A HISTORY OF ENGLISH LAW

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IN SEVEN VOLUMES

For List of Volumes and Scheme of the History, see p. ix

A HISTORY OF ENGLISH LAW

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VOLUME VI

To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law. ROGER NORTH

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THE RIGHT HONOURABLE FREDERICK EDWIN

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SOMETIME LORD HIGH CHANCELLOR OF GREAT BRITAIN

THIS WORK

IS

BY HIS LORDSHIP'S PERMISSION

RESPECTFULLY DEDICATED

PREFACE

THIS volume concludes Part I of Book IV of this History. The sixth chapter, with which this volume opens, deals with the public law of the seventeenth century, and shows how, as the result of the constitutional conflicts of that century, our modern constitution and constitutional law have emerged. It is necessarily a long chapter, partly because the subject is intimately bound up with the general history of England, and partly because the events of that century have never before been treated from a purely legal point of view. The continuity of English history has given to seventeenth century constitutional history a very permanent influence upon the politics of later centuries, with the result that its history has too often been written from the point of view of those politics, and has reflected the political prepossessions of the writer. But, if we would understand the strength and weakness of the claims made by King and Parliament, we must approach the problem from that legal point of view which was adopted by both the contending parties in the seventeenth century. It is only in this way that we can do justice to these rival claimants to sovereignty. The seventh chapter carries on the history of the enacted law from the point at which it was left in the second chapter of this Book, and describes the modifications and additions made by the legislature between 1660 and 1700. The eighth chapter deals with the professional development of the law. It also is a long chapter. This is partly due to the fact that no history of this period in our legal history has ever been written before; and partly to the fact that in the legal world, as on other sides of our national life, modern conditions then decisively emerged. It is obviously necessary to spend some time

in explaining why, under these conditions, our law and legal institutions assumed their familiar shape.

Both in the fourth volume of this History, and still more in this volume, the number of pages allotted by my publishers has been exceeded. It is due to the liberality of the Directors of the Commonwealth Fund of the United States, on the recommendation of their Legal Research Committee, that I have been able to include in the fourth volume and in this volume the extra pages needed to obtain completeness of treatment. It is naturally a source of great satisfaction to me personally that the Directors of the Commonwealth Fund should have done me the honour of recognising my work in this way; and I am sure that it will also be a source of great satisfaction to all English lawyers that America should have helped in the production of a history of what is perhaps the most valuable part of our common heritage—our common law and equity. Legal history has always been a branch of learning which has owed very much to American scholarship. By its students the names of such legal historians as Holmes and Wigmore and Pound, as Ames and Thayer, will always be honoured. I hope that readers of these volumes will agree that the action of the Directors of the Commonwealth Fund and its Legal Research Committee has increased the debt which we English lawyers already owe to the lawyers of the United States.

I again have to thank Dr. Hazel, All Souls Reader in English Law in the University of Oxford, and Reader in Constitutional Law and Legal History in the Inns of Court, for the benefit of his criticism, and his help in correcting the proof sheets; and Mr. Costin, Fellow and Lecturer in History at St. John's College, Oxford, for making the list of statutes.

All Souls College, Oxford
June, 1924

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PART I

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CHAPTER VI

THE PUBLIC LAW OF THE SEVENTEENTH CENTURY

THE contest between King and Parliament for predominance in the state occupies the greater part of this century; and the victory of the Parliament resulted in the settlement of the law of the constitution upon its modern basis. I have necessarily touched, in the first volume[1] and in the preceding chapters of this Book, upon those phases of this contest which affected the relative position of the various courts which administered justice in the English state; and, in the last chapter, it was necessary to deal with this aspect of the contest in some detail, because Coke's efforts to assert the supremacy of the common law courts and the common law led him finally to adopt the cause of the Parliament, to identify the cause of the common law with the cause of the Parliament, and thus to cement the old alliance which had long existed between them. As I have already pointed out, this alliance, thus cemented, secured both the continuity of the constitutional development of the English state and the supremacy of the common law. But, to understand the manner in which these results were produced I must, in the first place, turn back to the accession of James I., recall the many unsettled questions, both political and ecclesiastical which Elizabeth left her successor to solve, and consider the rival solutions of those questions suggested by James I. and Charles I. on the one side, and by Parliament on the other. In the second place, I must say something of the results of the civil

[1] Vol. i 459-465, 508-516, 553-558, 609-611.

war and the breakdown of the constitution to which the incompatibility of these rival solutions led. In the third place, I must discuss the events of the latter half of the seventeenth century which led to the Revolution of 1688, and the final settlement of the law.

I shall, therefore, divide the history of the public law of this century into these three periods: Firstly, the reigns of the two first Stuart kings; secondly, the period of the Civil War and Commonwealth; and thirdly, the reigns of the two last Stuart kings and the Revolution settlement.

I

The Reigns of the Two First Stuart Kings

In the constitution of the sixteenth century "Conventions"—that is, "customs, practices, maxims, or precepts which are not enforced or recognized by the Courts"[1]— played as large a part as in the constitution of the nineteenth century. It is true that neither the function of these conventions, nor even their existence, was clearly appreciated till the publication of Dicey's classic work upon the Law of the Constitution in 1885. But, in fact, the existence of some such conventions was as necessary in the sixteenth as in the nineteenth century. At both periods they were necessary to secure the working of a constitution, which had gradually grown up and was as gradually being modified; which was governed, not by a code, but by the indefinite common law;[2] in which the powers of government were divided between different persons and bodies. For, as Burke has said,[3] "the constituent parts of a state are obliged to hold their public faith with each other . . . as much as the whole state is bound to keep its faith with separate communities;" and this obligation naturally gives rise to the "customs, practices, maxims, or precepts" which create conventions. No doubt the nature of these conventions has varied greatly from age to age; and it is the fact that they are capable of variation "from generation to generation, almost from year to year,"[4] that has rendered them so powerful an aid to the smooth and continuous running of such a constitution. Obviously the sort

[1] Dicey, Law of the Constitution (7th ed.) 413.
[2] Vol. iv 53-54, 188-190, 200-209.
[3] Reflections on the French Revolution (7th ed.) 28; cp. Bryce, Modern Democracies i 492-493 for other illustrations ancient and modern.
[4] Dicey, Law of the Constitution (7th ed.) 30.

of conventions which are applicable to our own days, when the House of Commons is the predominant partner in the constitution, will be very different from those applicable to the sixteenth century, when the Crown was the predominant partner. Obviously, too, the conventions of the earlier of these two periods will be more uncertain and less capable of exact statement than the conventions of the later; for they will depend to a far greater extent upon the personal character of the ruler, and will in many cases resolve themselves into those qualities of mingled tact and firmness which made the Tudor monarchs the true leaders of the nation. Yet, if we look at the way in which these monarchs, during a century of acute religious controversy and social and economic change, retained the confidence of Parliament, and, without a standing army, restored and kept the peace; if we remember that the law which defined their prerogatives on the one hand, and the powers and privileges of Parliament on the other, was by no means clearly defined; and if we remember also that their *via media* in religion was at first disliked both by their Roman Catholic and by many of their Protestant subjects —we must admit that the conventions which gave them political predominance, and guided them in the manner in which they exercised it, were as successful in securing the smooth running of the constitution, as the more definite conventions of a later century, which perform a similar function for the House of Commons.

But times change and conventions become worn out. They are not however at once discarded. If they have been successful, they have attracted the unreasoning reverence of those large numbers who dislike change; and if, as in the Tudor period, they centre round a successful monarch, personal loyalty will be a decisive factor in delaying the recognition of the need for change. Respect for the old queen, and her own skill and tact, had caused the old régime to last unquestioned longer than it would otherwise have lasted, and questions ripe for discussion to remain undiscussed. We have seen that in the latter years of her reign there were many signs that changes in men's political and religious outlook, and changes in economic facts, were raising large questions which foreshadowed modifications in the law and practice of the Tudor constitution;[1] we have seen that the growing independence of Parliament was certain sooner or later to raise the question of the relation of Crown to Parliament, and that it was obvious that the stirring of this question would raise the most fundamental question of all—the question of the

[1] Vol. iv 165-166, 189-190, 338, 348-349.

whereabouts of the sovereign power in the constitution;[1] and we have seen that the existing law of the constitution gave no certain answer to this question.[2]

It was fairly obvious that this question of the relation of Crown and Parliament would be closely bound up with fiscal and economic questions. The regular revenue of the Crown, and the produce of the subsidies tenths and fifteenths granted by Parliament, were decreasing at a time when the influx of the precious metals from the New World was causing the purchasing power of money to decline. Even Elizabeth, with all her parsimony, had been obliged to sell crown lands, and had died in debt;[3] and it was not likely that any other monarch would be able to run the state so cheaply as she. It was clear also that the growing Parliamentary opposition would be as much religious as political. A large number of men desired relaxations in the rites ceremonies and doctrines of the Church of England, which would have enabled them conscientiously to conform to it.[4] For the peaceful settlement of these questions there was needed a monarch with all and more than all Elizabeth's tact and understanding both of her people and of her own constitutional position. Unfortunately her successor was to all intents and purposes a foreigner, without tact, completely ignorant of all those conventions which had guided the Tudor sovereigns in their dealings with their Parliaments and their people, and holding a very definite creed as to the absolute position which he, as king, ought to occupy in the state. The Scotch antecedents, the early training, and the personal qualities of James I., made a conflict inevitable upon all the many outstanding problems of the day—political, financial, and religious.

When James I. succeeded to the English throne, Scotland was still a poor and backward country.[5] It was, in Clarendon's picturesque phrase, "but the wilderness to the English garden." Feudal anarchy of an early mediæval type was still rampant. The king was merely a feudal chieftain; and there was no hesitation in levying war against him and taking him prisoner in

[1] Vol. iv 208-209; vol. v 430. [2] Vol. iv 200-209; below 20-29, 83-87.

[3] "Parsimonious as she was, Elizabeth had been compelled, during the last five years of her reign, to sell land to the value of £372,000, and had besides contracted a debt of £400,000. There was indeed, when James came to the throne, a portion still unpaid of the subsidies which had been voted in the time of his predecessor, which was estimated as being about equal in amount to the debt, yet if this money were applied to the extinction of the debt, it was difficult to see how the expenses of the Government were to be met," Gardiner, Hist. of England i 293, and the authorities there cited; cp. Parliamentary Debates in 1610 (C.S.) Introd.

[4] See Proceedings at the Hampton Court Conference (1604) 2 S.T. 70; below 123-126.

[5] Maitland, Camb. Mod. Hist. ii 550-552; vol. iv 248 n. 1.

in order to get control of the kingdom.[1] Family feuds were able to rage unchecked.[2] With the victory of the Reformation, however, other elements had come into Scottish life, and the foundations of modern Scotland had been laid. In the sixteenth century, it is true, it might seem that these other elements had merely aggravated the existing disorder. The Scotch reformed church had become a power which could and did oppose the king, not only if he hindered the teaching of its doctrines and the enforcement of its discipline, but even if he declined to conform to its views as to the government of the state;[3] and the magnates used the new religious dissensions, and prosecuted their old feuds as Catholics and Protestants. "Faith may be changed; works are much what they were, especially the works of the magnates. The blood feud is no less a blood feud because one family calls itself Catholic and another calls itself Protestant. The 'band' is no less a 'band' because it is styled a 'Covenant' and makes free with holy names."[4] But, even in the sixteenth century, we should take a very superficial view of the effects of the Reformation upon Scotland, if we supposed that this was its chief result.

The Scotch church had been organized by Knox on the Calvinistic model; and Calvin had given to all those churches which fell under his influence both a theology and an organization as logical and as definite as the theology and organization of the Roman church. He had thus made these churches the fighting force of Protestantism which saved the Reformation in its hour of trial. Their theology was in some respects less liberal than that of the Roman church; but they taught a far stricter morality—there were no priestly mediators who could absolve the sinner or dispense with the observance of the law.[5] Their democratic organization gave them the driving force which enabled them to withstand the shock of the counter-reformation;

[1] See A. Lang, Hist. of Scotland ii 371-373 for Bothwell's plot of 1593, and chap. xvii for the Gowrie conspiracy of 1600; "it is to be noted," says Lang, "that such attempts continued to be made almost till the year when he attained the crown of England," ibid 368.

[2] "From the Orkneys to the Oykel, one set of feuds was raging; others were active from the Lawes to Kintyre; others from the Borders to Peebles, Hawick and Biggar. When there happened to be no great feud, involving every family of the gentry, the minor lairds were fighting among themselves. There were constant sieges and burnings of houses, from the great castle to the little peel tower. . . . In the volume of the Privy Council Register for 1613 . . . we have a list of running feuds. There are forty-two feuds, exclusive of the Highlands and the Islands, and these are not feuds of the sweeping character of Huntly *versus* Argyll, or Stewart *versus* Hamilton," ibid 541.

[3] "The combinations of lawless nobles and powerful preachers, must, but for the English succession, have been fatal to Scottish civilization," ibid 368.

[4] Maitland, Camb. Mod. Hist. ii 551.

[5] Fairbairn, ibid 365-366; cp. Gardiner, Hist. of England i 46.

and the democratic principles which they taught gave them their influence upon the politics of the future.[1] And the narrowness and intolerance of their theology, which, to our eyes, is one of their main defects, was then a positive advantage; for they were thus the better able to teach authoritatively to the poorer and humbler classes, to whom they appealed, a set of logical principles both intelligible and capable of arousing enthusiasm.[2] They thus gave to these classes, at once a political education by teaching them to govern themselves in their General Assemblies and Church Courts,[3] and a political ideal by teaching them to apply to the conduct and policy of their rulers the same tests as those which they applied to their own conduct.[4] In these Assemblies and Courts a democratic form and theory of government were arising which claimed, as against kings and nobles alike, not only the supreme spiritual, but also the supreme political power in the state.[5] These ideas were destined to have an enduring effect upon Scotch life and character; and a large, though a transitory, effect upon the course of the contest between king and Parliament in England during this period.

James had spent his youth in contests with his turbulent nobles and this newly organized Kirk. He had been kidnapped by his nobles,[6] and defied by the ministers of the Kirk.[7] But he had at length managed, with some skill,[8] to secure for himself

[1] Gooch, English Democratic Ideas in the Seventeenth Century 42-48; cp. Basilikon Doron, Works of James I. (ed. 1616) 160—"Some fierie spirited men in the ministerie, got such a guiding of the people at that time of confusion [the Reformation] as finding the gust of government sweet, they begouth to fantasie to themselves a Democraticke forme of government: and having (by the iniquitie of time) beene overwell baited upon the wracke, first of my Grandmother, and next of mine owne mother, and after usurping the libertie of the time in my long minoritie, settled themselves so fast upon that imagined Democracie, as they fed themselves with the hope to become *Tribuni plebis*: and so in a popular government by leading the people by the nose to beare the sway of all the rule."

[2] "Presbyterianism in Scotland, as expounded by Knox or Buchanan, and inwoven with politics by Murray and Morton, was a system of clericalism as much more irritating and meddlesome, as it was stronger and more popular in its basis, than that of Papal sovereignty," Figgis, Divine Right of Kings (1st ed.) 133.

[3] Gardiner, Hist. of England i 47; History of the Civil War i 226.

[4] "Under the eye of the minister of the parish, the kirk session gathered to inflict penalties on offenders, and in the kirk session no regard was paid to worldly rank," Gardiner, Hist. of England i 47.

[5] Figgis, Divine Right (1st ed.) 187-195; cp. Gardiner, Hist. of England i 47-48.

[6] Above 7 n. 1.

[7] Gardiner, op. cit. i 55-65; and he never forgot what he had suffered from the ministers, as the Puritans found at the Hampton Court Conference, and as the following passage from the Basilikon Doron, Works 161, shows: "I protest before the great God . . . that ye shall never finde with any Hie-land or Border Theeves greater ingratitude, and more lies and vile perjuries, than with these phanaticke spirits."

[8] "He had contrived to dominate the two strongest opposing currents, the lawlessness of the nobles and the pretensions of the preachers," A. Lang, Hist. of Scotland ii 478.

some measure of independence by playing off these rival powers one against the other. In 1594 the ministers had helped him to suppress the insurrection of the Earls of Huntly, Errol, and Angus.[1] On the other hand, the nobles in 1597 assisted the king to suppress the tumults raised by certain of the ministers, who wished to dictate the policy of the state, and declined to submit themselves to the jurisdiction of its courts.[2] The king had thus been able to gain, on the one hand, a definite and a permanent superiority over his nobility,[3] and, on the other, to curb the pretensions of the Kirk; and, in order to further the latter object, he had, in 1598, induced an irregular convention of the Kirk to allow him to appoint bishops to sit in Parliament.[4]

These events of James's earlier life had set a permanent mark upon his character and intellectual outlook.

He was good-natured and a lover of peace, and intellectually inclined to tolerance—but in practice showing little to those who disputed his own pet theories. And we shall see that he had constructed theories upon many of the political and ecclesiastical questions of the day; for he was learned in a bookish academic way, and a keen disputant. But his environment and upbringing had accentuated his natural defects. He was king in a feudal society. In such a society there was but scant recognition of "the divinity that should hedge a king;"[5] and, in a state that was at the mercy of lawless nobles, there was much corruption and extravagance, and little organisation.[6] James never acquired a dignified bearing; he was always extravagant, always inclined to gratify the whim of the moment without counting the cost, and singularly blind to the corruption which was rampant at his court. At the same time he had been educated by learned men; and he had acquired all the defects of a learned pedant. He could criticize a theory, but he could not judge a man; and he was so vain of his own powers, so

[1] Gardiner, Hist. of England i 50-52. [2] Ibid 65.

[3] "This victory (over Huntly, Errol, and Angus) may be considered to be the turning-point of James's reign in Scotland. It established decisively . . . that the king had now a national force at his disposal which even the greatest of the nobility were unable to resist. The Scottish aristocracy would long be far too powerful for the good of their fellow countrymen, but they would no longer be able to beard their Sovereign with impunity," ibid 52.

[4] A. Lang, Hist. of Scotland ii 433-434; it was settled in 1600 that the king was to choose each bishop from a list of six selected by the Kirk, ibid 434.

[5] Maitland, Camb. Mod. Hist. ii 552—"Douglases and Hamiltons and others, hereditary sheriffs and possessors of 'regalities,' were slow to forget that these crowned stewards of Scotland were no better than themselves. What had 'come with a lass' might 'go with a lass,' and was in no wise mysterious;" see vol. ii 213, 255-256, vol. iii 460-463 for similar ideas in England in the Middle Ages.

[6] "How the distracted Scotland, torn by family feuds, ungoverned, unpoliced, could ever have reached a milder civilization, except by way of union of the Crowns and English influence, does not appear," A. Lang, Hist. of Scotland ii 562.

set on his own fancies, that, "whoever would put on an appearance of deference, and would avoid contradicting him on the point on which he happened to have set his heart at the moment, might lead him anywhere."[1] Such a man was predestined to fall into the hands of flatterers and favourites; and his want of natural dignity led him to show his fondness for them in ways which made him ridiculous. Elizabeth had had her favourites; but she never allowed them to gain uncontrolled power. And, though she gave them places and titles, she possessed in an eminent degree the Tudor power of attracting and using the ablest man of the day. This power was denied to the Stuarts; and James allowed his favourites to assume a large control over the government of the state. The contrast between James and his predecessors, and between their respective courts, could not but excite contemptuous criticism.

And yet he had views as to the dignity of his office, and as to the nature of his duties, as clear and strong as those of any Tudor. The state of his kingdom had forced upon him, as the state of their kingdom had forced upon the Tudors, the need for suppressing the turbulent nobility, and securing an even-handed administration of the law.[2] It was characteristic of the man that this need had produced, not practical measures of reform, but a definite theory as to the place which a king should occupy in the state. That it had had this result upon James's mind was due in part to the natural bent of his mind, but chiefly to the influence of the Calvinistic system in which he had been educated.

The Calvinistic system explained and regulated, with the neat logical precision of the lawyer, all the relations of God to man, and of man to man. It dominated the intellectual life of Scotland for many generations, and has played no small part in giving to Scotchmen that "power of reducing human actions to formulæ or principles,"[3] and that comprehensive outlook upon

[1] Gardiner, Hist. of England i 49.

[2] "And although the crime of oppression be not in this ranke of unpardonable crimes, yet the over common use of it in this nation, as if it were a vertue, especially by the greatest ranke of subjects in the land, requireth the King to be a sharpe censurer thereof. Be diligent therefore to trie, and awfull to beate downe the hornes of the proud oppressours: embrace the quarrell of the poore and distressed, as your owne particular . . . neither spare ye anie paines in your owne person, to see their wrongs redressed," Basilikon Doron, Works of James I. (ed. 1616) 158; "the greatest hinderance to the execution of our Laws in this countrie, are these heritable Shirefdoms and Regalities, which being in the hands of the great men, do wracke the whole countrie," ibid 163.

[3] "There appears to be in the genius of the Scottish people—fostered no doubt, by the abstract metaphysical education of their Universities, but also, by way of natural taste, supporting that education, and rendering it possible and popular—a power of reducing human actions to formulæ or principles," Bagehot, Literary Studies ii 247.

life, of a serious, literal, and business-like sort, which so irritated Charles Lamb.[1] James was an early product of this new intellectual type; and, in his case, though the intellectual characteristics are normal, the use made of the training was in that age by no means normal. It was not normal because James was the king of Scotland. The logical consequence of the Calvinistic theories was the establishment of the power of the church in quite as independent a position as that which the church of Rome claimed for itself. There were two kings and two kingdoms in Scotland, Melville told James, "There is Christ Jesus the King and his kingdom the Church, whose subject King James VI is, and of whose kingdom not a king, nor a lord, nor a head, but a member."[2] It is no wonder that James soon thought out a theory of divine right for the king, which was completely contrary to the theory of divine right by virtue of which the church set up its claim to control the king and state. It was necessarily a theory of divine right, because it was only a theory which was made to rest on this basis that could successfully oppose a theory similarly based.[3] As Figgis has pointed out, in the seventeenth century "the notion of divine right was in the air, and so all theories of government were then theories of divine right."[4]

James's views as to the position of the king in the state are contained in the "Basilikon Doron," published in 1598,[5] and more at large in the "Trew Law of free Monarchies," published in the same year. A Monarchy, he holds, is the most perfect form of government, because it approaches most nearly to God's

[1] Essays of Elia, Imperfect Sympathies—"The brain of a true Caledonian . . . is constructed upon quite a different principle. His Minerva is born in panoply. You are never admitted to see his ideas in their growth—if, indeed, they do grow, and are not rather put together upon principles of clock work. You never catch his mind in an undress. He never hints or suggests anything, but unlades his stock of ideas in perfect order and completeness. He brings his total wealth into company, and gravely unpacks it. His riches are always about him. . . . You cannot cry *halves* to anything that he finds. He does not find, but bring."

[2] Cited Gardiner, Hist. of England i 54; as Figgis says, Divine Right (1st ed.) 205, "the Presbyterian system, which, asserting national independence of Papal sovereignty, would have yet set up within the nation an organization which would have dwarfed the State and hindered the growth of the nation's life. A Geneva on a great scale would not have been a national Church. Before the Church should have established its position, the nation would have disappeared."

[3] "It is no matter for surprise, that at a time, when the sons of Zeruiah were too strong for him, and he felt his authority a mockery before the insolent representatives of ecclesiastical bigotry, James should promulgate with logical completeness, and grasp with the tenacity of a narrow but clear sighted intellect, the theory of the Divine Right of Kings," ibid 136.

[4] Ibid 175.

[5] As to the date of its publication see A. Lang, Hist. of Scotland ii 438-439; at first only seven copies were printed; in Sept. 1599, Dykes, a preacher, laid extracts from the book before the synod of Fife without disclosing the authorship, and the synod, "humourously forwarded them to James as the works of a malignant but anonymous author."

government of the world;[1] and a king is not "mere laicus," but the "office is mixed betwixt the ecclesiastical and civil estate."[2] He proves to his own satisfaction from the Old Testament, that a king, being God's lieutenant, must be implicitly obeyed, and under no circumstances resisted.[3] He is the author and maker of the law,[4] and has power to mitigate, suspend, and interpret it.[5] No rival power can be admitted in the state. He is subject to the control neither of the church nor of his subjects, and, being above the law, is answerable only to God for his acts.[6] That he can be bound to his subjects by any enforceable contract he proves to be legally impossible—"None of them can judge of the others break."[7] As Figgis says, "*In the True Law of Free Monarchies* is to be found the doctrine of divine right complete in every detail."[8]

It was both remarkable and creditable to James that he should have used his talents to construct a theory of political philosophy. And, in fact, many of his political views were not only sensible but even in advance of his age. He desired peace, a measure of toleration,[9] and a complete union between England and Scotland. But, though he could write and speak sensibly upon these topics, he was never more than an enlightened philosopher. He never grasped the fact, that, when a policy has been elaborated, the most difficult task yet remains to be accomplished—the preparation of the means for, and the removal of the obstacles to its execution.[10] And so when he came to play his part upon a larger stage he only succeeded in gaining the reputation of being the wisest fool in Christendom.[11]

[1] Basilikon, Works (ed. 1616) 148; The True Law, ibid 193.

[2] Basilikon 182; see vol. ii 444 n. 2 for a similar idea in the Y.BB.; and see vol. iv 215 for similar ideas in the Tudor period.

[3] The True Law 195-200—"Obedience ought to be to him, as to God's Lieutenant in earth, obeying his commands in all things, except directly against God, as the commands of God's minister, acknowledging him a judge set by God over them, having power to judge them, but to be judged only by God, whom to only he must give count of his judgment; fearing him as their judge; loving him as their father; praying for him as their protector; for his continuance if he be good; for his amendment if he be wicked; following and obeying his lawful commands, eschewing and flying his fury in his unlawful, without resistance, but by sobs and tears to God."

[4] Ibid 202.

[5] "Where he sees the lawe doubtsome or rigorous, hee may interprete or mitigate the same, lest otherwise *summum jus* bee *summa injuria*: and therefore generall lawes, made publikely in Parliament, may upon knowen respects to the king by his authoritie bee mitigated, and suspended upon causes onely knowen to him," ibid 203.

[6] Ibid 202-203. [7] Ibid 207-209. [8] Divine Right of Kings 136.

[9] Gardiner, op. cit. i 141-145; cp. his speech to Parliament 1603, Works 491.

[10] "Keenness of insight into the fluctuating conditions of success, and firmness of will to contend against difficulties in his path, were not amongst the qualities of James," Gardiner, op. cit. v 315.

[11] "On James himself the final word was spoken when he was called 'The Wisest Fool in Christendom,'" A. Lang, Hist. of Scotland ii 519.

When he came to England he found a set of conditions which appeared to correspond remarkably with his political ideals. The language of the men who had been trained in Elizabeth's court seemed to show that Englishmen were ready to subscribe to his views as to the divinity and the sovereignty of the king; and the language which the lawyers used about him and his prerogative seemed to prove it conclusively.[1] At the same time the attitude of the churchmen, who relied upon the royal supremacy to help them to resist all concessions to the Puritans, contrasted very favourably with the attitude of the Presbyterian ministers, and confirmed him in his belief in the interdependence of monarchy and episcopacy.[2] But, to his surprise, he soon discovered that Parliament claimed to occupy a position in the state which was quite incompatible with the position which he claimed for himself as king;[3] that the language of the lawyers about the king and his prerogative did not prevent them from insisting firmly upon supremacy of the law in the state;[4] and that the sentiments expressed by the bishops were not those of a large number of the members of the church of England.[5] Unfortunately these discoveries wrought no change in his theories or his policy. "He took for realities the formulæ of adulation which survived from the court of a woman and a Tudor."[6] And so he set to work to preach his theories and enforce his policy. Inevitably, therefore, he identified the monarchy with the party which magnified the king at the expense of Parliament, which was prepared to accept his absolute control over the law and the law courts, which was opposed to the smallest alteration in the rites and ceremonies of the church of England. Thus he split the nation into two parties; and the split was intensified by the fact that all the many various causes of dissension which existed in the nation were thus enlisted under the banner of one or other of these two parties. The upholders of the rights and privileges of Parliament, the common lawyers, and

[1] "As a king I have least cause of any man to dislike the common law: for no law can be more favourable and advantagious for a king, and extendeth further his prerogative than it doeth," James's speech at Whitehall, 1609, Works, 532.

[2] Below 127-128.

[3] Thus in 1604 he writes to his Council that "he is surprised to hear reports that the House of Commons, instead of submitting to the opinion of the judges in the points of dispute between them and the king [the case of Goodwin v. Fortescue] take upon them to judge both of the judges opinion and of royal prerogative," S.P. Dom. 1603-1610, 90, vii 1; in 1610 he writes that "he is not satisfied with the reasons given by the council why the offensive speakers in Parliament could not be punished; thinks they are afraid of the burden of doing it, and desires to know what evidence Queen Elizabeth had when she punished Wentworth's father, and why he should be tied to other formalties than she was," ibid 649, lviii 54.

[4] Vol. iv 201-202; vol. v 430.

[5] Below 123-126.

[6] A. Lang, Hist. of Scotland ii 520.

the Puritans, were united against those who magnified the king's prerogative, against those who supported the courts which competed with the common law courts, and against those who maintained the necessity for strict compliance with the rites and ceremonies of the church. And the contest between these two parties in the nation was embittered by the financial straits of the court—straits which were due in part to the king's extravagance,[1] by an unpopular and futile foreign policy, and by the action of some of the bishops and clergy who, not only preached high prerogative doctrines, but even seemed, in their fondness for pomp and ritual, to be inclining towards Rome. We shall see that, as the contest proceeded, the two parties naturally elaborated their constitutional positions; and that there gradually emerged two different theories of the constitution—the theory of the king's and the theory of the Parliament's supporters. Similarly we shall see that the religious opposition to the absolutist, and what seemed to be the Romanising tendency of the church, gradually drew to itself not only the Protestant nonconformists, but also many moderate churchmen.

Thus James chose to become the leader of a party instead of the king of the nation;[2] and his son followed in his footsteps. Both suffered from the fallacy, which is common to all party leaders, of supposing that the opposition to their views came only from a factious minority.[3] Neither could ever grasp the fact that that opposition had the support of the majority of Englishmen; and that their own obstinate adherence to their policy was constantly increasing that majority. They never ceased to hope that the next Parliament would really represent what they

[1] Parliamentary Debates in 1610 (C.S.) xiii-xv.

[2] "Changes in the balance of power were of course rendered inevitable by the growth of wealth and intelligence and the decline of the influence of the old nobility; but it was largely due to the king that the transition took the form of revolution instead of evolution," Gooch, English Democratic Ideas in the Seventeenth Century 69.

[3] James, in his Proclamation on the dissolution of Parliament in 1622, said, "Howsoever in the general proceedings of that House there are many footsteps of loving and well affected duty towards us, yet some ill-tempered spirits have sowed tares among the corn . . . and by their cunning diversions have imposed upon us a necessity of discontinuing this present Parliament without putting unto it the name or period of a session," Prothero, Constitutional Documents 316; so Charles on the dissolution of Parliament in 1628-1629, said, "We do not impute these disasters to the whole House of Commons, knowing that there were amongst them many religious, grave, and well-minded men; but the sincerer and better part of the House was overborne by the practices and clamours of the other, who, careless of their duties, and taking advantage of the times and our necessities, have enforced us to break off this meeting," Gardiner, Constitutional Documents 97; S.P. Dom. 1628-1629, 489, cxxxviii 45, Heath, A. G., writes that, "the untoward disposition of a few ill members of the House of Commons" had caused the dissolution; see Gooch, English Democratic Ideas 102-103, for royalist explanations of the outburst of opposition in 1641; Reresby, Memoirs 43, says that the Queen attributed the Rebellion to "some desperate and infatuated persons."

considered to be the true feelings of the nation, and cease to oppose their wishes. To the end James lectured his Parliaments on the limitations upon their powers,[1] and his judges on his right to settle all questions of disputed jurisdiction and to interfere in the trial of cases in which he was interested.[2] To the end he upheld, in defiance of Parliament, the churchmen who preached the religious and political doctrines which it detested.[3] Thus, as the reign proceeded, the breach between king and Parliament widened; and it widened more rapidly after the death of Cecil, who, while he lived, had managed to some extent to carry on the Tudor tradition. In the latter years of his reign, James occasionally profited by the political wisdom of Bacon; but matters went from bad to worse as he surrendered himself more and more to the guidance of the showy and incompetent Buckingham. It is true that the breaking off of the negotiations for the Spanish match produced an appearance of unanimity in his relations with his last Parliament. But it was only an appearance. At home the character of his political and religious views, abroad his adherence to a policy which seemed to concede everything to the Catholics, and to do nothing for his Protestant son-in-law, the Elector Palatine, had effectually divided the nation; and, unfortunately, his successor was a man whose principles were bound to aggravate all the existing causes of division.

James, with all his conceit and pedantry, had occasionally some glimmerings of practical common-sense; for he had had a troublous youth. He did not attempt to make changes in the liturgy of the Scotch church;[4] and he warned Buckingham, when he encouraged the impeachment of Middlesex, that he was preparing a rod for his own back.[5] He was capable, as Prothero has said, "of recognizing the impossible."[6] But Charles had never been brought into contact with the hard realities of life. He had acquired certain fixed and narrow views on political and

[1] See the king's message to Parliament in 1610, Parliamentary Debates 1610 (C.S.) 58—complaining of those who were too bold with his government "fetching arguments from former times not to be compared to these"; his letter to the House of Commons Dec. 3, 1621, Prothero, Constitutional Documents 310-311; and his answer to the petition of the House of Commons Dec. 10, 1621—"You usurp upon our prerogative royal and meddle with things far above your reach, and then in the conclusion you protest the contrary; as if a robber would take man's purse and then protest he meant not to rob him"; cp. S.P. Dom. 1623-1625, 260-261, clxv 61 for an account of the king's speech to Parliament in May, 1624—he forbade them, so Ed. Nicholas relates, to complain of his household, and angered the commons by making alterations in the preamble to a subsidy bill on the ground that it contained assertions contrary to his interests; for another account of this episode see Nethersole's letter, ibid 265-266, clxviii 10.

[2] See James's speech in the Star Chamber 1616, Works, 549 seqq.; vol. v 428 n. 5, 439-440.

[3] Below 129-131.

[4] Gardiner, Hist. of England vii 282.

[5] Ibid v 231.

[6] Prothero, Documents xxii.

religious questions; he could never be brought to see that any rational being could hold any other views;[1] and thus he could understand neither the national prejudices of his subjects nor the points of view of the different parties opposed to him. To his own views he considered it to be his duty to cling with all the obstinacy of an intellect that was narrow, and a nature that was weak.[2] Within these limitations he had a sense of justice, a desire to act in accordance with what he considered to be his legal rights, and some natural shrewdness.[3] These qualities enabled him to state effectively his point of view at critical moments of his life. His declaration put forward at the dissolution of the Parliament in 1629 was, as Gardiner says, "an able statement of his case against the House of Commons";[4] and nothing could be better than the manner in which he defended his cause before the court before which he was finally arraigned. But his somewhat narrow sense of justice, and his desire to act with strict legality, sometimes prevented him from taking the decisive action which the occasion demanded.[5] And, as he had a vacillating temperament, with a tendency to occasional outbursts of ill-considered action, he was sometimes obliged to take refuge in evasions and sophistries, and even in down-right deceit.[6] He did not regard this conduct as morally wrong, for the sincerity of his political and religious beliefs led him to consider all means justifiable which promoted those beliefs. It was persistence in this course of conduct which gradually destroyed all confidence in his honesty, and ultimately cost him his life.

When he came to the throne he was somewhat of an unknown quantity. But what little was known of him was good. His morals were pure, and he excelled in athletic exercises; he had artistic tastes and could criticize with some acutenesss a picture, a policy, or an argument; he had considerable theological knowledge, and was grave and dignified in his bearing. Moreover, the accident that he was in favour of war with Spain raised unwarranted expectations of a popular and a Protestant foreign

[1] "The firm convictions of his mind were alike proof against arguments which he was unable to understand, and unalterable by the impression of passing events, which slipped by him unnoticed," Gardiner, op. cit. v 318.

[2] Ibid vi 360-361. [3] See S.P. Dom. 1635, xlvi.

[4] Gardiner, Hist. of England vii 78.

[5] It was probably due to this cause that Charles hesitated to arrest the five members so long that the secret became known, see ibid x 134-135.

[6] S.P. Dom. 1635 xlvi; cp. Gardiner, op. cit. v 318-319—as Gardiner says, "He looked too much into his own mind, too little into the minds of those with whom he was bargaining. . . . When the time came for him to fulfil an engagement he could think of nothing but the limitations with which he had surrounded it, or with which he fancied that he had surrounded it. Sometimes he went still farther, apparently thinking that it was lawful to use deception against those who had no right to know the truth," ibid.

policy.[1] The French ambassador came to the shrewd conclusion that he was "either an extraordinary man or his talents were very mean."[2] If he had known as much as we do of his earlier history he would not have had much doubt as to which alternative was true. His subjects soon discovered that he was a king wholly unsuited to the needs of the England of his day; and, as his reign progressed, it became very clear that his capacity for government was very slight.[3]

During the earlier part of his reign he was, perhaps half unconsciously, dominated by Buckingham; but after Buckingham's assassination, no one again acquired the same amount of influence over him; and the government became essentially his government.[4] Even during the period of Buckingham's ascendency he showed impolitic eagerness to assume personal responsibility—perhaps to prove to the world that the line of policy pursued at any given time was really his policy.[5] But a man of his temperament needed a councillor on whom he could lean; and after Buckingham's death, he was controlled in various ways both by Laud[6] and his wife.[7] Unfortunately the narrow fixity of his political and religious views rendered him incapable of appreciating at their true value the characters either of his opponents or his supporters. "An Eliot or a Pym was to him just the same virulent slanderer as a Leighton or a Bastwick;"[8] and he never valued Strafford—the one able adviser he possessed—at his true worth, till after he had yielded to the pressure put upon him and signed his death warrant.[9] When that pressure became unbearable to a man of his temperament, when, after his rash attempt

[1] Gardiner, op. cit. v 319. [2] Ibid 317. [3] Ibid vi 360-361.

[4] Ibid viii 222; S.P. Dom. (1628-1629) 339, cxvii 83; "the duty of obedience to royal mandates was the corner stone of the thorough school of politics," ibid (1636-1637) ix.

[5] This is illustrated by his desire to give evidence in the proceedings against Buckingham, see the king's message to the Lords 2 S.T. 1293; this occasioned a question to be addressed to the judges by the House, "whether in case of treason or felony the king's testimony was to be admitted or not," ibid 1304, which the king forbade them to answer, ibid 1307; cp. Lords' Debates 1624 and 1626 (C.S.) 179, 186-187, 191; see also the interview between the earl of Totness and the King in 1626; the earl had said that it was better that he and the council of war should go to the Tower, rather than that the king and his Parliament should fall out, to which the king replied, "Let them do what they list, you shall not go to the Tower. It is not you they aim at, but it is me upon whom they make inquisition," S.P. Dom. 1625-1626, 275, xxii 51.

[6] Gardiner, op. cit. v 363-364.

[7] For her part in spurring Charles to arrest the five members, see ibid x 136.

[8] See ibid viii 300.

[9] That he bitterly repented this weakness is clear from his own letters; writing to the queen in 1645 he said, "Nothing can be more evident than that Strafford's innocent blood hath been one of the great causes of God's just judgment upon this nation by a furious civil war, both sides hitherto being almost equally guilty," Gardiner, History of the Civil War ii 115; cp. History of England ix 367.

to arrest the five members, he fled from London, when his wife had gone abroad, he appeared in his true colours—"a fleeting and friendlesse king."[1] He proved himself incapable either of organizing or of leading the large number of his subjects who were still loyal to him. His ignorance of the national prejudices of his subjects led him to alienate their sympathy by his attempts to get the help of an invading force of Irish or foreigners, and by his intrigues with the Roman Catholics. Even the defeat of his armies gave him no understanding of the strength or the nature of the forces by which he had been conquered. Consequently he threw away the chance of utilizing the divisions of his conquerors by a diplomacy which was so shifty and so stupid that it brought him to the block, and destroyed for a brief period monarchical government in England.

