteenth century that the Admiralty Court became definitely the Prize Court of England. Thus in time the Admiralty Court became possessed of two separate jurisdictions, and the Instance and Prize jurisdictions of the High Court of Admiralty became a distinct feature of English procedure. Lord Stowell presided in the Court of Admiralty when these separate jurisdictions were clearly recognised and in active operation.

How did it come to pass, however, that he left so permanent a mark of his individuality on English maritime law? Several answers may be made to this question.

(*b*) Early Prize Jurisdiction and Prize Law in England. By R. G. Marsden. English Historical Review, Vol. XXIV. p. 680.

Lord Stowell was master of his judgment seat; he had no colleagues to defer to, and every judgment which he delivered was an addition to a number of his own individual judicial opinions. He had the good fortune to occupy his office for a long period, for thirty years (1798—1828) he was judge of the High Court of Admiralty. Before this time no regular reports of the decisions of that tribunal had been collected, and during this particular epoch business flowed into it to an extent unknown to his predecessors. All these circumstances combined to make this period one singularly favourable for the impress of a judicial influence on the comparatively meagre body of English maritime law. There was the hour and there was also the man. Without a judge of unusual ability, especially one possessing remarkable powers of legal exposition, this period of thirty years would not have been so fruitful in the growth of one branch of our law. But Lord Stowell's capacity of clear expression, his mastery of legal principles, his attention to their formulation, arising not a little from his experience as a Professor at Oxford, as well as his great practical sagacity, made his judgments not only the basis of much of modern English maritime law, but also the clearest and most agreeable exposition of it which to this hour is to be found. It is one thing to decide a particular point, it is another to explain the principles on which the decision rests and to apply them to the facts of the case under discussion so that the latter may serve as an illustration of an abstract legal proposition. It was this rare gift which Lord Stowell possessed, and it is conspicuous as soon as some of his most remarkable judgments are examined. It would not be easy to find

one which better serves as an example than the decision in 1801, in the case of *The Gratitudine* (*c*). The result of that judgment was the creation of the rule of law that the master of a vessel in a foreign port has power to bind the cargo on board by a respondentia bond in order to obtain money to enable the vessel to prosecute her voyage. That rule has never since been questioned, and until steam, the telegraph, and improved postal communication lessened in recent years the necessity for obtaining money on bottomry bonds, it was one of immense commercial importance. The legal power of the master to enter into such a bond depended on his relationship to the owners of the cargo, and therefore, Lord Stowell had, in order to establish a rule upon the point, to consider when, and under what circumstances, the master of a vessel became, by virtue of necessity, the agent for the owners of the cargo. Having established as a legal proposition that in cases "of instant, and unforeseen, and unprovided necessity, the character of an agent is forced upon him, not by the immediate act and appointment of the owner, but of the general policy of the law," and having illustrated the rule by examples, Lord Stowell then applied it to the circumstances under which it may be necessary to borrow money, not only on the security of ship and freight, but also on that of the cargo. Satisfied as to principle, the judge then examined the authorities to see what light might be thrown by them on the subject. These authorities were not only the dicta to be found in English law, but the mediæval codes, which have been preserved. The examination completed, Lord Stowell

(*c*) 3 C. Robinson, 240.
(*a*) See *ante*, p. 121.

then proceeded to consider whether the situation of the master was such in the particular case before him as to authorise the exercise of this power. We have spoken of this judgment solely in regard to the fact that it establishes a proposition of maritime law. Considering the principle on which that rule is based, it scarcely needs pointing out that the judgment may be, and always has been regarded, as an admirable and conclusive exposition of the duty of a ship-master in relation to the interests of the owners of cargo under extraordinary circumstances, and as such its direct and indirect influence on the whole body of English maritime law has been marked and important.

There is no branch of law of which the basis is now more thoroughly fixed than that of Salvage. For the earliest and clearest enunciation of many of its principles the judgments of Lord Stowell must still be studied, containing as they do the principles which have guided his successors and have established the law. For example, from time to time seamen fall in with derelict vessels. When they bring such ships into a place of safety, saving them from certain loss, they are clearly entitled to a large reward, to the value, indeed, of a large proportion of the property saved, though not necessarily to a half of this value. Such was Lord Stowell's decision in *The Aquila* (*d*) so long ago as 1798, a decision which from that time forth became the leading authority on this particular point. Sixty-eight years afterwards, in the case of *The True Blue* (*e*), the same point was pressed on the

(*d*) 1 C. Robinson, 37.
(*e*) Law Reports, 1 Privy Council, 250.

attention of the Privy Council. But this Court considered that it was sufficient to refer to Lord Stowell's early decision, to take note of his research into the older authorities, and of his conclusion that the proper mode of deciding the question of the amount of reward to be given to salvors of a derelict vessel was "to consider all the circumstances, including the value of the property salved, and the risk to the property of the salvors."

Nor would it be easy to find a principle of salvage law more necessary for the interests of shipowners, and of those honestly desirous of rendering assistance to vessels in distress on reasonable terms, than that men who have taken possession of a ship as salvors have a legal interest in her which cannot be divested until an adjudication takes place in a court possessed of competent authority. Therefore, a second band of salvors has no right to take away from men who are doing their best to save life and property the opportunity of earning a reward, unless it be apparent that these efforts are altogether powerless to effect their object. Twice Lord Stowell laid down these rules with emphasis and clearness; so that from the date of the two decisions—one in 1809, *The Maria* (*f*), and the other in 1814, *The Blenden Hall* (*g*), this proposition has been a clear rule of maritime conduct. It is not unworthy of note, as showing the character of naval life at the time of these cases, that in both instances those whom we may call the piratical salvors, the second band who tried to dispossess those who had first tendered their services, were officers and men of the Royal Navy, proving that some-

(*f*) Edwards, 177.
(*g*) 1 Dodson, 418.

times, at the beginning of the nineteenth century, the wild and unscrupulous daring of the Elizabethan seamen was emulated by their modern successors.

Leaving this subject, though we have by no means exhausted the various decisions in which Lord Stowell built up the modern English law of salvage, we pass on to his judgment on the question of the sailor's lien on the ship for his wages. The judgment delivered in the case of *The Neptune* (*h*) in 1824, stands out just as remarkably as the decision in that of *The Gratitudine* (*i*), expounding and laying down as it does a principle of maritime law of the most vital importance. In the first place, it diminished largely the effect of the old maritime rule of English law that freight is the mother of wages, confining that maxim to cases where a vessel has wholly perished. It also, while laying down the principle that a seaman has a lien on the ship on which he has served to the last plank, expanded it, so that while it gave him this privilege it thereby prevented him from becoming entitled to any extra reward as a salvor. Lord Stowell viewed the matter from no narrow standpoint, and he decided the first point on the ground "private justice and public utility range themselves decidedly on that side of the question which sustains the claim of the mariner." To have held, however, that a crew bound to do their utmost in the service of the owner if the ship is in peril, should be able to assume the character of salvors, so that in time of danger they should be seeking for extra remuneration, would obviously have dealt a blow to the sense of duty

(*h*) 1 Haggard, 227.
(*i*) 3 C. Robinson, 240.

of seamen, and would have given opportunities for gross frauds on owners of vessels by unscrupulous officers and crews.

This chapter is not a criticism of Lord Stowell as a judge, but an attempt to show how considerable was his influence on a particular part of English jurisprudence. His own words in the conclusion of his judgment in *The Neptune* (*k*) (1824) show so clearly the various features of his judgments which have enabled them to influence English law so greatly that it is pertinent to transcribe them here. "Upon all these grounds," he says, "of the general practice of Maritime States, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, and upon the understanding of the law which has generally, though silently, prevailed, I adhere to the spirit, I had nearly said the letter, of what I am reminded of having said in a former case not exactly upon this question—that the seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them. Be it remembered that by the general and just policy of all Maritime States, the total loss of the ship occasioned solely by the act of God visiting the deep with storms and tempest, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man; and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavour to prevent it; and although he is prohibited by law from protecting himself from loss by insurance, it

(*k*) 1 Haggard, 227.

is surely a moderate compensation for these disadvantages, that he shall be entitled upon the parts saved so far as they will go in satisfaction of his wages already earned by past services and perils." Some judges, though they have been eminent for their knowledge of legal principles and legal decisions, have wanted that practical sagacity which enables them to see the bearing on practical affairs of legal rules. A judge of this character, placed in Lord Stowell's position, would have failed to rival him in influence because his judgments would have been wanting in practical point, and would have been too over-weighted with legal learning. Other judges distinguished for mental clear sight, for appreciation of every-day difficulties, and for a power of elucidating facts, have not had a grasp of legal principles equal to their common sense. A judge of this class would not have had that sound basis of legal knowledge which would have enabled his judgments to be received in after years with absolute confidence. There have been judges, too, most careful in the precise and accurate exposition of their opinions, yet wanting in breadth of view, and there have been judges who have been gifted with a power of forcible or pleasing expression who have not been great lawyers. Thus it is clear that the moulding of English maritime law at the beginning of this century was largely affected by the circumstance that in the Admiralty Court Lord Stowell presided, happily gifted with a rare combination of remarkable qualities.

Famous painters have often left behind them pupils who have passed on their style and influence. If it is allowable to call one judge the pupil of another, it may be

said that Lord Stowell's successor, Sir Christopher Robinson, was in some senses his pupil. The direct and indirect influence of Lord Stowell is constantly seen in the judgments of Sir Christopher Robinson. Nor is this to be wondered at, because he was the first to report the judgments delivered in the Court of Admiralty, and he had for years sat at the feet of a great master of law. He, therefore, had a natural reverence for the decisions of Lord Stowell. He directly acted on these when he was able to do so, and to some extent he caught Lord Stowell's broad and clear manner of reasoning and of expression. The principles of Admiralty law are now among the best defined, and the most certain of any part of English jurisprudence. This, no doubt, arises to some extent from the fact that it is not in itself an intricate subject. The right to salvage, to wages, the responsibility for collisions at sea, when elementary principles have been laid down, depend largely on questions of fact. But that these principles have been established in a broad, a clear, and a satisfactory manner, is owing to the judicial influence of Lord Stowell at the end of the eighteenth and the beginning of the nineteenth century.

The circumstances under which he delivered his judgments, which have been already pointed out, make it easier to observe Lord Stowell's influence than it is to note that of other judges, and a consideration of his most remarkable decisions enables us to estimate his judicial authority, to take him as a leading example of the way in which English law has been formulated by the Bench, and also to regard these decisions as legal landmarks. It must not be supposed that an undue importance is to be attached

to them over that of other and later judges in the other courts of the country. Such judges as Sir George Jessel, Mr. Justice Willes, Sir Cresswell Cresswell, and others, have each and all had an influence on the current of our jurisprudence. But not one of them was so favourably placed as Lord Stowell for the purpose of impressing a clearly defined individual mark on two branches of English law.

As a creator of prize law, the position of Lord Stowell is of the first importance in the history of English jurisprudence. England has produced no great writers on International Law, and at the time (1798) when Lord Stowell took his seat on the Bench, there had never been any enunciation in England of the principles of prize law by a writer of eminence. Lord Stowell's predecessor, Sir James Marriott, though a careful lawyer, had neither the capacity nor the inclination to formulate his judgments so that they should be expositions of prize law on the subjects to which they relate, and when Lord Stowell (or Sir William Scott as he was at that time) became a judge there was no ascertained body of prize law in this country. It was at the best a mixture of meagre and fragmentary reports, of professional tradition, and of general judicial opinion. The particular gifts of Lord Stowell have already been stated, more especially his power of lucid exposition, and of the statement of principles in striking language. Nor could there have been found a subject more suitable for the exhibition of his particular qualities and special learning than that of prize law. The opportunity thus presented was seized without hesitation. "I trust," he says in one of his most memor-

able judgments, "that it has not escaped my anxious recollection for one moment what it is the duty of my station calls for from me; namely, to consider myself as 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 nations holds out without distinction to independent states, some happening to be neutral and some belligerent" (*l*). It was in this large judicial spirit that Lord Stowell approached the decision of the several questions of principle which from time to time arose amidst the hurry of business in a Prize Court in a time of war when English privateers daily brought prizes into port.

Lord Stowell had another piece of good fortune. In Dr. Christopher Robinson his Boswell awaited him. Lord Stowell was appointed judge of the High Court of Admiralty on the 26th October, 1798, when the war with France, which had commenced in 1793, was in progress, and Dr. Christopher Robinson at once set to work to enshrine the decisions of the new judge in a series of reports. "The honor and interest of our own country," he writes in the preface to his reports, "are too deeply and extensively involved in its administration of the Law of Nations, not to render it highly proper to be known here at home, in what manner and upon what principles its tribunals administer that species of law; and to foreign States and their subjects, whose commercial concerns are every day discussed and decided in those Courts, it is surely not less expedient that such information should be given."

(*l*) *The Maria*, 1 C. Rob. 350.

The first volume of these reports was published in 1799, and from the decision of Lord Stowell in *The Vigilantia*, delivered on November 6th, 1798, there grew year by year a collection of judgments which ultimately formed a body of English prize law of greater importance and weight than the most elaborate of treatises. Rules were tested by realities, and each statement of principle was illustrated by the facts of an actual incident. In a word, by the genius —for it was little less—of Lord Stowell, England alone of European powers at the end of the Napoleonic Wars—for, as already stated, he did not retire till 1828—possessed a clear code of prize law binding henceforth on the successors of this remarkable jurist. For the best part of half a century this body of law crystallised in the pages of text-writers, and it was not until the war between Great Britain and Russia, in 1854, that it was subjected to judicial criticism. As a general code, it may be regarded as having been followed and approved, though as was to be expected of a series of decisions extending over a long period a few contradictions and imperfections were visible, which were corrected by the Privy Council in 1854 and 1855.

The mass of definite law which was created by Lord Stowell is so large that to refer to his decisions case by case in order to exemplify the preceding statements would fill a volume; but a few instances may be given to explain the rapid influence of this eminent man on this particular body of jurisprudence. If we take the question of contraband, we find a number of articles which were, it was obvious, not absolutely contraband, but were, in legal phraseology, *ancipitis usûs*, in other words they

were conditional contraband. When the judicial career of Lord Stowell began, he found no fixed or definite test by which it could be decided whether one important class of these articles, namely provisions, was contraband, but within a few months of his appointment he had stated a rule in regard to foodstuffs which reduced some of this chaos into order, a rule which he continued to apply year after year. "But the most important distinction is whether the articles were intended for the ordinary use of life or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra,* if the great predominant character of a port be that of a port of naval-military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usûs,* it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful" (*m*).

(*m*) *The Jonge Margaretha,* 1 C. Rob. 189 ; 1 English Prize Cases, 100.

Another and interesting example of Lord Stowell's particular capacity and apt manner is the case of *The Daifjie* (*n*), in which he laid down clearly the principle on which the Court should act in regard to cartel ships—"on general principles I must lay it down as clear that ships are to be protected in this office *ad eundum et redeundum*, both in carrying prisoners and returning from that service." But having stated this principle, the judge had to decide whether in the particular case before him the vessels were entitled to the privilege accorded to a cartel ship, since they were only going to a port to take prisoners on board. This point enabled Lord Stowell to deliver his opinion in the manner at once actuated by common sense and by a broad spirit of equity, which give his judgments a resemblance to the speeches of Burke. He would extend the principle so as to include vessels if they had been placed in a state of actual preparation and were going in good faith to commence the service. To state these conclusions in this bald manner inadequately expresses the importance of their incorporation definitely and permanently in a system of law which is based on judicial precedents. By one man in a day a rule of English law was formulated and explained which in other systems could only be collected from the unauthorised treatises of learned professors and the decrees of officials which might or might not be acted on by a prize court.

It has sometimes been asserted that the inclination of Lord Stowell's mind was in favour of belligerents as

(*n*) 3 C. Rob. 139: 1 English Prize Cases, 273.

against neutrals—in other words, of his own country. The extract already given from the case of *The Maria* shows, on the contrary, his desire to be fair to both parties, and of this his statement of the law in regard to the destruction of neutral prizes is an illustration. Lord Stowell decided once for all that however meritorious in the view of his own Government may have been the destruction of a neutral ship and cargo by the captain of a belligerent ship of war, the owners must receive full compensation, because the safe and proper course is to allow the vessel to go free, if it cannot be brought into port for adjudication (*o*). These judgements were not given till 1815 and 1819, but probably during the long course of the Napoleonic war decisions similar but unreported were delivered.

The work of Lord Stowell as a creator of maritime law is necessarily to some extent obscured by the abundant decisions which year by year have accumulated on the judicial foundations which he laid. But his work as judge of the Prize Court remains to this day distinct and conspicuous, and no changes of international law can ever diminish his fame as the creator of a great body of English prize law, the only complete and judicially made code in existence among European nations. For it should be borne in mind that in the eighteenth century England was the only nation having a well-established judicial Prize Court. Her main maritime opponent, France, received a Prize Court, the Conseil des Prises, from Louis XIV. in 1659, but with other bodies of the

(*o*) *The Acteon*, 2 Dodson, 48 ; 2 English Prize Cases, 209 : *The Felicity*, 2 Dodson, 381 ; 2 English Prize Cases, 233.

old *régime* it disappeared at the Revolution, and its jurisdiction by the Law of 3 brum: an IV. was transferred to the Tribunals of Commerce. It reappeared again in 1800, and was presided over by a Counsellor of State, together with eight other members. At the best it was only a semi-judicial body; its functions were strictly limited to the decision of the question as to the validity of a capture; its sittings were not open to the public, and it was not bound by precedents. Of other countries, Spain and Russia had nothing in the shape of a judicial tribunal, and Germany as a nation did not exist. Through a fortuitous combination of events, and especially through the fortunate circumstance that a jurist peculiarly fitted for the post occupied the judgment seat of the national Prize Court, Great Britain became possessed of a clear and definite body of prize law.

CHAPTER VII.

THE PROGRESS OF THE LAW OF EVIDENCE.

Those who have hoped that with the growth of democratic institutions, with increase of education and of national wealth, there would come also peace and order, municipal and international, have oftentimes been grievously disappointed. Progress has been spasmodic and halting, and the world is full of inequalities. But in one respect, at any rate, Great Britain may be congratulated on having steadily marched forward, not swiftly, indeed, sometimes with halts which to-day seem ludicrous, oftentimes with timidity. Her legal system has, in the last hundred years, become clearer, less technical, and more calculated to assist the cause of justice. No more remarkable step in this direction, one which completes the reform of a particular and most important branch of the municipal law of England, is to be found than the passing of the Criminal Evidence Act in 1898. From the beginning of the nineteenth century the law of evidence was continually growing more reasonable and more simple, while at the same time it has been a constant battle-ground of those who have advocated and those who have opposed the amendment of the law both in and out of Parliament.

In 1824 Lord Denman, then an eminent member of the bar, contributed an article to the Edinburgh Review on

the subject of Evidence in Courts of Law. It was based on Bentham's "Traité des Preuves Judiciaires," and put forward views in regard to the law of evidence which, though at the moment they were considerably in advance of the legal and general ideas of the age, were yet, in due time, certain of acceptance. For the theories and opinions of Bentham, who was regarded as an unpractical philosopher, were, by the publication of this article, shown to be accepted by an important and influential section of the legal profession and of the general public, which was determined to put an end to some of the absurd and illogical rules of evidence then in existence. The gist of that article was that there should be no exclusion of the evidence of persons who could throw light on the question which was before the court for decision, with two exceptions. In other words, every party to a civil action, and every prosecutor and prisoner in a criminal trial, ought to be allowed to give evidence, with the exception that confidential communications made by a client to his legal adviser need not be disclosed, and that married persons were disqualified as witnesses for or against each other. The negative of these two main propositions contained in a nutshell the most remarkable and the most startling of the rules of legal practice, in regard to evidence, at the beginning of the present century. The fact that a certain person was interested, in a greater or less degree, in the result of a trial was supposed to prevent him from testifying to the truth. Lord Denman, in the article in question, takes as an example of this practice the case of forgery.