For the fundamental defects in his intellect and character nothing at such a time could compensate. His natural dignity, and the sincerity of his political and religious beliefs, merely heightened the tragedy of his inevitable failure. But eventually these qualities proved to be an asset of no small value to his successors. By enabling him to play his part, even in the last fatal scenes, in a manner consonant with his high ideal of kingship, they gave him the reputation of a martyr in the cause both of the monarchy and the church. By the manner of his death he consecrated the theory of the divine right of kings, he made that theory a part of the religious and political creed of very many Englishmen, and, even after the theory of the divine right of kings had become obsolete, he helped to make loyalty to church and king a very permanent force in English political life. James II, indeed, sacrificed this source of strength by compelling his supporters to choose between their loyalty to the king and their loyalty to the church; and fortunately for the cause of constitutional liberty the majority preferred at the decisive moment to remain loyal to the church.[2] But many, after a short interval,

[1] This expression is taken from a letter of Sir Edward Dering to his wife written Jan. 13, 1641-1642, Proceedings in the County of Kent (C.S.) 67; he wrote, "Jealousys are high, and my heart pitty's a king so fleeting and friendlesse, yet without one noted vice"; as Gardiner says, op. cit. v 318, "When the moment came at last for the realities of life to break through the artificial atmosphere in which he had been living . . . it was too late to gain knowledge, the acquisition of which had been so long deferred, or to exercise that strength of will which is only to be found where there is intelligent perception of the danger to be faced."

[2] "The earl of Bath, who had been sent by James to influence the West, reported that all the justices and deputy lieutenants of Devon and Cornwall, without a single dissenting voice, declared that they would put life and property in jeopardy for the king, but that the Protestant religion was dearer to them than either life or property. And, sir, if your Majesty should dismiss all these gentlemen, their successors will give exactly the same answer," A. H. A. Hamilton, Quarter Sessions from Elizabeth to Anne 254.

relapsed into an attitude of sullen opposition to the new government which encouraged the hopes of those who desired another Restoration. Some few remained entirely loyal to the old dynasty, and endured banishment and defeat for its sake. Their loyalty still casts an undeserved halo round the careers of the last representatives of the incompetent and ill-starred house of Stuart.

The public law of the whole of the seventeenth century, and more especially the public law of the first half of that century, is dominated by religious quite as much as by political questions. Religion occupies quite as large a space in the debates of Parliament as politics. It was religious motives which animated the section of the opposition which was most fiercely opposed to the king. It was religious fervour which inspired the army which destroyed the king and the monarchy. But, for the sake of clearness, it will be necessary in relating the history of the public law of this century, to separate the political from the religious controversies; and, as I am writing legal history, to write more fully of the former. I shall therefore deal firstly with the political controversies; secondly with their religious aspect; and thirdly with the immediate causes of the outbreak of civil war.

The Political Controversies

In dealing with the political controversies of the first half of the seventeenth century, I shall attempt to describe firstly the views and theories of the king and his supporters, and secondly the views and theories held by the Parliamentary statesmen.

(1) *The views and theories held by the king and his supporters*

The main political question of the day was the position of the royal prerogative—was it or was it not the sovereign power in the state? I shall therefore endeavour, in the first place, to give some account of the views of the king's party on this point. Two questions then arise—how far were the views of that party in accordance with the law, and how far can they be considered to be historically correct? With these questions I shall deal in the second place. In the third place, I shall inquire how far it was possible for the king to enforce his views upon the country; and this question can only be answered by considering the manner in which the local government of the country was conducted during this period, and the relations between the central and the local government. Lastly, it will be necessary to review

the strong and the weak points of this scheme of prerogative government.

(i) The royalist view as to the position of the prerogative in the state.

We have seen that during the Tudor period there had been a large development in the legal doctrines which related to the prerogative.[1] To the king had been attributed a politic capacity; and to the king in his politic capacity the attributes of impeccability and immortality had been assigned. The Tudor sovereigns had been the real rulers and representatives of the nation; and these new attributes were the technical expression which the lawyers had given to their very solid achievements. So, too, the new position of the king had led to new distinctions between the powers which made up his prerogative. Some of his prerogatives had been called "inseparable" because it was impossible to conceive of a king who did not possess them.[2] Others had been called "absolute" because he had an uncontrolled discretion as to the manner of their exercise.[3] But, though the Tudor lawyers had invested the king with capacities and prerogatives which made him the head and representative of the nation, they had never attempted to define his position in relation to the other parts of the constitution. The question how far he could control Parliament or the courts was not settled because the Tudor kings were too wise to allow it to be raised in an acute form.[4] Far less would the Tudor kings allow the new and abstract question of the whereabouts of the sovereign power in the state to be mooted.[5] All these matters were left to be solved by the set of conventions which guided their relations both with Parliament and with the courts.

But, with the accession of James I., all this was changed. In the first place, the question of the relation of the prerogative to Parliament and to the courts was over-ripe for solution. Respect for the old queen had caused many fiscal and political questions to be shelved, the stirring of which must raise this question, and probably also the general question of the whereabouts of the sovereign power in the state.[6] In the second place, the king was prepared to solve all such questions by the application of his own political theories. He held, as we have seen,[7] that the king was the supreme ruler and supreme judge; that he was above the law, which he could make, mitigate, or suspend; and that he was answerable for his acts to God alone. It is

[1] Vol. iv 202-214.
[2] Ibid 204-206.
[3] Ibid 206-207.
[4] Ibid 104, 178-180, 348.
[5] Ibid 208, 214-215.
[6] Ibid 190.
[7] Above 11-12.

hardly necessary to say that no English king, except perhaps Richard II.,[1] had ever dreamed that such a theory was applicable to the English monarchy. The Tudors were too wise to seek trouble by propounding an academic theory of supremacy unless it was politically necessary to propound it;[2] and we have seen that the important books which had been written about the English constitution in the Tudor period had assigned a position to Parliament, to the law courts, and the law, which was wholly inconsistent with such a theory of royal absolutism.[3] James's theory was a direct challenge both to Parliament and to the courts.

The question of the position of the prerogative in the state had thus been fairly raised; and it was difficult to solve. The language of the authorities was both uncertain and conflicting. Though in some of the more recent precedents language was used about the king, and about his inseparable and absolute prerogatives, which seemed to make for James's views; other precedents, and the powers and privileges of Parliament, seemed to prove that there were definite limitations on the king's prerogative.[4] It was, therefore, difficult to make James's theory of politics fit in with the existing principles and rules of English constitutional law. But, in the course of James's reign, this difficult task was achieved. James's theory was adapted to the facts of English public life; and a theory as to the position of the prerogative in the state was evolved, which gave James the position which he claimed as king, and yet could not be said to be wholly contrary to the principles of English public law.

The corner stone of this new royalist theory was the new twist which was given to the distinction between the absolute, and the ordinary or private prerogative of the king. Instead of saying (as the sixteenth century lawyers had said) that the king had certain absolute prerogatives (such as the right to make war) which could not be questioned by Parliament or the courts, and certain ordinary or private prerogatives which could be so questioned, it was laid down that he had an overriding absolute prerogative to deal with matters of state. Any exercise of his ordinary or private prerogative was a fit subject for criticism or debate in Parliament or in the courts. But no matter in which he chose to exercise his overriding absolute power could be

[1] Vol. ii 414.

[2] If necessary they could do so with some success, as witness Henry VIII.'s theory of the royal supremacy over the church of England, which, with some minor modifications, is part of English law to-day, vol. i 589-591; vol. v 431-432.

[3] Vol. iv 209-214, 283-284.

[4] Ibid 201-209; below 87-107.

questioned by either.[1] We have seen that it was by virtue of this absolute prerogative that James claimed to settle all conflicts of jurisdiction between courts, and to stop pending cases in which his interests were concerned.[2] We have seen that it enabled him to claim a large power to issue proclamations,[3] and to stop discussions in Parliament upon matters which he considered to be outside its jurisdiction.[4] We shall see that it also enabled him to claim a large power to levy impositions on goods imported and exported,[5] and to arrest persons dangerous to the government.[6] Parliament had, it is true, an important position in the state. It could inform the king of grievances which needed remedy; it could, with his assent, deal with those grievances by legislation;[7] it alone could vote him the supplies necessary for the carrying on of the government; it could advise him on matters upon which its advice was asked.[8] But its powers were limited. The general conduct of the government belonged to the king;[9] and, though no statute could be passed or tax voted without the consent of Parliament, it must not overstep its limits, and assume to exercise any control over matters which, in the opinion of the king, should be determined by his absolute prerogative.

[1] "The king's power is double, ordinary and absolute, and they have their several laws and ends. That of the ordinary is for the profit of particular subjects . . .; and this is exercised by equity and justice in ordinary courts, and by the civilians is nominated jus privatum, and with us common law; and these laws cannot be changed without Parliament . . . The absolute power of the king is not that which is converted or executed to private use . . . but is that which is applied to the general benefit of the people . . . and this power is [not] guided by the rules which direct only at the common law, and is most properly named Policy and Government," Bates's Case (1606) 2 S.T. at p. 389 *per* Fleming, C.B.; "the king holdeth not his prerogatives of this kind mediately from the law, but immediately from God, as he holdeth his crown; and though other prerogatives by which he claimeth any matter of revenue, or other rights pleadable in his ordinary courts of justice, may be there disputed, yet his sovereign power, which no judge can censure, is not of that nature," Letters and Life of Bacon iii 371; "I desire you to give me no more right in my private prerogative, than you give to any subject; and, therein I will be acquiescent: as for the absolute prerogative of the crown, that is no subject for the tongue of a lawyer, nor is lawful to be disputed," James I.'s Speech in the Star Chamber, Works 557; see also above 15 n. 1.

[2] Vol. v 428-429, 439-440.

[3] Vol. iv 86 n. 10, 99-104, 296-297.

[4] Above 13 n. 3; vol. iv 88-90, 178-180; see the proclamation dissolving Parliament Jan. 6, 1622, Prothero, Documents 314-317.

[5] Below 42-48.

[6] Below 32-37.

[7] "The king cannot at other times be so well informed of all the grievances of his people, as in time of Parliament, which is the representative body of the whole realm. Secondly, the Parliament is the highest court of justice, and therefore, the fittest place where divers natures of grievances may have their proper remedie, by the establishment of good and wholesome laws," Works of James I. 535.

[8] In 1622 James complained that some members of the House took "the inordinate liberty," "to treat of our high prerogatives and of sundry things that, without our special direction, were no fit subjects to be treated of in Parliament," Prothero, Documents 315.

[9] "Do not meddle with the main points of government; that is my craft," Works of James I. 537.

Obviously this theory went a long way towards giving to James the position in the state which he claimed. It stopped short, indeed, of attributing to him the sovereign power; for the powers to tax and to legislate were denied to him. And, acting probably under Cecil's advice, the king repressed the first edition of Cowell's Interpreter in which these powers were attributed to him,[1] and acknowledged that he had no such powers.[2] But this theory made the king the predominant partner in the state. It gave him a large executive power, it enabled him to stop all Parliamentary criticism, and it made an adverse judicial decision upon his acts almost impossible. Logically the king's sovereignty could be made to follow from such a theory, for, if it became necessary to discover the whereabouts of the sovereign power in the constitution (and the continual disagreements between king and Parliament were making it evident that its discovery was becoming a very pressing question), a king with such a prerogative would have the best claim to it.[3]

Technically also this theory had considerable merits. The distinction between the absolute and ordinary prerogative went a long way towards reconciling the mediæval precedents, which laid it down that the king and his prerogative were subject to the criticism of Parliament and the control of the law, with the Tudor practice, which often ignored these limitations. It enabled a distinction to be drawn between the cases in which Parliamentary criticism was permissible and those in which it was not, and between the cases in which exercises of the prerogative were subject to the control of the law, and those in which they were not so subject. It could be fairly represented as a natural development of the line of sixteenth century cases which had given the king a politic capacity, and certain absolute powers when acting in that capacity.[4]

[1] Parliamentary Debates 1610 (C.S.) 23-25; Gardiner, Hist. of England ii 67; for Cowell and his book see vol. v 20-22, 432.

[2] Cecil said, "He (the king) said further that it was dangerous to submit the power of a king to definition. But with all he did acknowledge that he had no power to make laws of himself, or to exact any subsidies *de jure* without the consent of his three Estates," Parliamentary Debates 1610 (C.S.) 24.

[3] Cowell's book had attracted attention; and it was politic to suppress it; but Lord Ellesmere in Calvin's Case (1608) 2 S.T. at p. 693 had let slip expressions which, though less pointed, were almost as strong—"I may not wrong the judges of the common law of England so much as to suffer an imputation to be cast upon them, that they, or the common law do not attribute as great power and authoritie to their sovereigns, the kings of England, as the Roman laws did to their emperors"; cp. Figgis, Divine Right of Kings (1st ed.) 231-232, cited below 67 n. 1; as Figgis says, ibid 234, "Most men will arrive at the idea of sovereignty because they will seem to see it encircling the diadem of Henry VIII or Elizabeth. . . . The course of circumstances would lead men to suppose that the sovereignty was vested in the Crown, and not in Parliament."

[4] Vol. iv 202-208.

Under the political conditions which prevailed during the first quarter of the seventeenth century this theory was rapidly evolved. It was first clearly stated by Fleming, C.B., in *Bates's Case*.[1] We can see from James's own writings that it was accepted by him;[2] and from Bacon's writings and arguments that it was the basis of his views upon political and constitutional questions.[3] Indeed it is probable that it was he who had a good deal to do with its development and propagation. For he was a political philosopher, a consummate common lawyer, and a man of considerable influence in the House of Commons; and this uncommon combination of qualities was needed to construct a theory which would commend itself to a political theorist like James, and yet be technically defensible both in Parliament and in the courts.

Bacon was hardly a representative Englishman;[4] but it is worth while glancing at the evolution of his views upon the position of the prerogative in the state, because it was representative of a certain body of opinion at the beginning of the seventeenth century, and explains the measure of support which this set of views obtained. Under the Tudors he had been at the outset a politician with liberal sympathies. This is shown by his early opposition to the crown, which had cost him the favour of Elizabeth,[5] and by his "Brief Discourse upon the Commission of Bridewell," in which he had (in effect) argued that the king's prerogative was subject to the control of the law.[6] But during the latter part of the reign of Elizabeth he had tried to atone for his earlier indiscretion in Parliament;[7] and from the very beginning of the new reign he had ranged himself among the supporters of the court.[8] No doubt personal motives had their weight. He desired above all things political advancement; and that depended wholly on the king. But his motives

[1] Above 22 n. 1. [2] Ibid.

[3] Ibid; see also his charge against Whitelocke, Spedding, Letters and Life iv 355; in his argument in Calvin's Case, Works vii 646, he said that one of the functions of the law in relation to the king was "to make his ordinary power more definite and regular . . . and although the king, in his person be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day."

[4] Vol. v 242-243, 434-435. [5] Ibid 240-241.

[6] Works vii 509-516. [7] Vol. v 241.

[8] His views as to the Commission of Bridewell may usefully be compared with his charge against Whitelocke (Spedding, Letters and Life iv 353-356) who was brought up before the Star Chamber for an argument as to the validity of a royal commission, vol. v 432-433, not wholly unlike Bacon's argument upon the Commission of Bridewell; in the proceedings against Whitelocke he made use of the distinction between the absolute and ordinary power—"I make a great difference between the king's grants and ordinary commissions of justice, and the king's high commissions of regiment, or mixed with causes of state"; but there is no hint of this distinction in the earlier opinion; and the point of view then taken is quite different from the point of view of the later argument.

were not merely personal. He saw clearly that certain reforms were needed; and he was ready with wise and practical schemes of reform.[1] Obviously it was far easier to get these reforms carried out by the help of the king than by the help of Parliament, for the king and his Council were the permanent government and possessed of the initiative in all political questions. He thought too that a Council, which contained a small number of able men, would be better able to appreciate and push these schemes, than the miscellaneous collection of men who from time to time met in the House of Commons.[2] His ideal was an enlightened king and Council of the Tudor pattern, who would propose salutary reforms to Parliament, and would work in harmony with it.[3]

Unfortunately his ideal was impossible of realization. He overestimated the capacity of the king, and the intelligence of his advisers. He was blind to the fact that the king was led by his favourites, and that corruption was rampant at court.[4] He under-estimated the strength of the forces opposed to the policy pursued by the king, and was blind to the growth of a

[1] "His thoughts were constantly occupied with the largest and most sweeping plans of reform. . . . No abuse escaped his notice, no improvement was too extensive to be grasped by his comprehensive genius. The union with Scotland, the civilization of Ireland, the colonization of America, the improvement of the law, and the abolition of the last remnants of feudal oppression were only a few of the vast schemes upon which his mind loved to dwell," Gardiner, Hist. of England ii 193; for instances of the practical sagacity of his advice in political matters see his "Considerations touching the better Pacification and Edification of the Church of England," Spedding, Letters and Life iii 103; and his letter of advice to Villiers, ibid vi 13-56.

[2] Gardiner, op. cit. ii 194.

[3] Ibid 193; the nature of his views as to the relation of king and Parliament are illustrated (1) by a passage from a speech which he made while Solicitor-General in 1610: "The king's sovereignty and the liberty of Parliament are as the two elements and principles of this estate; which, though the one be more active the other more passive, yet they do not cross or destroy the one the other, but they strengthen and maintain the one the other. Take away liberty of Parliament, the griefs of the subject will bleed inwards: sharp and eager humours will not evaporate, and then they must exulcerate, and so may endanger the sovereignty itself. On the other hand, if the king's sovereignty receive diminution or any degree of contempt with us that are born under an hereditary monarchy . . . it must follow that we shall be a *meteor* or *corpus imperfecte mistum;* which kind of bodies comes speedily to confusion and dissolution," Spedding, Letters and Life iv 177; and (2) by a speech which he began to draw up for the opening of the Parliament of 1620-1621: "It is no doubt great surety for kings to take advice and information from their Parliament. It is an advice that proceedeth out of experience; it is not speculative or abstract. It is a well tried advice, and that passeth many reviews, and hath Argus eyes. It is an advice that commonly is free from private and particular ends, which is the bane of counsel. . . . But this advice is to be given with distinction. In things which lie properly in the notice of the subjects they are to tender and offer their advice by bill or petition, as the case requires. But in those things that are *arcana imperii*, and reserved points sovereignty, as making of war or peace, or the like, there they are to apply their advice to that which shall be communicated unto them by the king, without pressing further within the veil," ibid vii 171-172.

[4] Vol. v 244-245.

Parliamentary opposition which destroyed all hopes of a working partnership of the Tudor type between the king and Parliament. A similar under-estimate of the strength of the opposition to prerogative rule, a similar over-estimate of the intelligence of that rule, was made by Wentworth at a later date, when, despairing of the chance of establishing an efficient government on a Parliamentary basis, he devoted his energies to the establishment of an efficient government on the basis of the prerogative.[1]

As the controversy between king and Parliament developed under Charles I., as the temper of the disputants grew more bitter, it gradually became clear that those who upheld the cause of the prerogative must take a step further and claim that it was the sovereign power in the state. The attempts made by the House of Commons to criticize the government were met by dissolutions. The claim to impeach the king's ministers was met by assertions that not only the king's ministers, but even his humbler servants, were not amenable to the law for acts done under the authority of the king.[2] And it is clear that this immunity was causing the rapid development of the system of administrative law which had been coming into existence under the Tudors;[3] for, though these servants of the crown were withdrawn from the jurisdiction of the common law courts,[4] they were always amenable to the jurisdiction of the Council and the Star Chamber.[5] In a proceeding in the Star Chamber between Lord Mohun and Sir James Bagg, Charles declared that "he would readily give furtherance to the punishment of any, though never so near a servant, that shall justly deserve censure," and that "he would likewise give all assistance to any that shall be unjustly traduced especially in acts relating to his majesty's

[1] Gardiner, op. cit. vii 25-28; below 76, 78-79.

[2] S.P. Dom. 1625-1626 275, xxii 51; ibid 1623-1625 259-260, clxv 60-61; ibid 265, clxvii 10; ibid 1625-1626 275, xxii 51; ibid 281, xxii 96; Gardiner, op. cit. v 400, 401; ibid vi 79—in 1626 Charles said to the House of Commons, who were attacking Buckingham, "I would not have the House to question my servants, much less one that is so near me."

[3] Vol. iv 77-80, 85-87.

[4] See e.g. S.P. Dom. 1619-1623 589, cxlv 35—the Council orders the Barons of the Exchequer to free Sir Th. Wilson from an unjust suit against him brought by Hall—"the ground of the suit being service done by his majesty by command of the Council"; ibid 1631-1632 305, ccxv 26; ibid 362, ccxix 14—complaint to the Council of abuse offered to a king's messenger by an innkeeper; ibid 321, ccxvi 1—report of a petition of certain constables to be freed from an action of trespass for an arrest; ibid 1637 63, ccclv 66—a petition to be allowed to sue one of the Queen's servants, in which it was alleged that without such leave the justices of the peace dared not proceed.

[5] Ibid 1633-1634 135, ccxlii 50—proceedings against the licenser of Histriomastix; ibid 1635-1636 212, cccxiii 33; ibid 457, cccxxii 25—the misdeeds of a feodary; ibid 1637-1638 390, ccclxxxviii 77; ibid 576, cccxlv 89—complaints against postmasters; ibid 1638-1639 28, cccxcix 5—directions from the Council to the justices of the peace to punish a postmaster.

service in matters within his own knowledge."[1] And while the immunity of the king's servants from the ordinary courts was asserted, the liability of members of Parliament to answer for their conduct in the House before the ordinary courts was asserted equally strongly.[2] Dorchester, one of the king's secretaries, writing of the proceedings against Eliot and other members of the House of Commons in 1629, said, "Parliament men must be responsible for their words and actions in other courts, and so they will be more moderate hereafter."[3] Serious encroachments were made upon the legislative power of Parliament. The restrictions placed upon the power of the crown to issue proclamations by the opinion of the judges in the *Case of Proclamations*,[4] had always been regarded as unreasonable by those who favoured an extended prerogative—they feared that if the king was unduly restrained "the bonds would be broken."[5] During this period the bonds were broken and proclamations were made a substitute for statutes. Any proclamation which the king chose to issue was regularly enforced, and those who disobeyed it were as regularly punished by the Star Chamber—so that "those foundations of right, by which men valued their security to the apprehension and understanding of wise men, were never more in danger to be destroyed."[6]

Finally, even the Parliamentary control over direct taxation was attacked. As early as 1620 Chamberlain had said that the continual exaltation of the prerogative, "was meant to prepare the way for subsidies without Parliament."[7] The resolve of Charles, after the dissolution of 1629, to rule without Parliament made "subsidies without Parliament" an absolute necessity. The device of ship money,[8] which was to supply the place of subsidies, was defended by the theory that in a time of necessity,

[1] S.P. Dom. 1635 29, cclxxxvi 97.

[2] The case of Strode, Long, Selden, and others (1629) 3 S.T. 235; the case of Eliot, Hollis, and Valentine (1629) ibid 293.

[3] S.P. Dom. 1629-1631 203, cxlii 18.

[4] (1611) 12 Co. Rep. 74; vol. iv. 296-297.

[5] Ellesmere, in putting the case to the judges, said, "He would advise the judges to maintain the power and prerogative of the king; and in cases in which there is no authority and precedent, to leave it to the king to order in it, according to his wisdom, and for the good of his subjects, or otherwise the king would be no more than the Duke of Venice: and that the king was so much restrained in his prerogative, that it was to be feared the bonds would be broken," 12 Co. Rep. 74.

[6] "The council table by proclamations enjoining this that was not enjoined by law, and prohibiting that which was not prohibited; and the Star Chamber censuring the breach, and disobedience to those proclamations, by very great fines and imprisonment; so that any disrespect to acts of state, or to the persons of statesmen, were in no time more penal, and those foundations of right, by which men valued their security, to the apprehension and understanding of wise men, never more in danger to be destroyed," Clarendon, History of the Rebellion (ed. 1843) 28.

[7] S.P. Dom. 1619-1623 184, cxvii 13.

[8] Below 48-52.

of the existence of which the king was sole judge, the king could tax, or indeed, do as he pleased.[1] In *Hampden's Case*, in which this claim was sanctioned by the courts,[2] the logical consequence of this theory of the prerogative was reached. The king by virtue of his prerogative was in effect declared by some of the judges to be the sovereign power in the constitution;[3] and, by an extended application of the older doctrine that certain powers were inseparably annexed to the prerogative,[4] it was laid down that he could not be divested of his sovereign power even by an Act of the legislature.[5]

The royalist theory that the king by virtue of his prerogative was the sovereign power in the state thus received its final development, and its most logical expression, just before its final overthrow. And there is no doubt that the clearness with which it was expounded in this case had not a little to do with the completeness of that overthrow. When, Clarendon tells us,[6] men heard ship money "demanded in a court of law as a right, and found it, by sworn judges of the law, adjudged so, upon such grounds and reasons as every stander-by was able to swear was not law . . . when they saw in a court of law (that

[1] Below 52. [2] (1637) 3 S.T. 825.

[3] "Where Mr. Holborne supposed a fundamental policy in the creation of the frame of this kingdom, that in case the monarch of England should be inclined to exact from his subjects at pleasure, he should be restrained, but that he could have nothing from them, but upon a common consent in Parliament. He is utterly mistaken therein. I agree the Parliament to be a most ancient and supreme court, where the king and peers as judges are in person, and the whole body of the commons representatively. These peers and commons may, in a fitting way, 'parler lour ment'; and amongst other things make known their grievances (if there be any) to their sovereign, and humbly petition him for redress. But the former fancied policy I utterly deny. The law knows no such king-yoking policy. . . . There are two maxims of the law of England which plainly disprove Mr. Holborne's supposed policy. The first is, 'that the king is a person trusted with the state of the commonwealth.' The second of these maxims 'that the king cannot do wrong.' Upon these two maxims the 'jura summa majestatis' are grounded, with which none but the king himself (not his high court of parliament without his leave) hath to meddle, as, namely war and peace . . . and divers others; amongst which I range these also, of regal power to command provision (in case of necessity) of means from the subjects . . . for the defence of the commonwealth. Otherwise I do not understand how the king's majesty may be said to have the majestical right and power of a free monarch," 3 S.T. at pp. 1098-1099 *per* Berkeley, J.

[4] Vol. iv 204-206; for an illustration of the use of the term "inseparable" in the older sense, see Parliamentary Debates in 1610 (C.S.) 8, 15.

[5] "No act of Parliament can bar a king of his regality, as that no lands should hold of him; or bar him of the allegiance of his subjects; or the relative on his part, as trust and power to defend his people: therefore acts of parliament to take away his royal power in the defence of his kingdom are void; . . . they are void acts of parliament, to bind the king not to command the subjects, their persons and goods, and I say their money too: for no acts of parliament make any difference," 3 S.T. at p. 1235 *per* Finch, C.J.

[6] History of the Rebellion (ed. 1843) 28-29; "Trewly," said Sir Roger Twysden, "the common people had been so bytten with shippe money they were very averse from a cowrtyer," Proceedings in the County of Kent (C.S.) 6.

law that gave them title and possession of all that they had) apothegms of state urged as elements of law, judges as sharp-sighted as secretaries of state, and in the mysteries of state; . . . and no reason given for the payment of the thirty shillings in question, but what concluded the estates of all the standers-by; they had no reason to hope that that doctrine, or the preachers of it, would be contained within any bounds; and it was no wonder that they . . . were not less solicitous for, or apprehensive of, the inconveniences that might attend any alteration."

Such, then, was the theory evolved by the prerogative lawyers during the first half of the seventeenth century. We must now consider the question how far this theory was legally and historically justifiable.

(ii) The legality and the historical correctness of the royalist theory of the position of the prerogative in the state.

The constitutional position finally taken up by the king (like that finally taken up by the Parliament) was, as I have said,[1] gradually elaborated as the controversy proceeded. We can trace its gradual growth in declarations in and messages to Parliament, in the proceedings of the Council and Star Chamber, and in the constitutional cases which came before the common law courts. It is in the arguments used and decisions arrived at in these constitutional cases that we get the fullest information as to its growth; so that, in pursuing this inquiry, it is to them that we must chiefly look. And, at the outset, we shall do well to bear in mind three of their characteristic features.

In the first place, these cases cover a wide field, and are concerned with a number of fundamental questions. The most important are concerned with the king's prerogative in relation to legislation, to the liberty of the subject, to taxation, and to national defence. The course taken by the arguments in all of them shows that the extent of these branches of the prerogative was very uncertain. It proves that the Tudors had left many branches of English public law in a very fluid state.

In the second place, though these cases dealt with many diverse prerogatives, though the law as to all these prerogatives was at many points very uncertain, there is a connecting link between the questions at issue in them all. They all turn at bottom upon the amount of administrative discretion which is to be allowed to the king. Is the king's discretion free, or is it limited by a law that only king and Parliament can change?

[1] Above 21-22, 24, 26-28.

If the king could be proved to be legally entitled to exercise an absolutely free discretion as to the user of these prerogatives, it would not be difficult for him to exercise in effect the sovereign power in the state. If, on the other hand, his exercise of these prerogatives was strictly limited by a law which he could not change, then, not the prerogative, but the body which could change the law, would be sovereign.

In the third place, these cases illustrate the very skilful use which the royalist lawyers made of the uncertainty of the law. The royalist lawyers were much too clever to show their hand by large assertions that the prerogative was the sovereign power in the state, or to embark upon the hopeless project of proving that the crown could legislate or tax without the consent of Parliament. But they saw that the king had many prerogatives which, with a little extension, could be so exercised that they would secure his sovereignty, and either render Parliamentary control nugatory, or enable him to dispense with Parliament altogether. For instance, his powers to issue proclamations to control trade, to imprison persons dangerous to the state, or to act in defence of the realm, might be so interpreted that they would produce this result.

The uncertainty of English public law, the great obscurity which hung round the extent of many branches of the prerogative, and these tactics of the prerogative lawyers, make the task of the legal historian almost as difficult as the task of the judges who were set to try these cases. It is not possible to say that the discretionary powers claimed for the king were obviously contrary to the law. Still less is it possible to say that they were obviously contrary to public policy. On the other hand, it was becoming more and more clear, as the century proceeded, that these claims to discretionary powers were being made, not in good faith in order to increase the effectiveness of the executive, but in order that it might be rendered absolute. We cannot help seeing that though the crown had often—more often than is sometimes supposed—the letter of the law on its side, it was using the letter of the law to defeat its spirit. The eleven years of prerogative rule (1629-1640) made all this very clear to the men of the seventeenth century. And so, both on the part of the king and on the part of the Parliamentary opposition, the appeal to law gradually rings more and more false. What the parties are in fact appealing to is not the law, but the political creeds which they have elaborated in legal terms and cloaked with legal arguments.

But we are studying legal, not political or constitutional history; and therefore we must examine from the technical

point of view the legal arguments which the supporters of the prerogative used in the cases which came before the courts. I shall consider these arguments under the four heads of Legislation, The Liberty of the Subject, Fiscal Claims, and The Defence of the Realm.

Legislation.

Upon this topic a very few words will suffice. We have seen that the Tudors assumed a certain amount of latitude in the issue of proclamations; but that they used their power so wisely that Parliament raised no objections to its exercise.[1] The use which James I made of this prerogative called the attention of Parliament to it; and, as the extent to which the king had a free discretion was as doubtful as the extent of many of his other prerogatives, the judges were consulted. Their answer is, as we have seen, contained in the *Case of Proclamations;*[2] and though that case is reported in one of the later parts of Coke's Reports, the authority of which is not equal to that of the earlier parts,[3] the correctness of the law there laid down has never been doubted.[4] Indeed, the rules there set out followed directly from the legislative supremacy of Parliament which was then fully established.[5] But undoubtedly they confined the prerogative of the crown within much narrower limits than those within which it had been confined during the Tudor period. Naturally these limits were not observed either by James I. or by Charles I.;[6] and Charles I. was practically obliged to admit this in a somewhat obscure declaration which he issued in 1640-1641.[7] The later Stuarts did not attempt to offend in this way—largely because the abolition of the Star Chamber had deprived them of the means of enforcing proclamations which went beyond the limits laid down by the *Case of Proclamations.*[8]

The Liberty of the Subject.

Upon the general question of the liberty of the subject, and upon the remedies which the law has provided at different periods

[1] Vol. iv 104. [2] Ibid 296-297. [3] Vol. v 462. [4] Ibid n. 5.
[5] Vol. iv 99-102, 182, 185-186, 201. [6] Above 27 and n. 6.
[7] S.P. Dom. 1640-1641, 443-444, cccclxxvi 107—"If since the beginning of our reign, proclamations have been more frequent than in former times, or have extended further than is warranted by law, we take it in good part to be informed thereof by our loving subjects, and take it to heart as a matter of great consequence; and therefore we will confer with our Council, with our judges and learned counsel, and will cause such our proclamations as are past to be reformed, when cause shall be found, and for future time will provide that none be made but such as shall stand with the laws and statutes of the kingdom; and such as in case of necessity our progenitors have by their prerogative royal used in times of the best and happiest government of this kingdom."
[8] Vol. iv 296-297.

for its protection, I shall speak in the second Part of this Book.[1] Here I shall deal only with that part of the topic which is directly concerned with the extent of the prerogative of the crown to commit its subjects to prison.

There can be no doubt that under the Tudors the crown had assumed a very large discretionary power of imprisoning its subjects.[2] There can be no doubt also that, in the critical times through which the nation was passing, it was a salutary and necessary power. Thus we are not surprised to find that it was not questioned in Parliament, and that it was recognized, though in somewhat obscure terms, by the common law courts. The declaration of the judges upon this matter is contained in Anderson's Reports ;[3] and the correctness of the report, and its proper interpretation, were exhaustively discussed in *Darnel's Case*, and in the Parliamentary debates which followed upon the decision in that case. I shall therefore begin by stating the substance of this declaration from the report in Anderson, which is the version of which Coke approved when this case was debated in Parliament in 1628.[4] It runs as follows: The judges, addressing the Chancellor and Treasurer, complained that divers of the queen's subjects had been detained in prison by the command of noblemen or counsellors, contrary to law; that sundry persons had been imprisoned for suing actions at law, and, when writs had been issued to deliver them, no good cause of detention had been returned, and they had accordingly been released; that persons so released had been again committed to prison to unknown places, so that no writ to deliver them could be served; that divers officials had been committed for serving the queen's writs; that persons had been compelled by unlawful imprisonment to abandon their actions at law—"all which upon complaint the judges are bound by office and oath to relieve and help." They then proceed: "And where it pleased your lordships to will divers of us to set down in what cases a prisoner, sent to custody by her majesty, [or] her council, . . . are to be detained in prison, and not to be delivered by her majesty's courts or judges; we think that if any person be committed by her majesty's command, from her person, or by order from the council board; or if any one or two of her council commit one for high treason; such persons so in the case before committed, may not be delivered by any

[1] Pt. II. c. 6 § 3; cp. vol. i 227-228. [2] Vol. iv 87.

[3] (1592) 1 And. 297; another version from a MS. in the British Museum is printed by Hallam, C.H. i 234-236, and more correctly by Prothero, Constitutional Documents 446-448; both versions will be found in vol. v App. I.; at the crucial point, see below 33 n. 1, the other version is less favourable to the contention of the House of Commons than the report in Anderson.

[4] 3 S.T. 77-78.

of her courts, without due trial by the law, and judgment of acquittal had; nevertheless the judges may award the queen's writs to bring the bodies of such prisoners before them; and if upon return thereof, the causes of their commitment be certified to the judges as it ought to be, then the judges in the cases before, ought not to deliver him, but to remand him to the place from whence he came, which cannot conveniently be done, unless notice of the cause in generality, or else specially be given to the keeper or gaoler that shall have the custody of such prisoner." [1]

It can hardly be denied that this is a somewhat cryptic statement. But it seems fairly clear that the judges did not think that a person imprisoned by command of the crown or by the whole council should be released pending his trial. At the same time they asserted their right to have such persons brought before them in order that they might examine into the cause of their committal; and they considered that that cause should be certified to them. If the cause was certified, the judges should, they think, remand the prisoner. But they avoid saying whether, if the cause is not certified, he should be released; and they leave it uncertain whether a return that the prisoner is committed by the queen's command would be a sufficient "notice of the cause in generality." They probably meant to assert for themselves a certain amount of discretion in such cases; but I think that the context shows that they were prepared to consider that such a return might be sufficient.[2] And according to the other version

[1] 1 And. 298. The alternative version runs—"We think that if any person shall be committed by her Majesty's special commandment or by order from the Council-Board, or for treason touching her Majesty's person, any of which causes being generally returned into any court is good cause for the same court to leave the person committed in custody, but if any person be committed for any other cause, then the same ought specially to be returned"; then follows the signatures of the judges. Clearly this is less favourable to the claim of prisoners committed *per speciale mandatum regis* to be released than the statement in Anderson's report: cp. Gardiner, op. cit. vi 244-245. A still less favourable version of the law is contained in an opinion of Serjeant Thomas Harris, Richard Godfrey, and Anthony Dyott given to the Council in 1613, Acts of the Privy Council (1613-1614) 7; it allows arrest by the Council, "if any person happen to be suspected or accused either of treason, felony, or any other offence supposed to be done or committed against the Crown or State."

[2] This seems to have been the meaning assigned to it by Whitelocke, J., when he explained his decision to the House of Lords in 1628; he said, "Now, my lords, if we had delivered them presently upon this, it must have been because the king did not show the cause, wherein we should have judged the king had done wrong; and this is beyond our knowledge, for he might have committed them for other matters than we could have imagined. But they might say thus they might have been kept in prison all their days; I answer no, but we did remit them, that we might better advise of the matter. But they say we ought not to have denied bail. I answer, if we had done so, it must have reflected upon the king, that he had unjustly imprisoned them. And it appears in Dyer, 2 Eliz. that divers gentlemen, being committed and requiring Habeas Corpus, some were bailed, others remitted: whereby it appears, much is left to the discretion of the judges," 3 S.T. 161. This practice seems to have been followed; in 1640 Rossingham wrote to Conway, "Monday in this week, Mr. Davers and Mr. Pargeter of Northamptonshire, were brought by Habeas

of the resolution, there is no doubt at all that they were of this opinion.[1]

This was the most recent considered utterance of the judges when, in 1627, Darnel and four others,[2] who had been committed to prison *per speciale mandatum regis* for refusing to subscribe to a loan to the king, were brought before the King's Bench on a writ of Habeas Corpus, and applied for their release.[3] This application raised the question whether a return that a person was committed *per speciale mandatum regis* was good in law, and a sufficient answer to a claim to be released. The case was elaborately and carefully argued both by the bar and by the bench; it was a case, as the Court said, of great weight and expectation;[4] and the question was still more elaborately discussed in Parliament in the following year.

Both the counsel for the prisoners and the counsel for the crown relied upon arguments derived from statutes, from precedents, and from considerations of public policy. Firstly, it was contended by the counsel for the prisoners that both Magna Carta and statutes of Edward III.'s reign prohibited a man from being imprisoned except by the process and for the causes recognized as sufficient by the common law; and that a committal *per speciale mandatum regis* was not a committal by due process of law, and was therefore insufficient.[5] To this it was answered that none of these statutes touched the case of a committal for this cause; that the king, acting as head of the commonwealth and as fountain of justice, had an absolute power to commit which no court could question; and that therefore a committal by his command was just as much a committal by due process of law as a committal by the judges upon a presentment for a crime.[6] In fact, as the crown lawyers were fond of pointing out, the prerogative was a part of the law,[7] and therefore

Corpus to the King's Bench Bar, but the Lord's warrant, which committed them to prison, showed no cause wherefore they were committed; whereupon the Lord Chief Justice took three or four days to learn of the Council why they were committed, in the meantime they return to prison," S.P. Dom. 1640, 309, ccclvii 36. It may be remembered that Whitelocke was a man who had, in his earlier days, suffered for his constitutional opinions, vol. v 350; and there is no reason to suppose that he had in his later years become a blind supporter of the prerogative.

[1] Above 33 n. 1; vol. v App. I.

[2] Corbet, Earl, Heveningham, and Edmund Hampden.

[3] 3 S.T. 1. [4] Ibid 51.

[5] See Bramston's argument, ibid 6-8; Noy's argument, ibid 14-15; Selden's argument, ibid 17-18; Calthorpe's argument, ibid 22-26.

[6] See the Attorney-General's argument, ibid 38-41.