"Unless the crime," he writes, "has been committed in

the presence of witnesses, it can only be *proved* (in the proper sense of the word) by the individual whose name is said to have been forged. Yet that person is the only one whom the law of England prohibits from proving the fact. The trial proceeds in the presence of the person whose name is said to have been forged, who alone knows the fact and has no motive for misrepresenting it. His statement would at once convict the prisoner if guilty, or if innocent relieve him from the charge; and he is condemned to sit by hearing the case imperfectly proceeding by the opinions and surmises of other persons on the speculative question whether or not the handwriting is his." Unquestionably, at the beginning of the last century English law had lost sight of the fundamental truth which was well stated by Bentham, "that evidence is the basis of justice; to exclude evidence is to exclude justice." There followed from this principle what may be termed the practical rule—"Let in the light of evidence. The exception will be, except when the letting in of such light is attended with preponderant collateral inconvenience, in the shape of vexation, expense, and delay."

Forgetting, as we have said, that the exclusion of evidence is the exclusion of justice, English law made the exception the rule; in other words, there were so many restrictions on their competency that the most important witnesses were excluded from giving evidence.

To those who have seen Bentham's principles in regard to evidence at length carried in their totality into effect, it is hardly possible to understand a state of opinion,

legal and general, which could have retarded this complete developement for a century. For this period, speaking broadly, it took to make them active legal rules. Bentham published his treatise on judicial evidence in 1813; two years before the completion of the nineteenth century the edifice was finally crowned.

The remarkable feature of these movements and changes is the long time it has taken not to effect the establishing of some strange constitutional or legal theories, but to place on the Statute-book and in the Common Law of England rules based, not on subtle philosophies, but on common sense and sound reason.

Bentham on this point represented the modern spirit; it is now a truism to reiterate that utility was the foundation of his philosophical as well as of his legal theories. What we understand by utility has been the characteristic of all the legal changes of the present century. Speed, cheapness, absence of formality and technicality, even perhaps an unreasonable contempt for things which have had their use in times gone by, have been visible in every one of the legal movements of modern times. There never was a more business-like philosopher than Bentham; he epitomised modern thought in regard to English law to an astonishing degree. He saw through a maze of precedent, of forms and technicalities, he put his finger on the object of the law, and he had a perfect contempt for professional tradition and timidity. If there is one thing more than another which the modern man of business, at any rate to a recent date, believed in, it is that lawyers were essentially "fee collecting," that they put their own

interests first and foremost. Bentham wrote of the lawyers in the beginning of the nineteenth century as the man in the street often talked of them at its end. Therefore, in regarding law reforms, in observing how almost everything that Bentham advocated in the beginning of the century has come to pass, it is necessary, while giving him all credit for a rare foresight, not to overrate his influence. He was not, we must repeat, a man who put forward strange theories; he only gave expression to modern opinions before the country was ripe for them. He had not to convert an unbelieving world, because his ideas on English law were those which would occur to every man of common sense when the community as a whole began to interest itself in the subject, and to feel the necessity for a system which was in harmony with modern needs. Bentham, when men read him in more recent years, was in the position of the leader-writer who states in language which the man in the street cannot command the thoughts of that individual. The value of Bentham's writings to the cause of law reform, more especially to the reform of the law of evidence, was that those who saw that the state of things was unsatisfactory found in his writings the remedies for it set out with lucidity, and even with eloquence, and the absurdity of old-fashioned technicalities exposed with keenness and humour. To some extent, of course, the perusal of his writings would set some minds thinking, but, allowing for this, it is certain that Bentham's great merit was that he voiced the feeling of the public as against too conservative lawyers rather in the period which followed his life than during his own time.

But though the state of the law of evidence before the middle of this century was justly open to adverse criticism, though it was not in accord with the changes in English society, and its mediæval form was maintained through the timidity of eminent lawyers for too long a time, we ought not to regard it as if it were something wholly absurd and unreasonable. It was perfectly rational in its origin, and it had at one time conduced to the national welfare; all that could be said against it was that it retained its mediæval shape till it had become an inconvenient anachronism.

Let us go back for a moment to the twelfth and thirteenth centuries. We must get rid, in the first place, of the idea of the modern trial, of a case opened by an advocate. In a rude state of society prosecutor and prisoner, plaintiff and defendant, tell their own tale. Anyone who will go to-day to a County Court and see Jones and Robinson, who are concerned in a dispute about a few shillings, each go into the witness-box and state their respective cases without the intervention of lawyers, will obtain some idea of the mediæval trial. "The litigants in court debate the cause, formal assertion being met by formal negation" (*a*). Thus in the simplest state of society, the parties in stating their case practically gave their evidence. But if assertion and denial were not enough one of the parties had to go to the proof—"one of the two litigants must prove his case by his body in battle, or by a one-sided ordeal, or by an oath with oath-helpers, or by the oaths of witnesses." But gradually

(*a*) Pollock and Maitland's History of English Law, Vol. II. p. 599.

superseding this old procedure came "the proof given by the verdict of a sworn inquest of neighbours or proof by the country"—of this we shall have something to say presently, but for the moment the point which requires to be emphasised in regard to the law of evidence is that the jury were really the witnesses.

"The jurors must be free and lawful, impartial and disinterested, neither the enemies nor the too close friends of either litigant. We must not think of them as coming into court ignorant, like their modern successors, of the cases about which they will have to speak. In every case the writ that summons them will define some question about which their verdict is wanted. . . . It is the duty of the jurors, so soon as they have been summoned, to make enquiries about the fact of which they will have to speak when they come before the court. They must collect testimony, they must weigh it and state the net result in a verdict."

We are not now discussing the history of trial by jury, but it is impossible to pass over the effect of this institution on the law of evidence. At the base of the whole later edifice of technicality and judicial decisions which cumbered the law of evidence, we see clearly the principle that the men of the district, the jury, were in a real sense the witnesses, and that the interested party having stated his case his share of the business was done. He was not to be examined and cross-examined, because his neighbours were there to say if his story was true or untrue. The parties to the litigation have put themselves upon a certain test; that test is the voice of the country. It is

true that the modern form of trial by witnesses pure and simple seemed at one time to be growing, but it did not flourish. "Very soon it seems to be confined to one small class of cases, that in which a would-be widow is met by the plea that her husband is still alive; but the main institute of all new procedure is the inquest of the country." Growing out of this great central principle came another, that the parties were not to be examined and cross-examined—one may say were not to be tortured—their testimony was not to be extracted from them in secret. Thus the very rule which, in modern times under happier social conditions, became not only an inconvenience but a positive injustice, was in the middle ages a valuable safeguard of the individual.

"Our criminal procedure took permanent shape at an early time, and it had hardly any place for a law of evidence. It had emancipated itself from the old formulated oaths, and it trusted for a while to the rough verdict of the countyside without caring to investigate the logical processes, if logical they were, of which that verdict was the outcome."

Thus, to quote again from the same authors, since by so doing we can put the matter before our readers in the clearest manner, "we escaped secrecy and torture." On the Continent, under the influence of the Canon Law and of ecclesiastics, "torture stole into the courts, both temporal and ecclesiastical," where, in order to get the full proof, to make the prisoner convict himself, it was used. No doubt much crime went unpunished in England; on the other hand, an innocent man felt that he would not unjustly lose his life or his liberty; and certainly also,

if we look beyond the law, there can be no doubt that the system helped to give Englishmen that feeling for fairness and for judicial impartiality which has characterised the Anglo-Saxon race in the new as much as in the old world. When Bentham poured out on the English law of evidence his volumes of contempt, he voiced the modern spirit, the day of the mediæval system of evidence was done, but that system had in its time conduced in no small degree to the happiness of the English people and to the formation of the national character.

But in later times this system was supported by reasons which would never have occurred to the men of the middle ages. It is in accordance with human nature that a man should be inclined to say that which is favourable to himself, and so it was quite easy to evolve the theory that no person should give evidence who had an interest in the subject-matter of a suit. In a decision which involved this question in 1789, namely, whether one underwriter on a policy of marine insurance could give evidence in favour of another who had underwritten the same policy, the test was judicially stated to be, "Is the witness to gain or lose by the event of the cause?" If he could gain, he must not give evidence. The same reason may be found stated in Coke. When or how exactly it crept into English law it is difficult to say. Still more curious was it to make use of this reason in criminal cases. A prosecutor was allowed to give evidence, because the suit, so to speak, was brought by the king. The prisoner could not give evidence because he was an interested party. But the true origin of the practice was that the prisoner had chosen as a test of his guilt or innocence the verdict of the

jury, which was something above a judgement founded on actual evidence. "No one is to be convicted of a capital crime by testimony," is a maxim found in the Leges Henrici. A prisoner was seldom questioned in mediæval times; "probably no fixed principle prevented the justices from questioning the accused, but there are no signs of their having done this habitually"—a practice which, whatever its result, did not rest in the least on the reason of interest or no interest.

Sir Fitzjames Stephen, in his History of the Criminal Law, has stated that before the date of the Revolution the prisoner was examined. No doubt during the period when trials by the Star Chamber were frequent this may have occurred. But the political and semi-political trials of the age of the Stuarts, or even of the Tudors, must not be regarded as indicating the state of ordinary criminal justice. A case, for example, such as the trial of Sir Nicholas Throckmorton, in 1554, for high treason, when the proceedings "consisted almost entirely of a verbal duel between Throckmorton and the counsel for the Crown," should not be too much relied on, for, to a certain extent, these special and important trials do not harmonise with the description given by Sir Thomas Smith, Secretary of State to Queen Elizabeth, of an ordinary criminal trial in England. "The judge," says this official, "asketh first the party robbed if he knew the prisoner, and biddeth him look upon him; he saith, yea. The prisoner sometimes saith nay." The prosecutor describes the robbery more in detail, and then "The thief will say, no, and so they stand awhile in altercation" (*b*).

(*b*) Stephen's History of the Criminal Law, Vol. I., p. 348.

The truth seems to be that there was—as was natural—a certain amount of laxity in the practice, though the theory, arising from the mediæval system and from the anti-canonical character of English law, was that the prisoner ought not to be examined and cross-examined. It became more strict in practice after the destruction of the Stuart dynasty because, in the mind of the nation, the examination and cross-examination of prisoners was associated with the tyranny of the Star Chamber and of the Stuarts.

When, however, the legal system became less chaotic, and it became necessary to apply the law to more complex circumstances, and to have some kind of definite principle by which to test facts, it required little judicial ingenuity, which was always able to support a legal practice by some fiction, to apply the argument of interest to the exclusion of the evidence of prisoners (*c*). Thus in the eighteenth century, precedent producing precedent, there had grown up a body of legal rules of the highest technicality, so that the law of evidence was brought into a state which justly merited the wholesale condemnation of Bentham at the beginning of the present century.

In reviewing the history of the law of evidence, the publication of Lord Denman's article in the Edinburgh Review in 1824 may be taken as the starting point of the modern movement. Bentham had shown clearly that

(*c*) The theory of the incompetency of interested parties as witnesses broke down in regard to the evidence of accomplices. "If it should ever be laid down as a practical rule in the administration of justice that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue." (Charge of Lord Chief Justice Abbott, March, 1820.) This was pure Benthamism.

the existing state of the law of evidence was an anachronism, but this demonstration was not an actual step in advance; the publication of a paper by a person in the position of Lord Denman, though he was then but a member of the Bar, marks some practical progress, however small. In 1824 he was a voice crying in the wilderness; twenty years later he was able to carry into effect, partially at any rate, those legal reforms which he had advocated as a private individual. He had become Lord Chief Justice of England and a member of the House of Lords, public opinion was ripe for a change, and so, in 1843, there was passed the first of the series of statutes which have been gradually changing the law of evidence so as to make it a more efficient instrument of justice.

The preamble of that Act (*d*) formulated principles which the operative part of it did not by any means carry out. It ran as follows: "Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide them," certain changes were to be made—namely, that no person should be excluded as a witness by reason of incapacity from crime or interest, except parties to a suit, or the husband and wife of such persons. To us the exception to the new rule may seem so great as to render the Act almost useless, but this is to forget the extraordinary number of persons whom the law regarded as interested parties, so that over and over again the best evidence as to a fact was shut out. Still, however, the rule of the common law which, arising out

(*d*) 6 & 7 Vict. c. 85.

of those mediæval historical characteristics which we have already referred to—"Nemo in propria causa testis esse debet"—still remained in full vigour. It was a rule which, like many others in the English common law, was supported in judicial decisions by reasons which were historically false. To the popularisation and the cheapening of the law its abolition was immediately due.

The growth of population, more especially in the great towns, the necessity for tribunals to settle the small disputes which are constantly arising, produced the modern County Courts. They revived an archaic procedure, but to all intents and purposes they were new tribunals. Their creator, if the phrase may be used, was Lord Brougham, and they were brought into existence in 1846. The Act by which they were established empowered the parties to any action or proceeding under the Act, or their husbands or wives, to be called as witnesses. As we have already said, in a primitive state of society a party to a dispute tells his own tale—his opening statement, as it may be called, is his evidence. Thus, to some extent, this enactment restored to Englishmen a right of which they had been deprived by misplaced judicial ingenuity. Nor does it require legal knowledge to perceive that the new rule of law was an absolute necessity if the County Courts were to be of any use. In the majority of small disputes which it was the business of the County Court judges to settle, the only people who could give evidence of any value were the parties themselves. A small householder disputes a butcher's bill on the ground that the meat supplied was bad. Who can state the facts on which the judgement of the court is to be based so well as the two persons who are the parties to the dispute? And it

followed, as a matter of course, that two radically different principles of evidence could not exist in the higher and in the lower courts of the country—a modern and businesslike system in courts where shillings were recovered, a mediæval and worn-out system when large sums were in dispute. The two things were incompatible and absurd. It was not, however, till 1851 that an Act (*e*) was passed which made the parties to any proceeding in a court of justice admissible witnesses. It is astonishing, perhaps, that the ancient rule could have had this precarious existence for a few years when it was not in force in the County Courts. It is still more difficult to realise that the old rule existed in the lifetime of middle-aged men of to-day. The great progress which the country made during the nineteenth century cannot be better understood than by the statement that little more than fifty years ago a man of business who was a plaintiff or a defendant could not give evidence, because it was assumed that he could not be relied on to speak the truth.

But husbands and wives were still precluded from giving evidence when one or the other was a party to an action—an exclusion which was wholly due "to the unyielding opposition of Lord Chancellor Truro and the cautious misgivings of Lord Cranworth, and was found to be of much practical injustice. An attempt was accordingly made to get rid of the difficulty by putting a forced interpretation on the language of the statute. The attempt failed, as it deserved to do, and Lord Brougham had once more recourse to the Legislature." The final step came two years later, and 1853 saw the old rule

(*e*) 14 & 15 Vict. c. 99.

at an end in civil actions (*f*). The retention of the exclusion of proceedings in divorce, a retention which was abolished in 1869, and of the exclusion of criminal proceedings, and of the rule that husbands and wives were not compellable to disclose communications made to each other, cannot be regarded as lessening the general effect of the new legislation.

The consideration of the admission of the evidence of a prisoner cannot be dissevered, when the subject is regarded historically, from that of a party to a suit, for, as we have seen, in modern times the evidence of one and the other was theoretically excluded on the same ground. But during the half-century in which the recently accomplished change has been under discussion, the rule has been supported and opposed on much broader grounds; the legal fiction has, indeed, been almost wholly thrown overboard. Bit by bit the rule has been pared away during the last twenty years. For the first twenty years after the passing of the statutes which allowed parties to actions to give evidence, the question of the admission of prisoners' evidence lay at rest. But from 1872 onwards a series of statutes came into force by which in certain cases the party charged with an offence has been empowered to give evidence in his own behalf. An example is desirable. We take it from the Sale of Food and Drugs Act, 1875. By that statute a person who, after analysis by a public official of a substance, was considered to have committed an offence under the Act, was liable to a penalty if found guilty before justices. By the twenty-first section of the Act "the defendant may, if he think fit, tender himself and his wife to be

(*f*) 16 & 17 Vict. c. 83.

examined on his behalf." When the Act of 1898 was under discussion in Parliament, the supporters of the measure rightly called attention to this series of statutes. It was said, in reply, that they were rather civil than criminal proceedings; but such an Act as we have just referred to creates a criminal offence, and a sanction; it adds a piece to the criminal law of the country. But even if such an argument had been correct in regard to some of the recent statutes, it clearly was not in regard to the Criminal Law Amendment Act, 1885, by which persons accused of various offences against women were entitled to give evidence. Though that statute has been a good deal criticised, it has never been suggested that it should be repealed. Nor, when these criticisms are examined, can they be said to have much weight. The common sense of the country finds it absurd that two different systems of evidence should be applicable to the trial of different offences against the criminal law.

It is curious to note, however, that while this series of Acts was being placed on the Statute-book, a change in the general legal principle was being successfully opposed. The occurrences of the particular period are very clearly set out in a leading work on the law of evidence:— "So far back as 1878, an attempt was made by the Government to deal with the matter in accordance with the principle of these statutes. The Criminal Code Bill of that year contained a clause to the effect that every one accused of any indictable offence might make a statement on which he might be cross-examined, &c., but added the important proviso that 'the defendant should not be sworn as a witness, nor be liable to any punishment for making false statements.' The commissioners (Lord

Blackburn, Barry, J., Lush, J., and Sir James Fitzjames Stephen, Q.C.) to whom this Bill was referred, were divided in opinion as regarded 'the policy of a change in the law so important,' but were, on the whole, of opinion that, 'if the accused was to be admitted to give evidence on his own behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination.' They put forward a clause, which was subsequently embodied in other Criminal Code Bills, to the effect that an accused person, and the husband or wife of an accused person, should be competent but not compellable witnesses, and liable to a cross-examination, which the Court might limit so far as it might extend to credit. A bill of 1880 was referred to a Select Committee of the House of Commons, whose sittings were cut short by a dissolution, with the result that no 'Criminal Code Bill' has since then been re-introduced. For very many years, however, the late Lord Bramwell in the House of Lords, and successive law officers in the House of Commons, have brought forward 'Criminal Evidence' Bills to the same effect as the clause of the Criminal Code Bill, by which it was proposed that accused persons should be competent witnesses, and Lord Bramwell's Bill frequently passed the House of Lords. In 1888 the Government Bill was fully debated in the House of Commons, but though very strongly supported, failed to pass, on the ground of Irish members not being able to obtain the exclusion of Ireland from its operation.

"In 1892 a similar Criminal Evidence Bill passed the House of Lords, and also passed a second reading in the House of Commons. It was then referred to the Standing

Committee on Law, but too late to pass before the dissolution of Parliament in that year" (*g*).