[7] See e.g. Bacon's speech to Sir J. Denham when he was made Baron of the Exchequer in 1617, "The king's prerogative and the law are not two things; but the king's prerogative is law, and the principal part of the law . . . and therefore in conserving and maintaining that, you conserve and maintain the law," Spedding, Letters and Life of Bacon vi 203; cp. ibid vii 118.

these prerogative rights were included under the terms "per legem terræ," or "due process of law."[1] Secondly, it was contended that there were many precedents, both in mediæval times, and in modern times, in which persons committed by the king or his council had been released.[2] Certainly one of the mediæval precedents cited seems to bear out this contention.[3] But some of the more modern precedents did not bear it out. In some of them another definite cause, besides the command of the king, was assigned as the cause of detention; and the court had decided upon the legality of the other cause thus assigned. In others the release had been by the consent of the king.[4] In others prisoners detained for this cause had not been released.[5] I think that it is clear that counsel for the prisoners could not show that the precedents showed anything like a uniform practice; and that the counsel for the crown could point to a considerable number of modern precedents which were in their favour, and could successfully appeal to the modern practice as described in the resolution of the judges reported by Anderson. Thirdly,

[1] "No freeman can be imprisoned but by 'legale judicium parium suorum aut per legem terræ.' But will they have it understood that no man should be committed, but first he shall be indicted or presented? I think that no learned man will offer that; for certainly there is no justice of the peace in a county, nor constable within a town, but he doth otherwise, and might commit before an indictment can be drawn or a presentment be made: what then is meant by these words, 'per legem terræ'? If any man shall say this does not warrant that the king may for reasons moving him commit a man, and not be answerable for it neither to the party, nor . . . unto any court of justice, but to the High Court of Heaven; I do deny it, and will prove it by our statutes," the Attorney-General's argument, 3 S.T. 38; the same point was put more clearly by Bacon in his charge against Whitelocke; he said, "*lex terræ* mentioned in the said Statute, is not to be understood only of the proceedings in the ordinary courts of justice, but that his Majesty's Prerogative and his absolute power incident to his sovereignty is also *lex terræ*, and is invested and exercised by the law of the land, and is part thereof," Spedding, Letters and Life iv 350; and this was the view taken by the Council, Acts of the Privy Council (1613-1614) 214-215.

[2] Some of the records cited in the case are printed 3 S.T. 109-126; others are referred to in the judgment of the court, ibid 57, 58; the court said, "you shall see we have taken a little pains in this case, and we will show you some precedents on the other side."

[3] The case of John Bildeston, the record of which is printed ibid 109.

[4] The Court, after examining the precedents, concluded that, "Where the cause of the commitment hath been expressed, there the party hath been delivered by the court, if the case so required; but when there hath been no cause expressed, they have ever been remanded; or if they have been delivered, they have been delivered by the king's direction, or by the lords of the council," ibid at p. 53.

[5] See precedents cited ibid at pp. 57, 58. Those who argued for the view of the House of Commons in the subsequent debates and conferences with the House of Lords, tried to evade the force of some of the precedents by drawing a distinction between cases when the entry was that the prisoner "remittitur quousque secundum legem deliberatus fuerit," which, they said, was equivalent to a remand to prison; and cases when the entry was "remittitur," or "remittitur prisonæ prædictæ," which, they said, meant that he was only remanded that the court might advise, or that the gaoler might amend his return, ibid 142; but this distinction was denied both by Keeling, "a clerk of great experience in that court," ibid, and by Dodderidge, J., ibid 163.

the arguments drawn from considerations of public policy were fairly equally balanced. The counsel for the prisoners pointed out that, if this return was good, they might be perpetually imprisoned, and have no means to secure either release or trial.[1] On the other hand, the counsel for the crown pointed out that a government could not take ordinary precautions against suspected dangers if it had not this power of arrest. The security of the state, they contended, was of greater importance than the liberty of the few persons who might be unjustly imprisoned.[2]

The decision of the court was that the prisoners must be remanded. It considered that the precedents pointed to the conclusion that the king had this power to commit, and that the court could not admit to bail in such a case.[3] It admitted indeed that, if a definite cause of detention were assigned, it could judge of its sufficiency; but, if none were assigned, it held that it could not question the legality of a committal by the king.[4] At the same time it considered that it had some discretion in the matter, and that it could, on such a return, consult with the king, and act as it saw fit after such consultation.[5] "I did never see or know," said Whitelocke, J., "that upon such a return as this, a man was bailed the king not first consulted with";[6] and Jones, J., very appositely put the case of a person committed by the House of Commons asking to be bailed on a writ of Habeas Corpus—

[1] "If your lordship shall think this to be a sufficient cause, then it goeth to a perpetual imprisonment of the subject: for in all those causes which may concern the king's subjects, and are applicable to all times and cases, we are not to reflect upon the present time and government, when justice and mercy floweth, but we are to look what may betide us in the time to come hereafter," Bramston's argument 3 S.T. 8.

[2] "If a treason be committed, as it was not long ago . . . since there was a treason, and the actors thereof fled, some to the court of Rome, some to Brussels, when it was to be put in execution; the treason being discovered, one is apprehended upon suspicion of it, and is put into the Tower . . . It may be he is innocent, and thereupon he brings a Habeas Corpus, and by virtue of that writ he is brought hither; and will your lordship think it fit or convenient to bail him, when the accusation against him must come from beyond the sea? I think you will rather so respect the proceedings of the state, so that you will believe these things are done with a cause, then enquire further of them . . . It may be divers men do suffer wrongfully in prison, but therefore shall all prisoners be delivered? that were a great mischief," the Attorney-General's argument ibid at pp. 44-45.

[3] Clearly they considered the case reported by Anderson decisive, ibid at p. 58.

[4] Above 35 n. 4.

[5] It was for this reason that the point taken as to the construction of the Statute of Westminster I. c. 15 was really immaterial. That statute had defined the cases in which persons could not be replevied by the sheriff; one of these cases was the case when a man was committed by the king's order; Darnel's counsel contended (probably rightly) that the statute did not apply to the King's Bench, but only to sheriffs and such like officials, and that it did not apply to bailing, but only to replevying a prisoner; the counsel for the crown maintained the contrary, see Maitland, Constitutional History 273; the point was not material because, assuming that the statute did not apply, the court held that it had a discretionary power; it was therefore not dealt with in the judgment.

[6] 3 S.T. at p. 161; and see above 33 n. 2.

"would they, think you, take it well if he should be bailed at his first coming to the court?"[1] In point of fact, committals by the House of Commons are governed by much the same law as the judges in this case laid down for committals by the king.[2]

Thus the judges followed very faithfully the resolution of their predecessors reported by Anderson. We cannot say that their opinion was contrary to the later precedents; and that it was not contrary to what many considered to be public policy at that time comes out clearly enough in the debates in Parliament to which this case gave rise.

In the debates on the clause of the Petition of Right which dealt with the liberty of the subject, the great problem was to find a form of words which would safeguard that liberty, and yet leave the crown with a certain amount of administrative discretion to arrest persons, when the well-being of the state rendered such a course desirable. The difficulty of reconciling these two conflicting lines of public policy, which had emerged in the argument in *Darnel's Case*, emerged still more clearly in the debates in Parliament, in the propositions put forward by the king, and in the conferences between the House of Lords and the House of Commons.[3]

It was natural that men who remembered such national emergencies as the attack of the Spanish Armada, and such attempts against the government as the Roman Catholic plots of Elizabeth's reign and the gunpowder plot of James I.'s reign, should consider it madness to leave the king with no discretion to arrest and detain upon suspicion.[4] On the other hand, the House of Commons could not forget that in *Darnel's Case* this power had been used to force men to subscribe to a loan, levied in defiance of an express statute.[5] It was therefore only natural that they should feel pretty certain that the king would not scruple to use any discretion entrusted to him to enforce any arbitrary act which he chose to order, and to coerce those whose political opinions were distasteful to the court. Serjeant Ashley's argument at a conference between the House of Lords and the House of Commons puts the dilemma very clearly. "If," he

[1] 3 S.T. at p. 162.

[2] See the opinion of Holt, C.J., in Reg. v. Paty (1705) 2 Ld. Raym. at pp. 1112-1116; Sheriff of Middlesex's Case (1840) 11 Ad. and El. 273; and cp. Strode's Case (1629) 3 S.T. 235, below 38-39; for Holt's judgment and the later cases see vol. i 393-394; below 271-272.

[3] Gardiner, History of England vi 257-271, 276-289; vol. v 450-453.

[4] "Though men like Williams and Bristol and Arundel had suffered too much from the unrestrained exercise of the king's authority not to join heartily in the main demands of the petition, they were too old statesmen not to be aware that a discretionary power must be lodged somewhere, and they laboured hard to discover some formula which should restrict it to real cases of necessity," Gardiner, op. cit. vi 277.

[5] Below 40-42.

said,[1] "the subject prevails, he gains liberty, but loseth the benefit of that State Government, by which a monarchy may soon become an anarchy; or if the State prevails, it gains absolute sovereignty, but loseth subjects: not their subjection, for obedience we must yield, though nothing be left us but prayers and tears, but yet loseth the best part of them, which is their affections, whereby sovereignty is established, and the crown firmly fixed on his royal head." So impartial an exposition was not to the taste of either party, and serjeant Ashley was committed.[2] But he had expressed what was substantially the truth of the case.

The king submitted five propositions to the House of Commons which would have given him power to arrest and detain "for a convenient time," when such a course was necessary to ensure the common safety, and to maintain peaceable government.[3] The House of Commons declined to assent to them. "At this little gap," said Selden, "every man's liberty may in time go out."[4] In fact the House of Commons felt that it was only a clause which contained no saving of any kind that would adequately safeguard the liberty of the subject. To suggestions to insert a saving of the king's sovereign power Pym said, "all our petition is for the laws of England, and this power seems to be another distinct power from the law. I know how to add sovereign to his person, but not to his power."[5] They were content to risk the danger to the state because they considered that the danger to liberty was more serious. Therefore the clause of the Petition of Right which dealt with this subject contained no saving whatsoever—"No freeman was to be imprisoned or detained in any such manner." The House of Lords tried in vain to find some form of words which would preserve some discretionary power to the crown without prejudicing the liberty of the subject;[6] and Charles tried in vain to put the Commons off with a form of assent which would safeguard such a power.[7]

After the dissolution of Parliament in 1629 the question of the liberty of the subject came up again in another form. Strode, Long, Selden and others were committed to prison by the Star Chamber for the part which they had taken in the riotous scenes

[1] 3 S.T. at p. 151.

[2] "After Mr. Serjeant's speech ended, my Lord President said thus to the Gentlemen of the House of Commons, 'that though at this free conference, liberty was given by the Lords to the king's counsel to speak what they thought fit for his majesty, yet Mr. Serjeant Ashley had no authority or discretion from them to speak in that manner he had done.' And he was committed into custody, and afterwards, being sorry for any hasty expression he had used, was discharged," ibid at p. 151.

[3] Ibid at pp. 167-168.

[4] Ibid at p. 170.

[5] Gardiner, History of England vi 280; and Coke, Wentworth and Eliot expressed the same opinion, vol. v 451-452.

[6] Ibid 451.

[7] Ibid 452.

with which the adjournment of the House of Commons had been accompanied.[1] They sued out their writs of Habeas Corpus; and the cause of their detention was returned as "notable contempts committed against ourselves and our government, and for stirring up sedition against us." But it was quite obvious that such a charge was, if proved, only a misdemeanour, and that the prisoners were therefore entitled to be bailed.[2] Charles managed to keep them in prison for some time by not allowing them to be produced in court when the judges were ready to give their decision.[3] But he eventually avoided a defeat in the courts by allowing them to be bailed. He insisted, however, and the court ordered that they should find security for their future good behaviour—a condition with which they all at first refused to comply.[4] Strode and Valentine persisted in their refusal, and did not get their release till the summoning of the Short Parliament in 1640.[5]

It was clear from this case that, even after the passing of the Petition of Right, the powers of the king to commit his subjects to prison and to keep them in prison were very large. In fact so long as he had a court, like the court of Star Chamber, which he could count upon to obey his commands, opposition on the part of the judges could, to a large extent be disregarded, and the Petition of Right could be evaded in spirit, if not in letter. It was treated as non-existent, whenever it suited the policy of the crown so to treat it, during the eleven years of prerogative rule which followed. The king and the crown lawyers considered that it could be disregarded because it merely confirmed the old law, and enacted nothing new.[6] After the

[1] (1629) 3 S.T. 235.

[2] See especially Selden's argument on this point, 3 S.T. 264-286; he set out to prove that, "all offences, by the laws of the realm, are of two kinds: the first punishable by loss of life or limb; the second by fine, or some pecuniary mulct, or damage and imprisonment, or by one of them"; that, "in cases of imprisonment for offences of the second kind, sufficient bail, offered before conviction, ought of common right to be accepted"; and that the cause assigned in the return to the writ "did not denote any offence of the first kind," ibid 265-267; and the judges were of this opinion, ibid 288.

[3] Ibid 286-287; for the king's various messages and orders to the judges see S.P. Dom. 1629-1631 68-69, cxlix 110; ibid 69-72, cl 3, 4, 10, 22.

[4] 3 S.T. 287-288. [5] Gardiner, History of England vii 228.

[6] The king asked the judges what the effect of the Petition of Right would be if he assented to it; they seem to have agreed that it would not wholly deprive him of his power to arrest without cause shown, Bramston, Autobiography (C.S.) 48-49; Gardiner, History of England vi 294-296; in the proceedings against Strode and others (1629) 3 S.T. at p. 281, Heath A.G. *arg.* said, "The Petition of Right hath been much insisted on; but the law is not altered by it, but remains as it was before"; and a similar statement was made by Finch, C.J., in the case of ship money (1637) 3 S.T. at p. 1237; as a matter of fact, as Selden pointed out (3 S.T. at p. 265), the Petition of Right was not in issue in Strode's Case—"If there were no more in the case but the lords' or the king's command only, without further cause

Great Rebellion, however, the effect of the clause of the Petition which deals with this matter has been to deprive the executive of all power to arrest and detain in prison, unless it can bring a definite charge against the prisoner. Though in the eighteenth century the Houses of Parliament got the power, which had been denied to the crown, of arrest and detention without particular cause shown,[1] the executive still has no such power; and in times of emergency it must apply to the legislature for special powers. Thus, though in some cases the breadth and elasticity of the royal prerogative have been of the greatest service to our modern executive—the cabinet,[2] in this case the fear which the House of Commons had in the seventeenth century of trusting the king with a discretionary power of arrest and detention, has deprived it of a power to take precautionary measures, which, in disturbed times, might be very useful. But in spite of the fact that the executive now represents the party possessing the majority in the House of Commons, the view taken by Charles's Parliaments that the safe-guarding of individual liberty outweighs this inconvenience, is still the better view. Executives which imagine that they are backed by popular approval are at least as contemptuous of their opponents, and at least as ready to adopt high-handed measures against them, as kings who imagine that they are backed by a divine right.

Fiscal Claims.

We have seen that *Darnel's Case*[3] had arisen from the fiscal needs of the crown. Darnel had been imprisoned for refusing to contribute to a loan to the king; but it was impossible to assign this as a cause for his imprisonment;[4] and so recourse had been had to the supposed power of the king to commit without assigning a cause. It was a clever move. The right of the king thus to commit was, as we have seen, legally defensible. We shall see that the right of the king to exact a loan was not. The feeling against allowing the king any discretionary power over the pockets of his subjects was, and always had been, far stronger than the feeling against allowing him a dis-

showed of the commitment, then it was clear by the declaration of both houses of Parliament, and the answer of his Majesty to that declaration, in the late Petition of Right, that the prisoners were to be remanded"; as we have seen above 39, in that case another cause was expressed.

[1] Above 37.

[2] "It would very much surprise people if they were only told how many things the Queen could do without consulting Parliament, and it certainly has so proved, for when the Queen abolished Purchase in the Army by an act of prerogative (after the Lords had rejected the bill for doing so) there was a great and general astonishment," Bagehot, English Constitution, Pref. to second ed. xxxviii.

[3] 3 S.T. 1.

[4] Below 42.

cretionary power over their persons; and it was far more closely guarded by statutes. We have seen that the Tudors had been obliged to respect it; and that the pecuniary exactions made by them were neither frequent nor severe.[1] They had exacted loans from their richer subjects, and compelled them to pay the sums promised by summoning them before the Council;[2] they had occasionally profited slightly by rearrangements of the tariff made for the purpose of promoting English trade;[3] and they had levied ships and ship money for the defence of the country.[4] The Stuarts naturally made use of those precedents and attempted to develop them. But the spirit in which they applied them was totally different from the spirit in which they had been applied by the Tudors; so that what the Tudors had done without protest, and even with popular approval, now raised a storm of popular disapproval, heated debates in Parliament, and litigation in the courts. To understand why this was so we must look at the use which the Stuarts made of these powers of exacting loans, of rearranging the tariff, and of levying ship money.

It had been settled in the case of Oliver St. John,[5] a decision in which Coke had ultimately concurred,[6] that the crown was at perfect liberty to persuade[7] its subjects to lend their money; and that the circulation of a letter stating that this was contrary to law, and otherwise reflecting upon the king,[8] was punishable as a seditious libel. But in 1626 Charles, being hard pressed for money, attempted to compel his subjects to lend specific sums of money named by himself. The total amount to be collected was fixed at five subsidies; and persons were ordered to lend the amount which they would have been obliged to pay if five subsidies had been voted. Those who refused to lend were to be

[1] Vol. iv 104-105. [2] Ibid.
[3] Ibid 105, 335-338. [4] Ibid 105.
[5] (1615) 2 S.T. 899; see Acts of the Privy Council (1613-1614) 635, 641, 647 for the directions as to his arrest and imprisonment.
[6] In the list of "innovations" charged against Coke in 1616 it is said that, "he gave opinion that the king by his great seal could not so much as move any of his subjects for benevolence. But this he retracted after in the Star Chamber; but it marred the benevolence in the meantime," Spedding, Letters and Life of Bacon vi 92; cp. a letter of Bacon to the king in 1615, "My lord chief justice delivered the law for the benevolence strongly; I would he had done it timely," ibid v 135; for similar justifications of the loan given by the Privy Council see Acts of the Privy Council (1613-1614) 628-631, 649-650, 655-657.
[7] Bacon arguing for the prosecution said, "the whole carriage of the business had no circumstance compulsory. There was no proportion or rate set down, not so much as by way of a wish; there was no menace of any that should deny; no reproof of any that did deny; no certifying of names of any that had denied. . . . I conclude therefore that this was a true and pure benevolence, not an imposition called a benevolence of which the statute speaks," 2 S.T. at pp. 904-905; for the letters directing the levy see Acts of the Privy Council (1613-1614), 491-496.
[8] Cp. Spedding, op. cit. v 134.

bound over to appear before the Council.[1] If this did not go beyond the Tudor precedents, it was at any rate clearly contrary to a statute of Richard III.'s reign;[2] and, though precedents of similar illegal demands by the Tudor sovereigns can be produced,[3] it was at least certain that they had never made such demands at a time when there was strong disapproval throughout the country of the home policy, the foreign policy, and the ecclesiastical policy of the government. It was inevitable that the legality of such an attempt would be tested in the courts; and the judges could hardly do anything else than decide that it was illegal. Crew was dismissed;[4] but it was obvious that the other judges would not be compliant;[5] and so, as we have seen, the expedient was resorted to, of stating that persons arrested for non-payment of the loan were arrested *per speciale mandatum regis.* In the ensuing Parliament the illegality of such a loan was practically admitted by the king's secretary;[6] and the clause of the Petition of Right dealing with this matter finally settled the question. Charles did not again resort to this particular expedient to fill his exchequer.

The question of the right of the crown to impose new customs duties by his prerogative was considerably more complicated. It is clear from the mediæval statutes and precedents that the king had lost any power that he might once have had to impose new customs duties without the consent of Parliament.[7] Certain of these duties, the amounts of which had been fixed by Parliament, were annexed to the crown in perpetuity;[8] and from the end of Edward III.'s reign onwards any increase had had the sanction of Parliament. Since 1453 an increase known as tunnage and poundage had been voted by Parliament to each king at the beginning of his reign for his life.[9] Parliamentary

[1] Gardiner, op. cit. vi 144; S.P. Dom. 1625-1626 435-436, xxxvi 42-43; Bacon in 1614 had advised that all appearance of compulsion should be avoided, hinting that such a forced loan would be illegal, see Spedding, Letters and Life v 81-83; this policy, followed in 1614, was now abandoned.

[2] 1 Richard III. c. 2.

[3] See Scott Thomson, Lords Lieutenants in the Sixteenth Century, 120-125, for similar demands in 1589, 1591 and 1596.

[4] Vol. v 351.

[5] "One and all they refused to give the required signatures unless they were allowed to add that they signed simply to please his Majesty, without any intention of giving their authority to the loan," Gardiner, op. cit. vi 149.

[6] Ibid 237.

[7] Stubbs, C.H. ii 266, 571-576; Dowell, History of Taxation i 131-137.

[8] These were the Antiqua Custuma—export duties on wools, wool-fells, and leather, the rates of which were fixed in 1275, Hall, Customs Revenue i 67-68; the Nova Custuma—a further tax on goods exported by aliens the rates of which were fixed by the Carta Mercatoria of 1303, ibid i 69-70; Prisage and Butlerage, ibid ii 90-116.

[9] Dowell, op. cit. i 141, 145-146, 163; for the origins of this duty see Stubbs, C.H. ii 576-577; for the defence made by Charles I. of his illegal act in taking tunnage and poundage without a parliamentary grant, see below 70 and n. 1.

control over these customs duties was thus well established when James I. came to the throne. On the other hand, it was clear that the king had large powers of rearranging the tariff to further the commercial interests of his subjects; and, owing to the fact that in the sixteenth century commerce was becoming more and more international, these powers were more and more extensively exercised.[1] Nor was any serious objection made to their exercise.[2] But it is clear that the principle that the crown cannot impose new customs duties without the consent of Parliament, and the principle that the crown can make rearrangements of the tariff to further the commercial interests of its subjects, might easily conflict. It might be contended that a duty imposed in furtherance of the latter object was an infringement of the former principle.

This was exactly the contention raised by Bates in 1606.[3] James I. had imposed a poundage of 5s. on currants in addition to the poundage of 2s. 6d. imposed by statute. Bates declined to pay the poundage of 5s. on the ground that the king had no power to impose it. An information was brought against him in the Exchequer, and the question was thoroughly discussed both at the bar and by the bench.[4]

The history of this imposition upon currants shows that the crown had chosen its ground well.[5] Elizabeth had granted to a company of English merchants the monopoly of the Venetian trade. This grant enabled the members of the company to make a charge upon non-members for permission to trade. It expired in 1591; with the result that the company lost the right to make this charge, and the crown lost the money payable to it by the company in return for the monopoly. The crown therefore recouped itself by charging the merchants directly an imposition upon the goods which they imported. Shortly afterwards a return was made to the former policy. The merchants trading to Venice and those trading to Turkey were incorporated under the name of the Levant Company, and given the monopoly of trade to those countries.[6] The Company again adopted the plan of making a charge upon non-members for permission to trade. Non-members were allowed to import currants on payment of 5s. 6d. per cwt. The Levant Company's charter was forfeited in 1600; but a new charter was granted on condition

[1] Vol. iv 336-338. [2] Ibid 338. [3] 2 S.T. 371.

[4] The reporter Lane says, "this matter hath been divers times argued at the bar, and at the bench, by Snig and Savil, Barons, and now by Clark, and Flemming, Chief Baron, whose arguments only I heard," ibid 382.

[5] The following summary is taken from Gardiner, History of England ii 2-5.

[6] For the history of these early trading companies see vol. iv 319-320, 338-339; Pt. II. c. 4, I. § 4.

that it paid the crown £4000 a year. The trade did not prosper, and the charter was surrendered in 1603. The crown therefore lost its £4000 a year; and "it was only natural that, the trade being now open, the Council should revert to the imposition which had been before levied, either by the Crown or by the Company itself."[1] After taking a legal opinion as to the legality of such an imposition, the duty was imposed.[2] But it did not bring in much revenue to the crown. Both in 1604 and 1605 the merchants were excused arrears of duty. In fact the main object of the government was not to exact customs dues, but to regulate the Venetian trade.

The court decided that such an imposition was perfectly legal. The king's power, it held, was twofold—ordinary and absolute.[3] Over matters of state—such as the conduct of foreign affairs—the king's power was absolute. But the regulation of foreign trade was a branch of foreign affairs; and therefore the raising or lessening of these duties must belong to the king's absolute power.[4] In fact, if the law were otherwise, English subjects would be at a disadvantage as compared with foreigners, and trade would suffer.[5] It was argued that the king had no power to lay an imposition upon Bates because he was an English subject. The answer was the imposition was laid on the currants while in the hands of the Venetians; and Bates, having imported commodities so charged, became liable to pay the duty.[6] The court also said that, in its opinion, the crown had a similar power to lay an imposition upon commodities produced in England.[7] This question did not, however, arise in this case; and it held that, "for foreign commodities it appears by no Act of Parliament, or other precedent, that ever any petition or suit was made to abate the impost of foreign commodities, but of them the impost was paid without denial."[8]

The court was fully aware both of the difficulty and the importance of the case. They saw clearly that they must reconcile

[1] Gardiner, op. cit. ii 3.

[2] Ibid 4, citing S.P. Dom. 1603-1610 51, iv 46.

[3] Above 22 n. 1.

[4] 2 S.T. at p. 391, *per* Fleming, C.B., cited vol. iv 337.

[5] "If the king cannot impose upon foreign commodities a custom, as well as foreigners may upon their own commodities, and upon the commodities of this land when they come to them, then foreign states shall be enriched, and the king impoverished, and he shall not have equal profit with them," 2 S.T. at p. 390.

[6] "That the king may impose upon a subject I omit; for it is not here the question . . .; but the impost here is not upon the subject, but here it is upon Bates, as upon a merchant, who imports goods within the land, charged before by the king; and at the time when the impost was imposed upon them, they were the goods of the Venetians, and not the goods of a subject, nor within the land, but only upon those which shall be after imported: and so all the arguments, which were made for the subject, fail," ibid.

[7] Ibid at pp. 393-394.

[8] Ibid at p. 394.

the prerogative of the crown with the right of the subject, and lay down some rule which would settle the boundaries between two conflicting principles of constitutional law.[1] The rule which they laid down seems to me to be eminently reasonable. In effect they said, you must look at the intention with which the duty is imposed. Does the crown intend to regulate trade, or does it intend to raise money? If it intends only to regulate trade, if the imposition is imposed primarily with this object, the fact that the financial burden of the subject is increased is immaterial. We may thus sum up the effect of the decision in the following propositions—(1) the crown, being responsible for the conduct of foreign affairs, has a wide prerogative to act as it pleases in the interests of trade. (2) This includes a power to admit, to exclude, or to discourage by impositions, certain commodities. (3) Impositions levied with this object are not illegal because they have no Parliamentary sanction.

Though the House of Commons was inclined to back up Bates's contention[2] there was no general disapproval of the decision—in fact there is some evidence that it was generally regarded as correct. Coke and Popham approved of it;[3] and Hakewill, who argued strongly against it in 1610, admitted that, though he had since changed his mind, he was at the time "much persuaded" by it.[4] But the measures taken by the government in reliance upon this decision called renewed attention to the point raised by Bates. James issued a new Book of Rates, and placed impositions upon articles produced and sold

[1] "But for the matter it is of great consequence, and hath two powerful objects which it principally respecteth. The one is the king, his power and prerogative, his treasure, and the revenues of the crown; and to impair and derogate from any of these was a part most undutiful in any subject. The other is the trade and traffic of merchandise, transportation in and out of the land of commodities, which further public benefit ought much to be respected, and nourished as much as may be," 2 S.T. at pp. 387-388.

[2] Gardiner, History of England ii 5-6.

[3] Coke says, 12 Co. Rep. 33-34, "Upon conference between Popham, Chief Justice, and myself upon a judgment given lately in the Exchequer concerning the imposition of currants . . . it appeared to us that the king cannot at his pleasure put any imposition upon any merchandise to be imported into this kingdom, or exported, unless it be for advancement of trade and traffic, which is the life of every island, *pro bono publico* . . . and for this cause such impositions were lawful"; but in the Second Institute 63 he condemns the decision, saying that "the common opinion was that the judgment was against law, and divers express Acts of Parliament"; though the 12th and 13th parts of the reports were not published by Coke and are of less authority than the other eleven parts, vol. v 462, yet we should remember that the Second Institute represents the views which he held after he had thrown in his lot with the Parliament, ibid 444, 471; apparently, like Hakewill, his view had already begun to change before 1610—perhaps owing to the use which the king was making of the decision in Bates's Case, see above 41; below 46 and n. 2.

[4] 2 S.T. 409-410—"I do confess that by the weighty and unanswerable reasons, as I then conceived them, of those grave and reverend judges, sitting in their seat of justice, I was much persuaded."

within the kingdom.[1] Such impositions fell within the dicta rather than the decision of the case, and clearly pointed to the conclusion that the king intended to use his prerogative over trade for purely fiscal purposes. And, that this conclusion was correct, was proved by the terms of the commission issued in 1608 for the collection of impositions. The king claimed that the power to levy impositions "hath both by men of understanding in all ages and by the laws of all nations" been acknowledged to belong to kings, "to sustain the great charge and expense in the maintenance of their crowns and dignities."[2]

It was under these circumstances that the great House of Commons debate upon this question took place in 1610.[3] Not only was the question of indirect taxation discussed, but also the whole question of the relation of the prerogative to the law.[4] The purely fiscal aspect of the question was most thoroughly dealt with in Hakewill's speech.[5] Some of his positions may be historically incorrect; and some of his references to the statute book may be misleading;[6] but it can hardly be denied that he proved the illegality of the imposition of duties on merchandise without the consent of Parliament. Bacon, who as Solicitor-General spoke for the crown, criticized some of the authorities relied upon by the opposition. He pointed out that Parliamentary enactments and petitions were sometimes directed against Parliamentary grants as well as against royal impositions;[7] and that the king's answers to such petitions were not always categorical, but "admit all manner of diversities and qualifications."[8]

[1] Dowell, History of Taxation i 216-217; we first hear of a Book of Rates in Mary's reign—"the old system of rating merchandise, for the poundage, upon the value as sworn by the merchants was superseded by a Book of Rates, in which were specified the values at which goods of different sorts were to be rated for the customs," ibid 165.

[2] "This special power and prerogative (amongst many others) hath both by men of understanding in all ages, and by the laws of all nations, been yielded and acknowledged to be proper and inherent in the persons of princes, that they may according to their several occasions raise to themselves such fit and competent means of levying of customs and impositions upon merchandises transported out of their kingdom or brought into their dominions either by the subjects born under their allegiance or by strangers . . . as to their wisdoms and discretions may seem convenient (without prejudice of trade and commerce), sufficiently to supply and sustain the great charge and expense incident unto them in the maintenance of their crowns and dignities," Prothero, Documents 354.

[3] Parliamentary Debates in 1610 (C.S.) 58 seqq.

[4] Especially in Whitelocke's speech, see below 84-86.

[5] Parliamentary Debates in 1610 (C.S.) 79-83; 2 S.T. 407-476.

[6] Hall, Customs Revenue i 159-171.

[7] "Petitions divers times to take away impositions set by Parliament, which were lawful. So the petitions are of no force," Parliamentary Debates in 1610 (C.S.) 67; cp. 2 S.T. 398.

[8] Ibid; cp. Parliamentary Debates in 1610 (C.S.) 67-68; "If they [the impositions] had bene against law, his [the king's] answer should have bene simple and categorical. But his answer is divers. 17 E. I; 38 E. I. Petition to put

But he did not attempt to assert that the crown could raise revenue by the imposition of customs duties. Nor was he concerned to do so. He knew well enough that the decision in *Bates's Case* was no authority for such a proposition; and he was far too good a debater to take up so indefensible a position. On the contrary he took the line that these impositions were all levied in the exercise of the king's undoubted prerogative to regulate trade. At the outset of his speech he said "The question is de portorio, and not de tributo . . . it is not, I say, touching any taxes within the land, but of payments at the ports."[1] Later also he pointed out that the law had reposed a special confidence in the king in whatsoever concerned the government of the kingdom in relation to foreign affairs; and that it was on this principle that the imposition could be justified.[2] And this was the line taken by most of those who defended the government.[3] The chief effect of the debate was the abandonment by the Crown of impositions upon native products,[4] which Bacon had admitted to be illegal.[5] We have seen that such impositions fell within the dicta rather than the decision of *Bates's Case*.[6]

A bill to take away from the crown the power to levy all such impositions was introduced;[7] but it never became law; and the crown continued to levy them under cover of its prerogative to regulate trade. Thus in 1615 Bacon wrote to the king advising him to call another Parliament, and suggesting the policy which he should pursue on various controversial points.[8] With regard to impositions he suggested, "that the revenue by the late Impositions raised be turned, without diminution and perhaps with increase, into raising of rates, not upon the same

down all impositions not reasonable. 11 E. 3 *et* 14 E. 3. He grants in parte, and holds up in parte. 47 E. 3. He grants for a tyme. He hathe taken the balance in his hands, and moderates temperatures and positions. But *actus legitimus non recipit conditiones*"; and this is borne out by the Parliament Rolls, see R.P. 17 Ed. III. no. 28 (ii 140); 21 Ed. III. no. 11 (ii 166); 51 Ed. III. no. vi (ii 365); 15 Rich. II. no. 43 (iii 294).

[1] 2 S.T. 395; cp. Parliamentary Debates in 1610 (C.S.) 66.

[2] "The reason for the imposition is whatsoever concerns the government of the kingdom as it hath relation to foreign parts. The law hath reposed a special confidence in the king. The law cannot provide for all occasions," ibid 71.

[3] See the speeches of Carleton, ibid 61; Montague, ibid 62; Hitcham, ibid 78; Yelverton, ibid 86; Dodderidge, ibid. 99-100; it may be noted also that this is the view which Hale, C.B., took of Bates's Case; he said in his tract on the Customs 194, "Whatever the law was, yet the reason of state to make a balance between the trades here and beyond seas, and divers other matters prevailed"; for the views of Davis on this question see his Treatise on Impositions, and vol. i 572 n. 5; part of it is printed 2 S.T. 399-408.

[4] Dowell, op. cit. i 218-219.

[5] "The king cannot impose upon his subjects within the land," Parliamentary Debates in 1610 (C.S.) 66.

[6] Above 44.

[7] Its text is printed in Parliamentary Debates in 1610 (C.S.) 162-163.

[8] Spedding, Letters and Life v 176-191.

things, but when it shall be best for the advantage of the kingdom and the disadvantage of the stranger; and that it may be so handled that it be not done directly as a laying down of the Impositions, but in respect of advancing the exportation above the importation."[1]. Similarly in 1629 a new Book of Rates was said to be issued, "for the better balancing of trade in relation to the impositions in foreign parts upon the native commodities of the kingdom."[2] The question was not touched by the Petition of Right, which dealt only with direct taxation. Parliament was dissolved before it could mature the measures which it was preparing upon this topic.[3] But a statute of the Long Parliament and the Bill of Rights fixed the law in the sense contended for by Bates.[4] The result of this legislation is that, if any exercise of the prerogative results in the imposition of any sort of charge upon the subject to which the subject was not previously liable, it cannot take effect without the sanction of Parliament.[5]

There can be no doubt at all that the crown had no right to impose direct taxation without the consent of Parliament. Mediæval authority on the point was quite clear; and, if it had not been clear, the Petition of Right was decisive. So much was practically admitted even by the judges who decided for the king in the *Case of Ship Money*.[6] Though they minimized as far as possible the effect of the mediæval precedents,[7] and argued, as usual, that the Petition of Right merely declared old rights and made no new law,[8] they could not deny that the king, normally and regularly, had no power to levy any tax without the consent of Parliament. But Charles I.'s determination to rule without a Parliament had made some form of direct taxation an absolute necessity. *Bates's Case* had shown that the exercise of an undoubted prerogative of the crown could be so used as to benefit the crown pecuniarily; and it occurred to the king's advisers that this principle might be extended. Why should not the king's prerogatives to provide for national defence be so used? It

[1] Spedding, Letters and Life v 187. [2] Dowell, op. cit. i 223.

[3] Bramston, Autobiography (C.S.) 54-57; Gardiner, History of England vi 326-328; vii 3, 4, 58-61; Constitutional Documents of the Puritan Revolution, Introd. xxiv.

[4] 16 Charles I. c. 8 § 1; 1 William and Mary sess. 2 c. 2 § 1.

[5] Thus the crown has the power to make treaties; but a treaty which involved some new charge on the people would need the sanction of Parliament, see Anson, the Crown (3rd ed.) ii Pt. ii 109.

[6] (1637) 3 S.T. 825.

[7] See the judgment of Finch, C.J., 3 S.T. at pp. 1235-1237; at pp. 1230-1231, in order to minimize the decisive authority of Fortescue, he says, "The time when he wrote that book it was after all the Acts of Parliament that took away the royal power . . . it was writ when the civil wars were between the two houses of York and Lancaster, and he himself was in exile, no time then to displease the people."

[8] "There was no new thing granted, but only the antient liberties confirmed," *per* Finch, C.J., at p. 1237.

was this idea which inspired the project of ship-money; and it was by an appeal to these prerogatives that the levy was justified.[1] Therefore in order to understand the course which the arguments and decision in this case took we must look at the different views put forward as to the nature and extent of these prerogatives.

The Defence of the Realm.

The mediæval precedents made it quite clear that the king, being entrusted with the defence of the country, had wide powers of taking the measures necessary for this purpose. It could be proved that former kings had exercised the power to take ships, money, and men when they needed them for the defence of the country, and that the existence of this power was rarely if ever contested by the mediæval Parliaments.[2] This power had been recognized by later lawyers. In 1607[3] the judges, following the Year Book Cases,[4] laid it down that all sorts of trepasses upon private property could be justified by the exigencies of national defence;[5] and Charles I. had improved on the Tudor plan of making the counties lend coat and conduct money for the militia,[6] by making them pay these and other military expenses.[7] In particular the prerogative of demanding ships or money to equip ships had been recently exercised. A large part of the fleet which fought against the Spanish Armada[8] and of the fleet which had taken Cadiz,[9] had been provided by means of these writs; in 1613 the judge of the court of Admiralty had been

[1] "I take the true meaning of him [Fortescue] to be; and I hold (1) that the kingdom ought to be governed by the positive laws of the land; and that the king cannot change or make new laws without a Parliament. (2) that the subject hath an absolute property in his goods and estate, and that the king cannot take them to his own use. (3) that for his own use he cannot lay any burden upon his subjects without the subject's consent in parliament. (4) that for the benefit of trade the king may lay fitting impositions, and may command that which is for the necessary defence of the kingdom: *which is no command of charge but command of employing.* (5) I answer therefore to the great objection, that the liberty of the subject is lost, and the property is drowned which they have in their estates. First I say all private property must give way to the public. . . . And it is rather an averment of the subjects' property, that in case of necessity only they may be taken away, than contrary to it. My brother Hutton and my brother Crooke agree, that all are bound in case of necessity *exponere se et sua* to defend the kingdom; and may not the king command a part, with more reason than all," 3 S.T. at p. 1231 *per* Finch, C.J.

[2] See R.P. 51 Ed. III. no. 25; 2 Hy. IV. no. 22; 8 Hy. V. no. 6.

[3] 12 Co. Rep. 12. [4] Vol. iii 377. [5] 12 Co. Rep. at pp. 12-13.

[6] Scott Thomson, Lords Lieutenants in the Sixteenth Century 109; vol. iv 86, 104.

[7] Gardiner, History of England ix 105—citing Pym's speech in the Short Parliament of 1640; as a matter of fact these charges amounted to a good deal more than the amount raised by ship money; Sir J. Hotham said in 1640 that these charges had cost the country £40,000, while ship money had only cost it £12,000, ibid ix 115.

[8] Dasent xvi 9, 10 (1588); cp. Dowell, History of Taxation i 231.