When the opposition to the change is impartially looked at, it will be seen that it was based rather on apprehensions than on facts, and it must be candidly stated that if apprehensions such as have been expressed both by eminent judges and by members in debate in Parliament in regard to this and similar legal changes had been allowed to have weight, it is doubtful if any of the legal reforms of the last century would now be accomplished facts. Indeed, when one looks back to all the gloomy prophecies which have been uttered about every alteration in the law during the last eighty years, the warnings of *fin de siècle* conservatives—who in regard to legal changes are not confined to one side of the House—almost produce a smile. When, in 1851, it was proposed to allow parties interested in a civil action to give evidence, the Lord Chancellor (Lord Truro) solemnly said that "when the parties were examined the difficulty of discovering the truth was rather increased," and that if a husband or a wife could be examined it would put an end to that connubial confidence "essential to real happiness." So impressed was Parliament with this argument that, as we have already related, this latter change was postponed for some years. In many respects the opposition to a change in criminal trials was a satisfactory feature in public life, for it showed a strong desire that innocent men should not be prejudiced by having to give evidence, and that judicial impartiality should not suffer. The present, or rather the late, proce-

(*g*) Best's Principles of the Law of Evidence, 8th ed. p. 572.

dure, wrote Sir Fitzjames Stephen, "contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually aims at the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. On the other hand, I am convinced, by much experience, that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why, in the case of the guilty, there need be any hardship about it."

Here, in a nutshell, stripped of the verbiage of parliamentary debate and of newspaper discussion, are the two opposite arguments. The conclusion at which this high authority arrived was that the evidence of prisoners ought to be admissible. With their evidence already admissible here in a certain number of criminal cases, and in British colonies and the United States, and with the parties to civil proceedings allowed to give evidence, it was obvious that the final step could not be long delayed. That the proposed change had been introduced into the colonies was less dwelt on in the debates in Parliament than it deserved to be. For an assimilation of the legal systems of the mother country and of the colonies is a practical step towards that federation of the Empire which is a text for so much after-dinner and platform eloquence. A change of this nature in the colonies may also show that where common sense is less hampered by judicial and constitutional precedents it has prevailed. To cite only two instances—the reform in question was carried into

operation in Canada in 1893, and in Victoria in the preceding year.

The main provisions on this point of the Canada Evidence Act, 1893 (56 Vict. c. 31), are of sufficient interest to be briefly stated. It enacts in section three that a person shall not be incompetent to give evidence by reason of interest or crime, and in section four that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness. Finally, in sub-section two, the failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution.

The final result of the discussions which went on for so many years in this country was the passing of the Criminal Evidence Act, 1898 (*h*), by which a prisoner is now entitled upon, and only upon, his own application to be called as a witness; but if such application is not made the prosecution is not to comment upon the fact. This proviso was inserted to prevent an innocent prisoner, who might think that his cause was best served by his silence, from being prejudiced by his non-appearance in the witness-box. But the Act did not prevent the judge from commenting on this fact, and the proviso seems to lose sight of the ordinary common sense of mankind. Nothing will ever prevent twelve men in the jury-box from forming an opinion unfavourable to a prisoner who declines to exercise the right which the law now gives him. It would be impossible—except in the clearest cases either of guilt or innocence—that it should not be so. If the

(*h*) 61 & 62 Vict. c. 36.

person who can best explain a set of facts will not do so, an ordinary man will assume that he is unable to give a satisfactory explanation of his conduct. Nor can it be admitted that such a state of things is undesirable; the statute was not passed that the guilty might escape, and if it adds to the certainties of a conviction when a prisoner deserves it, so much the better. The main object of the Act was that the innocent might be able to explain circumstances in full detail. That perjury may be committed under it is quite certain, but the difference between the state of things before and since the Act came into operation is, that formerly a prisoner would, when asked if he had anything to say, assert an untruth without the solemnity of an oath, now he will do the same thing having previously taken an oath. Many guilty prisoners, of course, always assert their innocence. As regards prisoners who are innocent the Act is a protection to the more ignorant members of the community. It has been said that a prisoner is more likely than an ordinary witness to be disturbed by his position. But this is doubtful. To stand in a witness-box in a crowded court is trying enough to most people. Still every day old persons, women, girls—the most nervous and the most inexperienced—pass satisfactorily through the ordeal. In ninety-nine out of every hundred cases of innocent persons being on their trial it will be not only a satisfaction, but a thing tending to encourage and strengthen them, to know that they will be able to give with minuteness their account of the facts of the case, to explain discrepancies and points which may tell against the accused without some elucidation by the prisoner.

More especially is the Act valuable in the smaller criminal cases, in those which are being tried every day in the magistrates' Courts. Take, for example, the case of a man charged with trespass in pursuit of game. The only witness against him is a gamekeeper, an habitual prosecutor, pleased to show his zeal in his calling, prejudiced almost of necessity. The prisoner, under the old practice, was able of course to make a statement. He says something short and not very clear, and is found guilty and sentenced. But the very fact that under the recent Act the man can give sworn testimony at once increases the value of what is said; when he can be asked some question which will clear up what is obscure, an explanation which, at first sight, may not be easy to understand, becomes comprehensible. In addition, in such a case as we are supposing, it is probable that the witness for the prosecution will give his statement more carefully than formerly, because he will know that what he says will be weighed in the balance against conflicting testimony. Thus it is in the small criminal cases more than those of greater importance that the evidence of the prisoner will be valuable.

Nor has the fear that the prisoner would be subjected by the new system to something like a moral torture been realised. It was creditable to the hearts of those who used this argument that it was so much pressed, but after all English justice is, allowing for human imperfections, carried out humanely and considerately. It is not every judge of the High Court who, under ordinary circumstances in a civil suit, can from time to time refrain from cross-examining a witness. Nor is it likely that a judge

in a criminal prosecution will always abstain from questioning a prisoner. Indeed, in some instances, more especially in the inferior courts, some questions put judicially, and with a view of clearing up obscurities, are actually necessary. For the truth is that it is impossible in regard to evidence always to adhere quite strictly to theories. To do so is to become pedantic. What is required is that the theoretical rule should be the general rule of conduct; and as there is no direct rule against the intervention of the judge it is obviously allowable. And the traditions of English justice are so contrary to anything like the continental systems, and the sense of the country is so pronounced on the point, that these two factors prevent any injustice being done to prisoners.

So far as regards the actual working of the Act, not only does it work well, but it would appear that cases have occurred in which it is highly probable—more than this, perhaps, should not be said—that had it not been for the opportunity given to the prisoner of explaining details he would have been wrongly convicted. But if such opinions are correct, they are sufficient not only to justify the passing of this measure, but to cause among all reasonable men some regret that it did not sooner become the law of the land.

The Act does not apply to Ireland, Irish members of Parliament having shown great dislike to any such change in the law, yet the arguments in its favour were equally applicable to Ireland, and its limitation to England and Wales was merely a concession to local prejudices. Irish members in recent years have felt, or have professed to

feel, great distrust of the Criminal Courts, and where the impartiality of the tribunals cannot be trusted it is natural to fear that the examination and cross-examination of prisoners may be abused. The introduction of this procedure in England is the strongest possible testimony to the general confidence in judges, juries, and magistrates, and in the justice administered in the English Criminal Courts.

Although the competency of parties and prisoners as witnesses is the main subject which we have considered, there are yet some other points in regard to the developement of the English law of evidence which should not be left out of sight. No greater change in the law of evidence, except those to which allusion has already been made, can be found than was introduced by the rules made under the authority of the Supreme Court of Judicature Act, 1873, by which a broad and definite rule was laid down "that in the absence of any agreement in writing . . . the witnesses at the trial of any action shall be examined *vivâ voce* and in open court."

This was a complete reversal of the existing practice of the Court of Chancery, in which every question of fact was tried by means of affidavits. Sometimes, indeed, a witness who had given his version of the facts on paper was called for cross-examination, but the actual and existing system was that the trial took place on documentary evidence. No more unsatisfactory system could have been devised. It tended to delay, to expense, and to difficulties in the decision of comparatively simple issues of fact. It was a system, also, which was wholly unsuited to many

modern cases, to points arising on scientific questions which were wholly unknown to the Court of Chancery in former days. Like the other great changes to which we have referred, it marks the effect of the spirit of the age on the law, which is, as cannot be too often repeated, a mirror of contemporary ideas. The hurry, the rapidity of modern business, is reflected in the practice of the law. It is complained that judgements are now less elaborate, that strict rules of evidence are neglected, and that trials tend to become more like arbitrations before laymen. In this we see the Law Courts showing, slowly indeed, but none the less clearly, characteristics of the business community, which has a powerful influence on English law at the present day.

It is even yet doubtful whether the system of *vivâ voce* evidence might not be carried further. At present a motion, say for an interim injunction, to prevent the erection of a building so as to obscure the light of another building, is supported by affidavits. It may be doubted whether in many of these cases, which, indeed, are sometimes treated as the trial of the action, it would not be quicker and more satisfactory if the facts were proved by a witness in court.

There is, however, this observation to be made upon the system of *vivâ voce* evidence, that it is certainly open to abuse in regard to the number of witnesses. The more witnesses the greater is the expense, and, it must be added, also the profits to the solicitor. Certainly the present fault of the existing system of evidence lies in the many witnesses who are either called or are in readiness to be

called. It is a blot which adds much to the cost of litigation, which becomes very often out of all proportion to the amount at stake. A mere multiplication of witnesses does not add strength to the case of a litigant, and over and over again it may be seen that if two or three witnesses support a case efficiently it is not improved by half-a-dozen more. Indeed, there is a positive danger in a large number of witnesses, since among many it is seldom that one or two weak vessels are not to be found, who may actually detract from the force of the evidence of previous witnesses. In actions which involve some technical skill this multiplication of evidence is most conspicuous. It is a weakness in the present system which can only be checked by the judges before whom cases are tried. To leave the propriety of calling or having at the trial a certain number of witnesses to the official known as the taxing officer is to throw on him a responsibility which it is impossible for him to discharge in many cases as well as the judge who has tried the case. Where a judge considers that a case has been overloaded with evidence, it is very desirable that he should state this view in court, and give directions accordingly in regard to costs. If this practice were adopted, a practical step towards lessening the costs of litigation would have been taken without in any way diminishing the efficiency of modern trials.

In regard to affidavits there is yet another observation of a general kind to be made. The time appears to have arrived when, in the course of litigation, their number might be diminished. They are so common as not only to be of no more value than unsworn statements, but also,

by this very commonness, they detract from the solemnity of oaths in general. For example, in the course of litigation each party has to make what is technically called an affidavit of documents. This affidavit is simply a common form with two schedules at the end which are filled up, and then the litigant is sworn to the affidavit before a commissioner. But a statement unsworn, giving in similar form the details of the documents relating to the case, would be as satisfactory. If, at the present time, a document is omitted, and the opposite party discovers it, an application is made for a further and better affidavit. But the person who has made the affidavit is no worse for the omission. We cite this particular detail of practice merely as an example. The general proposition which we state is that affidavits should be diminished, and should be used, not as formal pieces of legal machinery, but only when it is absolutely desirable and necessary in the interests of justice that a statement should be made upon oath.

A change of this kind would be entirely in harmony with what may be termed the businesslike despatch of litigation, under the influence of which documents are now often admitted at trials without strict technical proof, the main desire of the court and the litigants being that a conclusion should be reached with as little of technicality and legal obstruction as possible.

But it is in the Criminal Evidence Act of 1898 that we see this modern tendency in regard to evidence more clearly reflected than in any other statute or rule or practice of recent years. Most persons think of it, and con-

sider it, purely from a practical point of view. To the historical observer, however, it will always be of equal interest, since it is the last, and most important, alteration in one branch of English law, the changes in which we are able to watch with tolerable certainty from century to century.

CHAPTER VIII.

THE HISTORY OF BANKRUPTCY LEGISLATION.

The history of English bankruptcy legislation must always have a deeper interest for those who are not lawyers, than that which usually belongs to purely legal questions. For it shows with considerable vividness some commercial ideas of different periods of our history, as well as the difficulty of reducing effectually into practice moral and legal theories which in themselves are clear enough. Among the many details and conflicts of procedure which characterise the course of English bankruptcy legislation, some main principles are apparent. These are that there should be a full and rateable distribution of a bankrupt's property among his creditors, that on his discharge a bankrupt should be free from existing liabilities, that property of which a bankrupt was reputed owner should be realised for the benefit of his creditors, and that a bankrupt should be allowed to make a composition with his creditors. These will appear as we follow the course of bankruptcy law, which is more easily traced than that of other branches of our jurisprudence, which depend much on case law. From the beginning of its existence in this country bankruptcy law has been formulated in the shape of a rude legislative code, which has from time to time been altered or enlarged by Parliament as defects of principle or procedure became

apparent, and new legal and social theories came to the top. Nor for the beginning of the history of the law of bankruptcy—an exception as it is to the ordinary law of debtor and creditor—is it necessary to go back to those now distant periods in which legal historians have often to seek for the springs of our streams of law and equity. It appears almost abruptly in the Statute Book, called for by the growing needs of the mercantile community. Commerce, as it is one of the first causes of the prosperity of a people, was also the main factor in the creation of a bankruptcy law.

It may be that, like some of the origins of English maritime law, the theory of a bankruptcy law came from the Mediterranean, for in the trading towns of mediæval Italy a system of bankruptcy law existed from an early period, and before Benevenuto Straccha, a learned lawyer of Ancona, wrote a treatise on the subject in 1584, a bankruptcy law of comparatively an elaborate character must have been in force. Coke places the first bankruptcy statute (*a*) in England in the reign of Edward III. in the year 1350, and takes a patriotic pride in regarding bankruptcy as a practice introduced by the Lombards, and one not indigenous in England. As a matter of fact, however, this was not in any sense a bankruptcy Act; for it does no more than make the company of Lombards in London liable for the debts of any other Lombard who quitted the country without paying his creditors. The first Bankruptcy Act (*b*) is in fact to be found in the reign of Henry VIII., when it is to be feared that the

(*a*) 25 Edw. 3, c. 23.
(*b*) 34 & 35 Hen. 8, c. 4 (1542).

three kinds of costliness of which Coke speaks, namely, "costly buildings, costly diet, and costly apparel, accompanied with neglect of his trade and servants," were, as in later ages, the cause of most of the bankruptcies of the time.

By the Act of Henry VIII. the ordinary debtor was left to the tender mercies of the common law, for though it was a statute aimed solely against fraudulent bankrupts, it was, nevertheless, a real Bankruptcy Act, because the debtor's property was to be distributed among his creditors "rate and rate alike according to the quantity of their debts." Thus we have this noticeable feature in the statute that it left untouched the debtor simply unable from misfortune and extravagance to pay his debts, and applied only to that limited class of men who, in the archaic English of the Act, "craftily obtaining into their hands great substance of other men's goods, flee to parts unknown, or are not minded to pay or restore to any their creditors their debts and duties."

But as yet no special court was formed for bankruptcy purposes, and only a comparatively informal body, more or less equivalent to the Privy Council, was given what may be termed a jurisdiction in bankruptcy. To this body, consisting of the Lord Chancellor, the Lord Treasurer, the Chief Justices and other Privy Councillors, complaint was to be made by aggrieved creditors. But in the authority vested in this tribunal, if tribunal it may be called, the principles of bankruptcy law are apparent, less developed, it is true, than in more recent times, but still sufficiently defined for the purposes of identifi-

cation. On the other hand, the absence of an essential element of a true bankruptcy law is apparent, the freedom of the bankrupt from further liability after his creditors have received so much of their debts as the realization of the debtor's property will permit. But it would certainly have been astonishing if a bankruptcy law had found its way into the Statute Book in a fully developed state.

For thirty years this first Bankruptcy Act remained undisturbed, but in the reign of Elizabeth Parliament again took the subject in hand, and passed an Act (*c*) more elaborately formulating what were to be considered acts of bankruptcy, and limiting the scope of the statute to "any merchant or other person, using or exercising the Trade of Merchandize by way of Bargaining, Exchange, Rechange, Bartry, Chevisance, or otherwise, in Gross or by Retail, or seeking his or her Trade of Living by Buying and Selling"—a limitation which existed until the year 1861. But the Act of Elizabeth was perhaps more noticeable as the basis of subsequent bankruptcy procedure, rather than as an exposition of substantive law. For in it is to be discerned the beginning of the whole modern machinery of official assignees, trustees, commissioners, judges, and the rest of the army of officials by whom the State has from time to time endeavoured to protect creditors. At this period they were only modestly described as certain "wise and discreet persons," not necessarily creditors, to whom the management of the bankrupt's affairs was intrusted. So that if we

(*c*) 13 Eliz. c. 7 (1570).

take these two statutes together, bridging over in our minds the interval of thirty years between the Act of Henry and the Act of Elizabeth, which after all is but a trifling space of time in a period of more than three centuries, we may consider the basis of English bankruptcy law as having been established in the latter part of the sixteenth century. Because, broadly speaking, subsequent legislation has, in spite of variations in procedure and the trial of opposing systems, been aimed at the same object as these early statutes, and indeed has often been no more than the expansion of the same principles amidst great details and changed circumstances. This feature is obvious in the succeeding Act of James I. (*d*), which as that of Henry VIII. preceded the statute of Elizabeth by the space of thirty years, so in its turn succeeded it by the same space of time. For it did nothing more than make the powers of the commissioners more effective and amplify and explain the language of the previous statute for the purpose of preventing "deceitful" persons from evading its provisions. But in no way did it differ either in the principles of law or of procedure, from the Act of Elizabeth, which, combined with that of Henry VIII., forms the basis of English bankruptcy law.

But the reign of James I. did not close without adding another statute (*e*) to the law of bankruptcy, important rather in the development of the existing system of law than in the laying down of new principles. The cruelty

(*d*) 2 James 1, c. 15 (1604).
(*e*) 21 James 1, c. 19 (1623).

of the age is indeed exemplified by the provisions intended to prevent the non-disclosure by the bankrupt of his goods by means of the punishment of the pillory for two hours, added to the torture of the bankrupt of having one of his ears nailed to it and then cut off. But the most noticeable step in advance was the creation of the doctrine of reputed ownership which has probably given rise to more litigation than almost any other part of the law of bankruptcy from that day to this. It is formulated in almost the same words as have been followed in recent Bankruptcy Acts, since it was enacted that if any persons should become bankrupt and should at such time by the consent and permission of the true owner have "in their possession, order and disposition" any goods whereof they should be reputed owners, then that these articles were to be sold for the benefit of the creditors.

It is fitting to pause here in a view of English bankruptcy law, because with this statute closes the first series of legislative efforts to create a satisfactory law, nor had those efforts been on the whole unsuccessful, for the bankruptcy law of the seventeenth century was considerably in advance of the common law. It was small in compass, reasonably clear in substance, free from technicalities of procedure, neither based on nor interwoven with legal fictions, and though cruel, not more so than the temper of the times allowed, or than was natural having regard to the callousness with which human suffering was treated in that age. Nor when the improvements and changes which have taken place in other parts of our municipal law are noted can the law of bankruptcy be said to have improved

as time has gone on. It has grown large in compass and more complicated in detail. It was nearly a hundred years, however, before a further change took place, and when it occurred it was followed by others down to our own time in a rapid succession caused by the fact that the existing law has never fulfilled the intentions of the promoters or satisfied the nation at large.

The modern epoch—as it may be termed—begins with the reign of Queen Anne, for the two statutes (*f*), which then became law, contain one essential element of the modern law of bankruptcy, the principle that the debtor should be freed from the incubus of his liabilities, and also that his property should be distributed for the benefit of his creditors. For while the bankrupt was to be allowed a percentage on his assets, a certificate of conformity was to be granted him by the commissioners which should protect him against all past claims. In this we at once see evidence of a change of opinion, for a debtor might now be regarded as one who might be incapable of paying his debts through misfortune, and was not by the fact of his insolvency a criminal. This view is seen more clearly in the honest but clumsy attempt to be lenient towards those who had become bankrupt through unavoidable misfortune, and to be properly severe to reckless traders and gamblers. Those, for instance, who had lost 100*l*. within twelve months of their bankruptcy at cards or with games of dice were to obtain no benefit from the Act. The commencement of the modern epoch also is shown by the fact that in 1732 an attempt was made to consolidate the

(*f*) 4 Anne, c. 17; 5 Anne, c. 22.

bankruptcy laws of the two previous reigns (*g*), for a system of law must be at once elaborate and detailed when it is necessary to begin to consolidate it. But one archaic notion was still clung to with steadfastness—that the ordinary debtor should be left exposed to the harshness of the common law and that traders alone should have the benefit of the Bankruptcy Acts (*h*). It is hardly necessary to point out that this caused men to make continual attempts to evade the law so as to bring themselves within the definition of a trader, and thus fall within the more lenient operation of the law of bankruptcy. Another marked feature of this time was the difficulty of preventing creditors from exercising their absolute power of withholding certificates of conformity for reasons not having to do with the debtor's bankruptcy. This absolute power thus became a hardship on debtors, and a measure which was intended by the legislature as a means of protecting the genuine interests of creditors became neither more nor less than a means of oppression and an engine of extortion. Thus in 1805 no less than 940 commissions were issued, but only 405 certificates were granted. The sequel to the scandal was the appointment of the Commission of 1818, chiefly through the exertions of Sir Samuel Romilly, and, subsequently, the passing in 1825 of the Consolidation Act (*i*) of that year, the object of which was to limit the power of creditors to prevent

(*g*) 5 Geo. 2, c. 30.

(*h*) The Court for the relief of insolvent debtors was established in 1813 by 53 Geo. 3, c. 102, but it was simply a plan to release imprisoned debtors and distribute their estate without in any way freeing them from past liabilities. It would more accurately be described as a Court for the release of imprisoned debtors.

(*i*) 6 Geo. 4, c. 16.

the issue of certificates. It contained also sections which abrogated the punishment of death in the case of the concealment of property by a debtor, and substituted for this tremendous punishment the comparatively gentle one of seven years' penal servitude. But it was, perhaps, more remarkable as introducing one essentially modern element of bankruptcy law—the principle of compositions. This is not only sound in itself, but altogether in the interests of honest debtors and creditors, yet it has thrown more discredit on the law of bankruptcy in modern times, and been oftener the means of letting off rogues cheaply and of causing laxity in business dealings than almost any other part of the law of bankruptcy. In the early stage of the development of the principle, compositions with creditors were not so easy as they afterwards became; a majority of nine-tenths of the creditors was required to make them valid, and most of the steps of a proceeding in bankruptcy had to be gone through. The new system was thus rather a means of removing the discredit of being adjudicated a bankrupt, than of practical relief. But in tracing the development of the law of bankruptcy, the appearance of the beginnings of a new principle is more important than its practical results.

It was about this time that reforms began to obtain considerable parliamentary notice. Bentham had by his writings drawn attention to the subject, Brougham chose to throw his enormous energy in this direction, and practical politicians like Lord Althorp were found to help the legal reformers. One of the first results of this movement was the establishment of a separate Bankruptcy Court in 1832; its arrangements were far from perfect,

and it received a good deal of scornful criticism from Bentham's pen. Still it was a marked step in advance.

We have seen that during the reigns of the four Georges the principle that the creditors should control the management of bankruptcies was in favour; but with that alternation of ideas which has characterised bankruptcy legislation in this country, a change came over the scene in 1842 (*k*), and it was enacted that the Court, and not the creditors, was to control the bankruptcy proceedings and to grant certificates. All that was left to the creditors of their former omnipotence was a veto on the grant of a certificate if they could show good cause why it should be withheld. We shall presently see that the pendulum swung back again in its old direction, and that there was little fixity of plan in the bankruptcy legislation of the reign of Queen Victoria. An Act of 1849 (*l*) continued the powers of the official assignee in the management of the bankrupt's estate, in conjunction with the assignee selected by their creditors. It not only did this, but it increased the facilities for compositions.

The most curious feature, however, of this piece of legislation was the transformation of bankruptcy officials into something approaching judges of morality. For a system of classified certificates was introduced, with a view to make the bankruptcy laws more efficacious by means of a series of mild moral rewards and punishments. It was truly astonishing that any man should have regarded such a system as of the smallest value. In a short time it was

(*k*) 5 & 6 Vict. c. 62.
(*l*) 12 & 13 Vict. c. 106.

apparent that bankrupts cared absolutely nothing about the class they were in. So long as they received a certificate of discharge the practical end of the bankruptcy was gained, and whether they were in the highest or lowest class made no difference at all to the future prospects of a debtor. Moreover, officials must have been singularly critical and careful if they could with certainty state that a man had become a bankrupt wholly from, not wholly from, or not from unavoidable losses and misfortunes, which were the essentials for a certificate of the first, second or third class.

For twelve years this curious system was in existence; it was put an end to by the Bankruptcy Act of 1861 (*m*), which abolished graduated certificates, and substituted for them a simple order of discharge. This was one noteworthy effect of this Act. Another was the absorption of the Local Commissioners by the County Courts, which then became what they have remained ever since, local Courts of Bankruptcy. Worthy of remark as this fact is, it is secondary in importance to the abolition of the long existing distinction between traders and non-traders, and the consequent amalgamation of the Courts for the relief of insolvent debtors with the Bankruptcy Court. At the beginning of the century Bentham had inveighed vigorously against the continuance of an absurd anachronism, in support of which there was really nothing to be said, and which as has already been stated was the cause of constant attempts to transgress the law, and was simply a vestige of mediæval ideas which remained in existence longer than one would have thought possible.

(*m*) 24 & 25 Vict. c. 134.

After a short interval of eight years it was necessary to pass another Act (*n*), and amidst the many details of which it is full, a distinct principle is apparent, that the creditors were the persons most interested in the bankrupt's affairs, and that they were therefore primarily concerned in the management and in the distribution of the estate. The official assignee so long a prominent figure in bankruptcy proceedings disappeared, and the trustee appointed by the creditors became the active person, the Court having little more to do than register the decrees of the creditors. It was a necessary concomitant of this system that compositions and liquidations by arrangement were expressly provided for and sanctioned by the Act, in regard to which the authority of the creditors was wholly uncontrolled by the Court. Nothing could be a greater contrast between the ideas formulated in this statute in regard to the controlling power in case of a person's bankruptcy, and those which are expressed in the Bankruptcy Acts of the earlier part of the reign; they are utterly opposed, and their very contrast shows the difficulty, if not the impossibility of passing a satisfactory bankruptcy law. Nothing can be clearer than the principles which should be the basis of a law of bankruptcy, experience, however, has shown that they are difficult of successful application. The Bankruptcy Act of 1883 (*o*) may be taken as a further proof of this proposition. Freedom of management by creditors being found unsatisfactory, the Board of Trade was called into requisition, and official receivers selected by the Board of Trade were appointed to act as trustees

(*n*) 32 & 33 Vict. c. 71.
(*o*) 46 & 47 Vict. c. 52.

of the property of the bankrupt until the appointment of a person by the creditors, or in default of his appointment. But the official receiver has likewise to make a report in regard to the conduct of the bankrupt, and in considering whether that discharge should be granted or refused or merely suspended for a time, the Court has to consider that report and the objections and views of the official receiver as placed orally before it. The official receiver has also necessarily to investigate the debtor's affairs and to report on any scheme of composition, which again must be sanctioned by the Court. Hence the principle of official management stands out prominently, as well as a kind of semi-moral censorship in regard to the conduct of the bankrupt. The Act of 1883, in fact, carries us back a long way; it has revived the principles which underlay the graduated certificates of conformity, and the official control of the Act of 1842. The absorption of the Bankruptcy Court in the High Court of Justice is of less interest than the reappearance of these old familiar principles. In other respects there is not much which is noticeable in this last statute; details are different, but we have in this review of bankruptcy legislation in this country endeavoured to keep in view the principles and the prominent features of each succeeding piece of legislation. The statute book is a monument of good legislative intentions; these are never more conspicuous than in the many Bankruptcy Acts, the very number of which testifies to the fact that these intentions have year after year often produced little but disappointments.

There are indications, however, that at length some

finality has been attained, and that a working compromise between government control, which is, in effect, the assertion of moral theories, and the management of a debtor's assets by his creditors, which is pure business, has been reached. After a long series of attempts—characteristic of the adaptability of English law—the conflicting interests of the debtor and of the creditor, of commercial morality and of the realisation of assets, appear to be reconciled as far as is ever likely to be possible.

CHAPTER IX.

THE COMMERCIAL COURT.

Tribunals of Commerce are well established in several European countries, but in England they have never been more than suggested. At the present time, however, something in the nature of a Tribunal of Commerce is to be found in the form of what is popularly called the Commercial Court, which, however, strictly speaking, is but one of the Courts of the King's Bench Division, in which what is termed the Commercial List of Causes is tried by a judge to whom this particular class of legal work is assigned for a definite though short period, and who, contrary to the ordinary practice of the High Court, himself deals with all the preliminary interlocutory proceedings. This unsymmetrical arrangement is typical of English ways, but it is one which, as a phase in the growth of English procedure, is remarkably interesting and important. In effect it has resulted in the existence of a special Court for the trial of a special class of legal business. Theoretically, there is no more reason why, for example, a merchant and a shipowner who have a dispute over a charter-party should have a particular Court set apart for the decision of their litigation, than two rival patentees who, however technical is the subject-matter of the disagreement, still have to take their place among ordinary litigants.

Yet after all this new tribunal is a return to mediæval procedure, for in seaport towns from very early times there were Port or Marine Courts, presided over by municipal officials who were assisted by merchants or mariners, for the trial of disputes relating to mercantile or maritime matters; and the Fair Courts and the Staple Courts had a similar jurisdiction in inland towns. These Courts long ago fell into abeyance, though in more modern times the sittings held at the Guildhall, in the City of London, for the trial of actions by jury, to some extent preserved ancient traditions. But these sittings were ended by the passing of the Judicature Act of 1873; the creation of a Commercial Court revived them to some degree, and was in principle a return to an even older system, of which the expeditious trial of commercial disputes in the place where they arose was the essential characteristic.

Let us first of all see how this Court, as we shall now call it, came into existence.

The mercantile community is in many respects an organised body; it has not only its special organs of opinion in the press, it has its Chambers of Commerce and its representatives in Parliament, who can safeguard its interests. It has thus an actual and definite force, which cannot altogether be ignored. But it is doubtful if even this organised force would in itself have been sufficient to introduce a change in the judicial system which would meet the wants of men of business. Something in the nature of an accident must be regarded as the efficient cause of the creation of a Commercial Court. At the end

of 1892, Lord Gorell (then Mr. Justice Barnes) became a judge of the Probate, Divorce and Admiralty Division, on the appointment of Sir Francis Jeune to the place of President of the Division, left vacant by the death of Sir Charles Butt. The new judge was thoroughly acquainted with mercantile law, and was equally cognisant of the demands of the commercial community, whilst the President cordially agreed with any plans to increase the usefulness of the Division over which he presided. So in the course of 1893 it was made known that commercial causes arising out of disputes in some way connected with shipping, but in no sense purely Admiralty actions, would be entertained in the Admiralty Court at such times as the Court could spare from its special work. At once several actions were entered to decide points arising out of contracts of marine insurance. The number of commercial cases increased, and it became clear that if the judicial strength of the Division would have permitted it, the commercial community would have gladly resorted to it as a Commercial Court. It was obvious, however, that this was impossible without an addition to the number of judges attached to the Division, for two judges were only sufficient to cope with the regular flow of business, whether probate, divorce, or admiralty; the commercial work, with the existing strength of the Bench of the Division, could, therefore, only be dealt with in a fragmentary manner, and sometimes at the risk of dislocating the arrangements for the trial of admiralty actions. With the Queen's Bench Division fully equipped for work it was obviously impossible to place an additional judge at the service of the Admiralty Division, to do work proper for another Division, and for a time it appeared as if the mercantile body

would have to remain satisfied with the odd moments of the Admiralty judge. It was plainly, however, more than ridiculous that commercial men should be unable to have their legal business satisfactorily transacted by the Queen's Bench Division, to which it properly belonged; it would have shown a total incapacity to recognise a public demand had the lead given by the Admiralty Court not been followed. The result was that at the beginning of 1895 it was announced that commercial causes commenced in the Queen's Bench Division were assigned to Mr. Justice Mathew, not only for trial, but in order that he might have control over them from their commencement. This was, as we have already pointed out, in reality the establishment of a Commercial Court. Nor did Mr. Justice Mathew allow the opportunity thus given to him to re-establish the confidence of the mercantile community in the Common Law Courts of England to pass by. He disapproved of dilatory interlocutory proceedings, and by the exercise of sound common sense, and from a contempt for mere legal technicalities, he put an end to the interlocutory applications which in many cases caused so much expense and had so little effect on the result of the litigation.

The Court has continued on the same lines, though it has to some extent lost its early judicial individuality, and its scope has been enlarged. It is now a general Commercial Court instead of one which had jurisdiction over a limited class of cases arising out of shipping and insurance contracts. Finally, it must be regarded as fixed in English procedure—a remarkable instance of the haphazard and yet on the whole effective manner in which legal changes have occurred in this country in all times.

It is worth while, however, to take note of this Court from another point of view—as emphasising a change which has occurred in procedure in the last fifty years. The Commercial Court is the most emphatic illustration which can be given of what may be called business procedure as distinguished from legal procedure—of the desire of the judiciary that litigation should be as little technical as possible. There are still some useless technicalities visible, not comparable, however, to those which were to be seen before the Common Law Procedure Act of 1854, and the Judicature Act of 1873, and several other modern measures. The changes introduced in the Commercial Court would startle a practitioner under the old *régime* (*a*); pleadings are not necessary, points of claim and defence being frequently ordered in place of formal claims and defences, documents which are not strictly proved are admitted in evidence, as are written statements containing hearsay matter. These and other details emphasise a popular revolt against legal technicality, and a desire to have disputes settled quickly and without formalities. The Commercial Court, in fact, responds to popular opinion, and it marks the culminating point of the reaction against technicality in procedure which has been visible for more than half a century, and the first step of which in regard to the Common Law Courts was the passing of the Common Law Procedure Act, 1854. It has influenced the procedure of other

(*a*) In the case of *Biddell* v. *Clemens, Hirst & Co.* (27 T. L. R. p. 47), Mr. Justice Hamilton decided a case on his personal knowledge of the meaning of a mercantile term. This decision was reversed by the Court of Appeal, on the ground that a commercial custom must be proved as a fact by evidence.

Courts, for what is right in one Court cannot *primâ facie* be wrong in another, and thus a general tendency has grown up to conduct litigation with as little formality as possible. Rules of procedure too strictly construed may be a constant menace to justice; construed reasonably, they make it proceed decently and in order. Such is the object of modern English procedure. The judicial point of view in the last quarter of a century, more especially since the creation of a Commercial Court, has in fact diametrically changed, and the Judicature Rules, voluminous though they are, being capable of alteration at any time, have lent themselves to this new movement, for they can be amended so as to prevent undue technicality whenever a necessity for so doing is proved. We have thus reached a period in English legal history, when procedure is on the whole no more than sufficient to enable litigation to be conducted on well-ascertained lines, and is subordinate to the redress of private wrongs. That there are improvements in existing procedure is not to be denied, but the Commercial Court, with its "short cuts" and absence of technicalities, is always at hand a constant object lesson of the advantages of common sense and rapidity in litigation, and a remarkable illustration of the trend of the direction of public opinion since the year 1873 in regard to legal procedure. As a reversion to a system which flourished in mediæval times, it is of peculiar interest to the student of the history of English law.

CHAPTER X.

THE VICTORIAN LORD CHANCELLORS, AND THEIR INFLUENCE ON ENGLISH LAW.

The lives of the eminent men who filled the high office of Lord Chancellor of England during the reign of Queen Victoria are remarkably illustrative of the trend of the English legal system, and of its personal characteristics, during a period which is now a well-defined historical epoch. The Victorian age has so many distinctly marked attributes extending over many years that it is now obviously a definite period, coinciding with the rule of a single sovereign. The lawyers who occupied the Woolsack during the reign of Queen Victoria differed remarkably in personal character, in mental qualities, and in legal attributes; but these differences help to create a complete picture alike of the lawyers of the age and of the system under which they flourished. From the point of view of the legal historian, it is important to form some estimate of the influence of this group of judges and statesmen—the heads of the English judiciary—on law and procedure during this long space of time.

This period, so far as concerns the office of Lord Chancellor, was to some extent one of transition. In England

changes proceed so gradually that one is apt to overlook the effect of a slow transition; it is clear, however, that the office of Lord Chancellor is now less judicial and more administrative in its nature than it was at the beginning of the reign of Victoria. The holder now fulfils more political and fewer judicial duties. Lord Cottenham during the last tenure of his Chancellorship "devoted his time almost entirely to judicial work, seldom appearing in the Cabinet." To-day a Chancellor who found his strength insufficient for judicial and political work would regard himself as bound to devote such vigour as he possessed to the service of the House of Lords in debate, and to the assistance of his colleagues in Council. The difference in the strain of political and administrative work in the last and present centuries is made more clear when we bear in mind that the Chancellor was not only a member of the House of Lords, and as such a member of the highest Court of Appeal, but that he was also an equity judge of first instance and a judge of appeal from the Vice-Chancellors. He had therefore at the beginning of the period to fulfil three judicial functions. Those of a judge of first instance were considerably lightened when in 1842 two additional Vice-Chancellors, as the Chancery judges were called, were appointed during the last Chancellorship of Lyndhurst. But though the Lord Chancellor was then relieved to some extent of one part of his work—for the disappearance of the Chancellor as a judge of first instance was gradual—this increase in the number of primary Chancery judges at the same time increased his duties as a judge of appeal, and rendered sooner or later a new appellate tribunal inevitable. This body came into being under the Chancellorship of Lord Truro in 1851.

Two new judges were created, who were styled Lords Justices of Appeal, and though the Chancellor from time to time sat in this Court, it gradually came to see little of his presence. Rolfe, afterwards Lord Cranworth, and Knight Bruce were the two first Lords Justices, and the former, two years later, became Chancellor on the formation of Lord Aberdeen's Government in 1852. Probably from his interest in the new Court, Cranworth, though he was not an experienced equity lawyer, continued to attend its sittings, and thus gave an opportunity for one of Bethell's mordant remarks: "I wonder," someone said to him, "why old Cranny always sits with the Lords Justices." "I take it to arise from a childish indisposition to be left in the dark," was the characteristic reply. Bethell's criticisms on his contemporaries are tempting incidents to dwell on in Victorian legal history; but our object at this point is to show, briefly, the manner in which the office of Lord Chancellor has changed during the years of the late reign.