[9] Dasent xxv 157, 198, 292, etc. (1595-1596); Gardiner, op. cit. vi 132.

given power to order a press of ships to suppress pirates;[1] in 1619 the maritime towns had been required to provide ships and ship money for the expedition to Algiers;[2] and in 1626 ships had been collected in this way for the war with Spain.[3]

Already in the Tudor period the way had been prepared for a levy, not of ships, but of ship money. The sea ports and districts bordering on the coast had found that the expense of furnishing their contingent of ships was burdensome, and so they had tried to make the neighbouring districts contribute to it.[4] Even in 1588 some persons in the seaport towns,[5] and in some inland districts,[6] had objected to be assessed for this purpose; and the principle that inland towns, which provided soldiers, were not liable to be thus assessed was recognized—though it would seem that merchants residing there were considered to be liable.[7] In 1619 a further development had been made. The ports were assessed, not as in 1588 in terms of ships, but in terms of money.[8] Thus it was only one or two very slight developments which were needed, firstly to convert the obligation to provide ships into an obligation to pay, and secondly to extend this obligation to the whole country. Obviously this wide prerogative to requisition ships, or money in lieu thereof, might, as thus extended, be turned to fiscal uses.[9] A suggestion that it should be so used was made as early as 1628; but the project aroused so much opposition that it was abandoned.[10] It was not

[1] Acts of the Privy Council (1613-1614) 145-146.

[2] Gardiner, op. cit. iii 288.

[3] Ibid vi 132—the City of London had at first resisted, but it had given way.

[4] Dasent xvi 40, 44, 54-55, 60, 395-397, 394-400; cp. 304, 353-354 for cases where the whole county was made contributory; ibid xxv 157, 161, 198, 201, 210, 212, 241, 461 (1595-1596).

[5] Ibid xvi 375-376, presumably on the ground that they were not merchants; cp. ibid xxv 489, 492-493.

[6] Ibid xvi 374-375, 379-380—the tinners of Devon and Cornwall; there was considerable controversy over the obligations of the town of Tewkesbury and the county of Gloucester—" some of the said county makinge suite to be exempted from the said chardges, *having no use of the porte nor usinge trafficke*, and as others in the behalf of the said cyttie did enforme their Lordships howe hard a thinge yt would be to gather that somme which this chardge did amount unto without order and assystaunce of the county," ibid xvi 143; cp. ibid xxvi *xi-xiii*.

[7] The inhabitants of Wharstead, a town near Ipswich, had been made to contribute, but, " for as much as it appeared to theire Lordships . . . that it is an upland towne, the inhabitauntes of smale habilitie, but their whole trade of lyving standeth uppon husbandry, and nothing at all by shipping, they were requyred to forbeare to laye anie taxe or chardge uppon them for the said service. . . . If there be anie marchauntes that lyve by trafficke amongst them their Lordships' meaning is not they should be exempted," ibid xvi 100.

[8] Gardiner, op. cit. iii 288, nn. 1 and 2.

[9] The width of the prerogative made it eminently suitable for this purpose; the prerogative as to the requisitioning of ships had not been restricted by the mediæval Parliaments in the same way as the prerogative to levy soldiers, see L.Q.R. xxxv 12-32.

[10] Gardiner, op. cit. vi 226-227.

till 1634 that it was determined, at the suggestion of Noy the Attorney-General, to have recourse to it.[1] Noy's first writs extended the old precedents in that the king's demand was founded not on actual, but on apprehended, danger. The extension was justified by the principle that prevention was better than cure; and it is perhaps arguable that there is some authority for this view in the case of *The King's Prerogative in Saltpetre*[2]—at any rate this seems to have been the opinion of the Court of Appeal in 1915.[3] There was some remonstrance from London against this levy, but no other opposition to the principle of the demand.[4] In 1635 there was a second levy, and the precedents were still further extended. The whole country, and not merely the maritime towns, were asked to contribute. This extension was justified by the obvious fact that the whole country was equally interested in repelling invasion.[5] This second levy roused greater opposition than the first. Richard Chambers, who had already suffered for his resistance to the levy of customs duties by the prerogative, attempted to contest the right to make this levy. But the judges would not listen to his arguments. "There was," said Berkeley, J., "a rule of law and a rule of government, and many things which might not be done by the rule of law might be done by the rule of government."[6] In 1636 a third levy was made. But, though the king had obtained an opinion of the judges in favour of its legality,[7] it aroused a

[1] Gardiner, op. cit. vii 356-359.

[2] (1607) 12 Co. Rep. 12.

[3] In re a Petition of Right [1915] 3 K.B. 649; it is pretty clear however that, whatever may have been the law in Coke's day, the views of the court as to the modern law were wrong, see Attorney-General v. De Keyser's Royal Hotel [1920] A.C. 508, at pp. 525-526; below 53 n. 10.

[4] Gardiner, op. cit. vii 374-377—"The only direct word of remonstrance as yet heard proceeded from the City of London. From other towns came petitions complaining that the burden had been unfairly adjusted; London alone asserted that it should not have been imposed at all"; but, after a stormy meeting, the Common Council gave way and obeyed the king's orders.

[5] Coventry addressed the judges in this strain before they went their circuits, in order that they might explain the reason for the levy to the country; he told them that the king, "hath resolved that he will forthwith send out new writs for the preparation of a greater fleet the next year; and that not only to the maritime towns, but to all the kingdom besides; for since that all the kingdom is interested both in the honour safety and profit, it is just and reasonable that they should all put to their helping hands," Gardiner, op. cit. viii 79; the speech is printed 3 S.T. 825-839.

[6] Gardiner, op. cit. viii 103.

[7] The opinion ran as follows: "We are of opinion that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, your majesty may by writ under the great seal of England, command all the subjects of this your kingdom, at their charge to provide and furnish such number of ships, with men, munition, and victuals, and for such time as your majesty may think fit, for the defence and safeguard of the kingdom from such danger and peril: and that by law your majesty may compel the doing thereof, in case of refusal or refractoriness. And we are also of opinion that in such case your majesty is the sole judge both of the danger, and when and how the same is to be prevented and avoided," 3 S.T. 844; cp. S.P. Dom. 1636-1637 416-418, ccxlvi, 11, 14 for an exact transcript of the

universal opposition.[1] In 1637 the king, relying upon the opinion of the judges in favour of its legality, thought that he might safely allow the question to be argued in the courts. A favourable decision would, it was erroneously thought, go far to allay popular discontent. It was for these reasons that Hampden was allowed to bring the question to an issue in the court of Exchequer, and that the case was adjourned into the Exchequer Chamber to be solemnly argued before all the judges.

The argument for the crown was as follows:—the king is entrusted with the defence of the country. In an emergency he has a prerogative, which is inseparably annexed to his person, of acting as he pleases for the preservation of the safety of the state. He may take what means he pleases to ward off the danger; and one of these means may be the levying of a sum of money.[2] The same principles apply to a case of apprehended danger. If they did not, the measures taken might be too late.[3] As to whether such a danger actual or apprehended exists the king is the sole judge. Therefore his allegation that it exists cannot be traversed. If it is argued that to give the king this power is dangerous, the answer is that in the case of many other powers—e.g. the power to make peace and war or the power to pardon—an equally large discretion is entrusted to the king; and it is gross want of respect to him to suppose that these discretionary powers will be abused.[4]

The basis of the argument for Hampden was the distinction drawn between the case of a time of actually present danger and the case of a merely apprehended danger, and the analysis of the real character of the powers given to the king in the former case. It was admitted that in the case of actually present danger, such as invasion, the king can act as he pleases.[5] But this is not really a royal prerogative. "In these cases of instant danger and actual invasion, it is not only in the power of the king, but a subject may do as much in divers cases . . . it is the law of necessity that doth it. Nay, in that case, the subject may prejudice the king himself in point of property."[6] In fact in

papers dealing with this transaction; it appears that Finch had made certain of the opinion of the judges before the king formally put this case, see 3 S.T. 1264; Bramston's Autobiography (C.S.) 68, 79, 80; the opinion was enrolled in the courts of common law, the Chancery, and the Star Chamber.

[1] Dowell, History of Taxation i 236-237; cp. Coventry's speech 3 S.T. 841; "the third writ of ship money drove the moderate constitutionalists into the arms of the partisans of Parliamentary supremacy," Gardiner, op. cit. viii 200.

[2] 3 S.T. at p. 1235 *per* Finch, C.J., above 28 n. 5; cp. ibid at pp. 1098-1099 *per* Berkeley, J.

[3] Ibid at pp. 1233-1234, *per* Finch, C.J.

[4] Ibid at p. 1232 *per* Finch, C.J.

[5] Ibid at p. 1013 *per* Holborne *arg.*

[6] Ibid at pp. 975, 1011-1012 *per* Holborne *arg.*; cp. ibid at pp. 904-905 *per* St. John *arg.*

these cases the law is superseded,[1] and therefore from them no inferences can be drawn as to the legal extent of the powers conferred upon the king by his prerogative.[2] But, if this is the law, two consequences follow. Firstly, it is only the actual presence of the danger which can give rise to this power.[3] Such a situation cannot be created by the allegation of the king that the country is in danger. To assert that a case of emergency can be created by the king's allegation destoys "the whole frame of political advice";[4] for it gives to a bad king the power of doing what he pleases; and it is to guard against this contingency that the law has laid restraints upon the king's powers.[5] And then the mediæval thought[6] is introduced—these restraints are not "a disability in the king, but a prerogative, to make him come the nearer to divinity in the attribute."[7] Secondly, the case of a merely apprehended danger does not add to the powers legally belonging to the king. In such a case the law is not superseded, and it has provided a remedy. Parliament can be summoned, and the necessary measures can be taken.[8]

It is obvious, as I have said, that the extent of the discretionary power claimed for the king in this case, and allowed by the court, in effect made him the sovereign power in the constitution.[9] The decision, if pushed to its logical conclusion, would have given him the last word in any serious conflict with his Parliament; for the law allowed him to use this extraordinary power whenever he judged the circumstances to constitute a danger to the state; and a long continued and hopeless deadlock between two branches of the legislature, which prevented the grant of supply to the government, might well be deemed a case of necessity. On the other hand, it is equally obvious that the argument for Hampden confined the discretion of the crown within dangerously narrow limits.[10] Its power to take timely

[1] 3 S.T. at pp. 975, 977.

[2] "The question is not, what we are to do by necessity, but what is the positive law of the land," ibid at p. 1011.

[3] Ibid at pp. 1012-1013. [4] Ibid at p. 972. [5] Ibid.

[6] Vol. ii 253, 435. [7] 3 S.T. at p. 972.

[8] "If there be time to make ships, or prepare ships at the charge of the counties; then there is time enough for his majesty if he pleases to call his parliament, to charge his commons by consent in parliament, and to have a subsidiary aid, as always hath been done in such cases," ibid at p. 1159 *per* Crooke, J.; to which Finch, C.J., replied, "I hold parliaments are excellent means to raise aid for the defence of the kingdom, and yet they are not the only means, for then the parliament and not the king should be the only judge, and have defence of the realm," ibid at p. 1235.

[9] "There was one thing which I forgot, for destroying of the distinction from necessity and leaving the king judge of the necessity; that in (my) judgment, so to do it, is all one as to leave it to him arbitrarily, if he will," ibid, at pp. 976 *per* Holborne *arg.*; above 28.

[10] This would seem to be the opinion of Lord Cozens-Hardy, M.R., in In re A Petition of Right [1915] 3 K.B. at p. 659, when, dealing with the king's powers

precautions for the national safety was made wholly dependent on Parliament; and we have seen that its power to rule its forces by martial law had been so cut down by Petition of Right as to be useless.[1] But it was obvious that any more extended powers would be used to justify billeting soldiers on the people,[2] the government of civilians by martial law in time of peace,[3] and even the imposition of direct taxation. As in the *Case of Darnel*,[4] so in the *Case of Hampden*, the certainty that any discretionary power given to the crown would be used to establish the sovereignty of the prerogative; and the knowledge that the sovereignty of the prerogative was, in practice, accompanied by gross abuses, made it necessary to cut down the crown's powers to such an extent, that, unless supplemented by Parliament, they were and are quite inadequate to deal with a national emergency.

But for the present the crown's contentions had prevailed in the courts. In *Darnel's Case*,[5] in *Bates's Case*,[6] and in *Hampden's Case*,[7] the courts had held that the king had large discretionary powers to imprison dangerous persons, to regulate trade, and to act as he pleased to secure the safety of the country; and it was obvious that by the use of the two last named of these powers he could raise revenue. No doubt there was much to be said, both on the ground of law and on the ground of policy, for the way in which the courts decided the dry legal issues submitted to them in these cases. But it was obvious that when a decision such as the *Case of Proclamations*[8] made against the king it was ignored;[9] and that when it was made for him it was extended beyond all bounds to support the system of prerogative rule.[10] Both the

to enter on land in case of invasion, he said, "the existence of the prerogative was not distinctly challenged by counsel for the suppliants, but they sought to limit it to a case of actual invasion rendering immediate action necessary. In my opinion there is no foundation for this limitation of the prerogative. To postpone action until the enemy has landed, or until the authorities are satisfied that a landing in a particular neighbourhood is imminent, would or might be fatal to the security of the realm"; this dictum is consistent with the views of the court in the Case of Ship Money rather than with the views of those who argued for Hampden, and its correctness is therefore open to doubt, above 51 n. 3; it is because the prerogative is so limited by the common law that comprehensive Defence of the Realm legislation is necessary.

[1] Vol. i 576; below 226 and n. 5.

[2] For an illustration of the abuses of billeting soldiers see the petition of George Phillips, constable of Banbury in 1628, Hist. MSS. Com. 4th Rep. App. 13.

[3] Vol. i 576.

[4] (1627) 3 S.T. 1.

[5] (1627) 3 S.T. 1.

[6] (1606) 2 S.T. 371.

[7] (1637) 3 S.T. 825.

[8] (1611) 12 Co. Rep. 74.

[9] Above 27.

[10] This was clearly pointed out by Whitelocke in his speech on impositions in 1610, 2 S.T. 514; he said, "the king by the common law, may send his writ, *ne exeas regnum*, to any subject of the realm. . . . So in point of government and common good of the realm he may restrain the person. But to conclude therefore he may take money not to restrain, is to sell government, trust, and common justice, and most unworthy the divine office of a king. . . . There is no question but that the king hath the custody of the gates of all the towns and cities in England, as well as all the ports and havens, and upon consideration of the weal publicke may open and shut them

king and his advisers under-estimated the intelligence of the English people when they supposed that they were blind to the real issues which lay behind these decisions.[1] They made, as I have already pointed out,[2] an equally serious under-estimate of the strength of the popular resentment which they were arousing. If, indeed, they had had a military force at their disposal and a civil service under their control, they might have ignored this resentment; and, with the help of the reasoning in these cases, justified their acts to a people who could not resist. But, as we have seen,[3] they had neither. It is true that the control exercised by the central over the local government might lead a superficial observer to suppose that the local officials were as completely under the control of the crown as the officials of a continental state.[4] But this was a mistake of the same character as the supposition that the language of the courtiers and high churchmen about the king and his prerogative[5] was a fair index to the king's real constitutional position in the country. It was a mistake which no Tudor would have made; but the two first Stuarts, being the men they were, could hardly avoid falling into it. If they had been wiser men, the working of the system of local government, which they had inherited from the Tudors, would have taught them what was the real feeling of the country towards their system of prerogative rule. It would have demonstrated the hopelessness of an attempt to apply in detail the consequences which they deduced from the principles enunciated by the courts in these cases.

(iii) The relations of the central to the local government.

Let us recall the main features of the system of local government which the Stuart kings had inherited from the Tudors. In the country it fell mainly upon the justices of the peace. They were assisted by the sheriffs, who executed the king's writs and the orders of the central courts and the quarter sessions, and the lord lieutenant and his deputies, who superintended the military forces of the counties.[6] Below them were the high-constables, the petty constables, the overseers, the churchwardens and other officers of hundred, parish, and township, to whom

at his pleasure. . . . So, if by reason of infection he forbid the bringing of wares and merchandises from some cities or towns in this kingdom to any great fair or mart, shall he therefore restrain the bringing of goods thither unless money be given him by way of imposition"; cp. also Hakewill's argument, ibid at pp. 473-474.

[1] It was obvious even to a foreigner; the Venetian ambassador said of the levy of ship money in 1634, "If it does not altogether violate the laws of the realm, as some think it does, it is certainly repugnant to usage and to the forms hitherto observed," cited Gardiner, op. cit. vii 376-377.

[2] Above 14-15. [3] Vol. iv 163-165. [4] Ibid 165-166.

[5] Above 13. [6] Vol. iv 76-77, 122.

the justices of the peace and the sheriff issued orders, and over whom they exercised jurisdiction by the machinery of presentment and indictment.[1] In the corporate towns charter and prescription had made the machinery more variegated; but even there it tended to follow the country system. The mayor and aldermen were often justices of the peace. They administered the multifarious statutes which imposed duties on town and country justice alike. They superintended the subordinate officials of ward or parish.[2]

We have seen that this complicated machinery of local government had been made efficient by the close supervision of the Privy Council, seconded in Wales and the Marches and in the North by the Provincial Councils.[3] That supervision was exercised directly by orders, advice, and rebukes; and indirectly through the judges of assize, who conveyed instructions to the justices of the peace and other officials, and reported to the Council on the state of the counties.[4] The justices of the peace could always invoke the aid of the Council to maintain their authority;[5] and, on the other hand, they could, on the advice of the Council, be struck out of, and other persons added to, the commission of the peace.[6]

During the reigns of the first two Stuart kings, this system of control was in full working order. We have seen that by its means the poor law was successfully administered,[7] and the economic policy of the state was carried out.[8] As we shall now see, it kept the ordinary machinery of local government running smoothly and efficiently.

In the North, and in Wales and the Marches, the authority of the Provincial Councils was maintained in spite of all opposition.[9] Over the whole country the justices of the peace—"the king's eyes and ears"[10]—were strictly supervised. They were instructed as to the nature of their duties and as to the procedure by which they could best execute them.[11] They were expected to obey promptly any orders sent to them,[12] and they were rebuked if they were remiss in this or in any other of their duties.[13] They were required to report regularly as to the

[1] Vol. iv 122-125, 156-158, 162-163. [2] Ibid 132-133. [3] Ibid 73-80.
[4] Ibid 75-76. [5] Ibid 79. [6] Ibid 78.
[7] Ibid 400. [8] Ibid 355-361. [9] Vol. i 510-512.
[10] A phrase used by James I., see below 58.
[11] See the orders issued by the Council in 1605 as to the procedure and duties of the justices, Hamilton, Quarter Sessions from Elizabeth to Anne 67-71.
[12] For a specimen of such orders see S.P. Dom. 1636-1637 2, cccxxvii 4—orders as to manufacture of malt.
[13] See ibid 78-80 for an admonition of this kind sent to the justices in 1609; cp. S.P. Dom. 1633-1634 538, cclxv 6, for orders given by the Ecclesiastical Commission to the justices.

performance of certain of their duties—notably those connected with the poor law.[1] The Council or the Star Chamber was always ready to settle conflicts of jurisdiction between the justices and rival authorities;[2] and to maintain the authority of the justices by summoning before it those who contemned their authority.[3] It endeavoured to secure their obedience by frequent revision of the lists of those who were in the commission of the peace for the different counties.[4] A similar control was exercised over the governing bodies of corporate towns;[5] and in 1628-1629 we hear of an expedient which was to attain great notoriety in the later years of this century—Quo Warranto proceedings with a view to the remodelling of a corporation.[6]

Throughout this period the greatest importance was attached to the control exercised through the judges of assize.[7] James I.'s speech in the Star Chamber in 1616[8] represents the existing theory and practice. "Remember," he said, "that when you goe

[1] There are a regular series of these reports in the S.P. Dom., see e.g. S.P. Dom. 1635 175; ibid 1635-1636 135; ibid 1636-1637 41; vol. iv 400.

[2] See e.g. S.P. Dom. 1629-1631 299, clxx 4—a complaint of the deputy lieutenants and justices of Oxfordshire against a purveyor; ibid 1634-1635 3, cclxvii 15-17—a dispute between the justices of Wiltshire and a commissioner of the cloth trade.

[3] Ibid 1631-1633 312, ccxv 57—the justices for Gloucestershire, having caused certain persons to be indicted for riot, and the jury having returned 'ignoramus,' they certify this to the Council; ibid 1611-1618 557, xcviii 30—refusal by Colchester to pay a rate, and request that the town might be ordered to show the cause of this refusal to the Council; ibid 1627-1628 77, lvi 12, the earl of Northampton writes to the Council that those who refused to lend in Gloucestershire should not be allowed to go away freely; "if so, it would embolden others, and make those suffer who have been most industrious in the king's service. The gentlemen who must remain there, and be every day subject to censure and contempt for doing his Majesty's service, have been instant with the earl on this account."

[4] Ibid 1619-1623 332, cxxvii 1, Locke writes to Carleton (Feb. 1623), "the Council are making an expurgatory index of justices of the peace, weeding out 20 or 30 in some counties"; ibid 1639-1640 387, ccccxvii 137, Burton, writing to Dr. Bray, says, "the last Lord Keeper (Coventry) as soon as he was chosen took instantly a survey of all the justices in every county, and expurged divers without rendering any cause . . . And so may the present Lord Keeper if he please, a thing done out of course by his predecessors."

[5] Ibid 1629-1631 42, cxlviii 88—Yarmouth, election of a magistrate and restoration of an alderman ordered.

[6] Ibid 1628-1629 555, cxliii 2—the idea was to get rid of the two bailiffs as heads of the town—an institution described as "monstrous in nature and dangerous and inconvenient in government."

[7] See ibid 1623-1625 8, cxlviii 43—the judges wait on the king before they go their circuits; ibid 1631-1633 535, ccxxxii 42—charge given by Coventry, L.K., to the judges before they go on circuit; ibid 1633-1634 352, cclv 44—notes of a speech by the Lord Keeper to the judges; ibid 1635 128, ccxc 108; cp. 3 S.T. 826-846 for the instructions given to the judges to explain and justify the various levies of ship money; in 1642 elaborate directions were given by the king to the judges, and he said, "We call to mind that in the former times the constant custom was, by the mouth of the Lord Keeper at the Court of Star Chamber in the end of Trinity term, to put the judges of Assize, shortly to depart on their circuits, in mind of such things as were then thought necessary for the good government of the kingdom." S.P. Dom. 1641-1643 349, ccccxci 52.

[8] Works (ed. 1616) 562-563; cp. vol. i 272-273.

your circuits, you goe not onely to punish and prevent offences but you are to take care for the good government in generall of the parts where you travell, as well as to doe justice in particular betwixt party and party, in causes criminall and civill. You have charges to give to justices of peace, that they doe their dueties when you are absent, as well as present: take an accompt of them, and report their service to me at your returne . . . I know not whether misunderstanding or slackness bred this, that I had no accompt but in generall, of that I gave you in particular in charge the last yeare: therefore now I charge you againe that at youre next returne, you repaire to my Chancellour, and bring your accompts to him in writing, of those things which in particular I have given you in charge: and then when I have seene your accompts as occasion shall serve, it may bee I will call for some of you, to be informed of the state of that part of the country where your Circuit lay. . . . And this you shall finde that even as a King (let him be never so godly, wise, righteous, and just) yet if the subalterne Magistrates doe not their parts under him, the Kingdome must needs suffer: so let the judges be never so careful and industrious, if the justices of the peace under them, put not to their helping hands, in vaine is all your labour. For they are the king's eyes and eares in the country." In fact the itinerant judges had a threefold duty to perform. They must see that the county business was properly conducted, they must keep the central government informed of the state of the local government and the feeling of the counties, and they must explain and justify to the rulers of the counties the policy of the government.[1] When political passions began to run high, the last mentioned duty supplied an additional and powerful reason for securing as judges men who were wholehearted believers in that policy.

It might at first sight seem that the king had in the machinery of local government a powerful instrument, under good control, for the enforcement of any line of policy which he might wish to adopt. In reality nothing could be further from the truth. The smooth running of that machinery depended entirely upon the approval by the officials and bodies entrusted with the conduct of the local government of the policy adopted by the king, and on their willingness to co-operate with him in the pursuit of it.

[1] "This manner of justices itinerants carrieth with it the majesty of the king to the people and the love of the people to the king; for the judges in their circuits are sent *a latere regis* to feel the pulse of the subject and to cure his disease. . . . It makes the government more united in itself; for the judges at their return meet at Serjeant's Inn, and there they make up their accounts, and then they relate their proceedings to the king and his chancellor, and so make it all one piece," Bacon's speech in the Star Chamber 1617, Spedding, Letters and Life vi 303.

We shall see the reason for this if we look, firstly at the character of the machinery of local government, and the nature of the political ideas which governed those who worked it; secondly, at the capacity for government, and the political creed to which this machinery and those ideas had given rise; and thirdly, at the motive force which kept the machinery running.

Firstly, we have seen that, though the old communal courts, through which local government in the Middle Ages was administered, had been for the most part superseded by officials such as the justices of the peace, constables, overseers, and churchwardens, much of the old communal spirit still survived.[1] Quarter sessions and petty sessions were more efficient courts of a new model; and parishes were, as units of secular government, new bodies entrusted with the performance of new statutory duties. But much of the machinery employed by these bodies was mediæval, and helped to preserve the tradition of the mediæval self-governing community.[2] And we have seen that the judicial processes under which that business was conducted helped to preserve the mediæval tradition of the rule of law.[3] The law which ruled them in the conduct of their business was the common law.[4] Its machinery and its principles governed the application and the interpretation of those "stacks of statutes" which contained their powers and defined their duties. The officials therefore of English local government were inspired, not by the ideas of a department of the central government, but by the ideas of the common law, which they applied through the judicial machinery of that law. It is true that they must obey the orders of the central government; it is true that they were liable to be summoned before the Council or Star Chamber if they disobeyed those orders; it is true that it was the active supervision of the Council and Star Chamber which had made them efficient administrators of the local government. But, in spite of all this, their ordinary every-day work was done under judicial forms which left them free to act independently so long as they obeyed the rules of the common law.

Secondly, as a result, these officials in their several spheres were obliged to show a self-reliance and an initiative which would be unnecessary and misplaced in officials who conducted their work according to the detailed orders of a department of the central government. The statutes and the rules of the common law which defined their powers and duties left much to their

[1] Vol. iv 158, 162, 164. [2] Ibid 142-144, 163-165. [3] Ibid 144.

[4] As Dr. Jenks has shown, Yale Law Journal, xxxii 530, the use made by Coke of the writ of Mandamus in Bagg's Case (1616) 11 Co. Rep. 93 proves that the writ gave the courts a very efficient instrument of control,

imagination and initiative; and though the Council expected obedience to its orders when it issued them, it also expected a capacity to act without orders in an emergency. In 1632 the attention of the Council was called to a letter, which the deputy lieutenants of the county of Carnarvon had written to the earl of Bridgewater, informing him that pirates had come into a certain haven in the county and threatened to land, and asking for instructions. The Council, "much marveyling they should make so strange a demande in matter wherein their owne judgements might sufficiently informe them," ordered that instructions be given to all the county officials to prevent such landing and to arrest the pirates.[1] It is obvious that persons set to govern under such a system as this will be educated by their experiences. They will acquire some ideas of their own, if not as to the policy which they would like to see adopted, at least as to the faults of the policy which they are asked to assist in carrying out. Having some practical knowledge of government in the concrete, it will be difficult to convert them by specious arguments to a belief in a policy of which they are suspicious. They may not be able to confute the arguments, but they will have an instinctive fear of measures which seem to threaten the foundations of their political creed.[2] And, naturally, the creed of the large majority of the officials who controlled the local government of the country was a belief in the supremacy of those technical common law rules, and that still more technical common law machinery, through which they carried on that government. It is quite arguable that this was a stupid creed, and that those who held it took a narrow view of the true ends of government, and of the best means of attaining those ends. But it was so universally held that it was a force which no statesman could afford to ignore.

Thirdly, as this system of local government was conducted by the voluntary service of unpaid officials, the central government had not the same hold over them as it would have had over paid officials. Dismissal had very few terrors. It followed, therefore, that the service of these officials would not be very willing unless the policy, which the central government wished to pursue, was approved of by those officials; and that it would be almost impossible for the central government to secure the enforcement of a policy which they actively disliked. Even if it could succeed in compelling the sheriffs and the justices of the peace to make the attempt to enforce it, it was certain that they

[1] Cited by Skeel, the Council in the Marches of Wales 256-257.
[2] See May, History of the Long Parliament, Bk. i p. 19 cited below 72 n. 1.

would fail, because they would find it equally impossible to force the lower ranks of the hierarchy—the constables, the overseers, and the churchwardens—to act.[1] Thus it was only if the policy pursued by the central government was substantially approved by the local government officials, that the machine could be kept running with any degree of smoothness.

As the seventeenth century progressed, the policy pursued by the central government aroused an increasing opposition. These justices of the peace and other officials were quite competent to judge the bearings of the policy pursued by the king; and, whatever lawyers might say, it was quite clear that it was leading to the substitution of the supremacy of the prerogative for the supremacy of the common law. Their increasing opposition was accurately reflected in every successive Parliament. In fact these characteristics of the local government, which were fatal to the success of a scheme of royal absolutism, were perhaps the most important cause for the ultimate success of the Parliamentary opposition. The Stuart kings, as we have seen,[2] explained their failure to work with their Parliaments by attributing the existence of a Parliamentary opposition to the work of factious individuals. They thought that if they could exclude a few of the Parliamentary leaders (by the device, for instance, of making them sheriffs[3]) all would go well.[4] But the untruth of this diagnosis, and the futility of the measures founded upon it, were demonstrated when the attempt was made to govern the country without a Parliament. It then gradually became very obvious that Parliament had represented truly the feelings of those through whom alone the royalist policy could be enforced. No doubt appearances were to some extent deceptive. The Tudors had accustomed the justices of the peace and the other officials of the local government to pay obedience to their orders;[5] and it was possible to deal with isolated acts of dis-

[1] As Defoe wrote at the end of the century in his True Born Englishman:—

> "The meanest English plowman studies law,
> And keeps thereby the magistrates in awe,
> Will boldly tell them what they ought to do,
> And sometimes punish their omissions too."

[2] Above 14-15. [3] Vol. v. 448.

[4] Eliot's comment on this attitude of mind, Negotium Posterorum ii 108-109, is quite justified; he said, "To that end a project was receav'd to remove the most active of the Commons . . . charging them with imploiments that might make them uncapable of the Parliament, presuming thereby others would be deter'd, and the whole abilitie of that house extracted with those persons. . . . Soe shallow are those rivulets of the Court, that they thinke all wisedome like their murmure. Kingdomes they will measure by the analogie of their rules; but in this they deceave themselves, as in all other things the world, and as they judge of Kingdomes, Kingdomes may judge of them."

[5] Vol. iv 77-78, 165.

obedience by rebukes, and, if necessary, by proceedings in the Star Chamber. They had also accustomed these officials to look to the Council and Star Chamber for effective support in maintaining their authority.[1] Thus in all matters of routine the old habits of subordination and obedience prevailed; and it might be thought that these habits would prevent disobedience or resistance to any orders which might be issued. But there was one very clear limit to this obedience. The crying need of the government was money; and attempts to collect money without Parliamentary sanction had always aroused the opposition of these officials; for such attempts were contrary to the plainest teachings of that common law which, they considered, should guide both their acts and the acts of the central government.

From the beginning of the century there were clear indications that the officials of the local government could not be relied upon to obey orders or requests for raising money without Parliamentary sanction. Thus in 1614 the Council sent a letter to the counties pointing out that the dissolution of the late Parliament had prevented the grant of supply, and suggesting that they should follow the example of the Council and many other lords and gentlemen, and collect subscriptions to a free gift to the king.[2] To this request the justices of Devonshire replied that they had met and considered the matter, and, "having spent much time and many meetings in the free discovery of our own opinions, and also private trial of others of best sufficiency we fell at length into this resolution . . . to make known to your Lordships our general scruple, which under your Lordships favour is briefly this: the exceeding prejudice that may come to posterity by such a precedent. His majesty's great necessity to be supplied . . . wrought much upon the affections of every particular of us, so as nothing but the fear of the just blame of after ages could have abated our forward dispositions from performing a service in itself so requisite."[3] Some of the leading justices were summoned to attend the Council, and there the legality of the demand was demonstrated to them.[4] This course, and a letter to the bench, induced it to take the

[1] Vol. iv 79.

[2] Hamilton, Quarter Sessions from Elizabeth to Anne 42-44; it would seem from a letter of Winwood to Carleton, S.P. Dom. 1611-1618 237, lxxvii 38, that the court fully expected that the country would follow its example and make a voluntary contribution.

[3] Hamilton, op. cit. 45-46; the letter was signed by thirty justices, ibid 47.

[4] "It was at this board in the presence of some of yourselves evidently proved and manifested by constant and continual precedents and records, that the like voluntary and free gifts (without coercion or constraint) have from age to age been made to his majesty's most noble progenitors for the supply of their necessities, as by the same precedents and records particularly appeareth," ibid 49.

necessary steps to bring the king's request before the county. But it does not appear what sum was collected—probably not very much. At any rate it is clear that the expectation of the government that the people as a whole would follow the example of the Council and the clergy, and make a large voluntary contribution, was disappointed.[1] Similarly in 1626 the king's request for a loan was met by a widespread passive resistance,[2] and direct refusals to subscribe "otherwise than by way of Parliament."[3] Some of the recipients of privy seals even treated them with contempt;[4] others who had promised to subscribe refused to pay;[5] and, in the face of this wide-spread resistance, it was not very much use imprisoning[6] or impressing for military service[7] individual refusers. At the same time we begin to hear of resistance to other demands, which would have the effect of throwing upon the county rates expenses which ought to have been borne by the central government. In 1626 the county of Essex absolutely refused a demand for some four or five thousand pounds for the maintenance of the troops at

[1] Hamilton, op. cit. 48-51; it seems that £23,500 was got from the City bishops and courtiers, and only £42,600 from the rest of England, ibid 51 n.

[2] S.P. Dom. 1625-1626 218, xviii 33, the Earl of Northampton reports that- "His delay in sending certificates for the loan had been occasioned by the back, wardness of the country, so that the whole burden of making the returns had been thrown upou himself. . . . Sends certificates for Salop and Flint compiled as carefully as he could, being destitute of all helps, and finding infinite difficulty in persuading men to discover the state of their country."

[3] The following are a few out of the many reports sent by the justices to the Council: Ibid 397, xxxiii 41, the justices of Berks say that they "had done all they could to prevail on the county respecting the voluntary gift to his Majesty, but they all with one voice cried out that their bodies and goods were ready to do his Majesty service, but that they would depart with no money, except it were granted in a Parliamentary way"; ibid 399, xxxiii 59, the county of Gloucester "made one unanimous answer to the proposal for a voluntary gift to his Majesty, that they submit themselves and their estates to be disposed of by his Majesty by way of Parliament"; ibid 428, xxxv 90, the commissioners for the loan in Derbyshire say, "every man in particular refused in several hundreds, and in others, they thrust upon the justices their denial with a great and joint noise. They added to their denial these words, but by way of Parliament. The justices did not give their money before the people were solicited, because few of them assembled, and those not all resolved to give. There were not forty givers in the whole county"; this is borne out by the returns printed by J. C. Cox, Derbyshire Annals ii 106-107; for other illustrations see S.P. Dom. 1625-1626 398, 401, 407, 409, 410, 450, 465; ibid 1628-1629 65, 76, 106; it is only very occasionally that any willingness to lend is reported, see ibid 79, lvi 31; 140, lx 52.

[4] Ibid 1625-1626 327, xxvi 32.

[5] "In Northfolk such as subscribed to the loan do refuse to pay the same. So Cumberland refuse," Yonge's Diary (C.S.) 100.

[6] S.P. Dom. 1627-1628 81, lvi 39—ten out of sixty-eight refusers imprisoned in Lincolnshire; ibid 233, lxviii 28; cp. Yonge's Diary (C.S.) 108.

[7] Ibid 91, lvii 1, the deputy lieutenants of Essex report to the Council that they had summoned the refusers, and, finding them resolute had "tendered press money to seven of them. They refused to receive the same, but were warned that they would be of the number which would be sent from Harwich to serve the king of Denmark."

Harwich, describing the demand as "excessive and unprecedented";[1] and the refusal was justified by the deputy lieutenants who explained that a bad harvest and other demands made it quite impossible to raise such a sum.[2] It should have been fairly clear that the prejudice against levies, otherwise than by Parliamentary consent, was so strong that it was not likely to be overcome by any considerations of personal loyalty to the king, or even by the most convincing arguments based on national necessity; and that, even if the sheriffs and the justices of the peace could be persuaded to use the machinery for collecting subsidies for this purpose, they would be met by a resistance which there was no means of overcoming.

These warnings were disregarded, and the attempt was made to turn the prerogatives of the crown to fiscal uses by the device of ship-money. So soon as the successive levies of ship-money had made it quite obvious that it was merely a device for raising extra-Parliamentary taxation, resistance became, as we have seen, almost universal;[3] and, as the crown had provided no machinery for its collection, other than the ordinary machinery of the local government, there were many methods by which that resistance could be made effective. Sometimes the opposition came from the higher officials such as the sheriffs and justices of the peace; and the Council tried the expedient of ordering those who were refractory to be dismissed.[4] But it was an expedient which was bound to fail, as, even where the sheriffs tried to levy the tax and the justices offered no opposition, the bailiffs and constables declined to act. They refused or delayed to make returns of the persons liable to pay.[5] They demanded to know by what statutory authority the demand was made.[6] If distress was levied, those who levied it were harassed by actions at law;[7] and, owing to fear of being so harassed, constables refused to execute writs ordering the property of defaulters to be distrained.[8] If the property was distrained, no one would buy it.[9] In some

[1] S.P. Dom. 1625-1626 106-107, vi 76.

[2] Ibid 107, vi 77—"They have raised above £4,000 and are out of hope of raising more, they therefore represent the state of the county to the Council. Scarce any man has half an ordinary crop of corn; clothiers have no vent of their wares; graziers and market men have no sale on account of the infection in London; Michaelmas rents and an assessment of the subsidy are becoming due; and extraordinary taxes for the relief of the sick poor. If the king will not bear the charge, other counties and especially Suffolk, ought to contribute."

[3] Above 51-52.

[4] S.P. Dom. 1636-1637 181, cccxxxv 13.

[5] Ibid 1635 505, cccii 90; 1635-1636 246, cccxiv 47; 1636-1637 3, cccxxvii 7; ibid 435, cccxlv 88.

[6] Ibid 1635-1636 368, cccxviii 75.

[7] Ibid 1636-1637 435, cccxlv 88.

[8] Ibid 205, cccxxxvi 29.

[9] Ibid 36, cccxxvii 126.

places the tax-payers themselves intervened; and then the attempts to levy the tax caused riots.[1]

It was, as we have seen, the extent of the opposition, and the widespread conviction that the tax was contrary to law, that induced Charles to allow the question to be solemnly argued before all the judges.[2] If he could get a decision in his favour it would stop the actions which were threatened against officials for illegal distress, it would enable him more easily to deal with officials who refused to do their duty and levy the tax, and it would go far to satisfy his subjects that he was legally entitled to levy it. That it was the intention of the government to make some such use of the decision is clear from the course which the courts took with objectors after it had been given,[3] and from a letter written by Finch, C.J., to Laud, giving an account of the manner in which he had dealt with an objector at the Exeter assizes in 1639.[4] It appears from this letter that Sir Richard Strode [5] had had one of his cows distrained for non-payment of ship money. He thereupon drew up and delivered to the grand jury for Devon a paper "in the nature of a presentment," in which Magna Carta and the other mediæval statutes against taxation without the consent of Parliament were recited, to prove that this distraint was illegal. One of the grand jury informed Finch of this. Finch thereupon directed that nothing should be done in the matter without acquainting him—"which I did lest they might be induced to find the presentment, which I thought might be of ill consequence." The next day, "there being present a great assembly of justices and a full *posse comitatus*," he interrupted Strode who was about to make a statement; and took occasion to explain that he was an "unquiet spirit" who had lately been fined in the Star Chamber, to enlarge upon the king's care for the defence of the realm, and to explain the reasons for the judgment against Hampden. Apparently Strode did not make much of an answer to this harangue. Thereupon Finch, "with much undervaluing of his presentment," returned it to the grand jury, who returned it to him again "as a thing they thought worthy of no further consideration." The court then rose. The next day Strode returned to the charge, and affirmed that the jury had returned it, "not as a thing rejected

[1] S.P. Dom. 1637-1638 198, cccIxxix 132; ibid 1638-1639 22-23, cccxcviii 116.

[2] Above 52.

[3] Lord Say's Case (1638) Cro. Car. 524, where the court on the application of the Attorney-General refused to hear an argument against the legality of the tax.

[4] S.P. Dom. 1639 439-441, ccccxxvii 31, 32.

[5] There was another Strode by name William who had had a similar experience, see ibid 1636-1637 205, cccxxxvi 29; and he also had been summoned before the Council, ibid 341, cccxliii 17; 400, cccxlv 33, 34.

by them, but as a true presentment." But the jury, on being questioned by Finch, "answered there was no such matter." "By which the scorn he had incurred was doubled upon him; and though then he began to talk in a more malapert way, yet I thought fitter to use him with contempt than with anger, and so let him go away, being despised by all that heard it, for ought could appear by the least sign."

It was easy for the courts to refuse audience to objectors; and it was not difficult for a man of Finch's talents and eloquence to score off a country knight at the assizes. But neither course went very far to persuade the country that the judgment in the *Case of Ship Money* was right.[1] Probably very many persons at the Exeter assizes sympathised with Strode. The year before, the Council had been informed that William Walker, chief constable of Kingsthorpe, in the county of Northampton, had been "prating and grumbling much against the ship money," saying that it was an intolerable exaction, that it would "cause the like stirs that were now in Scotland," that the "King was under a law as much as any subject," and that though some judges had determined it to be lawful "the best and most honest had not."[2] These were the real views of the majority of Englishmen. To any one who looked fairly at the facts it was impossible to contend, as Charles had contended when he dissolved his last Parliament in 1629, that all this opposition was due to a factious minority. To anyone who had any real understanding of the nature of the machinery by which alone the central government could enforce payment of the tax, it must have been obvious that the attempt to do so could not succeed. Why then did Charles and his advisers fail to grasp the fact that it was impossible to pursue the line of policy to which they had committed themselves? This question I shall endeavour to answer in the ensuing section.

(iv) The strong and weak points of the scheme of prerogative government.

The first half of the seventeenth century is the turning point in English constitutional history, because it was then that it was decided that the government of England was to be by the king and Parliament, and not, as in most other continental countries, by the king alone. This result was achieved by a Parliamentary opposition which gradually made Parliament an integral and a permanent part of the government of the state, and compelled the

[1] S.P. Dom. 1637-1638 451, cccxc 157—the sheriff of Chester wrote that the arguments of the dissenting judges had caused further difficulties in the collection of the tax, which bears out Clarendon's statement, above 28-29.

[2] Ibid 560-561, cccxcv 40.

crown to submit to such modifications of its prerogatives as would leave Parliament free to exercise the powers which it had won. Hence, in later ages, political parties which have aimed at effecting constitutional changes designed to secure a larger measure of popular control over the executive government, have connected their struggles with these struggles of the seventeenth century, and claimed as their ancestors the Parliamentary leaders who opposed the Stuart kings. The Whig historians of the first half of the nineteenth century always regarded the struggle for Parliamentary reform, and for the many other changes which followed the Reform Act of 1832, as the sequel of these constitutional struggles of the seventeenth century. They therefore regarded the leaders of the Whig party as the lineal descendants of the Parliamentary leaders in those struggles; and the same claims have even been made on behalf of the programmes and leaders of parties or fractions of parties which, in these later days, have advocated changes of a much more radical character. This manner of reading seventeenth century history has led to a serious misunderstanding of the real character of the policies pursued by the king and Parliament. Historians like Hallam and Macaulay represent the Parliamentary party as the party of progress, and the royalist party as the party opposed to change. In their histories the Parliamentary party is the party which moves with the times, and aims at the preservation and extension of individual liberty: the royalist party as the party which seeks its inspiration in the past, and aims at the preservation and extension of an overgrown prerogative.

There is some truth in this picture; but, for all that, the general impression conveyed is misleading; for it neglects the distinction between those "New Whigs," from whom Burke appealed, and those "Old Whigs" whose ideas did, to a large extent, represent the traditions of the earlier half of the seventeenth century. The Parliamentary party did aim at the preservation and extension of individual liberty; it did aim at the reform of administrative abuses; and no doubt its victory did, in the long run, make for progress and for the welfare of England and the world by preserving and consolidating a pattern of constitutional government. But, in the first half of the seventeenth century, it was the royalist party which was the party of progress, and the representative of modern ideas in politics:[1] it was the

[1] "The king had perceived that with the growth of legislative activity and the victory of the central power over its enemies, sovereignty had become a fact, and past history justified him in laying claim to all that was involved in the new state of things. It is the king and his supporters, be it observed, who first saw the change. . . . One side has ever before it the vision of law conceived as a system existing by Divine Right, its origin lost in the past, independent of circumstances and men's caprice,

Parliamentary party which resisted change, which drew its inspiration from a mediæval past, and adopted as its central political idea the mediæval conception of the rule of law. In the proceedings against Manwaring in 1628, Pym maintained that, "the form of government in any state cannot be altered without apparent danger of ruin to that state."[1] Gardiner,[2] speaking of the men who formed the majority in the Short Parliament, says, "They were no reformers, no followers of new ideas, by which the lives of men might be made brighter and happier than of old. They wished to worship as their fathers had worshipped, to believe as their fathers had believed, and to live as their fathers had lived. They did not wish to be harassed by constant changes of which they did not understand the import, and of which they mistrusted the tendency. To them Parliaments were not an instrument of improvement, but an instrument to avert unpopular alterations." These words cannot, as we shall see, be applied to the Long Parliament. But, till 1641, they are as true of the Parliaments of James I. as the Parliaments of Charles I.; and they are to a large extent true of the Whig statesmen who made the Revolution of 1688. Clearly we cannot rightly appraise either the strength or the weakness of the scheme of prerogative government, unless we begin by looking at its advocates and its opponents from this, the true historical standpoint.

The relations of the Stuarts with the Continent were close. James I.'s political theories[3] as to the position of the king in the state became accomplished facts in France, and in many other European countries in the course of the century; and Charles was married to a French wife. We have seen that neither the Cortes in Spain nor the States-General in France had been able to oppose any effective barrier to the growth of royal absolutism.[4] They had been swept aside; and experience seemed to prove that government by a sovereign king, who was backed by an army and a trained civil service, was the most effective means to ensure, not only protection against lawlessness, but also the development of trade, the encouragement of learning, and the rapid progress of all that made for an ordered civilization. It was little wonder that many of the higher classes of society

superior to kings, and controlling Parliament. The other side lays stress on the conception of a sovereign raised above all laws, with power to abrogate them, who alone can give binding force to enactments, and invest custom with legal sanctions. The supporters of the crown are repeatedly found arguing that the king must be before and above the law, or how can it be binding? They are enraged at the stupidity of their opponents, who cannot admit so obvious a fact. . . . Sovereignty presented itself to these men with all the force of a discovery," Figgis, Divine Right of Kings (1st ed.) 231-232.

[1] 3 S.T. 341.
[2] History of England ix 127-128.
[3] Above 11-12.
[4] Vol. iv. 166-167.

maintained that, "it was for the honour of a people that the Monarch should live splendidly, and not be curbed at all in his prerogative, which would bring him into greater esteem with other princes, and more enable him to prevail in treaties."[1] It was little wonder that those who drew these lessons from the political conditions of Europe, should consider that the supporters of representative assemblies which claimed to fetter the prerogative, and the supporters of law courts which claimed to subject it to the restraints of law, were the victims of ignorant and insular prejudice. They naturally considered themselves to be the enlightened thinkers who were supporting the most modern and up-to-date political theory, against opponents who were advocating a mediæval conception of the state, which experience had shown led to anarchy.[2] It was by the prerogative that the Tudors had mastered this anarchy, and had made England a well ordered state of the modern type. The prerogative of the king of England must be increased, as the prerogatives of continental kings had been increased, if England was to keep her rank among the civilised states of Europe.[3] Here, as abroad, experience of the good results which would follow from the intelligent working of a strong prerogative would soon convince even the most obstinate.

It is from this point of view that we must look at the relations of the two first Stuart kings (i) to the law, and (ii) to Parliament.

(i) We have seen that upon many points the law was really doubtful.[4] The mediæval precedents spoke with an uncertain

[1] May, History of the Long Parliament, Bk. i c. 2 p. 18.

[2] Wentworth, in his speech to the Council of the North in 1628, cited Gardiner, op. cit. vii 25-26, says, "the authority of a king is the keystone which closeth up the arch of order and government, which contains each part in due relation to the whole, and which once shaken and infirmed, all the frame falls together into a confused heap of foundation and battlement, of strength and beauty. . . . Whatever he be which ravels forth into questions the right of a king and of a people shall never be able to wrap them up again into the comeliness and order he found them." Manwaring, in a passage of one of his sermons, cited 3 S.T. 346, said, "If they would consider the importunities that often may be urgent, and pressing necessities of state that cannot stay without certain and apparent danger, for the motion and revolution of so great and vast a body as such assemblies are, nor yet abide their long and pausing deliberation when they are assembled, nor stand upon the answering of those jealous and over wary cautions and objections made by some who, wedded over much to the love of epidemical and popular errors, and bent to cross the most just and lawful designs of their wise and gracious sovereign and that under the plausible shows of singular liberty and freedom, which, if their conscience might speak, would appear nothing more than the satisfying either of private humours, passions, or purposes."

[3] Wentworth wrote to the king in 1637, "It is plain that the opinion delivered by the judges, declaring the lawfulness of the assignment for the shipping, is the greatest service that profession hath done the crown in my time. But, unless his Majesty hath the like power declared to raise a land army upon the same exigent of State, the crown seems to me to stand upon one leg at home, to be considerable but by halves to foreign princes abroad," Strafford's State Papers ii 61.

[4] Above 30, 32-33, 41-42, 44-45.

voice. In many cases they had been modified in a manner favourable to the prerogative during the Tudor period. Those who held this royalist creed naturally considered that public policy demanded that this modification should continue. They considered that when the law was doubtful it should be interpreted in accordance with modern needs. Nor can we blame those of the judges, who believed in the royalist creed, if they fell in with this idea. After all it is the method of interpreting old precedents which is followed to-day, and always has been followed, by judges who have been compelled to make modern law out of ancient material. Thus the law officers of the crown, who carefully chose the issues to be submitted to the courts, and the judges who decided them in favour of the king, considered that they were improving and developing English public law by raising it to the level of the public law of continental states. Similarly, both the lawyers and the politicians considered that respect should be paid to the spirit rather than the letter of the existing constitutional law and practice. For instance, they considered that it would be absurd, in the face of recent practice, to stop the levy of tunnage and poundage when the king died, because the formal consent of the House of Commons, which had always been given, had not been got.[1]

(ii) Both the king and Parliament were well aware that in other European countries the mediæval representative assemblies had gone under. "Wee are the last monarchy in Christendome," said Sir Robert Phillips in 1625, "that retayne our originall rights and constitutions;[2] let them not perish now, let not posteritie complaine that we have done for them worse than our fathers did for us."[3] Similarly, both king and Parliament were well aware that many of the prerogatives questioned by Parliament were exercised as of course by the kings of other countries. It was pointed out, for instance, that foreign kings levied impositions at their pleasure.[4] It is not, therefore, surprising that

[1] S.P. Dom. Add. 1580-1625 423, xxxv 8, James I. wrote to his Treasurer that though certain customs were no longer payable by strict law owing to the death of Elizabeth, he was to levy them, "not doubting their renewal next Parliament"; so Charles I., in the declaration he issued in 1629 (Gardiner, Documents 86-88), defended his levy of tonnage and poundage by saying that the duty had for a long period been granted to each successive sovereign for life, and that Parliament had always confirmed its levy between the death of the preceding king and the grant of it to his successor; in fact, he treated the fact that it had not been granted as an accident, and defended his levy upon much the same grounds of expediency as the enactment of the Provisional Collection of Taxes Act 1913, 3, 4 George V. c. 3, was justified.

[2] Commons' Debates in 1625 (C.S.) 110.

[3] This is reported by Eliot, Negotium Posterorum ii 83-84.

[4] S.P. Dom. 1611-1618 235, lxxvii 30, Chamberlain wrote to Carleton, "Sir Hen. Wotton spoke in Parliament in favour of impositions, alleging foreign examples. Winwood and Lake seconded him. Arguments on the other side. Wentworth

those who held the royalist creed should consider that Parliaments, which were constantly acting in a manner displeasing to the crown, were imperilling the continued existence of the institution of Parliament; and that they ought to warn Parliament of the consequences, not only to itself, but also to the state. "I beseech you gentlemen," said Carleton in 1626,[1] "move not his Majesty with trenching upon his prerogatives, lest you bring him out of love with Parliaments. You have heard his Majesty's often messages to you, to put you forward in a course that will be most convenient. In his message he told you that if there were not correspondency between him and you, he should be enforced to use new counsels. Now I pray you to consider what these new counsels are, and may be. I fear to declare those that I conceive. In all Christian kingdoms you know that Parliaments were in use anciently, by which their kingdoms were governed in a most flourishing manner, until the monarchs began to know their own strength; and seeing the turbulent spirit of their Parliaments, at length, they by little and little, began to stand upon their prerogatives, and at last overthrew the Parliaments throughout Christendom, except here only with us." And then he warned the House that if Parliaments were dispensed with the state of England might become even as the state of France, where men, weighed down with the heavy burden of taxation, went scantily clothed and fed.

Charles carried out his threat to use new counsels when he dissolved Parliament in 1629, because the House of Commons had shown a design to usurp a supreme control over the government, "which belongs only to us and not to them."[2] The royalists rejoiced that the government of England was now to be placed upon the same footing as other modern states. "The courtiers," says May,[3] "began to dispute against Parliaments in their ordinary discourse, that they were cruel to those whom the king favoured, and too injurious to his prerogative; that the late Parliament stood upon too high terms with the king; and that they hoped the king would never need any more Parliaments. Some of the greatest statesmen and privy councillors

said the reward of Spanish impositions was the loss of the Low Countries; of French, the murder of their kings, etc"; cp. above 46 n. 2.

[1] 2 S.T. 1374-1375, cited Gardiner, History of England vi 110; cp. Carleton's speech in 1610, Parliamentary Debates in 1610 (C.S.) 111 n.

[2] "In these innovations (which we will never permit again) they pretended indeed our service, but their drift was to break, by this means, through all respects and ligaments of government, and to erect an universal overswaying power to themselves, which belongs only to us and not to them," Gardiner, Documents 95.

[3] History of the Long Parliament, Bk. i c. 2 pp. 18-19.

would ordinarily laugh at the ancient language of England when the word liberty of the subject was named."

If we look at the history of the seventeenth century in the light of subsequent events it seems scarcely credible that any sensible man, and least of all "great statesmen and privy councillors," should have held these views. It is by no means incredible if we look at it from the standpoint of a contemporary. It was exactly these great statesmen and councillors who were likely to be led away by study of foreign analogies, and to suppose that the best policy for England was to set her house in order upon a continental model. Nor was this view altogether absurd; for they could point to great and tangible advantages which had followed, or might be expected to follow, from the system of prerogative government, and they could point to the fact that it had secured the adhesion of some of the ablest men of the day.

Three advantages which had followed or might be expected to follow from this scheme of prerogative government stand out clearly. Firstly, the kingdom was at peace and taxation was not heavy. Wealth increased, as the social and economic policy inaugurated by the Tudors and continued by their successors bore its fruit. The prosperity of the nation was shown by the growth of luxury which the more religious and serious minded deplored.[1] Secondly, this scheme gave a clear answer to the problem of the whereabouts of the sovereign power in the English constitution. The king was sovereign both in name and in deed. And, as the controversy between king and Parliament developed, it was, as we have seen,[2] becoming more and more clear that it was this question of sovereignty which underlay most of the various disputes between them. It was also becoming clear that, till this controversy was settled, the conduct of the government would continue to be very difficult, and that legislation was almost impossible. This scheme seemed to offer a solution of

[1] "I must be so just as to say, that, during the whole time that these pressures were exercised, and those new and extraordinary ways were run, that this, from the dissolution of the parliament in the fourth year, to the beginning of this parliament, which was above twelve years, this kingdom . . . enjoyed the greatest calm, and the fullest measure of felicity, that any people in any age, for so long time together, have been blessed with; to the wonder and envy of all parts of Christendom," Clarendon, History of the Rebellion (Ed. 1843) 30; May, History of the Long Parliament Bk. i c. 2 p. 19 says that the manners of the people were corrupted, "Prophanesse too much abounded everywhere; and which is most strange, where there was no religion, yet there was superstition: luxury in diet, and excess both in meat and drinke, was crept into the kingdome in an high degree, not only in the quantity, but in the wanton curiosity. And in abuse of those good creatures which God had bestowed upon this plentiful land, they mixed the vices of divers nations, catching at everything that was new and forreigne."

[2] Above 26-28.

the problem which had been adopted by the principal states of Europe. Thirdly, it gave to the king, as representing the executive, the powers needed to conduct the government of a modern state. Thus it gave him powers to discipline his troops, as all modern troops were disciplined, by martial law.[1] It gave him a discretionary power to arrest persons dangerous to the state.[2] It gave him power to appoint commissioners to see to the proper conduct of trades or industries, and generally to render more effective that general superintendence and control which, in the time of the Tudors, had kept the officials of the local government up to the mark;[3] and it had ensured the due carrying out of the statutes relating to the poor law.[4] Such powers as these were then and are now necessary for the proper conduct of the government of a modern state. The inability of the goverment, in the latter part of this and in the eighteenth century, to exercise many of these powers may have been a necessary price to pay for the preservation of constitutional liberty. But it was a price which was by no means inconsiderable; and, in the nineteenth and twentieth centuries, most of the powers which the Stuart kings claimed to exercise by virtue of their prerogative, and many others, have, from time to time, been given to the executive by the legislature.

It was the conviction, firstly, that the crown as representing the executive government must possess such powers as these, and secondly that the denial of these powers to the crown by the House of Commons made good government impossible, that led two of the ablest men of the day—Bacon and Wentworth—to give their adhesion to the scheme of prerogative government.

Of Bacon's relations to the politics of his day, I have already spoken.[5] His contribution was mainly of a speculative and literary kind, while Wentworth's was that of a statesman and a man of action. Both, at the beginning of their careers, gained a great reputation in the House of Commons. But, while Bacon was on the whole a firm believer in the need for a strong well-informed House to advise the king and initiate legislation,[6] Wentworth was impatient of the eloquence and the foolishness which are conspicuous in all representative assemblies, and profoundly distrustful of the competence of the House to do much

[1] See S.P. Dom. 1625-1626 198, xiii 41, martial laws are drawn up for the troops in England, "according to the customs of all well grounded kingdoms"; the need for martial law became very obvious during the wars with Scotland; for illustrations of the want of discipline of the soldiers see ibid 1640 xxx-xxxii; ibid 335-336, cccclvii 104; ibid 477, cccclx 8; ibid 496, cccclx 56; it was also quite obvious that the common law rules as to when martial law could be applied were wholly insufficient, ibid 355, cccclviii 46; ibid 514, cccclxi 16; vol. i 576.

[2] Above 32-37.

[3] Vol. iv 72-80, 359-361.

[4] Ibid 400.

[5] Above 24-26.

[6] Above 25 n. 3.

more than vote supplies, criticise obvious abuses, and propose legislation to remedy them.[1] To some extent the difference in their points of view is to be explained by the fact that party feeling was more embittered when Wentworth became a figure in public life than it was when Bacon held office. But it was also due to a difference in the nature of the men. Wentworth had none of Bacon's insight into the comparative strength of the various forces in the national life. He hated the Puritans,[2] and was therefore wholly opposed to that policy of tolerance to Protestant nonconformists which Bacon had advised.[3] He under-estimated the capacity of the House of Commons; and, because he never appreciated the fact that it truly represented the nation,[4] he never appreciated the strength of its position. Puritans and House of Commons alike seemed to impede the realization of his ideal—a strong and honest government which would discard all attempts to fritter away the money and energy of the nation on a showy foreign policy, and would devote all its strength to problems of domestic reform.[5] But both men aimed in substance at the same objects, and both were convinced that the only hope of attaining them was to strengthen the prerogative. A king with a strong prerogative, and advised by able ministers, was the first requisite; and the loyalty of both men to the reigning king convinced them that it was both to the interest of the nation and their duty as subjects to maintain his prerogative, to

[1] Gardiner, op. cit. iv 258-259; v 350-351; vii 136; cp. Strafford Papers i 21, 24.

[2] Gardiner, op. cit. iv 258. [3] Above 25 n. 2; below 126.

[4] "In Wentworth's eyes it only partially represented the nation, if it represented it at all. The lawyers and country gentlemen of whom it was composed were not to be trusted to govern England. The lawyers with their quirks and formulas too often stood in the way of substantial justice. The country gentlemen too often misused the opportunities of their wealth to tyrannize over their poorer neighbours. Wentworth therefore would appeal to the nation outside the House of Commons, as Chatham afterwards appealed to the nation outside the House of Commons," Gardiner, op. cit. vii 136.

[5] Some words he wrote to the king in 1637 illustrate his ideal; after pointing out that the decision in *Hampden's Case*, "forever vindicates Royalty at home from under the conditions and restraints of subjects, (and) renders us also abroad . . . the most considerable Monarchy in Christendom," he advocates a peace policy and a withdrawal from European politics—"I beseech you, what piety to alliances is there, that should divert a great and wise king forth of a path, which leads so manifestly, so directly to the establishing of his own throne, and the secure and independent seating of himself and posterity in wealth, strength, and glory . . . verily in such a condition as there were no more hereafter to be wished them in this world, but that they would be very exact in their care for the just and moderate government of their people, which might minister back to them again the plenties and comforts of life, that they would be most searching and severe in punishing the oppressions and wrongs of their subjects, as well as in the case of the publick magistrate as of private persons, and lastly to be utterly resolved to exercise this power (of levying ship money) only for publick and necessary uses: to spare them as much and often as were possible, and that they never be wantonly vitiated or misapplied to any private pleasure or person whatsoever," Strafford Papers ii 62.

increase its strength, and to obey without question any commands he might give.[1] Both men idealized the Tudor monarchy; and both firmly believed that the political salvation of their country could only be secured by a strengthened monarchy of the Tudor type.[2]

Wentworth's hatred of corruption, and his contempt for the futile foreign policy of Buckingham, had for the moment made him a leader of the Parliamentary opposition;[3] and he was an effective leader. Eliot says of him, "Ther was in that gentleman a good choise of partes, natural and acquisit, and noe less opinion of them. A strong eloquence he had, and a comprehension of much reason. His arguments were weightie and acute, and his descriptions exquisit. When he would move his hearers with the apprehension of his sense he had both *acumina dictorum* and *ictus sententiarum* to effect them. His abilities were great both in judgment and perswasion, and as great a reputation did attend them."[4] He approved the proposal to secure the liberty of the subject by an enactment containing provisions similar to those contained in the Petition of Right; and he wished to adopt the straightforward method of enacting a new law which should provide for the future.[5] The question of the discretionary power he would have left open.[6] If it was really necessary to use it he was prepared to trust the nation to approve the user. Such a power he considered was superior to all laws—*Salus populi suprema lex.*[7] And to reconcile king with Parliament he was prepared to go even further. He would be satisfied with a confirmation of the older statutes, and a proviso that those committed without cause should be bailed.[8] But all attempts at

[1] See his letter to the Earl of Carlisle, printed S.P. Dom. 1631-1633 xxiv-xxvi on the case of Foulis—"And surely if he leave it to be considered by the best affected, their verdict will be, his Majesty shall contribute more to his own authority by making him an example of his justice, than can possibly be gained by taking him in again. But this is an arrogance grown frequent nowadays, which I cannot endure. Every ordinary man must put himself in balance with the king, as if it were a measuring cast betwixt them who were like to prove the greater losers upon the parting. Let me cast then this grain of truth in and it shall turn the scale. Silly wretches! Let us not deceive ourselves. The king's service cannot suffer by the disgrace of him, and me, and forty more such"; cp. below 76 n. 3.

[2] Above 73-74; below 76 n. 5.

[3] Gardiner, op. cit. vi 33-34, 126-128, 235-236.

[4] Negotium Posterorum (Ed. Grosart) i 104.

[5] Gardiner, op. cit. vi 251, 262, 265.

[6] Ibid 262-263.

[7] He wrote in 1639 to Mr. Justice Hutton, "I must confess in a business of so mighty importance I shall the less regard the forms of pleading, and do conceive (as it seems my Lord Finch press'd) that the power of levies of forces at sea and land for the very, not feigned, relief and safety of the Publick, is such a property of sovereignty, as were the crown willing, yet can it not divest itself thereof: *Salus Populi suprema Lex;* nay, in cases of extremity, even above Acts of Parliament," Strafford Papers ii 358.

[8] He said, "We have by this Act a security by Magna Carta and the other laws. Let us make what law we can, there must—nay there will—be a trust left in the

reconciling king and Parliament failed;[1] and Wentworth found that he must choose between them. His choice was soon made. The subsequent proceedings of the House of Commons convinced him that it was aiming at a control of the government which would have reduced the king to insignificance.[2] Such a result, he considered, was incompatible with decent government.[3] He therefore went over to the side of the king, and set himself to build up a strong and honest government on the basis of the prerogative. The liberty of the subject, he considered, ought to be protected; and his other legal rights ought to be respected; but, in the interests of the state, the king must have a large discretionary power. He agreed with James I.'s view that Parliament ought not to "meddle with the main points of government."[4] If the House of Commons persisted in throwing all government into confusion by usurping the place which properly belonged to the king, the king was acting wisely in dispensing with it.[5]

This ideal he tried to realize as President of the Council of the North, and as Lord Deputy in Ireland. It was perhaps unfortunate both for the king and for Wentworth that he was employed in Ireland during these years of prerogative rule. He had no chance of appreciating the growing unpopularity of Charles' government. On the other hand, the very success of his own government in Ireland would naturally tend to make him think that what was possible in Ireland was also possible in England. A man who had any real appreciation of the feelings of England would never have advised the summoning of the

Crown. Let us confirm Magna Carta and those other laws, together with the king's declaration, by this Act. Let us provide by this law to secure us that we may have no wrong from Westminster. Let it be enacted that we shall be bailed if *habeas corpus* be brought and no sufficient cause," cited Gardiner, op. cit. vi 266; cp. his speech cited ibid 269.

[1] Ibid 270, 271. [2] Ibid 336.

[3] His views on this matter appear very clearly from his letter in 1639 to Mr. Justice Hutton, "It is a safe rule for us all in the fear of God to remit these supreme watches to that regal power, whose peculiar indeed it is; submit ourselves in these high considerations to his ordinance, as being no other than the ordinance of God itself; and rather attend upon his will, with confidence in his justice, belief in his wisdom, assurance in his parental affections to his subjects and kingdoms, than feed ourselves with the curious questions, with the vain flatteries of imaginary liberty, which had we even our silly wishes and conceits, were we to frame a new commonwealth even to our own fancy, might yet in conclusion leave ourselves less free, less happy, than now," Strafford Papers ii 388-389.

[4] Works of James I. 537.

[5] "He was standing in the ancient paths. His knowledge of history told him how a Henry II. and an Edward I., a Henry VIII. and an Elizabeth, had actually guided a willing people. It told him nothing of a dominant House of Commons reducing its Sovereign to insignificance. . . . As he had accused Buckingham once, so he might accuse Eliot now 'of ravishing at once the spheres of all ancient government,'" Gardiner, op. cit. vii 137.

Short Parliament as an experiment.[1] That a Parliament was to be summoned astonished everyone.[2] As everyone except the court [3] expected, it merely proved the strength of the opposition to the crown; and its dissolution aggravated the national hatred for all the agents of prerogative rule. That hatred now began to be concentrated upon Wentworth. The dissolution of the Short Parliament, and the belief that he was prepared to cœrce England with his Irish troops, had made both the nation at large, and his old colleagues in the Parliament of 1628, regard him as the great apostate, and the great enemy of Parliaments, who must at all costs be removed,[4] and to whom no law could be given.[5] "Pereat qui perdere cuncta festinat; opprimatur ne omnes opprimat"—these words with which Eliot had concluded his speech upon the impeachment of Buckingham exactly expressed the sentiments which the majority of the House of Commons now felt towards Wentworth.

That, as a measure of policy, it was expedient to remove the ablest councillor whom the king possessed, can hardly be doubted;[6] and that it was necessary to attack him at once, and forestall the charge of treason which he was preparing to make against Pym and other leaders of the House of Commons, is also obvious.[7] But it is quite clear to us that, whatever his shortcomings, Wentworth was not an apostate. The confession of

[1] S.P. Dom. 1639-1640 xxiv; Gardiner, op. cit. ix 75-76, 125-126; the king asked the Council whether, "if the Parliament should prove as untoward as some have lately been, the lords would not then assist him in such extraordinary ways in the extremity as should be thought fit," and they voted that they would, ibid ix 77.

[2] S.P. Dom. 1639-1640 xiii; ibid 420 cccclxiv 15, a letter from Devonshire in which it is said, "We, in Devonshire, have news of a Parliament, but no man believes it."

[3] Below 82 n. 2.

[4] Gardiner, op. cit. ix 127; he complained in his defence that "It hath been my misfortune now, when I am greyheaded, to be charged by the mistakers of the times, who are now so highly bent, that all appears to them to be in the extreme for monarchy, which is not for themselves. Hence it is that designs, words, yea intentions, are brought out for real demonstrations of my misdemeanours; such a multiplying glass is a prejudicate opinion," 3 S.T. 1465; but it must be admitted that both the mistakes of the court, to which he had largely contributed, and his own acts were the causes of this prejudicate opinion; local jealousies in Yorkshire arising out of his elevation to the post of President of the Council of the North, and his resolute administration, also helped to bring him down, Reid, the King's Council in the North 404-435, 437-438.

[5] "It is true, we give law to hares and deers because they be beasts of the chase; it was never accounted either cruelty or foul play to knock foxes and wolves on the head, as they can be found, because these be beasts of prey," St. John's argument before the House of Lords on the bill of attainder 3 S.T. 1509.

[6] Sir John Bramston says in his Autobiography (C.S.) 75, "I remember that day the Kinge passed that Act (the Act of Attainder) I came from Westminster Hall with Mr. Mainard (who had binn one of the mannagers of that tryall against the Earl) now Sir John Maynard, the King's serjeant; he with great joy sayd, Now wee have done our worke; if wee could not have effected this, wee could have done noething"; for Maynard see below 511-514.

[7] Gardener, op. cit. ix 231 and n. 3.

his political faith which he made in his defence to his impeachment shows that his views had been consistent. "The Prerogative of the crown and the propriety of the subject have such mutual relations, this takes protection from that, that foundation and nourishment from this; and as on the lute, if any one string be too high or too lowly wound up, you have lost the harmony; so here the excess of prerogative is oppression; of pretended liberty in the subject, disorder and anarchy. The prerogative must be used as God doth His omnipotency, upon extraordinary occasions; the laws must have place at other times. And yet there must be a prerogative, if there must be extraordinary occasions; the propriety of the subjects is ever to be maintained, if it go in equal pace with this; they are fellows and companions that are and ever must be inseparable in a well-governed kingdom; and no way so fitting, so natural to nourish and entertain both, as the frequent use of Parliaments; by these a commerce and acquaintance is kept betwixt the king and subject. These thoughts have gone along with me these fourteen years of my public employments, and shall, God willing, to my grave: God, his majesty, and my own conscience, yea, and all those who have been most accessory to my inward thoughts and opinions, can bear me witness that I ever did inculcate this—that the happiness of a kingdom consists of a just poize of the king's prerogative and the subject's liberty; and that things would never go well till they went hand in hand together."[1]

But how was this "just poize of the king's prerogative and the subject's liberty" to be secured? Wentworth, and those who thought with him, believed that it could only be secured by making the king the predominant partner in the constitution. Their ideals were high. Their views were in accord with the views held by many eminent statesmen and political thinkers all over Europe. Their policy simply carried to its logical conclusion the developments which had taken place under the Tudors. But they forgot, as many statesmen in many different ages and countries have forgotten, that a policy which may suit one country cannot be transferred in its entirety to another country with a different historical tradition, and that a policy which has had the most excellent results in one set of circumstances may produce the worst results in other circumstances. They did not appreciate the fundamental differences between the English constitution and that of continental states. They did not see that the England they were governing was not the

[1] 3 S.T. 1464-1465; for another version of the speech see S.P. Dom. 1640-1641 540-545, ccccIxxix 28.

England of the Tudors; and that, consequently, the fact that their policy was a continuance of the Tudor policy was an argument against rather than for its wisdom. In fact, like the high churchmen of the school of Laud with whom they were so closely allied,[1] they were a small cultured minority. And, like most cultured minorities, they were so absolutely confident of their intellectual superiority that they considered that opposition could only be the product of obstinate stupidity. Therefore they made no attempt to understand the point of view of their critics, or to realize the practical difficulties of carrying out their political programme. Moreover, they were a minority who commanded the power and patronage of the state. Therefore they gathered round them a number of courtiers who professed devotion to their political programme in order to enrich themselves, without any understanding of their real aims; and thus they burdened their cause with an additional weight of unpopularity. Confident in their political wisdom, and deceived by the self-interested praise of their small circle of supporters, they were blind to the plainest warnings of impending failure. They could not see that, in the first place, they had made a false estimate of the capacity of the king upon whom their whole system hinged; that, in the second place, they had misunderstood the character of the people upon whom they sought to impose their political theories; and that, in the third place, they had exaggerated the power of the government to force them upon an unwilling people. Let us consider the effects of these three obstacles to the success of their policy:—

(i) We have seen that neither James I. nor Charles I. were in the least fitted to take the place alloted to the king under this scheme of prerogative government;[2] and that Charles was even less capable of taking such a place than his father. He was so wedded to his political theories, so incapable of seeing merits in his opponents, so ignorant of the strength of the opposition which his policy aroused and of the power of his subjects to make their feelings felt, that he was easily deluded by any one who professed to believe in his political views. Hence he fell into the hands of second or third rate advisers whose chief merit was the faithfulness with which they echoed his sentiments.[3] Wentworth—his single capable adviser—he sent to Ireland. Moreover, he was so convinced of the legality of his views, so confident that proof of their legality would bear down all opposition, that he suffered their aims and tendencies to be advertised by the test cases which he permitted to be argued in the courts. He had all the

[1] Below 127-132. [2] Above 9-12, 15-18. [3] Above 61 n. 4.

shortcomings of a lawyer-politician; for he could make and state a case, and he considered that a technical victory in the courts was a complete answer to all objections.[1]

(ii) The king, therefore, was by reason of his intellect and character wholly unsuited to the task of carrying out this scheme of government. The scheme itself was equally unsuitable to the people for whom it was intended. Parliament and the system of local government had educated the people, and had given them a very definite political theory.[2] They had some very distinct views as to their rights and liberties; and they were quick to resent any infringement of them.[3] They were quite capable of judging the king's scheme of government by its actual consequences—illegal proclamations, burdensome monopolies, martial law, billeting of soldiers on the people, forced loans, ship money, and imprisonment for those who dared to criticize or resist. And, under these circumstances, it was quite hopeless to attempt to suppress discussion, or to keep the people in ignorance of the powers and privileges of Parliament.[4] But the adherents of this scheme of prerogative government could not appreciate these facts. They made, as I have said, the common mistake of supposing that a system which was suitable for one state and in one set of political conditions must be suitable for another state and another set of political conditions. It is a mistake which has frequently been made in these latter days by those who suppose that a Parliament and a constitution is necessarily the best form of government for all states in all places. It was a mistake which, as we have seen,[5] Wentworth was likely to make from his experience in Ireland. There he had successfully governed the country according to this system; and his success may well have strengthened both him and the king in the idea that it was the best system for England. They could not see that there was a vast difference between a people who were fast completing their political education and a people who were as yet politically untaught.

[1] An error into which Wentworth also fell, Strafford Papers ii 61-62, 388-389; above 69 n. 3.

[2] Above 59-66.

[3] May, History of the Long Parliament Bk. i. c. 2, p. 19, points out that those who favoured the scheme of prerogative government were, "but a small part of the nation (though a number considerable enough to make a reformation hard) compared with those gentlemen who were sensible of their birthrights, and the true interest of the kingdome; on which side the common people in the generality, and the Country Freeholders stood, who would rationally argue of their owne Rights, and those oppressions that were layed upon them"; cp. above 64 n. 2.

[4] Apparently in 1629 the government thought that they could effect something by suppressing the making of collections of documents relating to Parliament; see the petition of John Stanesly in 1640-1641, Hist. MSS. Com. 4th Rep. App. 54.

[5] Above 76.

(iii) The English people not only had some very definite ideas as to the political theory which they wished to see prevail in the English state, they also had the power to make government according to a theory which they disliked almost impossible.[1] Here again the adherents of the scheme of prerogative government were wilfully blind. Because they could make a case against the Parliament by exaggerating its faults, because the local officials generally tried to obey the instructions of the Council, they came to a wholly erroneous conclusion as to their power to enforce their policy. Want of money was admitted to be an ever present difficulty; but they had no idea of its fundamental character. The monopolies, patents, and projects, with which they sought to fill the gap between revenue and expenditure,[2] merely aggravated a system of corruption against which Wentworth and Laud struggled in vain.[3] After a few years of prerogative rule even royalists began to see that Parliament could not be permanently dispensed with. In 1636 Henry Danvers, earl of Danby, who had been an old and faithful servant of the king, told him that he could never hope to get an adequate supply without it;[4] and, when the war with Scotland broke out, when the resistance to ship money began to assume national proportions, a Parliament became inevitable.

Even then, those who advised that it should be summoned did not see that it meant the end of the whole scheme of prerogative government. A letter of 1639 recounts an interesting dialogue between Charles I. and Sir Thomas Wilford, a Kentish squire, which took place while the court was at Newcastle. Wilford, who was a royalist, thought that a Parliament, properly managed, might be persuaded to act with the king, and grant him

[1] Above 59-66.

[2] Persons whose claims were unpaid tried to get something by inducing the crown to grant them some monopoly or patent, giving them powers of collecting penalties for the breach of penal statutes, and of controlling the trade in certain articles; thus S.P. Dom. 1635-1636 320, cccxvii 9, Lesley, a gentleman of the Privy Chamber, got authority to see that the Statute of James I. against swearing was enforced and to collect penalties, keeping 2s. 6d. in the £; ibid 429, cccxxi 23, the wet nurse to the Duke of York asked for a grant for 31 years of the right to inspect and seal silk stockings and waistcoats for certain fees; ibid 433, cccxxi 32, Cornwallis, His Majesty's servant, wanted a grant of the right to view and mark vellum and parchment; then we have grants to projectors who proposed to improve manufactures by licensing the manufacturers, whereby the licensers and the crown would profit, see ibid 203, cccxiii 1—the hemp trade; ibid 43-44, cccviii 4-13, various proposals as to the salt trade; see generally ibid Introd. xxvi, xxvii; Verney Papers (C.S.) 184-185—it was said that Verney's patent for garbling tobacco "was not designed to relieve the trade, or diminish the price of tobacco. It was merely an expedient to put more money in the pockets of certain courtier speculators, and to increase the return to the exchequer"; Verney was advised by Mr. Roles (probably Rolle of the Abridgment) that a contemplated patent for the control of hackney coaches was illegal, ibid 223; many such grants were recalled before the summoning of the Short Parliament, ibid 223-224.

[3] Gardiner, op. cit. viii 67.

[4] Ibid 201.

a supply;[1] secretary Vane hoped that it would bring about a reconciliation between the king and his subjects;[2] and we have seen that Wentworth thought this result not impossible. The Short Parliament was summoned, and the nation became aware of its unity and solidarity in opposition to the policy of the king.[3] Its proceedings showed that that policy had failed. Still the king refused to see the impossibility of governing without a Parliament, and dissolved it. But the course of the war against Scotland soon proved that it really was impossible. Even the queen advised that Parliament should be summoned.[4] When it met, the king found himself face to face with an organized body of which he could not get rid. He found that it was truly representative of the nation, and that it was practically unanimous in its resolve, not only to shatter for ever the system under which the country had been governed for the last eleven years, but also to demand legislation which should make such a system of government for ever impossible.

To the evolution of the policy and aims of Parliament during this period we must now turn.

(2) *The views and theories held by the Parliamentary statesmen.*

Parliament was strong where the crown was weak. It stood for the personal liberty of the subject, for control over taxation and legislation, for the supremacy of the law over all subjects whether ministers of the crown or not. Consequently it had the support of the majority of the common lawyers, of the country gentlemen who, as justices of the peace, controlled the local

[1] S.P. Dom. 1639, 244, ccccxxii 65: "He said, 'I pray God send us well to do in this business but I like not the beginning.' The king asked why? He replied, 'Because you go the wrong way to work.' The king smiled and asked him which was the right way. He answered, 'If you think to make war with your own purse you deceive yourself; the only way to prosper is to go back and call a Parliament, and so should you have money enough, and do your business handsomely.' The king replied, 'There were fools in the last Parliament.' 'True,' said Sir Thomas, 'but there were wise men too, and if you had let them alone the wise men would have been too hard for the fools'."