We have seen the Chancellor ceasing to be a judge of first instance, then an intermediate judge of appeal. And when in 1876 two judges, known as Lords of Appeal in Ordinary, were added to the House of Lords so as to strengthen it as the final appellate tribunal, the importance of the office of Lord Chancellor as a final judge of appeal was noticeably lessened. In that Court a high legal capacity, whether in a Chancellor or in a Law Lord, necessarily gives an individual judicial supremacy. When Lord Westbury as Chancellor had for his colleagues Lords Chelmsford, Cranworth, and St. Leonards, his was obviously the master-mind. But the constant presence of

judges who have always devoted their minds mainly to the study and exposition of the law, and who have leisure to consider cases out of court, necessarily tends to diminish the weight of the judicial utterances of a hard-worked statesman who is also the president of the tribunal. More than half a century ago Lord Langdale proposed that the judicial and administrative functions of the Chancellor should be separated, and that the political functions "should be discharged by a Keeper of the Great Seal, who was to hold no judicial office, but was to act as a Minister of Law and Justice." The change, which Lord Langdale would have effected by legislation, has to a large extent come to pass by force of circumstances. Human capacity has definite limits, and so at the present time the Lord Chancellor, with his multifarious duties, occupies to some extent the position of the Keeper of the Great Seal under Lord Langdale's scheme. The Master of the Rolls, as Lord Langdale then was, saw some way into the future; but his scheme is now chiefly of historical importance, because it indicates that some clear-sighted minds perceived the inevitable tendency of events—the changes which have since occurred in the nature of the office of Lord Chancellor. Be this as it may, they have come to pass contemporaneously with the increase in the official and political work of the Attorney- and of the Solicitor-General, so that at the present time all these three offices have become more administrative and less legal. To some extent this has had an undesirable and unforeseen effect, for in consequence the judicial bench, which owing to various causes is increased in size and is a somewhat unwieldy body, has become more independent of a central control at the very time when, owing to the fact that it

forms part of one Supreme Court, it is desirable that it should be governed by a Chancellor who is at once in close touch with public requirements and with the legal profession.

Though the head of the legal system and responsible for its efficient working, the Chancellor has always held a curious and an anomalous position, which has emerged and taken shape almost imperceptibly. Though responsible, he has never had a free hand, and the mingled fortunes of legal and political life, and the urgencies of political necessities have affected the personal equation in unexpected ways. Men possessed of opposite qualities, of divergent aims and ideals, have succeeded one another as the political system has brought one party up and another down; so that it is not surprising that though the Lord Chancellor has ever been the most prominent legal personage in the public eye, his influence on the body and system of English law has not equalled his public authority, and that that influence has been exercised spasmodically and irregularly.

If we take the period 1858—1868, from the commencement of Lord Derby's second Administration to the end of his third term of power, the interval being filled by the Premierships of Palmerston and Russell, we see the Woolsack occupied by Chelmsford, Campbell, Westbury, Cranworth, and for a second period by Chelmsford. Chelmsford was an able Common Law advocate, whose tact, common-sense, and agreeable manners allowed him to fill any place which was offered to him without discredit, but also without distinction. Campbell was a

thorough all-round lawyer, whose robust brain and strong body enabled him to overcome difficulties and to be a thoroughly efficient advocate and judge. He was essentially the business lawyer—hard-headed, keen-sighted, and laborious, with the qualities which would have made an efficient railway manager or a capable archbishop. Westbury differed *toto cœlo* from his two predecessors. A scholar and a jurist, his keen, clear intellect saw through mazes of fact; points of law sank to their proper dimensions before his grasp of legal principles; and he had the ardour of the clear mind for system, and therefore for legal codes. This desire for system is the basis of the desire for codification, and causes also the dislike of prolixity and obscurity, which is the vice of judge-made law. If he had lived in a bureaucratic country and had been Minister for Justice, Westbury would have left behind him monuments in the form of codes. It would not be easy to find a sharper contrast to him than Cranworth, one of those men whose careers form models for English youth, who succeeded him on his fall, and who had already occupied the Woolsack in the Governments of Aberdeen and Palmerston. The story runs that when he took the place of Westbury, some one said of, we may suppose, rather than to him: "Well, Kingsley is right; it is better to be good than to be clever." Cranworth was essentially a safe man; he was well versed in judicial decisions, so that he was guided by an abundant number of legal signposts; his temperate character prevented him from mistakes of conduct, and his kindly nature made him a universal friend. It was impossible not to congratulate him on his several successes; yet he became a puisne judge because he had so little private practice that if he had

ceased to be Solicitor-General he would have lived a life of enforced leisure, and he became Chancellor because he had been Solicitor-General, and because for the moment no lawyer of high calibre was available. Yet he was a dignified and a sensible Chancellor, who would never have made the fatal mistakes of administration which caused the downfall of his infinitely abler predecessor; and he even carried some useful legal reforms in the true English fashion. Indeed, the comparatively small personal influence of the Chancellor is strikingly illustrated by the careers of Cranworth and Westbury; for the latter had not only, as we have pointed out, the type of mind which appreciates the importance of legal reforms, but also a lifelong and unquenchable wish to effect changes which he regarded as necessary. A scientific education for lawyers is the corner-stone of a clear legal system. In 1846, when overwhelmed by an enormous practice, Bethell, as he then was, brought forward the subject in a letter to the Master of the Rolls. And he also "unfolded the details of his scheme in a letter addressed to the Treasurer of the Inner Temple. He advocated founding four chairs for readers or lecturers on the subjects of real property law and conveyancing, constitutional and criminal law, personal property and commercial law, and equity as administered by the Court of Chancery, the compulsory attendance of all students at the lectures on real property law, as being of universal utility and necessity in all branches of the profession, and a compulsory examination with competition for honours and exhibitions. It was part of his plan that these readers should devote themselves not only to their separate duties, but to the general and public purpose of amending, improving, and digesting

the law" (*a*). Bethell's own Inn, the Middle Temple, appointed a lecturer in jurisprudence and civil law; but it was long before the present more systematic but still imperfect measure of legal education was established. Again, in 1854, Bethell—he was then Solicitor-General—in a debate on the work of the Inns of Court, "expresses his desire to see the Inns of Court erected into one great legal university, not only for the instruction of law students, but for the purpose of co-operating with the other universities in the education of the public at large. He contrasted the unfavourable position we then occupied with that of France, where the study of the law was systematically pursued, and lamented the want of instruction in original principles which was characteristic of English jurisconsults." This orderly and clear legal education was, in Bethell's opinion, necessary not only from the point of view of the practising lawyer, but also "because by the institutions of the country the people are invited to take a part in the administration of the law; and it is our bounden duty therefore to provide them with the means by which they may become qualified to do so, by obtaining a general knowledge of the principles of the law." This idea of a great legal university in the Metropolis of England, based on the ancient Inns of Court, to which students not only from the Mother Country but from the dominions beyond the seas should resort, and where the legal training should be of the highest kind, is a noble project and of the first importance. Writing in 1867 to the late Mr. Henry Reeve, Lord Westbury, referring to this plan, stated that his

(*a*) Nash, Life of Westbury, Vol. I. p. 93.

proposal had in 1847 received no support; and then he added regretfully but optimistically, "It must be the work of the next generation." More than one generation of lawyers has passed away since these words were written, and a plan which is in the highest sense imperial seems to be as distant as when Lord Westbury was alive (*b*).

This has been something of a digression, but Lord Westbury's unvarying views on the necessity of a first-rate education in legal principles is illustrative of his trend of mind, and at the same time of the personal impotence of a Chancellor to carry out his views. This was still more clearly exemplified in the case of law reform. The Bankruptcy Bill, which, as Attorney-General, he had piloted through the Commons, he was, as Chancellor, unable to carry in the Lords without compromises, which, he said, reduced its utility in the same degree as if a watch had been deprived of its mainspring. This illustration was given in a moment of irritation, but unquestionably the Bill was too much modified. Westbury also succeeded in passing a Registration of Title Act, which being, against his wish, non-compulsory, was almost a dead letter. In fact, far from being the successful author of a code even of any part of the case law of the country, or from establishing a Department of Justice, Westbury had to be satisfied with passing a modest Statute Law Revision Act, which covered the period from Magna Charta to the Revolution. Even this particular piece of legislation was no more than a sequel to that initiated by Lord Campbell, who passed a similar Act dealing with the period 1770—1858.

(*b*) See *post*, p. 246.

The introduction of this Bill gave Lord Westbury an opportunity of stating his opinions on and desires for the codification of the case and statute law of England in a speech which has been regarded as the most successful he ever made in Parliament. "He sketched the outlines of a scheme of revision of the case law," and "he proposed to get rid of enactments which were no longer in force, and to classify the remainder under proper heads." But while this address remains a monument of Lord Westbury's large and scientific legal views—views, be it remembered, not of a professor, but of a man who was one of the most powerful advocates who ever practised at the English Bar—it also continues to be a melancholy reminder of the powerlessness of a Chancellor to carry reforms which are theoretically desirable, but which are not supported by the necessary weight of a public opinion.

A most important measure of law reform was passed in 1852. The Common Law Procedure Act of that year was the beginning of a new era in Common Law procedure; it modernised the whole system and brought the practice into line with current ideas; and the Acts which abolished the Masters in Chancery and altered the procedure in the Chancery Courts were primarily intended to prevent the delays for which they were notorious. But these and other contemporaneous improvements were the result of popular pressure. The country, said Lord Lyndhurst, when Lord Derby's Government came into office in the spring of 1852, was looking for law reform "with eager and intense interest." And Lord St. Leonards asserted that "the cause of law reform was supported by the general opinion out-of-doors." When the country

has made up its mind that some law reform is required, a measure must be passed. But as to the details of it, the people are naturally careless. A Court of Criminal Appeal would never have been established by Lord Loreburn in 1907 had there not been, in Lord St. Leonards' homely words, sufficient public opinion "out-of-doors" to enable the Chancellor to pass the necessary legislation. For legal symmetry, or other legal ideals, the country cares not a jot. Public opinion demanded this particular measure as a safeguard for individual liberty, and a new Court was created. A more remarkable example is to be found in the system of County Courts, which dates from the year 1846, and which is unquestionably one of the most beneficial fruits of the legal reforms of the reign of Queen Victoria. For years before this date there had been a popular demand for courts in which the small litigation of the country could be conducted. This demand formed the reason for Brougham's Local Judicature Bill of 1833, which was mercilessly destroyed by Lyndhurst, by whom, by a strange irony, the County Court Act of 1846 was passed. If any Chancellor was the author of this reformation, to Brougham may be allotted the credit, though the Act was the Act of Lyndhurst, and Cranworth set it working. It is thus to public demands rather than to legal ideals that a Chancellor has to look who would make changes in the English legal system, and the novels of a Dickens may therefore be productive of more result than the addresses of a Westbury.

It thus came to pass that in the decade which, for the moment, we are considering, the Chancellor who unquestionably had the temperament and the intellect of a law

reformer has left no larger results than were achieved by men who passed useful and modest measures of reform, which it was obvious were peremptorily demanded by public opinion. It is the penalty of democratic Government that measures, however desirable, such as those which Lord Westbury conceived, cannot be passed through a popular assembly or a Conservative upper chamber merely on their own intrinsic merits. They are jostled and put aside for matters which evoke more public interest, or which rouse less acutely professional alarm.

It is obvious that, from the point of view of the influence of the Chancellors as legislators on English law, Lord Selborne was more important than Lord Westbury, for Lord Selborne passed the Judicature Act of 1873, which for good or evil was the most noticeable work of any Chancellor during the reign of Queen Victoria. To have put an end to the lamentable conflict between the systems of Common Law and Equity, to have ended for ever the almost personal antagonism between the two sets of courts, to have improved the procedure of the Chancery Courts in trials of matters of fact, and to have lessened the technicality of Common Law procedure would in itself have been a memorable work. But the amalgamation into one Supreme Court of all the several independent jurisdictions, primary and appellate, excepting that of the House of Lords and of the Privy Council, was, when we remember that the existing courts were the results of the legal evolution of many centuries, an extraordinary achievement. Yet in the result it has been proved that symmetry, however desirable, may not have the practical usefulness of systems which, anomalous as they may seem,

have been gradually evolved and are suitable to the country. The absorption of the then Common Law Courts has often been discussed; it is sufficient here to quote and endorse words of the latest biographer of the Chancellors:

"The amalgamation of the Exchequer and the Common Pleas with the Court of Queen's Bench was a sacrifice to the goddess of symmetry, the wisdom of which may reasonably be questioned. The three old courts with their three chiefs, each at the head of his band of puisnes, had much to commend them besides their antiquity. Their rivalry, their *esprit de corps*, and the sense of responsibility which is now distributed among the sixteen judges of the King's Bench Division, did much to maintain the high level of the Common Law Bench, which was never higher than in the 'sixties' and 'seventies'" (*c*).

A single Supreme Court presupposes a single responsible head. The expression, "the enthroning of the Chancellor on the necks of all of us," which the late Lord Coleridge used in writing to Lord Lindley, while it contains some germs of truth, was and is incorrect, because the office of Lord Chief Justice creates to some extent, as regards the Common Law Divisions, a dual responsibility. Yet that of the Lord Chief Justice of England, who appears to the public eye to be supreme in his own Division, is anomalous, for he shares the work of the puisne judges, and he has not that personal authority which was possessed by the chiefs of the old Common Law Courts.

(*c*) The Victorian Chancellors, by J. B. Atlay, Vol. II. p. 417.

If Lord Selborne has left his mark on the procedure of the country, he and Lord Cairns will long be remembered for their influence on its jurisprudence. The Vendor and Purchaser Act of 1874 may be placed entirely to the credit of Lord Cairns, the Conveyancing Acts of 1881 and 1882, the Married Women's Property Act of 1882, and the Settled Land Act of 1882 must be regarded as the joint work of these two eminent lawyers, for if these latter statutes were conceived by Lord Cairns, they were carried into law by his successor. It is, therefore, not altogether unreasonable to regard Lord Selborne as the Chancellor who, during the reign of Queen Victoria, had the most personal influence as a legislator upon English law. To apportion actual merit and the several services of the Chancellors when, to some extent at any rate, more than one personality has conduced to a reform, may tend to mislead, and to give false views of legal history. Yet, in any estimation of the Victorian Chancellors, it is of the highest interest to endeavour to ascertain the effect of the several personalities on English law, in the first place as legislators, in the second as judges, otherwise the story of their lives differs little from that of other eminent public servants, and the value of their careers is unassessed.

It has already been said that judicially the influence of the Lord Chancellor has under the force of circumstances steadily decreased. This is especially marked in the extent of judicial decisions. Lord Truro, for example, was Chancellor only for a year and seven months (1850-52), yet one hundred and thirty of his decisions are preserved, and fill two substantial volumes in the Chancery

Reports. On the other hand, during two years of Lord Halsbury's tenure of the Woolsack he gave judgement—during the years 1903 and 1904—in fifty-four appeals in the House of Lords, but in conjunction with other members of that tribunal. So that the judicial and individual influence of these judgements is not so great as if they had been delivered by a single judge. The influence of a judge on the body of English law is to some extent a question of time as well as of individual power. Lord Stowell and Lord Mansfield are memorable as judges; not only in consequence of the breadth and clearness of their judgements, but also because each was fortunate in the period during which he was a judge. Lord Stowell was partly able to mould the law of the Prize and of the Admiralty Courts because before his time judicial decisions in them had not been formally reported, and because he occupied the office of judge of the High Court of Admiralty at a time of a great maritime war and of a notable increase in maritime commerce. Lord Mansfield had also the opportunity of laying to a considerable extent the foundations of modern commercial law. Other names will not be forgotten—those of Willes, Blackburn, and Esher, in whose time much of the later body of commercial law was established, and on it these three judges have left their mark. But the tenure of office of the Chancellors is not sufficiently long to allow a moulding effect to be produced, and their individual influence on English law cannot therefore be considerable, even when the mental character and training of a Chancellor had been such as to give his judgements the breadth and the vivid expression of elemental principles as applied to concrete facts, which alone enables them to have the distinction and guiding power

to become landmarks in jurisprudence. Thus, numerous as were Lord Truro's decisions as a judge of appeal both from the decisions of the Vice-Chancellors and of the Masters of the Rolls, they are largely concerned with purely technical matters which are of little value beyond the immediate case in which they are raised. Lord Truro was a sound lawyer, though somewhat narrow in his outlook; in early life he had been an attorney much versed in the technicalities of his profession, so that he was without the training conducive to that habit of mind which seizes the opportunity to lay down in a luminous manner interesting principles of law, and to give apt illustrations of their applicability to modern social and commercial conditions. In 1851 we take these cases almost at random as two illustrations of the failure to seize judicial opportunities —Lord Truro had to decide whether the Attorney-General, acting on behalf of the public, could file an information to restrain the group of undertakings which is now the Great Western Railway Company from opening what may be called their main line, until the branch to Stratford-on-Avon, for which parliamentary powers had been obtained, had been constructed. An important question —almost national in its far-reaching consequences—was here raised. Lord Truro was, however, content to deal with it in a judgment which occupies but a single page of the report. He was satisfied to state that he could not extract from "the information" any grounds to warrant the exercise of the jurisdiction of the court. In another case an opportunity occurred of delivering a judgement of large social importance, which by means of a lucid statement of principles might have been a guide in many succeeding circumstances. The Chancellor set aside a family compromise as having been fraudulently obtained.

"I shall content myself," he said, "with stating the principle of law upon which my decision is founded and name two or three cases of, I conceive, undoubted authority in which the principle is recognised and acted upon. That principle is that to render a family compromise binding there must be an honest disclosure by each party to the other of all material facts known to them relative to the rights and title of each as are calculated to affect the judgement in the adoption of the compromise." Then Lord Truro cited four decisions which he regarded as establishing his statement of law. This decision, doubtless, effectually concluded the pending litigation, but it is so brief as to be of little use in regard to future cases.

In striking contrast to these judgements of Lord Truro are those delivered by Lord Westbury. It was only lack of opportunity which prevented him from being memorable as a judge. He possessed in a remarkable degree a large outlook and a grasp of main essentials, as well as a power of clear and pointed expression which has only been approached since by the late Lord Bowen, who had the same love of precision and the same fastidious literary judgement. Four years is no long period in legal history, and it was impossible in that time for Lord Westbury to affect the growth of English law to any large extent, however peculiarly well suited to that end. The same hindrance is observable in the case of Lord Cairns. During the short Administration of Mr. Disraeli in 1868, he had little opportunity for the further 'developement of the judicial qualities which he had shown as a Lord Justice of Appeal. But the six years of Mr. Disraeli's second

Government, 1874-1880, gave Lord Cairns an opportunity of showing remarkable power as a judge, though the time was too short for its influence to be fully felt. Those judges who have in some degree moulded English law have had placed before them the same branch of law for a considerable period. To this cause eminent men—Stowell, Mansfield, Willes, Blackburn, and Esher, and to these names may be added Cresswell and Penzance—in no small degree owe the historical position which they now occupy. Lord Esher (Brett), for example, during a long judicial career, had to decide a large number of commercial cases. Early experience and some predilection for this branch of law gave him a special aptitude for dealing with it, which, though he had not otherwise distinguishing judicial characteristics, has enabled him to take a place among those who have individually affected the body of English law.