[2] He wrote to Sir Thomas Roe, "Although it may seem that there are many reasons which might threaten some rubs and difficulties in the desired success of his Majesty's gracious resolution and intention of meeting with his subjects in Parliament, fixed for the 13th April next, yet there is great hope that by his wisdom all shall be overcome and carried so that so happy a meeting may be followed by a like conclusion to the contentment and satisfaction both of the king and his subjects," ibid 1639-1640 459, ccccxlv 34.

[3] "It made England conscious of the universality of its displeasure," Gardiner, op. cit. ix 118; as Gardiner has said, ibid 78-79, "In the seventeenth century, when Parliament was not sitting our ancestors were a divided people. . . . The men who grudged the payment of ship money in Buckinghamshire could only learn from uncertain rumour that it was equally unpopular in Essex or in Shropshire.

[4] S.P. Dom. 1640-1641 x.

government of the country at large, and of the mercantile classes who controlled the government of the larger towns. It was in close touch with the nation, whose ideals it truly represented. On the other hand, it was weak where the crown was strong. The crown, down to the period of the Long Parliament, possessed the initiative: Parliament was generally acting on the defensive against the claims put forward by the crown. The crown represented the ideals of those who wished to see the English government fashioned upon the most advanced continental models: the ideals of the Parliamentary party, like their precedents, looked backwards to the Middle Ages.[1] Consequently the crown was ready with a theory of the state which settled the new and burning political question of the day—the whereabouts of the sovereign power in the state: Parliament was slow to understand the nature of the question, and was unable to suggest a workable solution.[2]

As we have seen, it was this question of the whereabouts of the sovereign power in the state which was the most fundamental political problem of the day. Therefore of the solution suggested by the Parliamentary party I must speak in some greater detail. As with many another of the Parliamentary solutions of seventeenth century controversies, it has had, by reason of the victory of the Parliament, an extraordinarily long life.

Probably a very large number of the Parliamentary party were unacquainted with the new political theory that in every state some person or body must possess sovereign power. They were quite content with the mediæval conditions—a king with a prerogative vaguely defined, a Parliament with certain definite powers and privileges and indefinite rights to criticise the conduct of the government, and a law supreme over all. It never occurred to them that, under the new political conditions, it was necessary to have a sovereign power somewhere.[3] Even a man

[1] James told his Parliament in 1610, Parliamentary Debates in 1610 (C.S.) 58, that, "Thoe he might be justly offended with some who were somewhat too bold with his government, fetching arguments from former tymes not to be compared to theise, yet he hoped it sufficient to forewarne theyme to forbeare the like hearafter, lest he have just cause to doubt of theyre intentions." In Darnel's Case (1627) 3 S.T. at p. 46 Heath in his argument complained that "precedents are now become almost proclamations, for they already run up and down the town"; we have seen, vol. v 433 n. 3, above 24 n. 8, that Whitelocke got into trouble for questioning the validity of a royal commission, and supporting his argument by a reference to Magna Carta; for an attempt to prove that the Star Chamber ordinance as to printers was contrary to Magna Carta, The Petition of Right, and other statutes see S.P. Dom. 1628-1629 538, cxlii 22; cp. Figgis, Divine Right of Kings (1st ed.) 229, 230.

[2] Above 67-69; Figgis, op. cit. 231.

[3] Eliot is a good example of the somewhat loose grip which the Parliamentary statesmen had upon the doctrine of sovereignty; at first sight he seems to grasp it thoroughly—thus in his De Jure Majestatis he says at p. 4, "A Common wealth is nothinge else but a right and exercise of soveraigne power over their subjects"; and at p. 16, "Lawes ought to rule in the Citty. It is true the king must governe other by them, and must give life unto them: for whence has law his force, is it not from

of Coke's ability hardly saw the necessity. His conservative temperament, and professional pride, led him to the conclusion that the political theory which he found in his mediæval law books was good enough for the seventeenth century. The supremacy of the law—which he interpreted to mean the supremacy of the common law—satisfied him, and should satisfy all reasonable men.[1]

As we have seen, Coke's views as to the supremacy of the law have become a dogma of our modern law of the constitution.[2] But, taken by itself, this dogma was not sufficient. The modern territorial state needed a more active sovereign. The royalists found such a sovereign in the king. If, therefore, the need for a sovereign power in the constitution was admitted, and if Parliament denied the sovereignty of the king, it must be prepared to find a substitute. Some of the Parliamentary party, no doubt, appreciated this need. But the first to elaborate a theory to meet it was James Whitelocke.[3] In the debate upon impositions in 1610 he propounded a theory of Parliamentary sovereignty, which was the complement of Coke's theory of the supremacy of the law. It has become, like Coke's theory, an accepted principle of our modern constitutional law; and it is historically important because it is the earliest complete and formal statement of this principle. I shall, therefore, give it in Whitelocke's own words.

He said,[4] "It will be admitted for a rule and ground of state, that in every commonwealth and government there be some rights of sovereignty, *jura majestatis*, which regularly and of common right do belong to the sovereign power of that state; unless custom or the provisional ordinance of that state do otherwise dispose of them: which sovereign power is *potestas suprema*, a power that can control all other powers, and cannot be controlled but by itself. It will not be denied that the power of imposing hath so great a trust in it, by reason of the mischiefs [that] may grow to the commonwealth by the abuses of it, that it hath ever been ranked among those rights of sovereign power.

Majestie? Yes, all do confesse it. Now Majestie cannot compel itselfe; and cannot be both a Soveraigne and Subject: ergo, cannot lawes domineer over Majestie"; but at p. 175 he says, "We must also take heed of this extreme that we doe not confound royall authority with proprietie; as if the Kinge, because he is supream lord of our lands and goods, might therefore alienate them at his pleasure. . . . For it is a rule in lawe that rei suæ quisquis est moderator et arbiter. . . . A Prince therefore may not alienate either the whole Comonwealth, or any parte of it, without the consent of those, who have interest in the propriety, as he hath in the Soveraignty."

[1] Vol. v 428, 430, 453-454. [2] Ibid 493.

[3] For some account of him see ibid 343, 344, 345.

[4] 2 S.T. 482; Prothero, Documents 351-352; for a less full account of his speech see Parliamentary Debates in 1610 (C.S.) 103-109; this account makes it clear that the speech is Whitelocke's, and not, as stated in the State Trials, Yelverton's.

Then is there no further question to be made, but to examine where the sovereign power is in this kingdom; for there is the right of imposition. The sovereign power is agreed to be in the king: but in the king is a two-fold power; the one in Parliament, as he is assisted with the consent of the whole state; the other out of Parliament, as he is sole and singular, guided merely by his own will. And if of these two powers in the king one is greater than the other, and can direct and control the other, that is *suprema potestas*, the sovereign power, and the other is *subordinata*, it will then be easily proved, that the power of the king in Parliament is greater than his power out of Parliament; and doth rule and control it; for if the king make a grant by his letters patents out of Parliament, it bindeth him and his successors: he cannot revoke it, nor any of his successors; but by his power in Parliament he may defeat and avoid it; and therefore that is the greater power. If a judgment be given in the king's bench, by the king himself, as may be,[1] and by the law is intended, a writ of error to reverse this judgment may be sued before the king in Parliament. . . . So you see the appeal is from the king out of Parliament to the king in Parliament."[2]

Parliament thus acquired a theory as to the whereabouts of the sovereign power in the constitution which could be opposed to that put forward by the royalists. Both theories start from the premise that the king is sovereign; and both are elaborated by means of a twofold division of the powers of the king. It is in the character of this division that they are totally dissimilar. The royalist division was based on a division between two different sets of prerogatives possessed by the king—the ordinary and the absolute prerogative. By virtue of his absolute prerogatives, which the king could use when he pleased, he was the sovereign power in the state.[3] The basis of the division made by the Parliamentary statesmen was founded on the distinction between prerogatives which the king could exercise in conjunction with Parliament, and those which he could exercise independently of Parliament. It was only when he was acting with Parliament that he was the sovereign power in the state. Though personally

[1] Here Coke disagreed, vol. i 194, 207 n. 7; vol. v 430.

[2] Some words which Whitelocke spoke in giving judgment in Eliot's Case (1629) 3 S.T. at p. 308 seem at first sight (if correctly reported) to contradict the theory of sovereignty propounded by him in 1610; he said, "In every commonwealth there is one supereminent power, which is no subject to be questioned by any other, and that is the king in this commonwealth, who as Bracton saith, "Solum Deum habet ultorem';" but he was there considering the king in his capacity of the prosecutor of all crimes; and for this purpose he, by virtue of his prerogative, acts on behalf of the state, and his decision to prosecute or not to prosecute cannot be questioned by anyone; this was probably all that Whitelocke meant.

[3] Above 21-23.

sovereign, his powers exercised independently of Parliament were subject to the control of his powers acting in conjunction with Parliament. It followed from this theory that Parliament held a position in the state as important as the position held by the king. They occupied different positions, but positions of co-ordinate authority.

It was essentially a lawyer's theory, stated in a legal way, and pointed by legal illustrations. The objection which a royalist might fairly make to it was that, in effect, it left the state with no sovereign at all, unless king and Parliament were in agreement; and that a theory of sovereignty was useless unless it provided for the case of a disagreement. The royalist theory, he would have said, was infinitely superior because it provided for the case of a disagreement. In such a case the king had the last word. On the other hand, we, who can look at the royalist theory in the light of subsequent history, may justly say that, though superior as a theory, it was merely academic, because it was in practice impossible of realisation. It is true that Whitelocke's theory was not workable unless and until Parliament had asserted its position as the predominant partner in the state; but the royalist theory was equally unworkable unless and until the king had proved himself to be definitely stronger than Parliament. Neither theory was capable of realisation so long as king and Parliament stood over against one another as equal, co-ordinate, and opposed powers.

In the earlier years of the seventeenth century Parliament was not fully alive to the fact that, if it was to withstand the crown successfully, it must do something more than act on the defensive, and maintain its powers and privileges. It did not see that it must claim to be the predominant partner in the state. The eleven years of prerogative rule at length made this clear to its leaders; and the Long Parliament made this claim. It was a claim which the king refused to admit; and the result of this refusal was civil war. Parliament was then obliged to put forward a definite claim to be the sovereign power in the state; and, to support it, the privileges of Parliament were extended to an even greater extent than the king had extended his prerogative. Then came the execution of the king, and the various experiments in the manufacture of new constitutions, which mark the Commonwealth period. The Restoration brought back the old constitution with all its old uncertainty as to the whereabouts of the sovereign power. But the problem was one degree nearer solution on the lines marked out by Whitelocke, because it had become clear that Parliament was, if not the strongest power in the state, at least equally as strong as the king. It was clear

that it could not be defied as James I. and Charles I. had defied it. James II. attempted to defy it; and the Revolution definitely proved that it was the predominant partner. Whitelocke's theory of Parliamentary sovereignty therefore became the accepted theory of the constitution; and, in the eighteenth century, the growth of the conventions of the constitution made it a workable theory.

In this section we are concerned only with the earlier stages of this development of the theory of Parliamentary government. I shall deal with these earlier stages under the three following heads: (i) the Parliamentary opposition to the crown; (ii) the legislation of the Long Parliament; (iii) the Parliamentary claim to guide the policy of the state by controlling the appointment of the king's ministers.

(i) The Parliamentary oppposition to the crown.

We have seen that, in the sixteenth century, Elizabeth's Secretary of State—Sir Thomas Smith—had recognized that the crown in Parliament was the body in which "the most high and absolute power of the realme of Englande" resided.[1] We have seen, too, that the English Parliament was the sole survivor of those representative assemblies, which had once existed in many European countries in the Middle Ages;[2] that it alone had been able to make good its claim to share with the king the government of the state;[3] and that its ability to do so was largely due to the fact that it had always acted in close alliance with the common lawyers.[4] The lawyers were quite willing to allow to an assembly, in which they were the most influential party, supreme control over the law; they helped it to build up a workable code of procedure; and they saw the vital importance of securing and maintaining the privileges which it needed to fill the position in the state which it claimed—as with their own courts, so with Parliament, it must have the privileges necessary for the exercise of its jurisdiction.[5]

During the earlier period of the Parliamentary opposition to the Stuart kings the possession of a workable code of procedure was the first condition precedent to the success of that opposition. Without it the House of Commons would have been an unorganized mob opposed to the highly organized forces of the central government. The second condition precedent was the assertion of the privileges needed to enable the House to use its procedure freely. Therefore, if we would understand the manner in which Parliamentary opposition took shape and developed

[1] Vol. iv 181-182. [2] Ibid 166-169. [3] Ibid 174-184.
[4] Ibid 188-189; vol. ii 430-434. [5] Ibid 433; vol. iv 174-180.

during this period, we must concentrate our attention, in the first instance, upon these two questions of procedure and privilege.

Procedure.

I have already spoken of the manner in which the lawyers helped the English Parliament to develope workable rules of procedure, and of the way in which these rules of procedure enabled it to become a useful organ in the government of a modern state. The main outlines of this procedure had become quite distinct in the Tudor period; and, in fact, were intimately related to developments which had begun to take place in the Parliaments of the fourteenth and fifteenth centuries.[1] But it is clear that the growth of the Parliamentary opposition during the latter years of Elizabeth's reign, and its still more rapid growth under the first two Stuart kings, were rendering its rules both more detailed and more rigid. It would be quite out of place to attempt a detailed description of these rules; but some account of their main characteristics, and of the effects which this period of constitutional conflict had upon their development is necessary, because we cannot otherwise understand the strength of the opposition which the House of Commons was able to offer to the political views of the king and his supporters.

The most striking feature of the procedure of Parliament continued to be the influence exercised by the forms and conceptions of the common law. This influence was perhaps greater in the early seventeenth century than at any other period before or since, because the influence of the lawyers was naturally at its height in an age in which the great political questions of the day were fought out, both in Parliament and in the courts, under the guise of disputed questions of constitutional law; and, like so much else that was fought out and settled in this century, its effects upon Parliamentary procedure have been very permanent. It can be traced in many different directions. Firstly, we have seen that the whole fabric of Parliamentary procedure was regarded as a special law governing Parliament. It was the "lex et consuetudo Parliamenti," which governed the High Court of Parliament, just as the procedural rules of the common law, the civil law, or the canon law, governed the various courts which exercised jurisdiction in the English state.[2] Secondly, this law was a customary law to be ascertained mainly by the precedents to be collected from the records of Parliament.[3] It therefore possessed all the flexibility and adaptability of customary law; and this was no small advantage at this time of conflict. Thirdly, it was, like

[1] Vol. ii 430-434; vol. iv 174-180.
[2] Coke, Fourth Instit. 14, cited vol. ii 433.
[3] Ibid.

the common law itself, a permanent and an independent body of customary law.[1] Obviously this conception tended to give Parliament a position in the state as independent and authoritative as the position of the king. Lastly, we have seen that the whole conception of the office of Speaker in relation to this law was and still is strikingly similar to the relation of a judge to the common law.[2] During this period the fact that the Speaker had a large control over the business of the House[3] made the resemblance still more striking.

These characteristics of Parliamentary procedure were well marked in the Tudor period, and were probably older than that period. The constitutional conflicts of the seventeenth century produced many fresh developments, of which the following are the most important.

Firstly, in many instances the old customary rules of procedure were found to be too vague. In some of these they were defined and amplified by their application to concrete cases, the particulars of which were entered on the journals. In others new needs were met by new orders.[4] Redlich points out that it is during this period that "the order book—the record which contains the decisions of the House as to the conduct of its business —makes its appearance as a regular part of the apparatus of the House";[5] and that these orders, "cover almost the whole field of the regulation of business."[6] His summary of the results attained by this development shows clearly its leading features. "At this period," he says,[7] "it becomes customary to fix a regular time for the sittings, the time chosen being from seven or eight in the morning until midday, and the Speaker is forbiden to bring up any business after the latter hour. The quorum of forty members for the competency of the House for business is settled; the adjournment or termination, as the case may be, of every sitting is made independent of the Speaker and placed, as a matter of principle, under the control of the House. Further, instructions are given to the Speaker as to the arrangement of the day's business, and his powers against irrelevant or discursive speaking are precisely determined. Express prohibitions are framed against arbitrary debates on the order of business for the day, and also against the carrying on of a debate on more than one subject at a time. The principle is also laid down that

[1] Redlich, Procedure of the House of Commons ii 4, says that, like the rules of common law and equity, "the modern provisions for the conduct of business in Parliament welded together into a collection of rules, rest on the broad basis of the unwritten law, produced by centuries of usage in the two Houses."

[2] Vol. ii 433 and n. 7.

[3] Vol. iv 97-98, 176-177; below 90.

[4] Redlich, op. cit. i 43-44.

[5] Op. cit. i 45.

[6] Ibid 47.

[7] Ibid 47-48.

the orders of the day are to give the amount which the House is to do, and that this is to be settled by the House itself by means of its orders. And by this time the custom has arisen of making the daily programme known to the House at the beginning of the sitting, after prayers. As a measure of discipline it is ordered that members leaving the House after the first business has been entered upon must pay a fine. The doors of the House are repeatedly locked, and the keys laid on the table, in order to secure the complete secrecy of the proceedings. The mistrust of the courtier Speaker comes out both in the formulation of the principle that the Chair is not entitled to vote, and in the rule that if the Speaker has any communication to make to the House he must be brief: he is to make needful communications to the House, says one of these orders, but is not to try to convince it by copious argumentation. The Speaker is expressly forbidden to give the king access to the bills which had been introduced, as he had done on former occasions. We find, too, at this time the establishment of the great parliamentary principle that no subject matter is to be introduced more than once in a session. Again, the order of forwarding bills to the Lords is determined, and the important rule laid down that at a conference between the Houses the number of delegates sent by the Commons must always be double that sent by the Lords. Finally, we should note, as of great importance, the development which took place in the use of committees and the institution of committees of the whole House."

Secondly, as Redlich's summary shows, the position which the Speaker occupied in the Tudor period of the representative and chairman of the House, of royal nominee, and of messenger between the House and the king,[1] was becoming uncomfortable. The scene at the close of the Parliament of 1629, when Speaker Finch was held down in his chair and prevented from obeying the orders of the king to adjourn the House, was the turning point in the history of the office. The behaviour of Speaker Lenthall, when Charles I. made his attempt to arrest the five members, was very different. It is clear that the Speaker was tending to become less the representative of the king and more the representative of the House. When that development is complete in the latter half of the century,[2] his functions will tend to become more and more judicial, and he will tend to become more and more an impartial and independent interpreter of the *lex et consuetudo Parliamenti*, subject only to the control of the House.

[1] Vol. iv 97-98, 176-177; see Redlich, op. cit. ii 156-168 for a sketch of the history of the office.

[2] Below 255.

Thirdly, the rise of an opposition to the crown at the end of Elizabeth's reign, and its rapid growth under the first two Stuarts, leads to the growth of rules designed to protect this opposition. As the opposition had the majority in the Parliaments of the seventeenth century, rules made with this object became more numerous. The rules which were designed to restrict the powers of the Speaker, and to give the house a larger control over its own business are a striking illustration. Hence, as Redlich has pointed out, "the procedure of the House of Commons, its order of business, was worked out, as the procedure of an opposition, and acquired once for all its fundamental character."[1] But rules of procedure invented by an opposition with a view to its own defence and protection, will obviously be designed to stop the rapid progress of business promoted by the power which it is opposing. In the seventeenth century that power was the crown: in the nineteenth century it was the cabinet supported by the majority of the House of Commons. It followed that, until the recent reforms in procedure, "the forms of the House" were an ample and a sufficient protection to any minority who wished to place obstacles in the way of carrying out the programme of the majority.[2]

Fourthly, the desire of the opposition not only to criticize the policy of the government, but also to prevent actions which it disliked, led to a very important extension of the committee system. We have seen that at the latter part of Elizabeth's reign the committee system was well developed.[3] In the early part of the seventeenth century we can see three further developments. Firstly, we get in some cases committees of the whole House to which money bills, and other bills of great public importance were referred.[4] The object of creating such a committtee was to give all members a voice in the matter, and at the same time to give an opportunity for the freer debate which was possible in a committee.[5] As yet, however, these committees were new, and the procedure was not definitely fixed. Secondly, the practice of creating committees, to which certain subjects were

[1] Op. cit. i 57.

[2] This point was insisted upon by Speaker Onslow in the eighteenth century, Redlich, op. cit. ii 55-56, and by Cornewall Lewis in the nineteenth; Lewis said, "the forms of the English House of Commons are avowedly contrived for the protection of minorities; and they are so effectual for their purpose as frequently to defeat the will of the great body of the House, and to enable a few members to resist, at least for a time, a measure desired by the majority," Influence of Authority in Matters of Opinion 151, cited Redlich, op. cit. iii 194.

[3] Vol. iv 177-178; see also vol. ii 432; and on the whole question Redlich, op. cit. ii 203-214.

[4] Ibid 208.

[5] Ibid; cp. Eliot, Negotium Posterorum i 63-64, cited below 92.

referred,[1] had given rise to the appointment of certain grand or standing committees, which, by 1628, had become committees of the whole House.[2] The number of these committees, and the subjects referred to them, differed at first from Parliament to Parliament.[3] Eliot tells us that they were three in number—for religion, grievances, and courts of justice;[4] and in 1621 a committee for trade had been added.[5] He says,[6] "these have their several weeklie days assign'd them, and take general cognisance of all matters, examine all complaints, send for all persons and recordes; all corruptions and injustices of courtes, exactions of their ministers, oppressions of the people, abuses and enormities in the church are respectivlie the subjectes of their treaties. These they discuss and handle for the knowledge of the facts; and if they finde them faultie, worthie of a publicke judgment, then they are reported to the house w^{ch} therupon proceeds to censure and determine them." Thirdly, in addition to these standing committees of the whole House, the committee for privileges had come to be one of the standing committees. This was always a select committee.[7] "The intention of that Committee," says Eliot,[8] "which is standing and not transient, has a general reflection on their rights, and on all actes of prejudice that impeach them, to examine, to discuss them for the ease and information of the house, that ther they may be punisht, or prevented." Its appointment was always one of the first businesses of the House —"that being thought most necessarie to precede, by which their powers and being did subsist."[9] It was because "the powers and being" of the House depended on its jealous assertion of its privileges that this committee was during this period perhaps the most important of all the standing committees. This will be clear when we have examined the large part which privilege plays in the constitutional conflicts of the first half of this century.

Privilege.

It would have been of little use to the House of Commons to have evolved a workable system of procedure if the House and its members had been hampered in its use. It was the privileges of the House which enabled it to act freely, to carry on the controversy with the king in a Parliamentary way, and thus to secure a continuous development of constitutional principles. It is, therefore, not surprising to find that the earliest controversies

[1] Vol. iv 178.
[2] Redlich, op. cit. ii 210.
[3] Ibid 208-209.
[4] Negotium Posterorum i 63.
[5] Redlich, op. cit. ii 208.
[6] Negotium Posterorum i 63.
[7] Redlich, op. cit. ii 209 and n. 4.
[8] Negotium Posterorum i 60, 61.
[9] Ibid.

between James I. and his Parliaments turned upon questions of privilege, and that these same questions were always in the forefront of the constitutional controversies all through this period.[1] We must, therefore, consider in some detail the manner in which Parliament asserted and used its privileges to win for itself the position of a partner with the king in the work of governing the state. We shall see that the whole position of the Parliament was involved in the view which it took, firstly, as to the nature and basis of Parliamentary privilege, secondly, as to the contents of its privileges, and thirdly, as to the use which should be made of them. Let us look at this question of privilege from these three points of view :—

(*a*) *The nature and basis of Parliamentary Privilege.*—In James I.'s first Parliament the House of Commons laid it down in clear terms that the privileges of Parliament were as much their "undoubted right," as the right of property which every subject had in his lands or goods ; that the House of Commons was a court of record and the highest court in the land ; and that these privileges being necessary for the conduct of the business of the House, they could not be "withheld, denied, or impaired, but with apparent wrong to the whole estate of the realm." [2]

Neither James I. nor Charles I. would admit the truth of this view as to the nature and basis of Parliamentary privilege. In 1621 James I. told the House of Commons that in his opinion these privileges were not their ancient and undoubted right, but, on the contrary, were derived "from the grace and permission of himself and his ancestors" ; "for," he said, "most of them grow from precedents, which shows rather a toleration than inheritance." Further, he warned them that if they persisted in trenching upon his prerogative, he would be forced to trench upon their privileges.[3] James's view as to the nature and basis of privilege was, in fact, a fair logical deduction from his view as to the positions which the king and Parliament had always occupied, and ought to

[1] The importance of this question of privilege comes out very clearly in a MS. speech written by Eliot for a Parliament which he did not live to see, Forster, Life of Eliot, ii 445-448; he wrote at p. 446, "Now the whole power and virtue of the Parliament depends upon the privileges thereof. Her ancient franchises and immunities are that which has sustained her. A Parliament without liberty is no Parliament."

[2] Apology of the House of Commons, 1604, Prothero, Select Documents, 287-288; they pointed out that, "our making of request in the entrance of parliament to enjoy our privilege is an act only of manners, and doth weaken our right no more than our suing to the King for our lands by petition, which form, though new and more decent than the old by *præcipe*, yet the subjects' right is no less now than of old" ; the legal character of the argument is noticeable, also the adhesion to the historical heresy that there was a time in which writs lay against the king, as to this see vol. ii 253 ; vol. iii 465 ; Pt. II. c. 6 § 1.

[3] Letter of the king, Dec., 1621, Prothero, Documents, 313.

continue to occupy, in relation to one another. According to his view the kingship was primeval; and it was to royal concessions that Parliament owed its being. Therefore the privileges of Parliament originated, not in any inherent right, but in royal grant. This was a view which the supporters of the royalist party were constantly putting forward in the course of the various disputes between king and Parliament as to their respective powers.[1] When so much turned, or was thought to turn, upon the events of early English constitutional history, it was a good debating weapon, because it was an effective reply to the precedents derived from mediæval Parliamentary history, which were the main weapons of the Parliamentary statesmen. As applied to Parliamentary privilege it struck at the root of the Parliamentary theory of government. The House of Commons, therefore, lost no time in contradicting it in the most decided way.

Their famous Protestation of 1621 runs as follows:[2] "The Commons now assembled in Parliament . . . do make this protestation following: that the liberties, franchises, privileges, and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the king, state, and defence of the realm, and of the church of England, and the maintenance and making of laws, and redress of mischiefs and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses every member of the House of Parliament hath and of right ought to have freedom of speech, to propound, treat, reason, and bring to conclusion the same: and that the Commons in Parliament have like liberty

[1] Thus Bacon said in the debate on Impositions in 1610, 2 S.T. 398,' "If any man think that those more ancient customs were likewise by Act of Parliament, it is but conjecture. . . . Acts of Parliament were not much stirring before the Great Charter which was 9 H. 3. And, therefore, I conceive with Mr. Dyer, that whatsoever was the ancient custom was by the common law. And if by the common law, then what other means can be imagined of the commencement of it but by the king's imposing?" The contrary view was stated by Pym in 1628—"the law of England whereby the subject was exempted from taxes and loans, not granted by common consent of Parliament, was not introduced by any statute, or by any charter or sanction of princes, but was the ancient and fundamental law, issuing from the first frame and constitution of the kingdom," 3 S.T. 341; Eliot alludes to this theory in Negotium Posterorum, i 38, "I know the vulgar and common tradition does repute that parlialiaments had beginning with those charters which were made by H. 3, and that he that granted those liberties to the people gave being unto parliaments, upon which foundation many arguments are laid to impaire the worth of either; the weakness of that king, the greatness of his barons, the tumults of that time, which made a necessitie of those grantes, that were not taken but extorted: but truth shall speake for both, how injurious is this slander; how much more antient and authentick their descent."

[2] Prothero, Documents, 313-314.

and freedom to treat of these matters in such order as in their judgments shall seem fittest : and that every member of the said House hath like freedom from all impeachment, imprisonment, and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning, or declaring of any matter or matters touching the Parliament, or Parliament business ; and that if any of the said members be complained of, and questioned for anything done or said in Parliament, the same is to be showed to the king by the advice and assent of all the Commons assembled in Parliament, before the king give credence to any private information."

James was so enraged at this protestation that he sent for the Journals of the House of Commons, and tore it out with his own hand. Nor was it strange that he should be enraged. He had quite wit enough to perceive the magnitude of the issue. The House was, in effect, claiming a position in the state which would have made it able, whenever it pleased, to render wholly unworkable in practice the theory which he had elaborated as to the ultimate sovereignty of himself and his prerogative ; for, if the view of the Commons as to the nature and basis of Parliamentary privilege was correct, privilege would be placed on a level with prerogative. This we shall see clearly when we have examined the contents of some of those privileges which the Commons considered to be their ancient and undoubted right.

(*b*) *The contents of the Privileges of the House.*—The list of the privileges of Parliament was completed in the early years of the seventeenth century.[1] The four most important were the right to decide disputed elections, the right of freedom from arrest, the right of freedom of speech, and the right to decide the order of business in the House. Either the existence or the extent of these four privileges came into question during this period ; and therefore I must say something about each of these controversies.

The question of the right of the Commons to decide disputed elections arose in the case of *Goodwin v. Fortescue* in 1604.[2] The facts, shortly stated, were as follows : James I. had issued a proclamation in which he had ordered, *inter alia*, that no bankrupts and outlaws should be elected members of Parliament ; that the returns should be sent into Chancery ; and that returns made contrary to the proclamation should be rejected. Goodwin, an outlaw, having been elected for Buckinghamshire, the return was refused. A new election was held, and Fortescue was

[1] For a general account of the privileges of the House of Commons, see Anson, Parliament chap. v § 4.

[2] 2 S.T. 91.

declared to be elected. The Commons interposed, and declared that Goodwin was elected. The king asserted that "the House ought not to meddle with returns, being all made into the Chancery, and are to be corrected or reformed by that court only."[1] After a conference with the judges, the House agreed that both returns should be set aside and a new election held.[2] But they remained the victors, as their claim to this privilege was not again disputed. Three points in connection with this dispute may be noted. Firstly, in this case the usual positions of king and Parliament were reversed. The mediæval precedents were in the king's favour: the modern precedents were in favour of the Commons.[3] Secondly, some of the arguments used in the House were legal arguments of the most technical kind. The decision of the House was, it was argued, a judgment in favour of Goodwin. No court could reverse its own judgment, and therefore the House could not recede from its resolution.[4] Thirdly, the extreme importance of the privilege was fully realized. If the king was right, it was said, "the free election of the country is taken away, and none shall be chosen but such as shall please the King and Council."[5] In this no doubt the House judged correctly; and, as the constitutional conflict developed, the Parliamentary leaders had cause to be thankful that this victory had been won at its beginining.

That the Commons had the right of freedom from arrest for offences other than those of treason, felony, or breach of the peace, is clear. The questions which arose in *Shirley's Case*,[6] in 1604, were questions, not as to the existence of the privilege, but as to the mode and consequences of its exercise. Shirley had been arrested for debt and confined in the Fleet prison. The Commons began by passing a private bill, by virtue of which the Chancellor was to bring Shirley before him and release him, the warden of the Fleet prison was to be indemnified for the release, and the rights of the creditors were to be saved. But, before this bill had received the royal assent, the Commons decided that it would be derogatory to their privileges to release their member by the help of the Chancellor. They therefore acted on their own authority, and ordered the warden of the Fleet prison to release him. This the warden declined to do, and was therefore committed. The Commons then passed a second private bill identical with the first, except that under it

[1] 2 S.T. 98. [2] Ibid. 112.

[3] Stubbs, C.H. iii 457-458; Hallam, C.H. i 274; Anson, Parliament (5th ed.) 178-179.

[4] 2 S.T. 100. [5] Ibid 98.

[6] For a full account of this case and the text of the two private Acts passed in connection with it see Prothero, E.H.R. viii 735-740.

Shirley was to be released without reference to the Chancellor. Finally, after being confined for some days in "Little Ease" in the Tower, the warden gave way. The Commons then passed a public bill [1] which became law, under which a member taken in execution was to be at once released, the gaoler was not to be held liable for such a release, and the creditors were empowered, after the period of privilege had expired, to sue out new writs of execution.

The privilege of freedom of speech was undoubted; but its extent was doubtful. We have seen that in Elizabeth's reign the queen had strong ideas as to its limitations.[2] Members who persisted in discussing forbidden topics, or who protested against royal prohibitions of such discussions, were committed to the Tower. Much more, it might be argued, ought members of Parliament to be liable if they were guilty of seditious speeches and riotous conduct. On the other hand, the majority of the House of Commons considered that no court had any jurisdiction over anything done within the walls of the House. The question came before the courts in the proceedings taken against Eliot, Holles, and Valentine in 1629.[3] They were charged with seditious speeches, with a contempt against the king in resisting the adjournment of the House, and with a conspiracy to keep the Speaker by force in the chair.[4] All the accused pleaded to the jurisdiction.[5] But the court overruled the plea on the ground that the offences of conspiracy and riot were criminal offences which must be punishable in the court of King's Bench,[6] as otherwise they might go unpunished.[7] Members of Parliament, it was said, had freedom of speech—but in a parliamentary way. They had no privilege to speak seditiously or to behave in a disorderly manner. The defendants refused to plead over, and therefore the court gave judgment against them on a *nihil dicit.* Rather than compromise the privilege of Parliament they

[1] 1 James I. c. 13.
[2] Vol. iv 89-90, 178-180.
[3] 3 S.T. 293.
[4] Ibid 295.
[5] For some directions of the king as to the trial see S.P. Dom. 1629-1631, 77, 79, cl 33, 66; for the difficulties which Eliot had in getting meetings with his counsel and settling his defence see Letter Book of Sir J. Eliot (Ed. Grosart) 89, 93, 94.
[6] "It hath been objected, 'that by this means none will adventure to make complaints in parliament.' That is not so; for he may complain in a parliamentary course, but not falsely and unlawfully, as here is pretended, for that which is unlawfully, cannot be in a parliamentary course. It hath been objected, 'that the parliament is a higher court than this.' And it is true: but every member is not a Court; and if he commit offence he is punishable here," 3 S.T. at p. 309 *per* Croke, J.; Whitelocke gave judgment to the same effect, and thought that a judge or even an ambassador, as in the Bishop of Ross's case, might be held liable for criminal offences, such as the uttering of scandalous speeches.
[7] "No court more apt for that purpose than this court in which we are: and it cannot be punished in a future parliament because it cannot take notice of matters done in a foregoing parliament," 3 S.T. at p. 307 *per* Hyde, C.J.

remained in prison.[1] Their constancy astonished Sir Allen Apsley, the Lieutenant of the Tower. He wrote to Dorchester that "Among all the Parliament men and others that have been prisoners there, he finds none to parallel these prisoners . . . they will not so much as petition that they are sorry the King is offended with them."[2] Most of them eventually made their submission, and got their release. But, as we have seen, Strode, Valentine, and Eliot made no submission;[3] and Eliot died from the effects of his imprisonment.

The way in which this case was brought before the court is a very good instance of the skill with which the crown lawyers confused the issues in order to get a favourable decision.[4] There is no doubt that, in so far as the court decided that it could hold the defendants liable for words spoken in the House, it was wrong. No doubt Elizabeth had imprisoned members for this cause;[5] but no court of common law had ruled that imprisonment for this cause was legal; and Strode's Act[6] was really decisive that it was not legal.[7] On the other hand, there is no doubt that, in so far as the court ruled that it had jurisdiction over crimes committed in the House, it was right.[8] When this decision was reversed by the House of Lords in 1668, one of the causes of error assigned was the fact that the speaking of seditious words and the assault on the Speaker were made the subject of one judgment, when in fact there were two separate causes of action on which two separate judgments should have been given; because, even if the assault on the Speaker was cognizable by the court, the speaking of seditious words was not.[9]

The right to decide the order of business in the House was expressly claimed by the House in 1621;[10] and there can be no doubt that, from an early date, it had exercised this privilege as a part of its general right to control its internal proceedings. An important practical application of the rule was the principle that

[1] Eliot explained his position at length in his "Apologie for Socrates"; at p. 22 he points out that if he had yielded, "All the secretts of the Senate . . . must be subject to the Judges; the most intimate counsells of that conclave obnoxious to their censure."

[2] S.P. Dom. 1629-1631, 83, cl 101.

[3] Above 39.

[4] Above 30.

[5] Vol. iv 179.

[6] 4 Henry VIII. c. 8.

[7] § 2 provided that, "Sutes, accusementes, condempnacions, execucions, fynes, amerciamentes, punysshmentes, correccions, greivances, charges, and imposicions, put or had or hereafter to be put or hadde unto or uppon the said Richard, and to every other of the person or persons afore specified, that nowe be of this present parliament, or that of any Parliament hereafter shalbe for any bill, spekyng, reasonyng, or declaryng of any mater or maters concernyng the parliement to be commened and treated of, be utterly voyd and of none effecte."

[8] Bradlaugh v. Gossett (1884) 12 Q.B.D. at pp. 283-284 *per* Stephen, J.; cp. Anson, Parliament (5th ed.) 184-186.

[9] 3 S.T. at p. 332.

[10] Above 94-95.

redress of grievances must come before supply.[1] This principle was established in the first years of the fifteenth century by a reform in the procedure of the House;[2] and in fact this whole question of the order of business is as much a question of procedure as of privilege. It illustrates very well both the interdependence of these two topics, and the need for both an adequate procedure and adequate privileges in the contest of the House of Commons with the crown.[3] No doubt the fact that the Speaker, who had a large control over the order of business, was a servant of the crown as well as of the House,[4] tended to obscure the limits of this privilege. The riotous scene at the close of the Parliament in 1629 sufficiently illustrates this. It was the insistence on this privilege, and the consequent refusal to vote supplies before peace was made with Scotland and grievances were redressed, that was the chief cause of the dissolution of the Short Parliament in 1640.[5] From the meeting of the Long Parliament onwards, the control by the House of Commons of its order of business has been absolute.

These two last-mentioned privileges were of the most vital importance to the success of the Parliamentary opposition. As Anson has pointed out,[6] in the privilege of freedom of speech there was involved not merely a question of "latitude of discussion," but also of the "initiative in legislation and deliberation." "The crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one."[7] Moreover, as we shall now see, the curtailment of the privilege of freedom of speech in the manner contended for by Charles I., and the denial of the right to decide the order of business, would have

[1] The principle was negatived by Henry IV., Stubbs, C.H. iii 281, citing Rot. Parl. iii 458, 2 Hy. IV. no. 23; but, as Stubbs says, ibid 282, "It is probable that the point was really secured by the practice, almost immediately adopted, of delaying the grant till the last day of the session, by which time no doubt the really important petitions had received their answer, and at which time they were enrolled"; see Eliot's speech in 1628 on the importance of maintaining this principle, Forster, Life of Eliot ii 18-20.

[2] See last note.

[3] Eliot, Negotium Posterorum ii 92, reports Glanvile as saying "that it was the prerogative of kings to call parliaments at their pleasure, but in counterpoise of that their ancestors had erected the privilege for them themselves to treat of what business they should pleasure"; for another report of Glanvile's speech see Commons Debates in 1626 (C.S.) 114.

[4] Vol. iv 97-98, 176-177.

[5] Gardiner, C.H. ix 112-117.

[6] Parliament 147-148.

[7] In point of fact the crown was trying to go rather beyond the Elizabethan precedents in wholly denying the initiative to the House of Commons; while the Commons were certainly going beyond those precedents in the manner in which they asserted their right to the initiative on all topics, vol. iv 88-90, 96-97, 179-180.

deprived the House of the power to criticize the government effectively, and to take the measures necessary to force the government to take notice of that criticism.[1]

(*c*) *The use made by Parliament of its Privileges.*—The use which the House of Commons made of these two privileges shows that without them it would have been almost impossible to offer an effective opposition to the crown. The privilege of deciding the order of business enabled the House to obstruct. It could decline to do anything till its grievances were redressed. The privilege of freedom of speech enabled it to criticize the conduct of the government and of its agents, and to suggest changes and reforms. And there is no doubt that the growth of the committee system made this criticism very much more effective and more searching than it had ever been before. One of the charges which Charles I. made against the Commons, in his declaration of 1629,[2] was the extension of their privileges by the establishment of standing committees.[3] He complained that "there are so many chairs erected to make enquiry upon all sorts of men, where complaints of all sorts are entertained"; that young lawyers sitting there decried the opinion of the judges, and maintained that the resolutions of the House were binding upon them; and, last and worst, that they have sent for and examined the attorney-general, the treasurer, chancellor, and barons of the exchequer, some of the judges, and other officials, for matters done in the course of their respective duties, for which they were in no way accountable to the House of Commons. "Under pretence of privilege and freedom of speech, they take liberty to declare against all authority of Council and Courts at their pleasure. . . . Their drift was to break, by this means, through all respects and ligaments of government, and to erect an universal overswaying power to themselves, which belongs only to us, and not to them."[4]

[1] Eliot said in a speech in the Parliament of 1624 (printed in Negotium Posterorum i 130) "For the priviledges of Parliament they have been such and soe esteemed, as neither detract from the honor of the kinge nor lessen his authoritie, but conduce to the libertie of this place, that wee may heere freely treate and discourse for the publique good of the kingdome, which I take to be a maine base and prop whereby it doth subsist."

[2] Gardiner, Documents 83-99.

[3] "We are not ignorant how much that House hath of late years endeavoured to extend their privileges, by setting up general committees for religion, for Courts of Justice, for trade, and the like; a course never heard of until of late: so as, when in former times the Knights and Burgesses were wont to communicate to the House such business as they brought from their countries; now there are so many chairs erected, to make enquiry upon all sorts of men, where complaints of all sorts are entertained, to the unsufferable disturbance and scandal of justice and government, which, having been tolerated a while by our father and ourself, hath daily grown to more and more height; insomuch that young lawyers sitting there take upon them to decry the opinions of the Judges; and some have not doubted to maintain that the resolutions of that House must bind the Judges, a thing never heard of in ages past," ibid at p. 93.

[4] Ibid at pp. 94-95.

In these developments of the machinery and procedure of the House, and in the consequent extensions of its privileges, Charles recognized, as he could hardly fail to do, the hand of the common lawyers. In fact, the alliance between the common lawyers and the leaders of the Parliamentary opposition had at no period been closer; and at no period had it been more fruitful of results. From the king's point of view, the most distasteful of these results was the manner in which these developments in the machinery and procedure of the House, and these extensions of privilege, had been combined with the central doctrine of the common lawyers—the supremacy of the law over all subjects alike from the highest to the lowest.[1] The king himself was not subject to the law. He could do no wrong. "I know how to add sovereign to his person," said Pym in 1628, "but not to his power."[2] But his subjects, the House of Commons held, could do wrong, and if they committed wrongs, whether in the course of their employment or not, they could be made legally liable.[3] The command or instruction of the king could not protect them. If the king really had given such commands or instructions, he must have been deceived. Therefore such an excuse, even if true, merely aggravated the offence. The guilty servant had committed the offence, whether instructed to do so or not, and was liable for his act.[4] If the law were otherwise, argued Eliot, all public servants would escape. If, not only the king but also all his servants were immune from prosecution, as the king contended, no public servant could be brought to judgment.[5] But if the king's

[1] Vol. v 428, 430, 451, 492-493.

[2] 3 S.T. at p. 193; on the same occasion Wentworth is reported as saying "our laws are not acquainted with sovereign power," ibid 194.

[3] "Our lawes laie all faults and errors in the ministers, that noe displeasure may reflect upon the King," Eliot, speech on the liberty of the subject, Negotium Posterorum ii 122.

[4] Eliot said in his speech on the impeachment of Buckingham, Forster, Life of Eliot i 325-326, "Supposing he might without fault have sent those ships away, especially the king's; supposing that he had not thereby injured the merchants, or misinformed the king, or abused the parliament; supposing even that he had not done that worse than all this, of now seeking to excuse himself therein by entitling it to his majesty; nay, my lords, I will say that if his majesty himself were pleased to have consented or to have commanded, which I cannot believe; yet this could no way satisfy for the duke, or make any extenuation of the charge"; cp. his speech in 1629 as to whether the king's command was an excuse, Gardiner, op. cit. vii 63; the theory is fully developed and clearly explained in the charge against Herbert, who, as attorney-general, had accused the five members—"But for the excuse," it was said, "under which he seeks to shelter himself, that is, the king's command, this adds more to his offence; a foul aspersion on his majesty, and wrong to his gracious master; for he could not but know that the king's command, in things illegal, is utterly frustrate, and of no effect" (1642) 4 S.T. 125.

[5] "Naie it was alledg'd further that noe man could committ a publicke crime or injurie; but by color of some publicke imploiment for the King, and soe, all being made his servants as that was then requir'd, all, by the same reason, should

servants were subject to the law for their unlawful acts, the House had every right to censure them, and to impeach them. And it is quite clear that by the new machinery of the standing committees, and with the help of the privilege of absolute freedom of speech claimed by the House, it was possible to collect easily and quickly the evidence upon which a censure or an impeachment could be grounded.

To prove the legal liability of the humbler servants of the crown, such as sheriffs and constables, for their wrongful acts, there was abundant authority, and a continuous practice. To prove the legal liability of the chief ministers of the crown to impeachment and censure in Parliament there was also abundant mediæval authority; but though the rule that they were liable to the ordinary law and the ordinary courts is implicit in this liability to impeachment, it would have been difficult to point to a case in which the inference had been drawn. The large powers, which the king had in the Middle Ages of stopping litigation which affected his interests, prevented the formation of precedents.[1] Moreover, during the sixteenth century, this liability to impeachment had fallen into the background. The responsibility of the ministers of the crown had come to be regarded as a responsibility to the king, whose servants they were, and not to the law. It was thought by many that liability to the ordinary courts and the ordinary law was quite incompatible with orderly government in a modern state. The king's servants should be subject, as they were abroad, to the jurisdiction of the king himself, and not to the ordinary law. We have seen that both James I. and Charles I. held this view.[2] It was one of the most important results of the alliance between the common lawyers and the Parliamentary opposition that this mediæval principle of liability to the law was resuscitated, pushed to its logical conclusions, and applied even to the highest ministers of the state. Just as the Parliamentary statesmen had evolved a theory of Parliamentary sovereignty for the English state, in opposition to the theory of royal sovereignty which was spreading all over Europe;[3] so they evolved a theory of ministerial responsibility to the law, in opposition to those systems of administrative law which were elsewhere springing up. This theory of ministerial responsibility, like the Parlia-

be free from the jurisdiction of the Parliament. What the Parliaments would be then, and what the Countrie by such Parliaments, was offered to the consideration of the house, with a strong caution on that pointe to be carefull for posteritie," Negotium Posterorum ii 14; this accurately represented the king's point of view, for which see above 26 n. 2; vol. iv 85-86.

[1] See Select Cases before the Council (S.S.) xxvii; cp. vol. ii 562-564.

[2] Above 26 nn. 2, 4, and 5.

[3] Above 84-86.

mentary theory of sovereignty, had its weak side. It meant a less strict control, a weaker discipline. On the other hand, it encouraged independence and self-reliance. It was the best of all securities for the strict observance of the law; and, in that age, to secure that the highest officials of the state strictly observed the law, was to secure the nation against the gradual introduction of royal absolutism.

It is clear, then, that the Parliamentary opposition down to 1629 was essentially a legal opposition. It did not aim at change. It aimed only at securing the observance of the law, interpreted as its leaders interpreted it, and the punishment of those who had broken it. It recognized that both the king (who was always spoken of with the greatest respect), and Parliament, had important functions in the state; and it aimed at delimiting their respective spheres of action, and securing for them liberty of action within those spheres.[1] Its logical culmination and conclusion was the Petition of Right. That document embodied the methods and ideals of this stage of the Parliamentary opposition. It enacted nothing new. It merely set out the law in the sense in which the opposition understood it; it set out the points in which the law had been infringed; and it enacted that there should be no such infringements in future. The law was to govern. There was to be no place for any other authority even in an emergency.[2]

The work of this phase of the Parliamentary opposition had considerable merits, and equally considerable defects.

The first and by no means the least considerable of its merits was the fact that it improved the mechanism of the House of Commons. The House was thereby fitted, not only to take its place amongst the organs of the government of a modern state, but also, in the future, to take the position of predominant partner among those organs of government.[3] Secondly, the influence of

[1] Eliot said in the Parliament of 1624, Negotium Posterorum i 130, "Wee cannot but remember the antient opinions held of those assemblies, and how happie theire effects have beene unto this kingdome; how like a Sanctuarie they have beene ever to the subjects, how like a magazine to the princes: the princes heer for the most part granting such lawes and reformacons as were convenable for the necessities and welfare of theire Subjects, and the Subjects, to reciprocat the affeccons of theire princes, often making there retribucons larger than was expected"; and again, ibid 136, "Our whole storie seems but a continued instance of this by the Acts of Parliament ever expressing the wisedome and excellencies of our Kinges, for whose soever be the labour, the honor still reflects on them, and the reputation onlie beares their names"; cp. the Monarchie of the Man ii 76—"the counsell of a Senate and consent of subjects does not impeach the principles of Monarchie; it gives authority and reputation to their acts, and [does] not detract the honor of the king"; cp. Pym's argument in Manwaring's Case 3 S.T. at pp. 346-347.

[2] Vol. v 450-454.

[3] Above 89-92.

the lawyers tended to prevent the proposals of rash projects of reform, which, as the experiences of the Commonwealth were to show,[1] would have alienated the nation. It made, therefore, for continuity of constitutional development. It is easy to see why this was so. The lawyers naturally represented the programme of the Parliamentary opposition as simply a desire for the observance of the common law as determined by precedent. Precedents, they held, "were the life and soul of Parliaments."[2] The royalist party who were, as we have seen, the progressive party, declined to adhere slavishly to precedent. Precedents, they considered, should be used with discretion.[3] No doubt the precedents quoted by the Parliamentary statesmen were sometimes insensibly modified in the course of their application to modern facts; but they were not consciously modified. Obviously, therefore, this temper of mind made for a development which was slow, but which was therefore sure, because it did not go beyond the wishes or the intelligence of the nation. Thirdly, as a result, it educated the nation. The frequent collisions with the king, the debates to which they gave rise, the frequent dissolutions and consequent elections, all helped to define the issues in dispute between king and Parliament, and to teach the nation the true nature and meaning of the constitutional controversy. The nation thus acquired a political creed which was something very much more definite than the old vague desire for the observance of Magna Carta and the rules of the common law.[4] It was exactly this definite creed which was needed to counteract the effect of the rival creed of the royalist party. Fourthly, and consequently, the House of Commons began to attract, both amongst its own members and amongst the nation at large, a personal loyalty which, in the last century, had, for the most part, been the exclusive possession of the crown. It is for this reason that we see, during this period, the rise of a new type of statesman.

Before the reign of Charles I., the statesmen who had filled a large place in the national life had been the servants of the crown, holding one or more of the great offices in the state. It was in the reign of Charles I. that the leaders of the Parliamentary

[1] Below 149-161, 411-423.

[2] Littleton's speech in the Parliament of 1625, Forster, Life of Eliot 255-256, as reported in Negotium Posterorum ii 99.

[3] Sir Humphrey May, to whom Littleton replied, had said, "Let noe man dispise the presidents of antiquitie; noe man adore them. Though they are venerable yet they are no gods. Examples are strong arguments, being proper, but times alter, and with them oft their reasons. Everie parliament, as each man, must be wise with his owne wisdome, not his father's. A dramme of present wisdome is more pretious than mountaines of that which was practis'd in ould times," Negotium Posterorum ii 84.

[4] Vol. v 435-436; above 59-66.

opposition began to fill an almost equally large place. During the early years of the reign, the man who thus gained a prominent position, simply because he was a great Parliament man, was Sir John Eliot.[1] He was, as Gardiner has said,[2] an idealist. He idealized the House of Commons, just as Wentworth, in his later years, idealized the crown. He had the same exaggerated feeling of respect for the privileges of the House of Commons[3] as Wentworth had for the prerogative of the crown. "None have gone about to break Parliaments," he said in his last speech in the House of Commons, "but in the end Parliaments have broken them. The examples of all ages confirm it. The fates in that hold correspondency with justice. No man was ever blasted in this House but a curse fell upon him."[4] Both men revered the Tudor monarchy, and both were loyal to the king;[5] but, while Eliot emphasized the importance of the House of Commons in the constitution, Wentworth emphasized the importance of the crown. Both laid down their lives for their ideals. Eliot was a martyr in the cause of political liberty:[6] Wentworth in the cause of a strong, modern, efficient government based on the prerogative.[7] Both were great orators because they had ideals to inspire them; but Eliot was the greater of the two. He was Wentworth's superior in moral earnestness;[8] and he combined this moral earnestness with a wide reading in the classics and in ancient and modern history,[9] and an untiring industry.[10] His moral earnestness, his learning, and his industry made him the leader of the House of Commons, and by far the greatest orator of his day, and

[1] "The first of England's Parliamentary statesmen," Gardiner, History of England vii 228.

[2] Ibid v 186.

[3] Thus in 1629 he committed, as Pym pointed out, a tactical error in treating the interferences of the custom house officers with Rolle on the lines of a breach of privilege; as Pym said, "the liberties of this House are inferior to the liberties of this kingdom," ibid vii 61-62.

[4] Forster, Life of Eliot ii 241.

[5] Above 103 n. 1; below 108 n. 1.

[6] Gardiner, op. cit. vii 228, "the idea for which he lived and died was the idea that the safest rule of government was to be found in the free utterance of the thoughts of the representatives of the people. He was the martyr, not of spiritual and intellectual, but of political liberty."

[7] Above 73-78.

[8] "He called upon every man to profess openly, in the eye of day, his personal conviction of right as the basis of action. With such a faith, whatever mistakes Eliot might commit in the immediate present, he had raised a standard for the future which could never be permanently dragged in the dust," Gardiner, op. cit. vi 104.

[9] This comes out in all his speeches and writings, especially in his De Jure Majestatis, and the Monarchie of Man.

[10] Grosart, Negotium Posterorum i 140, notes the care which he took to get authentic copies of speeches for this work; and this, he says, "holds equally of the precedents and facts of all his speeches . . . Before he delivered his opinion or judgment he spared no cost to know at once fact and law. There is a plethora of extracts from all manner of recondite sources; and on these he based his arguments and appeals and counsels."

almost of his century. In that century of oratory two speeches stand out—Eliot's on the occasion of Buckingham's impeachment, and Halifax's on the Exclusion Bill.[1] Halifax's speech we only know by hearsay, of Eliot's we have a full report. Nothing can surpass its fire, its terse eloquence, and its burning indignation. The man who could make such a speech upon such a topic could expect no mercy from such a king as Charles. As he truly said in his Apology for Socrates, he died a lingering death for the service of the people, to preserve for them and their posterity the rights and liberties which had been handed down to them from their fathers.[2]

The tragedy of Eliot's death in the Tower, and the eleven years of prerogative rule, drew attention to the defects of the purely legal opposition to the crown, which had characterized the first stage of the constitutional conflict. These defects can be summarized as follows:—Firstly, the Parliamentary leaders did not and could not quite consistently carry out the theory upon which they based their opposition. They professed to desire no change in the law—simply the clear ascertainment and carrying out of the existing law. But it was quite impossible to apply mediæval rules in the seventeenth century with no modifications; and, on many points, these mediæval rules gave no clear answer to the problems which they were expected to solve. No doubt the Parliamentary statesmen interpreted them in such a way that they gave a solution; but the Parliamentary interpretation was often quite as strained as the king's. Both parties were seeking to adapt mediæval rules to a modern environment. Both read into these rules meanings which, historically, were ridiculous.[3] Secondly, the view of the Parliamentary statesmen that they were not changing the law, but merely maintaining it, though not wholly true in fact, exercised an unfortunate influence upon their political programme. They represented themselves as the advocates of a very mediæval body of law, which was, they asserted, fully capable of providing for

[1] Below 187 and n. 8.

[2] "I will not enumerat his passions to tell you what he suffered; what he suffer'd in his fortune, what he suffered in his person, in his liberty, in his life: to be made poore and naked; to be imprisoned and restrain'd; nay not to be at all; not to have the proper use of anythinge, not to have knowledge of Societie; not to have beinge and existence: his faculties confiscat; his frendes debarr'd his presence; himselfe deprived the world: I will not tell you of all this suffer'd by your Socrates, all this suffer'd for your service . . . for your children, your posteritie, to preserve your rights and liberties that as they were the inheritance of your fathers, from you likewise they may againe devolve to them," p. 30.

[3] Redlich, op. cit. i 44, says quite truly that in the seventeenth century, "the new spirit of the House of Commons born of its resistance to absolutism, did, on questions of procedure as well as in other matters, often put new wine into old bottles"; for instances see above 91, 92, 100.

all the needs of a modern state. Hence they refused to consider any lessons that might be drawn from the experience of foreign countries—"Some worthy members of this house," said Coke in 1628, "have spoken of foreign states, which I conceive to be a foreign speech."[1] They almost refused to admit a discretionary power in the executive to take measures for the security or well-being of the kingdom—"our rule in this plain commonwealth of ours," said Whitelocke in 1610, "is *oportet neminem esse sapientiorem legibus*—if there be an inconvenience, it is fitter to have it removed by a lawful means, than by an unlawful";[2] and we have seen that the Commons would not allow any sort of saving clause, designed to give the king a discretionary power, to be inserted in the Petition of Right.[3] After events were to show that martial law, restricted as the House considered it should be restricted, by the mediæval statutes, was wholly inadequate for the government of a modern army.[4] Thirdly, this same point of view had induced the Commons in 1628, not to accept Wentworth's plan of a new law, but on the contrary to give the Petition of Right a declaratory form.[5] But this made it easy for the king and his advisers to evade it. "There was no new thing granted," said Finch, C.J., in the *Case of Ship Money*, "but only the ancient liberties confirmed."[6] This argument had been foreshadowed in the king's speech at the prorogation of 1628,[7] and was constantly urged by the royalist lawyers.[8]

It was becoming clear that the House of Commons must do something more than oppose the policy of the king by means of remonstrances, impeachments, and appeals to the existing law. Their declarations of right were insufficient—Eliot's blood still cried for vengeance.[9] New laws must be passed to curtail the royal power, and to make it impossible for the future to rule without a Parliament. The eleven years of prerogative rule made all these facts very evident to a large number of the leaders of the Parliamentary opposition. They were the decisive facts which guided the policy of Pym in his leadership of the Long Parliament during its first years; and it was under his leadership that the legislation, which effectively carried out this new programme, was passed.

[1] 3 S.T. 68.
[2] 2 S.T. 518.
[3] Vol. v 451-452.
[4] Vol. i 576-577; below 225-229, 241.
[5] Vol. v 451-452, 454.
[6] 3 S.T. at p. 1237.
[7] "The profession of both houses in the time of hammering this Petition, was no way to trench upon my Prerogative, saying, they had neither intention or power to hurt it. Therefore it must needs be conceived, that I have granted no new, but only confirmed the ancient liberties of my subjects," ibid at p. 231.
[8] See Heath's argument in Strode's Case (1629), ibid at p. 281; above 39 n. 6.
[9] The Grand Remonstrance § 15.

(ii) The legislation of the Long Parliament.

Eliot was England's first Parliamentary statesman; but he was not a Parliamentary statesman of the modern type. Like the other Parliamentary leaders of his period, he wished to see a revival of the Tudor constitution, with the sphere of Parliamentary control somewhat enlarged. In his speeches he always glorified and idealized the constitution as it existed under Elizabeth.[1] There is no hint in his speeches or writings that he desired to see the Parliament, much less the House of Commons, the ruler of the state. Pym, in his earlier days, had the same views: "The form of government," he said in 1628,[2] "is that which doth actuate and dispose every part and member of a state to the common good; and as those parts give strength and ornament to the whole, so they receive from it again strength and protection in their several stations and degrees. If this mutual relation and intercourse be broken, the whole frame will quickly be dissolved. . . . It is true that time must needs bring some alterations" . . . but "those commonwealths have been most durable and perpetual, which have often reformed and recomposed themselves according to their first institution and ordinance." And, even in 1640, in his speech at the opening of the Short Parliament,[3] in which he detailed the religious and political grievances of the nation, we see no departure from this point of view. He attacked no individual minister, but concluded simply by proposing that the House of Lords should be asked to join with the House of Commons in searching out the causes of these grievances, and in petitioning the king for their redress. As Clarendon remarks,[4] it would have been well if Pym, and other

[1] See his speech in the Oxford Parliament of 1625, printed in Negotium Posterorum i 141-142, "Now Mr. Speaker soe longe as those attended about our Soveraigne Master nowe with God as had served the late Queene of happie memorie, Debtes of the Crowne were not soe greate, Commissions and Grantes not so oft complayned of in Parliament, Trade florished, Pentions not soe many though more than in the late Queen's time. . . . All thinges of moment carried by publique debate at the Councell Table. Noe Honors sett to sale or places of judicature, lawes against Priestes and Recusantes unexecuted, Resorte of Papists to Ambassadors houses barred and punished. His Majestie both by dayly direction to all his ministers, and by his owne Penn declaringe his dislike of that profession. Noe waste expences in fruitless Ambassadges. Nor any transcendent power in any one minister for matters of state. The Councell Table holdinge upp ye fitt and auncient dignity."

[2] Proceedings against Dr. Manwaring, 3 S.T. 341.

[3] See Gardiner's summary, History of England ix 102-105; cp. S.P. Dom. 1640 46-48, ccccl 108 for another version of the speech; and see Gardiner, op. cit. ix 105 n. 1. for the various versions of this speech.

[4] History of the Rebellion (ed. 1843) 129, "If that stratagem . . . of winning men by places, had been practised, as soon as the resolution was taken at York to call a Parliament . . . and if Mr. Pym, Mr. Hambden, and Mr. Hollis, had been then preferred with Mr. Saint John, before they were desperately embarked in their desperate designs, and had innocence enough about them, to trust the king, and be trusted by him; having yet contracted no personal animosities against him; it is

leaders of the opposition who thought with him, had been given office before the Long Parliament assembled.

The dissolution of the Short Parliament showed that this moderate policy was neither possible nor expedient. St. John was right in his view that it was wholly inadequate.[1] Pym and all the other leaders of the opposition were now agreed that Parliament must pursue a more active policy, that it must get rid of the agents of prerogative rule, and that it must pass legislation which would make such rule impossible.

Pym had helped to secure the summoning of the Long Parliament. He had had a hand in drafting the petition of the twelve peers for the summoning of a Parliament;[2] and that petition had led, first to the assembly of the Great Council of the peers at York, and then to the assembly of the Long Parliament. He soon became the leader of the House of Commons,[3] and as its leader was mainly responsible for shaping its policy. This was no easy task. In the first place, it was necessary to keep the House together and to direct its energies in the right direction. Though at first it was practically unanimous, it might easily, amidst the multitude of religious and political grievances, have frittered away its energies. In the second place, it was necessary to provide against the danger of violence from without. The various plots which the royalist party set on foot to get rid of the leaders of the House of Commons, or to coerce the Parliament,[4] must be sifted, and measures taken to frustrate them. That Pym accomplished both these objects is due both to his intellectual qualities, and to the manner in which those qualities developed under the stress of the new position in which he was placed.

Pym had not, like Eliot, the temperament of an idealist: on the contrary he had the temperament of a practical man of business. He was a born organizer. In 1621 he had proposed an association for the defence of the king and the execution of the laws against the Roman Catholics;[5] he organized the machinery by which Parliament, at the outbreak of the war, took over the

very possible that they might either have been made instruments to have done good service; or at least been restrained from endeavouring to subvert the royal building, for supporting whereof they were placed as principal pillars."

[1] "Oliver St. John understood better what the facts of the case really were, when he said that all was well, and that it must be worse before it could be better; and that this Parliament would never have done what was necessary to be done," Gardiner, op. cit. ix 118.

[2] S.P. Dom. 1640-1641 vi.

[3] Gardiner points out, op cit. ix 223, that Pym did not at once become the leader of the House "in the sense in which he became its leader after some months of stormy conflict. . . . But he was securely established as the directing influence of a knot of men who constituted the inspiring force of the Parliamentary Opposition."

[4] Above 77; below 115-117.

[5] Gardiner, op. cit. iv 243.

executive government; and he played a large part in organizing the Parliamentary forces, and later in organizing the alliance with the Scottish Presbyterians.[1] "Honourable combination," says Gardiner, "with men of good will to the cause which they reverenced was Pym's defence against the shifty politics of Charles;"[2] and he points out that it was from this idea of "mutual association in defence of a principle as better than mutual association in defence of a person," that "party government would eventually grow."[3] Pym had held a post in the Exchequer;[4] and this gave him the practical acquaintance with finance which was essential to the leader of an assembly which controlled absolutely the finance of the country.[5] His Parliamentary experience had enabled him to acquire a thorough knowledge of the forms of the House of Commons;[6] and this knowledge made him "a consummate Parliamentary tactician."[7] Seeing that this knowledge was necessary both to guide the House of Commons, and to defend it from external enemies, its possession was an advantage of the highest importance, and its skilful use demanded real statesmanship. Such knowledge was not then, as it is too often in modern times, a mere cloak for the absence of all the qualities that go to make a statesman. His control of the House was strengthened by the fact that he shared the prejudices and feelings of the majority of its members. Like all effective orators he won applause largely because he could give eloquent and pointed utterance to the inarticulate feelings and aspirations of his audience.[8] In addition he had the tact which all successful leaders of men must possess.[9]

It was natural that a man of this kind, at the centre of affairs during this exciting period, should be educated by the quick movement of events. He knew all about the royalist plots and schemes.[10] He knew therefore the dangers to which Parliamentary government was exposed. It was therefore only to be expected that, when the early unanimity of the Long Parliament

[1] See Gardiner's article in Dict. Nat. Biog.

[2] History of the Civil War i 258.

[3] Ibid 257.

[4] Clarendon, History of the Rebellion 74

[5] "When the resources of the City began to fail, John Pym, who . . . was by nature a distinguished financier, developed a novel source of supply by rendering the Excise a general impost, whereas formerly it had been confined to a few commodities, and those chiefly of foreign import," S.P. Dom. Introd. xlii; and see ibid 484-485, ccccxcviii Sept. 11th.

[6] Clarendon, op. cit. 53, 74.

[7] Gardiner, op. cit. x 223.

[8] Ibid iv 244, "He was strong with the strength, and weak with the weakness of the generation around him. But if his ideas were the ideas of ordinary men he gave to them a brighter lustre as they passed through his calm and thoughtful intellect. Men learned to hang upon his lips with delight as they heard him converting their crudities into well-reasoned arguments."

[9] Ibid vii 36.

[10] Below 115-117.

disappeared, and when the king began to gather a party together, he should side with the more radical section which carried the Grand Remonstrance, and insisted upon a large control over the executive government.[1] And he was the more inclined to this side because he was a Puritan.[2] He would have liked to see the church settled by the House of Commons upon a broad Protestant basis.[3] To this solution the supporters of the church of England were wholly opposed. They united with those who were opposed to taking from the king all control over the executive; and consequently, as we shall see,[4] the House of Commons was split into two parties. It was this division of the House of Commons and the country into two parties that made Pym the first Parliamentary statesman of the modern type; for it made him a party leader depending for his power on his tact, his eloquence, his knowledge of Parliamentary procedure, his business-like qualities, and his power both to outline a programme and to enforce upon his party the discipline needed to carry it through.

The first Act of the Long Parliament was, as we have seen, to secure its own safety by impeaching Strafford.[5] Then it fell upon some of the other agents of prerogative rule—Laud, Windebank, Finch, and some of the other judges. Thus it took a long step towards finally settling the doctrine, for which the Parliamentary leaders had always contended, that all ministers were answerable to the law for their illegal acts.[6] While the practice, introduced about this period, that all royal acts must be countersigned by a secretary of state, ensured that, for these acts, there would always be a minister who could be made thus responsible.[7]

Side by side with these prosecutions the constructive work of the Long Parliament was going on; and it is not too much to say that some of the statutes regularly passed by it, that is, some of those statutes which had the assent of all three branches of the legislature, embody some of the most important principles of our modern public law, and still influence the form and contents of that law. One or two other statutes are of a somewhat more temporary importance, and are chiefly interesting as illustrating some of the acts of the crown which were generally regarded as abuses. I shall therefore deal with this legislation under these two heads.

[1] Below 119-120. [2] Gardiner, op. cit. vii 36; x 33.
[3] See the Grand Remonstrance §§ 183-185.
[4] Below 121-122, 135-138. [5] Above 77. [6] Above 101-103.
[7] S.P. Dom. 1641-1643, Introd. viii.

Statutes of Permanent Importance.

Among these statutes we must place first those which finally secured to the House of Commons the absolute control over taxation direct and indirect. The Act[1] which granted tunnage and poundage to the king for two months, enacted and declared, "That it is and hath been the ancient right of the subjects of this realm that no subsidy impost custom or other charge whatsoever ought or may be laid or imposed upon any merchandize exported or imported by subjects denizens or aliens without common consent in Parliament"; and the penalty of a præmunire was imposed on any officer who attempted to collect these duties after the expiry of the period mentioned in the Act. These provisions were repeated in the various Acts which from time to time continued these duties.[2]

Next in importance comes the Act which abolished the Court of Star Chamber, and the power of the Council of Wales, the Council of the North, the Duchy Court of Lancaster, and the Court of Exchequer of the county Palatine of Chester, to exercise a like jurisdiction.[3] As we have seen,[4] it in effect deprived the Privy Council, and the various courts derived from the Privy Council, of all extraordinary jurisdiction in England. If, as in the case of the Star Chamber and the Council of the North, this extraordinary jurisdiction was all the jurisdiction that the court possessed, the court itself necessarily disappeared; but if, as in the case of the Council of Wales, these courts exercised in addition ordinary common law or equitable jurisdiction, they continued to exist for the purpose of exercising that jurisdiction.[5] Thus the most formidable rivals to the common law courts were removed, and the common law finally asserted its supremacy not only over the private, but also over the public law of the state. This Act further safeguarded the liberty of the subject by reversing the decision in *Darnel's Case*.[6] It provided that persons imprisoned contrary to the Act should be entitled to their writs of habeas corpus,[7] and that these provisions should apply to persons committed by the command of the king himself or his Council.[8] The Act which abolished the Court of High Commission [9] removed a court which had often used its powers to persecute theological opponents, who were also the political opponents of the royalist theories of government.[10] It also deprived the ecclesiastical courts of the power to inflict any penalty or corporal punishment,

[1] 16 Charles I. c. 8.
[2] Ibid cc. 12, 22, 25, 29, 31, 36.
[3] 16 Charles II. c. 10 §§ 1 and 2.
[4] Vol. i 515.
[5] Ibid 126-127, 515 n. 3.
[6] Above 36-37.
[7] 16 Charles I. c. 10 § 6.
[8] Ibid § 7.
[9] Ibid c. 11.
[10] Vol. i 610-611.

or to administer the *ex officio* oath.[1] These latter clauses were repealed in 1661;[2] but the Act marks the beginning of the rapid decay of the temporal jurisdiction of the ecclesiastical courts, and the consequent increase of the jurisdiction of the common law courts over many matters in which these courts had formerly exercised a concurrent jurisdiction.[3] Both these Acts expressly prohibited the Crown from setting up courts with a like jurisdiction.[4] Charles spoke truly when he said that these two Acts "altered in a great measure those fundamental laws, ecclesiastical and civil, which many of my best governing predecessors have established."[5]

It was quite obvious that the eleven years of prerogative rule had been made possible by the fact that the king's prerogative to summon, prorogue, or dissolve Parliaments was absolute. To control this prerogative the Triennial Act[6] was passed. It provided in substance that no longer than three years should elapse between the dissolution of one Parliament and the holding of another;[7] that if a Parliament was continued by prorogation or adjournment for three years, it should be dissolved, and the Chancellor should issue writs for a new Parliament;[8] that if the Chancellor did not issue the writs the sheriffs should hold the elections, and if the sheriffs did not hold the elections the electors should proceed to an election;[9] and that no Parliament was to be dissolved or prorogued within fifty days of its meeting without its own consent.[10] We shall see that this Act was repealed after the Restoration;[11] but the Act repealing it provided that no longer interval than three years should elapse between the dissolution of one Parliament and the summoning of another. It was not, however, till after the Revolution had finally established the supremacy of Parliament, that the object at which the framers of the Act of 1641 directly aimed was attained less directly but more certainly.

Statutes not of Permanent Importance.

These Acts were directed against the abuse of certain old prerogatives to which the king had had recourse in his efforts to get money. Among them we may mention the Act declaring ship money illegal, annulling the judgment in the *Case of Ship*

[1] 16 Charles I. c. 11 § 2. [2] Below 165; vol. i 611. [3] Ibid 620-621.
[4] 16 Charles I. c. 10 § 2; ibid c. 11 § 4; for the Act dealing with the Stannary courts, ibid c. 15, see vol. i 162.
[5] The king's speech in the House of Lords when he gave his consent to these two bills, S.P. Dom. 1641-1643 44, cccclxxxii 17.
[6] 16 Charles I. c. 1. [7] Ibid § 2. [8] Ibid.
[9] Ibid §§ 4 and 5. [10] Ibid § 6.
[11] 16 Charles II. c. 1; below 166.

Money, and ordering the Petition of Right to be put in execution;[1] the Act settling the boundaries of the Forests;[2] and the Act abolishing distraints of knighthood.[3]

None of these statutes can be described as revolutionary. They were measures which were obviously necessary, either to strengthen the position of Parliament, or to guard against admitted abuses; and they commanded the general assent of the nation. There was one statute, however, which proved to be distinctly revolutionary in character. That was the Act which provided that the Parliament then sitting should not be dissolved or prorogued except by Act of Parliament, nor should either House be adjourned except by Act of Parliament or by its own order.[4] The reasons for passing it were partly the difficulty of raising money on credit if there was no security for the continuance of the Parliament, partly the fear, induced by the discovery of the Army Plot,[5] that it might be dissolved before peace was made with Scotland, justice executed on delinquents, and grievances redressed. These considerations were so pressing that the essentially revolutionary character of the Act was not sufficiently perceived.[6]

It was during the first year of this Parliament's life, when the House of Commons was practically unanimous, that it enacted the statutes which have proved to be of permanent importance. At the end of the August, 1641, the House of Commons adjourned. Its resolution to adjourn was, as Gardiner has pointed out,[7] the last time that it acted as a united whole. Consequently, in the ensuing sessions, its legislative output was much diminished. The only statute calling for notice is that which deprived the archbishops and bishops of their seats in the House of Lords, and prohibited persons in Holy Orders from being members of Parliament, privy councillors, justices of the peace, of oyer and terminer and of gaol delivery, or of exercising any temporal authority.[8] The reason for passing the Act was partly the unpopularity of the church of England as administered by Laud,[9] partly the manner in which he had introduced churchmen into high offices of state.[10] A bill to the same effect had previously been rejected

[1] 16 Charles I. c. 14. [2] Ibid c. 16; vol. i 105.
[3] 16 Charles I. c. 20. [4] Ibid c. 7. [5] Below 116.
[6] See the preamble to the Act; and cp. Gooch, English Democratic Ideas 106; it may be noted, however, that the House of Lords tried in vain to limit the duration of the Act to two years, Firth, The House of Lords during the Civil War 91.
[7] Op. cit. x 10, 11. [8] 16 Charles I. c. 27. [9] Below 132-133.
[10] A Clergyman—G. Garrard,—writing to Strafford in 1636, after the appointment of Juxon as Lord Treasurer, says, "The clergy are so high here since the joining of the white sleeves with the white staff, that there is much talk of having a Secretary, a Bishop, Dr. Wren Bishop of Norwich, and a chancellor of the Exchequer, Dr.

by the House of Lords;[1] and, though the House ultimately passed this bill it certainly did not command anything like universal assent.[2] It was repealed in 1661.[3]

We shall see that when this Act was passed religious differences had divided the House of Commons into two parties.[4] This division rendered all constructive legislation impossible, and led in no long period to the outbreak of civil law. It was necessarily fatal to the realization of the aspirations of the majority of the House of Commons to guide the policy of the state, by acquiring, in a constitutional way, a control over the appointment of the king's ministers.

(iii) The Parliamentary claim to guide the policy of the state by controlling the appointment of the king's ministers.

The leaders of the Long Parliament, while pursuing their work of prosecuting the king's ministers, and passing the legislation designed to secure their own position and that of future Parliaments, were constantly being alarmed by projects, and rumours of projects, to break up their sessions by violence, or to override their authority by similar means. We have seen that Strafford had intended to make the relations maintained by the leaders of the Parliamentary opposition with the Scotch the basis for a charge of high treason against these leaders; and that they had only parried this blow by getting in their own blow at Strafford first.[5] Charles himself would not have been averse to using foreign help against his own subjects if it could have been procured.[6] There was an Irish army in existence, suspected by the Commons of being largely Papist in character, which had been got together to subdue the Scotch, who were the natural allies of the Parliament, the cause for its assembly, and the best security for its continuance; and this army the king refused to disband.[7] The queen was negotiating with the Pope for foreign

Bancroft Bishop of Oxford; but this comes only from the young fry of the clergy, little credit is given to it, but it is observed they swarm mightily about the Court," Strafford's Letters ii 2; May, History of the Long Parliament, Bk. i c. 2 pp. 23-24, says, "Archbishop Laud, who was now growne into great favour with the king, made use of it especially to advance the pompe and temporall honour of the clergy, procuring the lord treasurer's place for Dr. Juxon . . . inasmuch as the people merrily, when they saw that treasurer with the other bishops riding to Westminster, called it *the church triumphant:* doctors and parsons of parishes were made everywhere justices of peace, to the great grievance of the country in civill affaires, and depriving them of their spirituall edification."

[1] Gardiner, op. cit. ix 382-383; below 136.

[2] Ibid x 37-38; below 140; the queen persuaded the king to assent to the bill largely that time might be gained; it was a matter of indifference to her whether or not the bishops sat in the House of Lords so long as the king retained his control over the militia, ibid 165-166.

[3] 13 Charles II. St. 1 c. 2; below 165.

[4] Below 121-122, 137-138.

[5] Above 77, 111.

[6] Gardiner, op. cit. ix 257.

[7] Ibid 323, 325.

aid.[1] She also encouraged the Army Plot—a plot to induce the English army in the North, which was discontented by reason of the irregularity with which it was paid, to intervene on behalf of the king;[2] and the king was cognisant of it.[3] The plot was betrayed by Goring; and Pym was informed of the discovery.[4] Though at first he did not reveal to the Commons all he knew,[5] they were aware that plots had been formed;[6] and they naturally connected them with the refusal of the king to disband the Irish army, and with their standing suspicions of the designs of the queen and the Roman Catholics. It was not surprising, therefore, that they pressed forward the bill of attainder against Strafford; and that the Lords, in consequence of the revelations which Pym at length made as to the extent of the Army Plot, were induced to pass it.[7]

The fears of the Commons are evidenced by the Protestation which they passed at this time.[8] It stated, in substance, that the Roman Catholics were undermining the Protestant religion; and that there was just cause to suspect that endeavours were being made to subvert the fundamental laws of England and Ireland, to introduce tyrannical government, and to create misunderstandings between the Parliament and the English army. It then went on to provide a form of undertaking, which each member of the House was to enter into, to maintain the Protestant religion and the powers and privileges of Parliament, and to bring to condign punishment all those guilty of conspiring against them. This Protestation, which the clergy and the citizens of London were invited to sign,[9] published to the world the kind of intrigues against the Parliament which were known to or suspected by the Parliamentary leaders. The people were thus told a little; and naturally they suspected more. Wild rumours of a coming French invasion got about.[10] The mob violence which followed, and more especially the threats against the queen, were the causes which finally induced Charles to consent to Strafford's execution.[11]

[1] Gardiner, op. cit. ix 309, 310.

[2] Ibid 310-317; the soldiers were discontented by reason of the irregularity with which they were paid, and there was some feeling in favour of Strafford, the Fairfax correspondence (Ed. Johnson), ii 65-66, 101-102, 200, 207.

[3] Gardiner, op. cit. ix 314. [4] Ibid 317. [5] Ibid 351.

[6] Ibid. [7] Ibid 358-361.

[8] Gardiner, Constitutional Documents 155.

[9] Gardiner, op. cit. ix 356.