The judgements of Lord Cairns are remarkable for the ease with which long and complicated facts are marshalled into a comparatively short and almost an agreeable as well as lucid narrative, so that principles of law appear to emerge from them ready for solution. Legal principles enunciated with simplicity and with an absence of judicial affectation become extraordinarily clear, and the whole series of judgements thus constitute balanced masterpieces of judicial reasoning. But in spite of qualities which in the opinion of many cause Cairns to rank as the most eminent of the Victorian judges and Chancellors, he has, as has been said, failed to impress himself on British jurisprudence, even though judicially and personally he may be regarded as the first of the Victorian Chancellors.

To Lord Westbury's power of testing cases by means of ground principles, Cairns added the judicial gifts of self-restraint and patience and a capacity for precise reasoning and a quick insight, and was less unwilling than Lord Westbury to give weight to judicial precedents. Of his judgements it has been said that "they went straight to the vital principles on which the question turned, stated these in the most luminous way, and applied them with unerring exactitude to the particular facts. It is as a storehouse of fundamental doctrines that his judgements are so valuable. They disclose less knowledge of case-law than do those of some other judges; but Cairns was not one of the men who love cases for their own sake, and he never cared to draw upon, still less to display, more learning than was needed for the matter in hand. It was in the grasp of the principles involved, in the breadth of view which enabled him to see these principles in their relation to one another, in the precision of the logic which drew conclusions from the principles, in the perfectly lucid language in which the principles were expounded and applied, that his strength lay" (*d*).

It is undesirable to apportion with nicety judicial merit under the singularly varying circumstances of the several Chancellorships, but the testimony of competent critics appears to give Lord Cairns the first place as a judge among the Chancellors of the reign of Queen Victoria. He had, in addition to other qualities, one supreme merit as a judge, that of silence. A story is related of him which deserves to be remembered in every court in the

(*d*) Bryce, Studies in Contemporary Biography, p. 184.

land: "Lord Blackburn, one of the first Lords of Appeal under the Judicature Act, had acquired in the Queen's Bench a habit of interfering with the arguments of counsel by difficult questions in a harsh voice, which few who once heard it will ever forget. His first effort in this direction was checked, before an answer could be given, by a stern remark from the Woolsack, 'I think the House is desirous of hearing the arguments of counsel, and not of putting questions to him.'"

To listen without interruption to the arguments of counsel is a rule now often more honoured in the breach than in the observance, though it is one which should be strictly observed, especially in cases of an appellate kind, since the constant interrogation of counsel by the Bench not only delays the progress of a cause, but detracts in no small degree from the dignity of the court.

It was said at the commencement of this chapter that the careers of the Victorian Chancellors formed a striking picture of the lawyers of the age. Men of the most opposite gifts, qualities, and tastes, born in different circumstances, trained under varying systems, have become Chancellors. But though to some extent, and on some occasions, the holders of this high office have been indebted to a kind fortune, it is unquestionable that no man has attained it without remarkable qualities, and in every case the Woolsack has been the reward of unremitting labour and patience, and of the exercise of considerable mental powers. If Lord James of Hereford had been willing to accept the Home Rule policy of Mr. Gladstone, Lord Herschell might never have attained the

Woolsack; and if Lord Selborne had acquiesced in Mr. Gladstone's attack on the Irish Church, Sir Page Wood would never have become Lord Chancellor Hatherley. But no one would dream of regarding either Hatherley or Herschell as unfitted for the post to which a combination of circumstances and personal qualities carried them. Lord Herschell was barely fifty years of age when he attained office, and he would never have been, to use a popular phrase, "in the running," had he not shown unusual capacity both as a lawyer and a politician. Lord Hatherley, on the other hand, was approaching seventy when, much to his surprise, Mr. Gladstone offered him the seals, but he would never have received them had he not, in addition to the political virtue of being a sound Liberal, added to it the qualification of being admittedly an equally sound lawyer and a painstaking judge. In a word, the several careers of the Victorian Chancellors prove that there is no special road to the Woolsack. Natural ability cultivated very highly in a particular profession, united with power of expression, and unusual capacity for work added to an adaptability for politics, are the main features of these various lives. So long as mind and will were concentrated on the practice of the law, no hereditary gifts, no special early training were requisite. Indeed, the difference in these respects is noteworthy. If we take—by way of example—four Chancellors: St. Leonards, Cranworth, Chelmsford, and Westbury, we find that the first was the son of a barber, the second of a clergyman, the third of a merchant, and the fourth of a doctor. The first seems to have had the slight and unsystematic education which was usual at the end of the eighteenth century, to have become a clerk in a solici-

tor's office, and in that capacity to have attracted the attention of Mr. Duval, a well-known barrister, who took him as a pupil without a fee. Cranworth followed, as might be expected, a more normal course. From the Grammar School of Bury St. Edmunds he proceeded to Trinity College, Cambridge, and thence to the Bar. Chelmsford had a curious early career. Educated, if one may use the phrase, for the navy, with a short experience, yet he found himself in the West Indies, and having decided to become a member of the Bar in St. Vincent, he came to England to qualify himself for his future profession. When reading in the Temple he was persuaded by his master to relinquish the idea of a colonial life, and become a barrister in England.

The last of the four men whose careers for the moment we are noting was educated at home, and then sent at the early age of fourteen to Wadham College, Oxford, and when called to the Bar he was only twenty-three. It would be interesting, if it were possible, to ascertain the actual quality which assured to each one of these men professional success. Lord St. Leonards at the very outset of his career published the now classical treatise on the law of vendors and purchasers. Lord Bowen once said that to write a law-book was to produce a work which redounded in time little to the credit of the author, because it was constantly being altered by changes in the law. But as the years advance the name of Lord St. Leonards will remain fixed and noteworthy in legal annals as an author as well as a judge. Other jurists have written books and have not become Lord Chancellors, and other lawyers have had intellects as clear as Westbury's, and have had but

little of his professional success. A considerable combination of qualities united in a single personality may, however, be noted. Every Chancellor has been a lawyer of some eminence, an advocate of fair capacity, confident in himself and thus giving confidence to his clients. Common sense and insight into men and their motives, so that the knowledge of law should be capable of application to the business of the world, have also been necessary adjuncts. How little, indeed, of the academic temperament there is in the English lawyer, how entirely unprofessorial he is, is well exemplified by the careers which we are now surveying. The salient qualities of the Englishman of the eighteenth century, his common sense, his clear view of an objective, and his absence of imagination seem to be perceptible in all these eminent persons. In other words, they were typically English, they suited the English taste, as shown by that essentially English person, the solicitor with a practice. Perhaps Westbury was the most academically-minded of the group, and it was his absence of common sense which caused his downfall; indeed, a man less abnormally brilliant would never have had that want of the perception of the ordinary man's mind which Westbury constantly showed in his biting sarcasms. An intellectual arrogance had gained the mastery over him, which showed itself on the smallest provocation. "Mr. Rolt, we must be careful how we make our quotations in the presence of that distinguished scholar, Mr. Bethell," said Lord Justice Knight Bruce on one occasion, as he and Rolt were quoting passages against each other. "I beg your lordship's pardon," said Bethell, looking up, "I thought my learned friend and yourself were quoting from some Welsh author." But among the

Victorian Chancellors Westbury was unquestionably pre-eminent for mental grasp and range, for a vivid interest in any subject which came within limit of his mind, and for his classical cultivation (*e*).

Our legal education may be unscientific, our jurisprudence informal, but nothing, as these careers indicate, can detract from the fact that the English Bench is as a whole the most meritorious in the world, because even in the case of the Chancellor, who must be a politician and must belong to the party in power, in every instance during the reign of the late Queen Victoria the lawyer who has been chosen by the Prime Minister for the time being for the office has arrived at the position which, by common consent alone, makes him eligible, by his individual exertions and by his intellectual capacity.

As a politician the Chancellor is but one among several members of a Cabinet, each of whom, even if, as happens to-day, there are among them men who have practised at the Bar, is primarily a politician. A Chancellor who can be pre-eminent as a statesman and a debater must be of

(*e*) A popular historian in commenting on the death of Lord Westbury has called him a "failure," and rhetorically pronounced "the close of his career but a heap of ruins." (M'Carthy, History of Our Own Times, Vol. IV. pp. 378, 379.) This statement is an absurd exaggeration. Westbury, after a brilliant professional career, was Chancellor for several years. He left office under Parliamentary censure on a comparatively small administrative mistake, and he subsequently served with distinction as a judge both in the House of Lords and the Privy Council, and was strongly urged by Mr. Gladstone to accept the office of a Lord Justice of Appeal. It was generally recognised that his administrative error was caused by good-natured carelessness. Westbury's loss of office is chiefly remarkable as an example of the cleanliness of English official life—a small mistake cut short his official career.

abnormal capacity. To be a useful politician and a capable lawyer—Lord Halsbury, for example, well answers this description—is not enough to cause a Lord Chancellor to be singled out for particular commemoration. Looking back over the lives of those who occupied the Woolsack during the reign of Queen Victoria, two names only seem to satisfy the test which enables us to rank them as statesmen of weight and influence, those of Lyndhurst and Cairns. The influence of the former in the House of Lords was remarkable; in 1832 he nearly destroyed the great Reform Bill. His power arose from the fact that he was not only an orator and a debater, but also united large general knowledge to much worldly shrewdness.

"Lyndhurst," says his last biographer, "possessed an extensive and accurate store of knowledge on the minutiæ of the Eastern question, and on the history of Austria and Prussia. Five years later, when in his eighty-eighth year, he took the opportunity, on July 5, 1859, of calling attention to the state of our national defences. It was the year of Solferino and Magenta, and its later months were marked by that extraordinary ebullition of Anglophobia on the part of the French colonels which evoked the Volunteer movement on this side of the Channel. In July there was no open sign of ill-feeling between the two nations, but Lyndhurst pointed out how vastly the invention of steam and the improvements of internal communications had increased the striking power of our old rival, as illustrated by her rapid mobilisation and triumphant campaign on the Mincio, and he proceeded to state to the House the measures which he deemed necessary for the safety of the country. Into these details we need

not follow him further than to notice that he was emphatic in his insistence upon what is known as the 'two-Power standard' recently raised by official acknowledgement to 'two Powers and a margin.' If we wish to be in a state of security, if we wish to maintain our great interests, if we wish to maintain our honour, it is necessary that we should have a power measured by that of any two possible adversaries."

And when Lord Palmerston was in doubt as to the person whom, when he came into office for the last time in 1859, he should create Lord Chancellor, it was to Lyndhurst that he applied to solve the difficulty, and it was on his advice that Campbell, then Chief Justice of the Queen's Bench, was selected. "He had always belonged," said Lord Lyndhurst, "to the Liberal party, he was a sound lawyer, and would do no discredit to the Woolsack." When we remember the position and the character of Palmerston, it would be difficult to find a better illustration than this of the opinion that was held by his contemporaries of Lyndhurst's sagacity and shrewdness. Yet his brilliant qualities were sometimes in the zenith of his career marred by a certain irresponsibility and by an audacity which, whilst they often served him well in debate, inclined him to take risks which slower intellects would not have incurred. Still he remains among the Victorian Chancellors a striking and illustrious figure, connecting the mid-Victorian period with Eldon and the eighteenth century, at once a memorable Chancellor and a Parliamentarian of the first order.

It is singular that the man whom we couple with him

was so dissimilar to him. The urbanity of Lyndhurst was in marked contrast to the austerity of Cairns. One passed his life in actual physical enjoyment, the other was always contending against ill-health. The one lived to a great age, the other was prematurely taken from his contemporaries. Yet each attained to a position of exceeding political influence by the sheer force of ability. But Cairns, though he was equal to Lyndhurst as a debater and a politician, was unquestionably superior as judge, and it is for this pre-eminent combination of qualities, as we have said, that Cairns should probably be held to be the first of the Victorian Chancellors. No two men worked harder for their party; but Cairns was a Conservative by conviction, Lyndhurst by choice. It is remarkable, however, that whilst Lyndhurst would have involved the country in a formidable constitutional crisis over Lord Grey's Reform Bill, the more true-hearted party man, as Cairns was, negotiated the passing of the Irish Church Bill of 1869. It would be out of place here to enter into details of this episode, which is political and not legal. It is sufficient to say that the Bill had passed through the House of Commons by a large majority, that in the Lords the second reading had also been carried, but that the measure was in danger of destruction in Committee, and that it was through the disinterested efforts of Lord Cairns that the opposition of the Conservative party was overcome.

This action was not only a remarkable revelation of Cairns' character, but one which stamps him as a statesman of first-rate calibre, who combined boldness with caution, and it exemplifies the influence which he had

gained over the Conservative party and shows the position which he attained as a statesman.

Cairns now seems a distant figure belonging to a quite departed generation. In later times, had Lord Herschell not prematurely died at Washington whilst engaged on an official mission to the United States on the Venezuelan boundary question, it is not impossible that he would have won fame as a statesman not less than that of Cairns. Herschell united in an unusual degree conspicuous merits as judge and statesman—perhaps in time he would have become more famous on the larger stage. To a mind of singular quickness he added sagacity and an insight into men, a self-reliance and a self-control which fitted him more than most of his contemporaries for high political office. In 1886 he formed one of the famous Round Table Conference upon the Home Rule question, and in 1892 he was one of the Cabinet Committee which drafted the second Home Rule Bill. Of that Committee Lord Morley and Mr. Bryce are now alone left, and this bare enumeration shows the position which, had fate been kinder, might in time have been Herschell's in the councils of the nation. Though as a judge both learned and quick, the tendency of his mind was probably rather political than judicial, and he has left no mark on English jurisprudence. He was perhaps more supple than Lord Selborne in reconciling himself to the demands of party; and he was free also from the ecclesiastical idiosyncrasies which marked not only Selborne but Hatherley and Cairns. His mind was of a broad and tolerant cast, and he had been educated in a legal school more likely than the Court of Chancery to breed a statesman. Herschell

is in many ways certainly not the least agreeable personal figure of this group of Chancellors, for he was full of varied interests, kindly, friendly, and courteous. Lord Selborne's gravity of manner rarely left him. Lord Cairns' austerity was almost chilling, and, like Mr. Gladstone, he had the old Covenanter's habit of seeing the finger of Providence in acts obviously due to his own volition. Lyndhurst was rather too pronouncedly a man of the world, and the kindly, smiling face of Cranworth, if always pleasing, was a little monotonous. In his life at the Bar and on the Northern Circuit Herschell had not only in his professional work a varied experience of legal business, but on the social side he had been brought into contact with various sorts and conditions of men, and had had opportunities of enlarging his knowledge of different sides of human nature. The difference between the Common Law and Chancery Bars in their effect upon character is certainly obvious in the case of the Victorian Chancellors; and unquestionably more facility in handling men is apparent in those Chancellors whose professional life was passed at Westminster and not at Lincoln's Inn.

After considering the careers of the Victorian Chancellors some may be tempted to think that a lifelong legal training does not tend to make a man a statesman, and that the pursuit of politics does little good to law. It is, however, certain that the combination of law and politics has in every generation given us a group of men at once remarkable and interesting, the like of which is not to be found in any other country. And those who care to study individualities and powerful wills directed to the attainment of legitimate objects of civil ambition

by the straightforward exercise of high attainments will find no more marked and admirable examples than in the Chancellors of the reign of Victoria, even though their influence in English law and procedure has, on the whole, been less than would have been anticipated from their high position.

CHAPTER XI.

THE INNS OF COURT.

There is sometimes to be seen in an English landscape the remains of a great tree, firmly rooted in the ground, but with a huge and immovable trunk, and without branches, only a few feeble green shoots indicating that life still exists in it. An Inn of Court at the present time may be likened to such a tree: it is there, fast rooted among English institutions, having a certain ancient picturesqueness, but maimed, and with little of its former vigour and luxuriance left. Yet it is so firmly fixed that it is less likely to be removed than many younger growths.

From a purely utilitarian point of view the Inns of Court are anachronisms. When we compare their elaborate but unwritten constitutions, their buildings and their revenues, with present practical results, the difference between their functions now and in the past is remarkable. They have ceased to be great educational bodies; their main business is to admit to the Bar those who desire to practise as advocates in England. Certain tests of fitness are required from those so admitted; and to enable students to pass the examinations instruction is given. But the passing of the examination is the main point upon which the student sets his mind. Thus the

Inns of Court are rather examining than educational bodies. They are also the owners of premises which are the business resort of one branch of the legal profession, but this fact cannot be regarded as in any sense a fulfilment of a public duty; it is now the result of a long-continued custom, but it is a thing which could be as well, if not better, managed by a limited company of ten years' existence as by a society which counts its lifetime by centuries.

Moreover, the creation of a General Council of the Bar has not only deprived the Inns of Court of their old disciplinary functions, but has made the unfitness of these societies to control a part of the legal education of the country more obvious. Yet still they are here, and here they will certainly remain, the object of constant criticism, more historically interesting than practically useful.

To-day, as we have said, the Inns of Court fill a comparatively small place in the legal system of England, and are of no account at all in the social life of the time. Thus their legal and their social importance in the past is apt to be overlooked and forgotten. But England in the fifteenth and sixteenth centuries cannot be understood without a proper recognition of the place filled by the Inns of Court, and of their influence on English law and society, just as to know the society and the politics of Great Britain at the end of the eighteenth century we must appreciate the clubs and coteries of St. James's Street.

For the true realisation of an institution in the past we

require to have before us what may be termed the details of the day, and it is impossible to obtain exact information in any other manner than from original documents. The opportunity now exists to study in detail the history of the Inns of Court in mediæval times. We have not to trust only to the statements of Fortescue and Dugdale; the records of the Inner and Middle Temples, and of Lincoln's Inn can be perused in the fullest detail. Some cynics may remark that the Inns of Court would have done well not to exhibit the vigour of their earlier days so markedly in contrast with the decrepitude of the present. But the historical student will rightly thank these societies not only for their public spirit in publishing their records (*a*), but for the admirable manner in which they have been produced.

The records of Lincoln's Inn carry us farthest back. They are called the Black Books of Lincoln's Inn, and begin from 1422, in the first year of the reign of Henry VI. They do not, however, cover the whole history of the Inn as a legal society or college. Older documents there no doubt were, which contained the entries relative to this earlier period.

But the existing Black Books contain an immense mass of detailed information, in which, among much that is trivial, interesting and important facts are embedded:—

"Besides the admissions, the Black Book contains

(*a*) A Calendar of the Inner Temple Records. Edited by F. A. Inderwick, Q.C. 3 vols. 1505—1714.—The Records of the Honourable Society of Lincoln's Inn. 4 vols. 1422—1845.—Middle Temple Records. Edited by C. H. Hopwood, K.C. 1501—1703. 4 vols.—Master Worsley's Book on the History and Constitution of the Honourable Society of the Middle Temple. Edited by R. H. Ingpen, K.C. 1910.

entries of the most varied character: the names of those yearly filling the different offices of the society; the names, after 1518, of those called by the society to its Bench and Bar; the minutes of the governing body; the yearly accounts of the two great officers of the society, the Pensioner and the Treasurer; the accounts of members to whom the special superintendence of some building or other work had been entrusted; narrations of public events" (*b*).

The Temple has been less fortunate. The Bench Table orders and the accounts down to the reign of James I. have disappeared, as well as a number of old records, rolls, and writings which are referred to in the documents which are, happily, still in existence, and which begin in 1505. The loss of the Inner Temple records would have been more to be lamented if it were not for the preservation of those which belong to Lincoln's Inn. The actual life, whether educational or social, of the two societies did not apparently differ, so that by the aid of the records of Lincoln's Inn we are able to survey the system of legal education in England for many centuries, which was also an important element in the social life of the country in mediæval times. But neither the records of Lincoln's Inn nor of the Inner and Middle Temples give us direct information upon the actual origin of two societies which have filled so important and curious a part in the legal and social history of this country. For remarkable these societies beyond question are. They have been, from their very beginning, a university without statutes and without a

(*b*) Vol. I. p. 1.

definite set of rules, existing under a species of customary organisation. For the orders of the Privy Council —as, for example, those of 1574, which, it is stated, were "established" with the advice of that body and the justices of the Queen's Bench and Common Pleas—appear to be rules drawn up by the Benchers and approved by the Privy Council. The sanction of the Council gave these regulations a force which they would not have otherwise possessed. In other words, they issue from the society which they regulate; they are not statutes or ordinances introduced by a hostile or a supreme legislature. These Inns were, in fact, at once academic and professional bodies, singularly unfettered, exercising functions of the first importance in the national economy, yet wholly free from any species of State control. The education of English barristers, the supervision of the whole body of English advocates, has been the duty of these societies, which in the beginning appear to have been no more than stray aggregations of lawyers and of legal students, who have continued from century to century to manage their affairs free from any external control.

We are so much accustomed to look at the Inns of Court as well-recognised parts of English society, their peculiar organisation has been so familiar to many generations, that we are apt to overlook both the singularity and the continuity of their existence, and the noticeable example they afford of the freedom and the individuality of the English people.

Though, as we have said, the records of the Inns of Court do not give any direct statements as to their origin

—which, indeed, could not be expected—they make the character of that origin pretty clear. A body of lawyers rented some land and premises on the east side of what is now Chancery Lane from two landlords, the Bishop of Chichester and the Hospital of Burton Lazars of Jerusalem in England. The occupation of the first portion was probably between the years 1245 and 1253, when Richard, Bishop of Chichester, filled this see. For in 1466 a statute of the society begins—"In honour of Almighty God, of Jesus Christ our Lord, of S. Mary His mother, and of S. Richard, formerly Bishop of Chichester, late dwelling in this house of Lincoln's Inn, and the true possessor thereof in right of his church of Chichester" (*c*). For this property the society paid "a yearly rent of 10 marks, reduced by Bishop Arundel to 8 marks, and raised again to 10 marks on that prelate's death. . . . On the southern edge of this estate were houses with back doors opening on to gardens which abutted on Ficketsfield; there were other buildings on the property, some houses used as chambers, a hall with a kitchen and butlery, and a chapel. In 1537 Bishop Sampson sold the land held of the see to William and Eustace Sulyard, from whom it descended to Edward Sulyard" (*d*). An interesting minute of 1580 shows at once the way in which the estate then became the absolute property of the Inn, as well as the composition of the governing body at that time. A number of lawyers took it into their minds to become tenants of land and buildings for which the ecclesiastical owner had little personal use, and this body of lawyers in later times, without aid or interference

(*c*) Vol. I. p. 1.
(*d*) Vol. I. p. 2.

from the State, decided to make it their home in perpetuity.

The history of the two Temples is somewhat different. Here we have the Knights Hospitallers, or the Knights of St. John of Jerusalem, possessed of the Church of St. Mary and of the semi-ecclesiastical buildings which were grouped around it. This half-priestly order of knighthood was, by the middle of the fourteenth century, decaying as a separate body whilst the lawyers were increasing; and so it came about that in the year 1347 a group of lawyers became the tenants of the Knights Hospitallers, taking possession of most of the secular buildings at a rent of 20 marks a year, and leaving to their landlords the church of the order and its adjoining chapels.

"They also retained in office, as the keeper or guardian of the church, an ecclesiastic known as 'The Master of the New Temple,' who was, under the Prior of S. John, responsible not only for the maintenance of the fabric and for the decoration of the church, but also for the performance of the services and for the lodging and sustenance of the priests" (*e*).

And so things remained until the dissolution of this famous order in 1540, when the lawyers became the owners of the entire Temple as tenants at will of the Crown. Their title was precarious, and on the accession of James I. there are indications that some of the Scotchmen about the Court would have been glad to turn the

(*e*) Inner Temple Records, Vol. I. p. 20.

lawyers out of their property. The Temples had, however, influence enough to turn this danger into an actual benefit, and in 1608 the societies of the two Temples were confirmed by patent in their possessions. The recital of this document contains these noticeable words: "whereas the Inns of the Inner and Middle Temple, London, being two out of those four colleges the most famous of all Europe, as always abounding with persons devoted to the study of the aforesaid laws and experienced therein, have been, by the free bounty of our progenitors, kings of England, for a long time dedicated to the use of the students and professors of the said laws, to which, as the best seminaries of learning and education, very many young men eminent for rank of family and their endowments of mind and body have daily resorted from all parts of this realm." The patent then proceeds to grant and confirm all the buildings of the Inner and Middle Temple at a yearly rent of 10*l*., payable by each Inn.

We have stated how, when the Knights Hospitallers granted the semi-ecclesiastical buildings to the lawyers in the fourteenth century, the church was excepted from the grant. This exclusion now came to an end, and all the buildings "commonly called the Temple Church" were handed over to the lawyers. The Mastership of the Temple was, however, vested in the Crown, and not in the Benchers of the Temple. The grant was something more than a confirmation of the possession of the temporal buildings, and an addition by gift of the ancient church —it was a recognition of the position of the two Temples as great colleges of the law. In the new order of things

which was beginning in England it established them securely, linking their mediæval existence with that modern life which has continued to the present day.

Of the division of the legal society which was located in the Temple into two bodies the books of the Inner Temple tell us nothing. But among the MSS. of that society still preserved there "is a pamphlet of twenty-six pages folio, closely written, in the nature of a report, giving an account of the origin and growth of the Knights Templars, of their building of the New Temple. . . . According to this statement, the lawyers . . . in the reign of Henry VI. divided themselves into those two societies, the Inner and the Middle Temples" (*f*).

This pamphlet is part of the collection of William Petyt, who was Keeper of the Records of the Tower, and in 1701 Treasurer of the Inner Temple. To some extent this account is merely a report transferred to writing, but it is substantiated by passages in the "Paston Letters," some extracts from which are given in the introduction. In these letters the first mention of the Inner Temple as a single society is in 1440. Before that date the reference is to the Temple as an undivided body. There can, therefore, be little doubt that some time in the reign of Henry VI. the lawyers who were associated in the Temple divided themselves into two separate bodies, having, however, a common church. Those who occupied the buildings nearest to the City naturally called their portion of the estate the Inner Temple, while those who lived in

(*f*) Inner Temple Records, Vol. I. p. 17.

the other portion, intermediate between the Inner Temple and Westminster, gave it the name of the Middle Temple.

But at the very time when the Temple was entirely losing all signs of its ecclesiastical character, which in some degree had clung to it for so many years, the lawyers were being troubled still by an ancient privilege. This is not the place to dwell on the well-known right of sanctuary, a right which, it need scarcely be said, attached to the Temple Church and its precincts. Adjoining the Temple was that historic refuge of criminals and thieves, Whitefriars, or, as it was commonly called, Alsatia. The result of this proximity was that the Temple was constantly invaded by ruffians of all sorts. Access to the church and its burying-ground "appears to have been surreptitiously effected through houses built on land forming part of the New Temple, which had their front entrance in Fleet Street, with backways into the churchyard." Continual attempts were made by the Bench to prevent this and other means of access. Sometimes doors are to be bolted and barred, sometimes "strongly mured up with bricks;" sometimes it is a petition which is under consideration from the fellows of the Temple, complaining of the disturbances "caused by a disorderly crew of outlawed persons." From these and other details in these records we obtain a lifelike picture of a phase of English society which, however discreditable, cannot be overlooked. By the middle of the seventeenth century the most flagrant disorder in the Temple had been checked, but its precincts for years continued to be the haunt of debtors and disreputable persons, who by no means were always excluded from the Temple itself, and gave to it

an atmosphere of Bohemianism little characteristic of its professional and academic purpose.

It is necessary, however, to return to the foundations of the Inns of Court before describing shortly the system which prevailed there.

It is obvious that before a body of lawyers was sufficiently homogeneous to begin a corporate existence, not only as a college of law, but also as a club, if the expression may be used, of professional lawyers, it must have had some kind of social or professional bond of union. This connexion seems to have sprung from what were subsequently called the Inns of Chancery—originally, there can be little doubt, hostels or common lodging-houses for lawyers and law students. The legal caste had grown into existence in England with surprising rapidity, though in mediæval times it was almost entirely confined to London. Being a caste, there would be a tendency in those who belonged to it to live together, and to form some kind of indefinite corporation. The lawyers in the thirteenth century were collected round the king's courts at Westminster.

"In Edward I.'s day we see that the king has a number of pleaders, who are known as his servants or serjeants at law (*servientes ad legem*). Already in 1275 it is necessary to threaten with imprisonment 'the serjeant countor,' who is guilty of collusive or deceitful practice. Also, there seem to be about the Court many young men who are learning to plead, and whose title of 'apprentices' suggests that they are the pupils of the serjeants. We may

infer that already before 1292 these practitioners had acquired an exclusive right to be heard on behalf of others. In that year King Edward directed his justices to provide for every county a sufficient number of attornies and apprentices from among the best, the most lawful, and the most teachable, so that king and people might be well served" (*g*).

Once we realise a class, however small, of lawyers, however uneducated in legal principles, but with some kind, at any rate, of special knowledge, at the end of the thirteenth century, it becomes easy to perceive that they would live together in houses convenient of access to the king's courts. It is these houses which were the Inns of Chancery, and which appear to have historically a twofold character.

It is probable that in the first instance they were simply common lodging-houses, which gradually lost their private character as their owners died. Thus, in 1344, Isabella, widow of Robert Clifford, demised to the apprentices *de banco*, or students who frequented the Common Bench, what subsequently became known as Clifford's Inn, and "the will of John Thavie, an armourer, who died in 1348, shows that he was the owner of a hospice which had been, and probably then was, frequented by students of the law" (*h*). Thavie's, or Davy's, Inn was afterwards, like Clifford's Inn, one of those ten Inns of Chancery which became affiliated to the Inns of Court. In each of

(*g*) Pollock and Maitland's History of English Law, Vol. I. p. 194.
(*h*) Inner Temple Records, Vol. I. p. 12.

the above instances there cannot be a doubt of its earlier character, so that the evolution of the Inns of Chancery producing, as one may say, the Inns of Court, and then falling into definite positions as subsidiary but important members of the collegiate legal system of mediæval and later times, is clear. How truncated and diminished, then, in our day is the great legal academic system of an earlier age!

In their second form the Inns of Chancery have become subsidiary and auxiliary to the larger and more important societies, the Inns of Court. Broadly speaking, there is some analogy between the relations of the Inns of Chancery and the Inns of Court in the sixteenth century and the great public schools and the universities of Oxford and Cambridge in the nineteenth, though there was between the two legal bodies a closer union than between the schools and the universities, a union which grew stronger after the purchase of Thavie's Inn in 1551 and Furnival's Inn in 1548 by the greater society of Lincoln's Inn. In 1565 there is to be found in the Black Books of Lincoln's Inn the following entry in connexion with a meeting of the Benchers of the Society:—"None shall be admitted into this house hereafter unless he have been of some house of Chancery before, under five marks fine. None of Chancery shall be admitted under forty shillings, at his admission to be paid, unless he be an utter Barrister in Chancery and have kept two vacations as utter Barrister there" (*i*).

It was, therefore, the policy of the Inns of Court to

(*i*) Vol. I. p. 345.

oblige all those who desired admission to one of the legal colleges to have first been a member of the smaller society. In other words, we see, imperfectly no doubt, but clearly enough, a system of graduated legal education. Such a relationship depends on various details which in the lapse of time are necessarily lost; they cannot be restored, as can the parts of a great mediæval building, and so we must be content now to view them more or less in outline. But there was a yet more important connexion between the Inns of Court and of Chancery. The readers both of Thavie's and Furnival's Inns were members of Lincoln's Inn. Of these officials in the Inns of Court we shall have something to say presently. For the moment we are concerned not with the readers of the Inns of Court, but with those of the Inns of Chancery, more especially as connecting the smaller and the larger societies. The reader was the official channel of communication between the society and the Houses. "Every reader of Court is to give order to their Houses of Chancery that the orders for apparells and weapons and study be observed by their companies." The reader was the teacher, the lecturer of those who belonged to the Houses of Chancery, and the responsibility for his efficiency and for the performance of his duties lay with the legal university. Thus, if a member of an Inn of Chancery applied for admission to an Inn of Court, the latter body received a person already educated to some extent in legal principles. There was obviously, therefore, a definite system, a lower and a higher form of legal membership. In 1574 there were approved and recognised by the Privy Council ten orders for the government of the Inns of Court. The ninth order runs thus: "The reformation and order for the Inns

of Chancery is referred to the Benchers of the Houses of Court whereto they are belonging: wherein they are to use the advice and assistance of the Justices of the Courts at Westminster." Up to this date the relations between these different bodies may be regarded as customary only; from the moment of these orders they are almost statutory. The order recognises existing practices and sanctions them for the future. At this epoch the Inns of Court, with their affiliated and subsidiary Inns of Chancery, are at the most important point in their history, at once legal colleges and societies for the governance and the enjoyment of the advocates of England.

It is now time to turn to a survey of the character of these great institutions.

We have to picture to ourselves what must, in the language of to-day, be called a college. At either of the two ancient English universities we see grouped under various titles a society of students and teachers, with their hall, their chapel, their library, and their living-rooms, with their rules for education, and their social meetings. The scene was the same at Lincoln's Inn and at the Temples in the Middle Ages, where the hall was the centre of the society. It was "the only fire to which the majority of students had access." It is easy to picture the social gatherings in the hall, not always peaceful. "Kenelm Digas," we read in an entry of 1465, "was put out of the society because, on the Sunday before Christmas Day, he violently drew his dagger, in the hall of the said Inn, upon Denys, one of the fellows of the Inn. Afterwards, on the 1st of March, at the instance of several fellows, Digas was

readmitted on condition that he should not carry a dagger within the Inn, or the precincts thereof, for one whole year, because he had offended with his dagger in form aforesaid, and, further, that he paid a fine of 40*s*. for the offence" (*k*).

Later we read of two students who were put out of commons for an affray between them in the hall. Indeed, it seems to have been a favourite place for a brawl, and the use of the dagger was frequent. Chalynor, on March 11, 1526, "was amerced 10*s*. for assaulting Stafferton junior with his dagger, and wounding him in the arm." Details such as these in themselves are trivial, but they are both interesting and important when we recollect how they indicate the character of the place and the nature of the gatherings in it. The entries, with numerous others, are important, too, as showing the discipline which existed in the society, a discipline in no sense concerned with legal matters, but characteristic of an academic society. The morality and the conduct — even the dress and the hair — of the members of the Inn was the constant care of the Bench; they were concerned not merely with the ordinary behaviour of those who assembled in the Inn, but with their habits when they were engaged in the ordinary social life of the place. "Purification of Blessed Virgin, 1495. Francis Southwell, John Pole, and Henry Smyth were put out of commons for playing at dice at night within the Inn, in the chamber of the said Henry, contrary to the statutes and ordinances of the Inn. Fined 10*s*. each" (*l*). To-day a room in Lincoln's Inn is usually a lawyer's

(*k*) Black Books, Vol. I. p. 40.
(*l*) Black Books, Vol. I. p. 103.

office; in the Middle Ages these rooms were almost identical with the rooms of undergraduates at a university. "For the most part they were long rooms, inside of which a cell or cells were constructed by panelling. These cells, called studies, were the subject of frequent orders by the Bench. The floor-space outside the studies was probably shared in common by the inhabitants of each chamber, and partly occupied by bedding. The Bench lay down that in chambers the junior is to give place to the senior, and on one occasion adjust a dispute about the title to some bedding in the chamber. Each house or chambers was distinguished by a name, such as Le Horsemill, Le Dovehouse, or by references to the occupants or sites of other chambers." They had, in fact, something of a particular and corporate existence, which made the club-like, social character of the societies more noticeable. They were bodies to which men belonged not merely for legal purposes, but because they formed a society at once legal and social. "Robert Abbot, of Missenden, in the county of Buckingham, was admitted and pardoned his vacations, and was allowed to be at repasts: for these liberties he granted to the society a hogshead of red wine yearly at Christmas as long as he lived." Such is an entry in the records of Lincoln's Inn in 1470. These honorary fellows, to whom there is constant reference in the records, no doubt strengthened the society and gave it a greater importance, but they were not active members of the legal college. The true "Socii," or fellows, were lawyers.

"At the head of the fellowship stood the masters of the Bench, with an executive of governors and officers. . . . Next to the Bench came the utter barristers, those

who had been called by the Bench to the Bar of the society; and last of all the clerks, whose position corresponds to some extent with that of the law student of the present day" (*m*).

The position of a bencher was an honourable one; but it was by no means always desired, and from time to time entries are found of members being expelled or fined for not taking the Bench. The Benchers of Lincoln's Inn seem to have met until 1524 in the chapel of S. Richard, the chapel of the society, where there is mention of a council chamber. From the benchers were elected the gubernatores, or rectores—the governors, usually four in number, who remained in office for a year. They were the executive of the fellowship; but after 1575 their functions appear to have been exercised by the whole body of benchers, and the term ceases to appear in the records. Next to the benchers came the barristers—a term which has now grown beyond its original meaning. The barrister for many years was not as such necessarily entitled to an audience in the king's court. In the orders of 1574 it is enacted that none shall be admitted to plead in the courts at Westminster, or to draw any pleadings, unless he shall be a reader or bencher of an Inn of Court, or five years "utter barrister," and have continued for that time in exercise of learning, or a reader in Chancery two years at the least. Thus it is clear that the "utter barrister" was no more than a person of legal education who had attained to a certain standing in an Inn of Court. He had taken a legal degree, and the barrister had ceased,

(*m*) Black Books, Vol. I. p. 5.

if one may so say, to be a legal undergraduate, and he had reached a standard of learning which rendered him eligible to be allowed to plead before the king's judges. Doubtless before 1574 there had been caprice and uncertainty in regard to the selection of those who might exercise the profession of advocates. In that year an end is made to this uncertainty, and those members of the legal colleges who had attained to a certain seniority in the society became thereupon qualified advocates (*n*). The distinction between the state of things in the sixteenth and the nineteenth centuries is important, for the systematised education of the earlier age becomes more apparent when we understand that an "utter barrister" was one who had attained an academic degree only. Lowest in order of the members of the fellowship came the clerks—those who had not attained the legal degree of utter barrister, in fact those who were pursuing a pre-graduate course of study, as those who were barristers for a time, at any rate, were occupied with post-graduate studies.

It may cause some surprise that those who had taken a degree should continue a study of the law. It must be remembered, however, that in the Middle Ages, the body we are considering did not consist only of professional lawyers. Legal studies occupied a larger place than is now the case in ordinary education, and the Inns of Court

(*n*) In the Judges' Orders, 1614, No. 6 runs thus:—"For that the over-early and hasty practice of utter barristers doth make them less grounded and sufficient, whereby the law may be disgraced and the client prejudiced: therefore it is ordered that for the time to come no utter barrister begin to practice publicly at any Bar at Westminster until he hath been three years at the Bar; except such utter barristers that have been readers in some houses of Chancery."

were a famous university to which young men of the highest rank were proud to belong (*o*). There are also distinct traces of something in the nature of a general elementary education being given. "Parker," so we read in 1506, "fined 12*d*. for throwing wyspis in Hall during the drinking time in an insolent way in the Grammar School." The innumerable mention of boyish offences; the resolutions of the Bench as to dress, as in this very year, when the Bench ordered that every clerk should "be decorously clad, and not with his shirt in public view beyond his doublet at his neck"—all point to students being little more than boys; which indicates again that we must take no narrow view of the functions of the Inns of Court and Chancery up, at any rate, to the end of the sixteenth century. We must therefore regard them as filling a great and important place in the general educational machinery of England. The latter word must be used advisedly. Irishmen were prohibited from becoming fellows of the society. In 1437 it was ordered "that no person born in Ireland should in future be admitted as a Fellow of the Society of Lincollysyn; and if any one born there shall hereafter be admitted by any person or persons, he shall be expelled."

In later years, when the rigour of this order was relaxed, and Irishmen, however few in numbers, became members of the society, they were regarded as a class who should not be allowed to mix with Englishmen. They were

(*o*) "These societies were excellent seminaries and nurseries for the education of youth, some for the Bar, others for the Seat of Judicature, others for Government, others for the Affairs of State."—Antiquities of Hertfordshire, Vol. I. p. 431. By Sir Henry Chauncey, who was Treasurer of the Middle Temple in 1685.

ordered, in 1556, to live in the chambers called the Dove-house, the special character of which at a later period is referred to when it was rebuilt: "to build from the ground the Irishmen's chamber called the Dovecot." It is in such entries as this that we see more vividly than by any amount of description the feeling of the age, and can realise the conditions of an epoch. It is easier also, when we bear in mind the youth of many of the members of the Inns of Court, to understand the place which minstrelsy and revels held in their life.

But it is with the educational system of the Inns of Court that we are now concerned. It reached its perfection in the middle of the sixteenth century; by the middle of the seventeenth it was in process of decay. In the beginning of the seventeenth century it was carried out with a difficulty which had not before been experienced, and after the breaking out of the Civil War it began to assume that partial and indeterminate character which it has borne in modern times. The reason is obvious. A system suitable for a mediæval society, one evolved out of the needs and the characteristics of a particular age, has been continued into years for which its peculiar character is not suited. In the fifteenth century the system of legal education could not be improved.

We have already referred to the composition of the society. Benchers from whom readers or teachers were selected; Utter and Inner Barristers and Students formed three grades of lawyers, the Benchers being, as we have seen, also the governing body of the several Inns, men of the highest experience and eminence in their profession.

For educational purposes the year was divided into terms, learning vacations, and mesne vacations. Many of the entries in the records of the Inns of Court are concerned with the keeping of the vacations by the members, either as learners or teachers. Indeed, "the pardoning of vacations" is so frequently mentioned that it would seem to indicate that there was a much larger number of fellows who made but a partial study of the law than the actual entries would suggest. The pardoning of vacations was also a convenient method of supporting the society, whether by money or kind. "Christopher Hanyngton, one of the Clerks of the Chancery, was admitted to the society in 1482, and pardoned all vacations and admitted to repasts, for which he shall pay a hogshead of wine or 20*s*. as he pleases" (*p*).

It is well known that the instruction given at the Inns of Court was chiefly oral; it could not be otherwise until reading and writing became common and easy, and text-books and reports became numerous. The form which this instruction took was threefold. It was by readings, by moots, and by bolts. The reading was in the nature of a lecture, probably for the younger students. The moot was the argument of a case, the chief form of technical legal instruction. Two members of the Inner Bar had to write upon a case which was chosen and assigned to them. By them it was taken to some of the Utter Bar:—"The case was to be cast into the form of pleadings, and after the argument at the Bar, in which the utter barristers were expected to join, the puisne of the Bench recited the

(*p*) Black Books, Vol. I. p. 73.

whole pleading, according to the ancient custom. Then the Bench advanced such arguments as pleased them. If any of the Bench advanced more than two points, the reader was to show him that he 'breaketh the common order.'" As years went on the mootings became more elaborate, and were a real preparation for the business of legal advocacy. As has been already pointed out, a barrister was no more than a person who had taken a legal degree and who continued post-graduate studies. It is obvious that with moots an important part of a system of legal education the advocate, whether of mediæval or more recent times, came to his duties in court far better prepared than does the barrister to-day, who has generally to gain experience at the expense of his clients. In former days an advocate who stood up to argue a case in court for the first time undertook a task with which he was acquainted, and for which he had been specially trained. The very judges whom he addressed were not unfamiliar to him (*q*). The practice at the Inns of Court stood him in equally good stead in the House of Commons as in the law courts. The value of it was held in the highest estimation by those responsible for the management of the Inns of Court, for, in addition to moots, there was the similar but simpler exercise—the bolt. In 1656 there is an order of the Bench of Lincoln's Inn which gives a picture of this exercise:—

"Ordered that the bolts hereafter to be performed be

(*q*) February 11, 1630:—"It is declared to be the ancient custom of this house that the reader for the time being ought to argue his own case, after that the judges who shall happen to be there present have argued."—Black Books, Vol. II. p. 292.

done by the utter barristers and gentlemen under the Bar in the same place as the vacation moots are usually performed; and that the Put-case standing between the two gentlemen under the Bar that are to argue, put his case, and after they are repeated by the ancient barrister that is then to argue, the Put-case is to sit down between the two gentlemen during the argument, and the Panierman is to place forms both for them that are under the Bar, and for the rest of the gentlemen that attend there" (*r*). The bolt appears, in fact, to have been a discussion, less formal and more elementary, among the less important members of the society, but equally intended with the moots to quicken the understanding and to give ease and proficiency in the verbal expression of legal arguments. When the value of these exercises ceased to be appreciated by the members of the Inns their practical usefulness for the purposes of legal education began to fail. A minute of 1659 states that "the holding up of the commons in vacation, intended by the Bench for reviving exercises in the vacation, which have been nevertheless neglected, is a charge, beside the fruitlessness thereof, too great for the revenue of the House." Thus, as the seventeenth century nears its end the decadence of the Inns of Court as great legal universities, as educational institutions of the highest value, can no longer be overlooked.

Into the social life of the Inns of Court the entries in these records give considerable insight. Music from the earliest times formed the main amusement of those who belonged to the societies. Growing out of it came the revels, more elaborate and expensive than simple singing

(*r*) Black Books, Vol. II. p. 412.

or playing. They were followed by masques, and these, in their turn, led, in a later age, to purely dramatic performances (*s*). The importance attached to music, the sums, considerable in amount, spent upon it (*t*), show the social importance of the Inns of Court. In an age when it was difficult to obtain amusement of a refined kind, the possibility of such enjoyment at Lincoln's Inn and the Temple indicates not only one reason of their popularity, but the place they at one time held in the social life of the age.

The Inns of Court, however, must not be regarded solely as schools of law, without reference to their influence on English society. It is not easy to overestimate their service in the past to English civil and religious liberty. From their very beginning they were purely secular societies. An abbot or a prior was from time to time admitted to them, but he joined them not as the superior, but as the equal of the laymen by whom they were formed and carried on; not to alter their character, but in order to be a member of a fellowship which was at once learned and social. They represented the influence of lay thought on English mediæval education, an influence not ephemeral, but lasting from century to century. The earliest colleges

(*s*) "Between 1660 and 1668 twenty plays were performed at the Inner Temple by professional actors, including plays by Ben Johnson and other well-known dramatic writers."—Inner Temple Records, Vol. I. p. 61.

(*t*) "Accounts of Ralph Scroope, Esquire, Treasurer, 6 & 7 Eliz., 1564–5. . . . Allowances 38*l.* 18*s.* Including 53*s.* 4*d.* to William Perryn and Richard Knight, minstrels [*musicis*], for their salaries at the Purification, 30*s.* to William Leade, paid to Robert Jugler, deceased, late harper [lyrator] of the Inn, 38*s.* 2*d.* for a supper for the boys of Mr. Edwards, of the Queen's Chapel, and for the staff torches and clubs and other necessaries for the play at the Purification last."

at Oxford and Cambridge were founded for the instruction of the clergy; in the famous universities of Italy—Bologna, Reggio, Modena—the civil and canon law formed the basis of the teaching. Nowhere but at the Inns of Court (*u*) could the Englishman study the common law, and as a member of a society free from any kind of papal, episcopal, or regal control. Nowhere but at the Temple or Lincoln's Inn could there be obtained an education, secular in its character, in its influence equally hostile to ultramontane and to regal pretensions. The unique position of the Inns of Court in this respect has hitherto been overlooked, because their great position has been insufficiently realised, for at one time they certainly formed, in the language of Coke, a "most famous university for purposes of law."

Moreover, their self-government, the intimate association of men of various ages and stations in the pursuit of a common study was conducive to the enlargement of intelligence, to accuracy of thought, and to the understanding of the rights of individuals. It was at the Temple and Lincoln's Inn that the common law of England, so vital to the growth of the nation, was treasured, studied, discussed, and handed down from one generation of students and lawyers to another, until, like the civil law and the canons, it grew into a definite body of jurisprudence. It is not easy to estimate the exact influence of the education received at the Inns of Court on English jurisprudence and procedure. It is certain, however, that it must have been considerable. It was a practical rather

(*u*) Trinity Hall, Cambridge, was founded in 1350 as a school of civil and canon law, "probably designed to further ultramontane interests."

than a theoretical education, it regarded law in relation to the daily needs of the people, and it fitted students to become legal men of affairs without delay. The entire system was carried on with one main object in view, to fit students for the actual practice of the law. Students met their teachers not as if the latter were professors, but as older and experienced members of the same profession. Thus the tendency of the education at the Inns of Court was to keep the law in its judicially created form, and to produce criticism not of theoretical legal doctrines, but of decisions given in relation to actual facts of social or commercial life. Possibly it narrowed the student's view of law, and made our jurisprudence somewhat unsystematic, but, on the other hand, it caused it to become what is after all the main object of any system of national jurisprudence, serviceable to the community.

When the Inns of Court began to fall into decay, their work as factors affecting the extension of the reign of law was almost finished. We see the results of it in the legal atmosphere which enveloped the constitutional struggle between the Stuarts and their subjects, in the law reforms of the Commonwealth, in the whig doctrines which prevailed at the Revolution. The influence of these ancient schools of law had permeated national life, and interesting as their history is as illuminating some phases of social life in the past, it is essential to remember that above all they formed a distinct and effective element in the developement of English law.

But the question naturally may be asked, Can the Inns of Court ever fulfil a larger part in the future than they

do in the present? No one can be satisfied with the present state of legal education; its systematic study is in this country neglected at a time when the appreciation of legal principles is more necessary than ever. For in the midst of an overwhelming mass of case and statute law legal principles are the only safe guide. Solicitors are subject to examination, but the teaching they receive has to be found by themselves. Quite to the end of the seventeenth century attorneys were members of the Inns of Court. They were suffered as members mainly for the purposes of legal education. In the orders of 1574, which have already been referred to, we read that "if any hereafter admitted in Court practice as attorney or solicitor, they to be dismissed and expulsed out of their houses thereupon, except the persons that be solicitors shall also use the exercising of learning and mooting in the House, and so be allowed by the Bench." As the difference in the nature of the work done by barristers and attorneys became more marked the exclusiveness of the Inns of Court became greater. In 1635 there was an order that no attorney or common solicitor be admitted, yet in spite of it attorneys were certainly members of the society at a still later period. This modern exclusiveness should be altered. The Inns of Court might resume their functions as great legal colleges. They should not limit the legal education which they give to students who intend to practise as barristers. There should, too, be a closer relation between the Inns of Court and the universities. The study of law at Oxford or Cambridge in most instances takes the place of studies which should precede it; and there is a tendency to use the law schools of the universities for the purposes of professional rather than of general educa-

tion. The educational system of the Inns of Court should form either a post-graduate course of legal study for those who have already graduated in more general studies at the universities, or be followed simultaneously with an ordinary university career. This is no more impossible than is the practice of preparing for the Civil Service examinations during the university vacations. Some kind of relationship between the Inns of Court and the universities must, however, be established before the former can be brought into their right position as educational factors. At present nothing is more remarkable than the complete separation and want of sympathy, educationally considered, between the universities and the Inns of Court. Some kind of touch between the two bodies might be created were, as would be quite possible, the professors and teachers of law at the universities to be members of the governing bodies of the Inns of Court. At the present moment, when the Inns of Court attempt to deal with legal education, the names of the legal teachers of the universities—men much more eminent than some of the practitioners who by age or forensic success become members of the Bench—are conspicuously absent. It is impossible that legal education can be satisfactorily dealt with by men who are without experience in legal education. It may, indeed, be doubted whether a successful professional man can ever, without assistance, be a desirable manager of what should be a college or university. The tendency of his mind is alien to academic thought; in the stress of mature work he necessarily loses touch of elementary teaching. On the other hand, the professional and the academic elements, properly united, make a better managing body than either

alone. If this be so, it is obvious that the educational authority of the Inns of Court—the Council of Legal Education—should have upon it some of those who at the universities have passed their lives in legal teaching and in the consideration of methods of study. In an age of great intellectual activity, when legal principles are entering every day into social and business relations, it is absurd to suppose that, if the teaching of law by the Inns of Court were placed on a broader and more scientific basis, and made more adequate both in regard to legal principles and professional practice, it would not eagerly be taken advantage of. A great school of law in the capital of the British Empire could hardly fail to attract students from all parts of the world, and the increasing facility of intercourse between the oversea dominions of the Crown and England would render it possible for the Inns of Court to again fill the large place which they held in past times. The social life of the Inns of Court has died out; yet in other respects it can scarcely be doubted that there are opportunities of usefulness open which the traditions of these great societies still render feasible (*x*).

The Inns of Court, though they have in recent years shown some signs of a recognition of the possibilities of their position, are far from having regained the place which the records published in late years so vividly recall to us. To the law school of Bologna students in the Middle Ages came from all parts of Europe, drawn thither by the excellence of the teaching. Is there any reason why in the immediate future societies

(*x*) Upon Lord Westbury's attempt to carry out this idea in 1846, see *ante*, p. 195.

with so noble an historic past as the Inns of Court should not become the central law school of England and her dependencies? The imperial idea is not necessarily one of expanding boundaries or growing navies; its development also lies in the strengthening of the connexion of England and her colonies by a common education in an ancient and common jurisprudence.

CHAPTER XII.

A RETROSPECT.

In the first pages of this book a sketch was given of the beginnings of English law, and the legal scene was briefly surveyed for the first three centuries after the destruction of the Anglo-Saxon polity. Some phases and events in the growth of law and procedure since that time have also been depicted, and their places in the evolution of our legal system have been suggested. It may be useful in this final chapter to summarise some conclusions which may be formulated as we glance at the several subjects which have been discussed.

Two cardinal points seem to emerge from this survey —the flexibility and the permanence of English jurisprudence. The general groundwork of law and procedure once settled, the growth proceeded on the same general lines. There was never any drastic change such as, for example, occurred in France after the fall of the monarchy of Louis XVI. Even during the Commonwealth, as has been told, such changes as were proposed were in the nature of remedies and not of revolutions. The amalgamation in 1873 of the famous Courts of Common Law and Chancery into one Supreme Court, though superficially a momentous change, putting an end as it did to tribunals which had for centuries an independent existence, was

not one in fact. The three Common Law Courts at Westminster—the King's Bench, the Common Pleas, and the Exchequer—had long ago become in a great degree separate Courts of one division or section of tribunals. The union of these and other Courts into a single Supreme Court was, therefore, little more than the giving them a new name, though, as regards procedure, the amalgamation was the means of rendering it more simple and uniform. The Act of 1873 therefore did not alter the manner in which legal changes had hitherto occurred in England, though it was nominally, at any rate, a remarkable historical break. Yet permanent as has been not only the general body of law, but the system of civil and criminal procedure, neither the one nor the other has ever failed—perhaps sometimes tardily—to respond to the demands of the public. This has occurred in spite of the force of professional opinion which has been very conservative, and even during the Commonwealth, at a time peculiarly favourable for legal changes, was able to embarrass to some extent the efforts of law reformers. In truth, English law has always been susceptible to external influences, and on its commercial side absorbed principles and rules which had grown into customs among traders on the Mediterranean and on the North Sea which, as we have also seen, were enunciated in distant European towns.

From the fact that it is largely composed of judicial precedents it has also felt and shown in a marked degree, at certain times, the influence of individual members of the Bench. At the end of the eighteenth and in the first half of the nineteenth century this influence was most apparent, because the courts were then so constituted that

judicial individuality had plenty of play. Legislation had not yet raised innumerable points for judicial discussion, and there was ample opportunity for the statement of legal principles; it was an age of "leading cases." But this judicial influence would not have had so much effect, if the legal system had not from its beginning been highly centralised, and at work in a country of small size, so that a judicial decision had all the power of a legislative enactment.

By the House of Commons English law has been criticised and protected, and law and procedure alike exemplify the beneficent effects of popular government, and sometimes also its defects. In the history of Bankruptcy legislation we see an excellent example of the influence of Parliament—reflecting the changes of public opinion—on a branch of law the substance of which has always been statutory, though it has received innumerable judicial glosses.

Throughout the ages English law has been constantly in a state of slow evolution, and, trifling as some of the changes appeared at the time—if we review the centuries which lie between to-day and the Anglo-Saxon epoch—we are struck with the importance of the results of the aggregate of small things. Of all the influences which have affected civil law the most important appears, as was to be expected in this country, to be that of commerce: in some form or other, it was always making itself felt with increasing force, and constantly enlarging the body of the common law, and, as we have noted—as illustrated by the Commercial Court—affecting procedure. If, there-

fore, one conclusion more than another is to be drawn from any review of English law in the past it is the importance of regarding it not as a subject separate and apart, fit for the study of a special class of students and for the labours of practitioners, but as one inseparably connected with and affected by the movements of politics and society from its very commencement.

Again, in a survey of this kind, we cannot fail to be constantly reminded of the passion for legality which has always characterised the English people, and which it is suggested was not a little due to the existence of a central legal university—the Inns of Court—at which men from all parts of England and of all degrees of society were students, and from which a knowledge of, and respect for, law were disseminated into the remotest corners of the kingdom. We see this characteristic—the desire for legality—in the Laws of the Forest, and in the forestal judicial system rude as it was. Doubtless, many wrongs remained unredressed, but in the forestal areas an elaborate system of justice was found in mediæval times, which at any rate mitigated the power of the strong arm and carried a sense of law into the wildest parts of the land. We see it also on the sea, where the personal authority of the Lord High Admiral grew into a judicial tribunal for the settlement not only of maritime disputes but of those as to the validity of the capture of a prize in time of war. This last is, perhaps, as remarkable an instance as can be found, because in no other European country was the question of the right to a prize regarded from the same legal point of view.

English law is often stated to be chaotic and wanting in precision, but if we cast our glance over the spaces of time which extend from the beginning of the thirteenth century to our own day, and note the working of the English legal system and the action of English jurisprudence, we may very well be satisfied with one and the other. For, making the necessary allowance for individual and national imperfections, for the difficulties which surround the ascertainment of legal obligations, rights, and remedies, in times less civilised than our own, it is certain that English law and procedure have always been serviceable and useful, in a word, popular. For they have answered to national requirements, and they have remained abreast of national demands—as in regard to the Law of Evidence—and, after all, more could not and ought not to be expected.

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