[10] Ibid 362-363—"False as the rumour of the French attack was, it did no wrong to the Queen. If she had had her way a French force would by this time have been in possession of Portsmouth. The popular instinct rightly fixed on her as the author of the mischief;" cp. Gardiner, Cromwell's Place in History 19-21, 25, 26.

[11] Charles, writing to the queen in 1646, said, in reference to Strafford's death, "I must confess to my shame and grief that heretofore I have, for public respects—

A new series of perils began with Charles's journey to Scotland, and his intrigues with the Scotch. He hoped to conciliate the Scotch, to get evidence in Scotland of the intrigues of the leaders of the House of Commons with the Scotch, and to induce the English army in the North to support him.[1] In self-defence the House of Commons appointed commissioners, of whom Hampden was one, to report to the House upon the happenings in Scotland.[2] In spite of the concessions made by Charles, he did not get the support he expected. Argyle, who had the nation at his back, would not lend himself to any such intrigues.[3] But it was not difficult to engineer a plot, of the usual Scotch sort,[4] to kidnap and perhaps murder Argyle.[5] This plot, known as "The Incident," failed; and, since Pym had been kept well informed by the Parliamentary commissioners, he was able to give the House definite information as to the intrigues with the Northern army. Obviously, events in Scotland were highly suspicious; and naturally fresh Catholic plots were suspected.[6] Then came the outbreak of the Irish Rebellion.[7] The fall of Strafford had destroyed efficient government in Ireland. Charles held out hopes to the Roman Catholics, and pursued his usual "wait and see" policy. The new Lord Lieutenant "loitered in England with no sufficient excuse."[8] The natural result was rebellion. But the House of Commons did not, and could hardly be expected to understand the true cause of the outbreak. They could hardly be expected to see that their own act in destroying Strafford had largely contributed to it. To their minds it was merely a conclusive proof of the correctness of their views as to the results of the encouragement given to the Roman Catholics by the queen, and by the slackness in the administration of the penal laws.[9]

It was little wonder that the leaders of the House of Commons, who had lived in this atmosphere of fear and suspicion, should have come to the conclusion that they would never be safe unless they could get a large control over the conduct of the government. Clearly, they could only get this control by restricting the king's free choice of his ministers.

yet, I believe, if thy personal safety had not been at stake, I might have hazarded the rest—yielded unto those things which were no less against my conscience than this," Gardiner, History of the Civil War iii 70; cp. History of England ix 365.

[1] Gardiner, op. cit. ix 409, 410.

[2] Ibid x 3, 4; their appointment was, as Gardiner points out, the first ordinance made by the Lords and Commons without the king; it was due to a suggestion of D'Ewes, after the Chancellor had refused to fix the Great Seal to their commission without an order from the king.

[3] Ibid 21.

[4] Above 6-7.

[5] Gardiner, op. cit. x 23-25

[6] Ibid 29, 32, 42.

[7] Ibid 43 seqq.

[8] Ibid 46-47.

[9] Ibid 54.

Ministers, in other words, must be responsible not only to the king but also to the House of Commons; and ministers whom the House of Commons could not trust must be dismissed. It was only by the adoption of this expedient that the House could be freed from those fears and suspicions which had weighed upon it from the first moments of its assembling. It was only by thus in effect asserting a right to be the predominant partner in the state, that it could secure the constitutional liberties which it had won.

This expedient had been foreshadowed in 1629.[1] In the stormy scenes which accompanied the closing of that session Coryton had said, "I shall move that his Majesty may be moved from this House to advise with his grave and learned Council, and to leave out those that have been here noted to be ill councillors both for the king and kingdom." The leaders of the Long Parliament had gradually been driven by the force of events to see that this was the only path of safety. Among the Ten Propositions[2] which, in June 1641, both the Lords and the Commons addressed to the king, was a demand that he should remove from his counsels all those counsellors who had been active in furthering courses contrary to the religion, liberty, and good government of the kingdom, and in stirring up division between him and his people; and that he should "take into his Council for managing of the great affairs of this kingdom such officers and counsellors as his people and Parliament may have just cause to confide in." To this demand the king returned an absolute refusal.[3] But the intrigues of the king in Scotland, the second army plot, and the outbreak of the Irish rebellion, again brought it to the front. When the English and Scotch Parliaments were asked to act together in the suppression of the Irish rebellion, Pym moved that the House should refuse unless the king removed his evil counsellors, and accepted those of whom the House approved.[4] This motion was violently opposed and ultimately rejected.[5] But he succeeded in carrying a similar motion to the effect that, if the king would not appoint ministers approved by Parliament, the House would be forced to adopt a method of defending Ireland which would secure it from the de-

[1] Gardiner, op. cit. vii 73.

[2] Gardiner, Constitutional Documents 163.

[3] The king replied that, "his Majesty knows of no ill-counsellors, the which he thinks should both satisfy and be believed, he having granted all hitherto demanded by Parliament; nor doth he expect that any should be so malicious as, by slanders or any other ways, to deter any that he trusts in public affairs from giving him free counsel, especially since freedom of speech is always demanded and never refused to parliaments," Lords Journals iv 310, cited Gardiner, op. cit. ix 405.

[4] Ibid x 55.

[5] Ibid 55-56.

signs on foot against it; and with that object, would entrust its contributions to persons upon whom it could rely.[1]

The Commons were clearly grasping at the control of the government; and this policy, though justified by the intrigues of Charles, was arousing a considerable opposition. Their leaders resolved to gain support by appealing to the judgment of the people.[2] It was with this object that the Grand Remonstrance[3] was pressed on. It contained a long and detailed account of all the illegal and arbitrary acts of Charles I.'s reign, of the favour shown to Arminians and Papists, and of the tyranny of the bishops and the Court of High Commission. It went on to recount the beneficial effects of the proceedings and legislation of the Parliament, the large sums of money voted to the king, the intrigues of those hostile to the Parliament, and the slanders against its measures and designs. It concluded by stating the policy which it intended to pursue. A synod of divines was to reform religion. A competent maintenance was to be provided for preaching ministers. The universities were to be reformed. Effectual protection against the Papists was to be provided. The king was to employ only such ministers at home and abroad, as the Parliament "may have cause to confide in."[4]

It was this demand for control over the appointment of the king's ministers, and the explanations by which it was accompanied, which showed, more clearly than had ever yet been shown, that the object of the Commons was to control the policy of the state. "It may often fall out," it was said,[5] "that the Commons may have just cause to take exceptions at some men for being councillors, and yet not charge those men with crimes, for there be grounds of diffidence which lie not in proof. There are others, which though they may be proved, yet are not legally criminal. To be a known favourer of Papists, or to have been very forward in defending or countenancing some great offenders questioned in Parliament; or to speak contemptuously of either Houses of Parliament or Parliamentary proceedings. Or such as are factors or agents for any foreign prince of another religion; such are justly suspected to get councillors' places, or any other of trust concerning public employment for money; for all these and divers others we may have great reason to be earnest with His Majesty, not to put his great affairs into such hands, though we may be unwilling to proceed against them in any legal way of charge or impeachment." It is clear that Parliament has abandoned its old position of simply seeking to secure the ob-

[1] Gardiner, op. cit. x 56-57. [2] Ibid 59.
[3] Gardiner, Constitutional Documents 202-232.
[4] Grand Remonstrance § 197. [5] Ibid §§ 198-201.

servance of the law. For that purpose the remedy of impeachment was quite adequate. It now wants to dictate policy; and for that purpose the remedy of impeachment was wholly inadequate. Political disagreement is not and cannot be a criminal offence.

The Grand Remonstrance foreshadowed the solution ultimately reached by the growth of the Cabinet system. But very many years were to elapse before that solution was accepted. To the passage of the Grand Remonstrance there was furious opposition; and at one time it seemed as if the debate would not end without blood-shed. It was only carried at two a.m. by a majority of eleven votes.[1] It was the trial of strength between the two parties who in a few months time would be facing one another in the field. To the leaders of the House of Commons its passage was vital. They felt that it was only by getting control over the policy of the state that they had any security for the continuance of constitutional government; and that the refusal of the House of Commons, and those whom the House of Commons represented, to back this demand, would have been tantamount to a vote of want of confidence in their leadership. "If," said Cromwell, "the Remonstrance had been rejected, I would have sold all I had the next morning, and never have seen England any more; and I know there are many other honest men of this same resolution."[2]

Why, then, did a measure which the leaders of the House of Commons considered to be vital provoke this opposition? Why had they ceased to command the unanimous or almost unanimous consent of the House?

There were several different reasons. In the first place, there was, as was only natural, some disappointment among the people at large, because the Parliament had not and could not satisfy the exaggerated expectations which they had formed of its power to redress immediately all the grievances of the nation.[3] At the same time the weight of the taxation which Parliament had been obliged to impose was heavy.[4] Many were, therefore, the more ready to listen to the arguments of those who, from the first, had disliked or suspected the Parliament.[5] In the second place, the policy of some of the measures passed by the House

[1] Gardiner, op. cit. x 76-77.
[2] Ibid 78, citing D'Ewes' Diary, Harl. MSS. clxii f. 179.
[3] May, History of the Long Parliament, Bk. 1, c. ix p. 114.
[4] Ibid 115.
[5] "Many people by degrees grew disaffected to the Parliament, being daily poysoned by the discourses of the friends, kindred, and retainers to so many great Delinquents, as must needs feare such a Parliament; who, though they be no considerable party, in respect of the whole Commonwealth; yet fly their particular interests, with more eagernesse than most do the publicke," ibid 114.

of Commons were disliked by some of the lawyers. Several of them voted with the minority against Strafford's attainder.[1] Many more considered that the aim of the House of Commons to take the control over the policy of the state from the king was wholly unconstitutional.[2] Many suspected and disliked the mob violence, which the majority in the House of Commons did not discourage when it was directed to silencing or overawing its opponents.[3] In the third place, the most important of all the causes which broke up the early unanimity of the Parliament was the religious question.

"Another thing," says May,[4] "which seemed to trouble some who were not bad men, was that extreme licence which the common people, almost from the very beginning of the Parliament, took to themselves, of reforming, without authority, order, or decency; rudely disturbing church service whilst the common prayer was reading; tearing those books, surplices, and such things: which the Parliament (either too much busied in variety of affairs, or perchance too much fearing the loss of a considerable party, whom they might have need of against a real and potent enemy) did not so far restrain as was expected or desired by those men. To this was added those daily reports of ridiculous conventicles and preachings made by tradesmen, and illiterate people of the lowest rank, to the scandal and offence of many." In fact it was becoming more and more obvious that those who were concerned in these breaches of the law had the sympathy of the majority of the House of Commons. The legislation directed against the bishops and the ecclesiastical courts, the still more radical proposals of those who wished to abolish episcopacy root and branch,[5] and the policy outlined in the Grand Remonstrance, all pointed in the same direction. It was clear therefore that, if the House of Commons succeeded in getting complete control over the policy of the state, sweeping changes would be made in church as well as in state. For this reason those who disliked the new aims of the House of Commons on political and constitutional grounds combined with those who disliked them on religious grounds. A party therefore arose who supported Church and King in opposition to the Puritan majority of the House of Commons.[6]

[1] Gardiner, op. cit. ix 338. [2] Ibid x 57-59.

[3] The mob in 1641 got into Westminster Hall and attempted to assault the bishops, but the Commons refused to take action—"God forbid," said Pym, "the House of Commons should proceed in any way to dishearten people to obtain their just desires in such a way," ibid 118.

[4] History of the Long Parliament Bk. I c. ix p. 113. [5] Below 135.

[6] As Gardiner puts it, op. cit. x 59, Pym's motion as to the conditions under which the House of Commons would consent to vote money for the suppression of

Eliot had remarked in his Negotium Posterorum [1] that, "It is observable in that House, as their whole storie gives it, that when ever that mention does breake of the fears or dangers in religion, and the increase of poperie, their affections are much stir'd, and whatsoever is obnoxious in the state, it then is reckoned as an incident to that." Religion still had the same power in the House of Commons, and so political agreement disappeared in the face of religious disagreement—everything else became merely "an incident to" that disagreement. But we can understand neither the nature of this disagreement, nor its results upon the political situation, unless we glance briefly at the history of those religious differences between the Stuart kings and a large number of their subjects, which, all through this period, had accompanied and aggravated the political differences.

The Religious Aspect of the Political Controversies

The Elizabethan settlement of the English Church seemed both to the Roman Catholics and to Protestants of the school of Calvin to be an illogical compromise. To the Roman Catholics the Church of England seemed to be an essentially Protestant and heretic church. The royal had been substituted for a papal supremacy, and some of the most distinctive doctrines of the Roman church had been discarded.[2] To the Calvinists the Church of England seemed to have retained very many of the distinctive marks of Roman Catholicism. Its formularies, its ceremonies, and its episcopal government, seemed to them to be reminiscent of Rome.[3] But the majority of the English people did not belong to either of these two extreme parties; and so the Elizabethan settlement, supported by the crown, stood its ground, and gradually gained popularity amongst the nation at large.[4]

In truth, the fact that the Elizabethan settlement was a compromise, and, like all compromises, not wholly logical, was the chief cause of its success. In many ways it met national needs and harmonized with national prejudices. The fact that it was founded on the royal supremacy made it in that age an essentially national church. It was not subject to any foreign power, and it was subject to the power of the crown, in and through which England had become a compact territorial state of the modern type. The fact that its doctrines were in the most impor-

the Irish rebellion (above 118-119) was "the signal for the final conversion of the Episcopalian party into a Royalist party"; below 137-138.

[1] i 69.
[2] Vol. i 593-596; vol. iv 47.
[3] Ibid 47-48.
[4] Ibid 47.

tant respects distinctively Protestant in character, meant in the sixteenth century, that it was allied with the more progressive ideas of the age; and, at the same time, the fact that it had retained many of the formularies, much of the ritual, and much of the governmental machinery of the past, saved it from the narrowness of the Calvinistic and other Protestant systems which were built up directly and solely upon the inspired words of the Bible. Its composite character preserved for it an element of continuity with the earlier ages of ecclesiastical history and tradition. This element of continuity helped men like Cranmer and Parker, Jewel and Hooker, to make its theology more learned and more literate than the narrower systems which discarded all connection with the great theologians of the past; and, on that account, it has proved to be more adaptable than other Protestant churches to the new needs and the new ideas of future ages.[1] In fact the Tudor settlement of the English church was the counterpart of the Tudor settlement of the English state. In the church, as in the state, the transition from mediæval to modern had been effected with the minimum of change. But necessarily the breach of continuity was more apparent in the church than in the state. The substitution of the royal for the papal supremacy, and the rejection of many of the distinctive dogmas of the Roman church, were changes more violent than any which had occurred in the state. But the formularies of the English church, its ritual, its government, and the machinery of its courts, preserved a good deal of the spirit of the mediæval past, and are closely parallel to that large mediæval element which was retained by the law and institutions of the state.

That such a settlement as this was on the whole popular with the majority of English people is clear from the Millenary Petition presented to James I. in 1603.[2] That Petition did not ask, as some reformers earlier in Elizabeth's reign had asked, for the abolition of episcopacy and the substitution of a Presbyterian system.[3] It only asked for a change in certain definite points in the existing system—that certain ceremonies should be disused, certain reforms made in the liturgy, certain abuses removed, some relaxation in the rule that the beneficed clergy and candidates for ordination must subscribe to the whole of the Prayer Book.[4] It is probable that if some of these concessions had been made,

[1] Gardiner, History of England i 38-39; cp. Gardiner, Cromwell's place in History 6, 7.

[2] Prothero, Documents 413.

[3] Gardiner, History of England i 148; cp. Tanner, Constitutional Documents 166-170.

[4] "That ministers be not urged to subscribe but (according to the law) to the articles of religion and the King's supremacy only."

and if the church had been wisely administered in the spirit of Hooker, the element of religious controversy would not have bulked so large in the constitutional quarrels of the seventeenth century. If that element could have been eliminated the constitutional controversies would have lost a large part of their bitterness; and, even if a revolution had been needed to settle them, that revolution would not have been preceded by a rebellion and a royalist restoration.

But, even in Elizabeth's reign, it was fairly clear that, to attain this result, the supreme governor of the church needed very considerable diplomatic gifts. The long struggle with Spain had left a legacy of fear and hatred of Roman Catholicism. No doubt the execution of Mary Queen of Scots and the defeat of the Armada had removed the dangers of a forcible counter-reformation; but intrigue and plot were still active, and the Protestant cause was still fighting for its life on the Continent. Thus the dread of Rome did not diminish; and those who thus dreaded Rome naturally tended to embrace the system which was most definitely opposed to it. As we have seen, the Calvinistic theology and the Presbyterian discipline created the force which saved the Reformation.[1] It is not surprising, therefore, that, though the demand for the establishment of the Presbyterian system had died down, many were attracted by the Calvinistic theology and forms of worship, and desired, if not to get rid of, at least to lay less stress upon, the importance of those doctrines and ceremonies in the church which conflicted with that theology and those forms. Many also were attracted by this theology and these forms of worship, because they felt that it was in and through a church of this kind they could attain to a purer morality, and a more real Christianity.[2] It was these men who formed the backbone of that Parliamentary opposition which had arisen in the later years of Elizabeth's reign. They cemented that alliance between religious and political opposition which was to have so large an effect in the seventeenth century. On the other hand, a party in the Church of England was arising which dissented from the strict theology of Calvin, and laid stress upon the spiritual help afforded by ritual and ceremonies.[3] They naturally insisted upon the strict observance of the Act of Uniformity; and they had the support of the law and the queen.

Two very different systems of theology, two very different conceptions of worship, were beginning to confront one another. The Calvinist theology was harder, more rigid, and less liberal

[1] Vol. iv 19; above 7; cp. Gardiner, History of England i 31-32; v 355.
[2] Ibid iii 241-242. [3] Ibid i 39.

than the Anglican theology. In the Calvinist scheme of worship the greatest stress was laid upon the preaching of the Word. In the Anglican scheme it was the sacraments and the rites and ceremonies of the church which were emphasized. "Men were to be schooled into piety by habitual attendance upon the services of the church. At these services nothing unseemly or disorderly was to be permitted, by which the mind of the worshipper might be distracted. Uniformity of liturgical forms, and uniformity of ecclesiastical ceremony, would impress upon every Englishman the lessons of devotion, which were to sustain him in the midst of the distractions of the world. This uniformity was to be preserved by the exercise of the authority of the bishops who were divinely appointed for its maintenance."[1] It is doubtful whether even Elizabeth, if she had lived longer, would have dealt wisely with this situation. She was very jealous of the smallest interferences with her royal supremacy. In her eyes the government of the church was not a matter with which Parliament had any right to interfere.[2] Any concession to Protestant nonconformists she regarded as politically dangerous. She had not forgotten Knox's views on the "Regiment of Women"; nor was she blind to the consequences of permitting any approach to the principles of a church which, like the Roman Church, claimed to exercise an authority in opposition to and even over that of the state.[3] The political views expressed by Knox, Buchanan and Melville were, from her point of view, an abundant justification for resisting any attempt to make concessions to the Protestant nonconformists.[4] And yet if these men, who were thoroughly loyal to the crown, were not to be driven into permanent opposition, it was clearly politic to make some concessions. If the church of England was to be a really national church, it was necessary to do something to conciliate an important minority. It was clear that no concessions could be expected from Elizabeth or from the bishops; but would not James see the necessity? The whole future of James's dynasty depended upon the manner in which he answered this question.

[1] Gardiner, History of England ii 125.

[2] See the Queen's speech to Parliament in 1585, D'Ewes 328; vol. iv 89-90.

[3] Elizabeth wrote to James in 1590, "Ther is arisen, bothe in your realme and myne, a secte of perilous consequence, suche as wold have no kings but a presbitrye, and take our place while the inioy our privilege, with a shade of Godes word, wiche non is juged to follow right without by ther censure the be so demed . . . I pray you stop the mouthes, or make shortar the toungz of such ministars as dare presume to make oraison in ther pulpitz for the persecuted in Ingland for the gospel. Suppose you, my deare brother, that I can tollerat suche scandalz of my sincere gouvernment? No." Letters of Elizabeth and James VI. (C.S.) 63-64.

[4] See Gooch, Democratic Ideas in the Seventeenth Century 42-48; above 8, 11.

Great expectations from many various sides were aroused by James's accession to the English throne. The Roman Catholics hoped that he would not forget that his mother was a Catholic, and thought that he was determined to grant them some measure of toleration.[1] The Protestant nonconformists perhaps expected something from a king who was a Presbyterian. On the other hand, the orthodox Anglicans were soon assured that, whatever else James might do, he would certainly not try to establish the Presbyterian church in England.[2] It soon became quite obvious that the feeling of the nation was wholly against any toleration to the Roman Catholics.[3] But it was equally obvious that the nation would have acquiesced in some concessions to the Protestant nonconformists; and upon this question James was advised by the ablest man of the day. For his instruction Bacon wrote a paper "Touching the better pacification and edification of the church of England."[4] He pointed out that the church, like the state, needed periodic reformation;[5] and that, though doctrine was "immutable," yet "for rites and ceremonies and for the particular hierarchies, policies, and disciplines of church, they be left at large."[6] Then he recommended certain reforms which might be made in the episcopal government of the church;[7] in the liturgy;[8] in various ceremonies, such as confirmation, private baptisms, the ring in marriage, the wearing of cap and surplice;[9] and in the extent of the subscription required from candidates for ordination and the holders of benefices.[10] He advocated certain changes designed to secure a "preaching ministry,"[11] to put a stop to excommunication for trivial causes,[12] to deal with the evils of non-residence and pluralities,[13] and to the provision of an adequate maintenance for ministers.[14] It is safe to say that, if James had dealt with these points at the Hampton Court conference[15] in the manner suggested by Bacon, he would have strengthened both the church of England and his own dynasty.

[1] Gardiner, History of England i 97-100. [2] Ibid 147-148.
[3] Ibid 143-145. [4] Spedding, Letters and Life iii 103-127.
[5] "I would only ask why the civil state should be purged and restored by good and wholesome laws made every third or fourth year in parliaments assembled, devising remedies as fast as time breedeth mischiefs, and contrariwise the ecclesiastical state should still continue upon the dregs of time, and receive no alteration now for these five and forty years and more," ibid 105.
[6] Ibid 107-108. [7] Ibid 108-114. [8] Ibid 114-118. [9] Ibid.
[10] Ibid 118—"And for the subscription, it seemeth to be in the nature of a confession, and therefore more proper to bind in the unity of faith, and to be urged rather for articles of doctrine than for rites and ceremonies and points of outward government. For howsoever politic considerations and reasons of state may require uniformity, yet Christian and divine grounds look chiefly upon unity."
[11] Ibid 118-121. [12] Ibid 121-122. [13] Ibid 122-124. [14] Ibid 124-126.
[15] See 2 S.T. 69 for a report of the proceedings at the conference.

Unfortunately James was guided by the views, not of Bacon, but of Cecil. Cecil held strongly the view of Elizabeth that any departure from strict uniformity in favour of nonconformists was dangerous both to the church and to the monarchy.[1] Though a certain number of reforms,[2] and certain changes in and additions to the Prayer Book,[3] were made as a result of the Hampton Court Conference, no change satisfactory to the Protestant nonconformists was attempted, and no relaxation was made in the subscription required from candidates for ordination and the holders of benefices. As a result many ministers were ejected from their livings, and James was deaf to all pleadings for some relaxation of the strict rule.[4]

James had thrown away his opportunity; and it was perhaps inevitable that he should do so. Intellectually, he had far more in common with the learned, literate, and courtly English prelates than with the narrow dogmatism of the Calvinist ministers.[5] Though strict uniformity of doctrine and discipline was enforced in the church, its dogmas tended rather to the more liberal Arminian than to the more rigid Calvinistic views.[6] They allowed more scope for individual differences of opinion; and James was quite sufficiently learned to favour, within limits, an amount of tolerance for divergent opinions upon speculative points which no Calvinistic church would allow.[7] Politically, the agreement between James and the leaders of the English church was even more striking. His views as to his divine right and as to his position in the state,[8] were accepted by them as obvious truths, and maintained as against the anti-monarchial views both of Presbyterians and Papists.[9] The very mention of the word Presbytery at the Hampton Court Conference had aroused his anger. "A Scottish Presbytery," he said, "agreeth as well with a monarchy as God and the devil."[10] He was quick to learn from

[1] Gardiner, History of England i 199.
[2] Prothero, Documents 416-417.
[3] Rymer, Foedera xvi 565.
[4] Gardiner, History of England i 197-199; a petition in favour of the deprived ministers was presented; but, as it intimated that, if the petition were not assented to, widespread discontent would be caused, it was treated as seditious, and its draftsman was summoned before the Council; the judges apparently agreed that such a petition was seditious, ibid 198 n. 4.
[5] Above 13.
[6] Above 123.
[7] Above 9.
[8] Above 11-12.
[9] James asserted in a letter to the bishops that, "the Puritans are no less dangerous than the Papists and therefore equal care to be taken for their suppression," S.P. Dom. 1603-1610 40, iii 82. The term "Puritan" was used at this period as a nickname or a term of abuse, and is used to describe men whose beliefs were very divergent, Gardiner, History of England iii 241 n. 2; cp. Cromwell's Place in History 3, 4.
[10] 2 S.T. 85; and Charles I. had the same views; he wrote to his wife in 1646, "The nature of Presbyterian government is to steal or force the crown from the king's head; for their chief maxim is . . . that all kings must submit to Christ's

the words and conduct of the courtly divines of the English church that episcopacy was the best support of what he called a "free monarchy."[1] In fact, just as the English churchmen were receptive to the more liberal theological ideas which opposed the stern and narrow Calvinistic theology,[2] so they were receptive to the new political ideas which seemed to show that a well organized modern state could not exist unless the power of the king was maintained and strengthened.[3] It followed that they were far less likely than Calvinistic ministers to protest against a foreign policy which involved alliances with Roman Catholic states, or against the relaxation, for diplomatic reasons, of the penal laws against the Roman Catholics. As James's foreign policy developed, the opposition which it encountered from the Protestant prepossessions of his subjects, tended to cement his alliance with the party in the church of England which was opposed to the Protestant nonconformists, and to destroy all hopes that any concessions would be made to them.

Conversely, just as there was a natural affinity between James and the orthodox Anglican, so there was an equally natural affinity between the Protestant nonconformists and the political opponents to James's view of his own position in the state. In the first place, these Protestant nonconformists were Calvinists; and the theology of Calvin taught men to be no respecters of persons. They and their Maker stood face to face without priestly intermediaries, and their relations were governed only by the word of God as contained in the Bible.[4] These ideas harmonized with the temper of the political opponents of the king, who held that all men were equally subject to the supremacy of the law of the land, and to it alone; and that they were quite capable of spelling out for themselves the provisions of that law from the literal words of mediæval textbooks and records. In the second place, these Protestant nonconformists were quite incapable of appreciating the strong points in the Anglican theology—they ascribed its opposition to distinctively Calvinistic doctrines, and its adherence to rites and ceremonies, to leanings in favour of popery. Similarly the political opponents of the king could not appreciate the strength of the royal

kingdom of which they are the sole governors, the king having but a single and no negative voice in their assemblies," Gardiner, History of the Civil War iii 72.

[1] "How they (the Presbyterians) used the poor lady, my mother, is not unknown, and how they dealt with me in my minority. I thus apply it. My Lords, the Bishops, I may (this he said putting his hand to his hat) thank you that these men plead thus for my Supremacy. They think they cannot make their party good against you, but by appealing unto it: but if once you were out, and they in, I know what would become of my Supremacy, for No Bishop, No King," 2 S.T. 85.

[2] Above 123.

[3] Above 67-69.

[4] See Gardiner, History of England i 47-48.

view as to the position of the prerogative in the state.[1] They considered that his adherents merely wished to establish a royal tyranny for their own selfish ends. Thus those who wished to see reforms in the church, which would, as they thought, restore the church government and the theology of the first ages of Christianity, became the close allies of those who wished to see reforms in the state, which would, as they thought, restore that mediæval constitution in which Parliament had played so great a part. Thus the opposition to those dogmas and practices in the church which offended the Calvinist, united with the opposition to those political theories of the crown which offended the supporters of Parliament. Protests against Arminianism and Popery were coupled with protests against arbitrary taxation, interferences with the liberty of the subject, and breaches of privilege. It is true that there is no necessary connection between the theories at the root of Calvinistic Protestantism and Parliamentary government,[2] any more than there is between the theories at the root of high Anglican tenets and prerogative government.[3] But, in the seventeenth century, the movement of political and religious forces, and the intellectual affinities of the chief actors, had consolidated and strengthened the alliances of these two political and religious creeds.

In the Parliaments of 1604,[4] and 1610,[5] the party which had been defeated at the Hampton Court Conference made its voice heard. And, as the reign went on, the corruption of the court, the successes of the Roman Catholics on the Continent, the futile negotiations for the Spanish match, and the relaxation of the penal laws against the Roman Catholic, gave to this party a greatly increased strength. Its demands were met, not by concession, but by repression. The order to read the Declaration of Sports, which struck at widespread views as to the manner of keeping holy the Sabbath day, roused so great a resistance that it was necessary to withdraw it.[6] Endeavours were made to silence preachers and to limit the topics upon which they might hold forth.[7] It is not surprising that religious questions took a

[1] Above 69. [2] Gardiner, Cromwell's Place in History, 9, 10.

[3] Figgis, Divine Right of Kings, 202-203.

[4] Gardiner, History of England i 178-180; cp. the Apology of the Commons, Prothero, Documents 290, 291.

[5] Gardiner, op cit. ii 84-85, 111; cp. Petitions of the Commons, Prothero, Documents, 300-301, 302-305.

[6] Gardiner, History of England iii 251-252.

[7] S.P. Dom. 1619-1623 436-437, cxxxii 85—none below the degree of Dean to enter on the deep points of election or universal redemption, etc. . . . , none to presume to limit the power or jurisdiction of Sovereign Princes, or the conditions between them and their people, otherwise than as contained in the homily on obedience; none to fall into invectives against either Puritans or Papists, but merely to defend the doctrine and discipline of the church.

place of constantly increasing importance in the debates of the House of Commons. Pym in 1621 made his name as a debater by his speech in the committee on religion, in which he proposed an oath of association for the defence of the king's person, and the execution of laws made for the establishment of religion.[1]

In the religious, even more than in the political world, the existing causes of controversy were aggravated by the character and intellect of Charles I. Just as he had very definite views as to the position which he as king ought to occupy in the state, so he had equally definite views as to the character of the English church and its position in the state. The High Anglican theory of the church was being rapidly developed. Its theory and ritual appealed to his literary and artistic sensibilities; and with the political theory of Anglican divines, such as Manwaring,[2] he was in perfect agreement. There is no doubt that the church of England had no more faithful disciple than Charles. Both theologically and politically he regarded the church as a main buttress of the throne;[3] and even in his utmost extremity he could never be brought to abandon it.[4] But he had married a Roman Catholic wife; and, as a consequence, the laws against the Roman Catholics were not executed with that rigidity which the Protestant party demanded. Hence the suspicion of collusion between the Anglican bishops and the church of Rome increased. The growth of elaboration in the ritual of the church of England, the manner in which theologians like Montague[5] emphasized the differences between the English and the other reformed churches, the favour with which divines who preached these doctrines were received at court, all seemed to point to a settled design to depress the Protestant religion. The distinction between Catholic and Roman Catholic was not then and is not now readily perceived by the Protestant mind.[6]

[1] Gardiner, History of England iv 242-243.

[2] See the proceedings in Parliament against him (1621) 3 S.T. 335.

[3] Below 136 n. 3; and next note.

[4] He wrote in 1646, "How can I keep my innocency which you, with so much reason oft and earnestly persuade me to preserve, if I should abandon the Church? Believe it, religion is the only firm foundation of all powers; that cast loose or depraved, no government can be stable; for when was there ever obedience when religion did not teach it? But, which is most of all, how can we expect God's blessing if we relinquish His Church? And I am most confident that religion will much sooner regain the militia than the militia will religion," cited Gardiner, History of the Civil War iii 136.

[5] See Proceedings in Parliament against him (1625) 2 S.T. 1257; cp. Gardiner, History of England v 351-355.

[6] The incapacity to perceive this distinction was later to prove fatal to Laud; he and his school were supposed to have been somehow implicated in Popish plots in Ireland and elsewhere, Gardiner, History of the Civil War i 246; no doubt this particular deduction was fostered by the shifty diplomacy of Charles, which thus recoiled unexpectedly on his own head.

As these same divines preached also doctrines of divine right, non-resistance, and royal absolutism, the alliance between the religious and political opposition was still further strengthened. In every Parliament we hear demands for the rigid enforcement of the laws against the Roman Catholics; in the Parliament of 1625 Montague was attacked for his theological views; in 1628 Manwaring was attacked for his political views; and in 1629 a sub-committee of the Commons drew up a series of resolutions against the whole ecclesiastical policy of the crown,[1] in which it was alleged that popery was on the increase, that orthodox doctrine was suppressed, and that those who suppressed it were preferred. They complained of "the subtle and pernicious spreading of the Arminian faction," which had kindled such divisions in the state that it tended to the ruin of religion, "by dividing us from the Reformed Churches abroad, and separating amongst ourselves at home, by casting doubts upon the religion professed and established; which, if faulty or questionable in three or four Articles, will be rendered suspicious to unstable minds, in all the rest, and incline them to Popery, to which those tenets in their own nature do prepare the way."[2] The first article of that Protestation,[3] which was read while the Speaker was forcibly held in the chair, proclaimed that "whosoever shall bring in innovation of religion, or by favour or countenance seem to extend or introduce Popery or Arminianism, or other opinion disagreeing from the true and orthodox church, shall be reputed a capital enemy to this kingdom and commonwealth."

Charles was even less likely to tolerate Parliamentary interference with the church than with his own prerogative. According to his view it was for himself and the clergy in convocation to settle all matters concerning religion, to prescribe the doctrines to be taught, and to interpret them authoritatively.[4] After the dissolution of 1629 he set himself to carry out these views; and in his endeavour to carry them out thoroughly he found a zealous minister in Laud. Laud had long been a favourite at court, and in 1633 he succeeded Abbott as archbishop of Canterbury.

Three features of Laud's character appealed strongly to the king. In the first place, he was a learned man, a patron of learning and learned men, a collector of books and manuscripts,

[1] Gardiner, Documents 77-82. [2] Ibid 79. [3] Ibid 82-83.

[4] "We are supreme Governor of the Church of England: and if any difference arise about the external policy, concerning the injunctions, canons, and other constitutions whatsoever thereto belonging, the Clergy in their Convocation is to order and settle them, having first obtained leave under our broad seal so to do: and we approving their said ordinances and constitutions; providing that none be made contrary to the laws and customs of the land," The King's declaration prefixed to the articles of religion (1628), ibid 75.

and a benefactor both to Oxford University and to his own college, St. John's, of which he had been President. In the second place, he was, as might be expected, intellectually a liberal in religious matters.[1] He objected to the rigid formulæ both of Rome and Geneva because "they both insisted upon the adoption of articles of faith which he believed to be disputable, or at least unnecessary to be enforced."[2] Therefore he naturally attached himself to the school of Anglican divines who rejected the authority of Calvin, and emphasized the Catholicity of the English church at the expense of its Protestant character. But we have seen that insistence upon ritual, ceremony, and liturgical forms were the essential features of their system.[3] In the third place, he was a disciplinarian obstinately determined to translate, with the precision of a machine, his principles into practice. "The liberty which he claimed for men's minds he denied to their actions."[4] At all costs uniformity of ritual and ceremony and discipline must be maintained in the church. The powers of the bishops and the ecclesiastical courts were stretched to the utmost to effect this result.[5] And he rigidly enforced their jurisdiction to correct the morals[6] of all sinners of whatever rank or station.[7]

The combination of two men with the characters of Charles

[1] "The desire to leave as much as possible to be regarded as indifferent, and therefore open to free discussion by intelligent inquiries, is manifested in Laud's letter to Vossius and in his controversy with Fisher, as well as in the new Preface to the Articles, which was mainly his work. Nor must it be forgotten that he was the patron of Chillingworth, and was tolerant to the 'ever memorable' John Hales, who was far more of a latitudinarian than Chillingworth himself. In the chain which binds together the forward movement of the age—between Bacon and Locke—Laud has his place, even though that place be a very narrow one," Gardiner, Cromwell's Place in History 8.

[2] Gardiner, History of England iii 244; "Half the dogmatic teaching of the Papal Church, half the dogmatic teaching of the Calvinistic churches, was held by him to be but a phantom summoned up by the unauthorized prying of vain and inquisitive minds into mysteries beyond the grasp of the intellect of man, as unreal as were the Platonic ideas to the mind of Aristotle," ibid vii 301.

[3] Above 125.

[4] Gardiner, History of England iii 244.

[5] "The Archbishop, guided purely by his zeal, and reverence for the place of God's service, and by the canons and injunctions of the church, with the custom observed in the king's chapel, and in most cathedral churches, without considering the long intermission and discontinuance in many other places, prosecuted this affair more passionately than was fit for the season; and had prejudice against those, who, out of fear or foresight, or not understanding the thing, had not the same warmth to promote it," Clarendon, History of the Rebellion (ed. 1843) 39; cp. Gardiner, History of England viii 106-110.

[6] Vol. i 619-620.

[7] "He intended the discipline of the church should be felt, as well as spoken of, and that it should be applied to the greatest and most splendid transgressors, as well as to the punishment of smaller offences, and meaner offenders. . . . Persons of honour and great quality, of the court, and of the country, were every day cited into the high commission court, upon the fame of their incontinence, or other scandal in their lives, and were there prosecuted to their shame and punishment," Clarendon, History of the Rebellion 38.

and Laud was dangerous both to king and church. To give a commanding position in the state to a man who applied his hard and narrow views of discipline to all the questions which came before him, increased the bitterness of the political opposition. Laud, it was noted, was always in favour of the severest sentence in the cases which came before the Star Chamber.[1] Though his inflexible honesty irritated the courtiers, his lack of business knowledge prevented him from effecting any very large reforms;[2] and his irascible temper sometimes gave his opponents a chance to hold him up to ridicule.[3] He increased the unpopularity of Charles's personal government without making any great accession to its strength. More especially he made the church of England more unpopular than it had ever been before, partly by the manner in which he used his influence to promote churchmen to places of influence in the state,[4] but chiefly by the manner in which he emphasized in it all those features which were most distasteful to the nation.[5] The clergy warned him in vain of the unpopularity of his measures,[6] and complained of the difficulties which they experienced in enforcing them.[7] He kept his course, and many fled to New England to escape from the persecution of the High Commission and the other ecclesiastical courts.[8] Charles, so far from moderating, encouraged all these activities. Thus he re-issued in 1633 the Book of Sports which his father had been obliged to withdraw.[9] As we have seen, he was wholly incapable of looking beyond the immediate circle of the court, and quite ignorant of the feelings and prejudices of his people.[10] Laud's political and religious views exactly coincided with his own;[11] and therefore they must be unquestionably right. It followed that both political expediency and religious duty dictated their adoption and rigid enforcement.

It was Laud's tactless mania for uniformity of ecclesiastical discipline at all costs, and Charles's utter want of sympathy with those whose religious and political views differed from his own,

[1] S.P. Dom. 1633-1634 xxv.

[2] Gardiner, History of England viii 69, 89-91; cp. Clarendon, History of the Rebellion 40.

[3] Ibid.

[4] Above 114 and n. 10.

[5] The scenes at the punishment of Prynne, Burton, and Bastwick in 1637 are the best proof of this, Gardiner, History of England viii 231-233.

[6] S.P. Dom. 1631-1633 xxii, xxiii; ibid 492, ccxxix 123—verses against the clergy of Colchester who had carried out Laudian reforms.

[7] Ibid 1637 257-258, ccclxii 96; Laud's informers were exposed to much peril on account of the hostility provoked by his measures, ibid 26, cccliv 91; ibid 37, cccliv 122.

[8] Ibid 1633-1634 450, cclx 17; ibid 1638-1639, 430-431, ccccxv 45.

[9] Gardiner, Documents 99-103.

[10] Above 17, 79-80.

[11] He was so pleased with the views which Laud expressed upon the subject of episcopal jurisdiction when he sentenced Prynne, Burton, and Bastwick that he ordered the speech to be published, Gardiner, History of England viii 230.

which were the immediate causes for the overthrow of the unstable edifice of prerogative government. The attempt to impose the English liturgy and ritual upon Scotland provoked, as any sensible person would have forseen, civil war. And even civil war and the debates of the Short Parliament could not teach Charles and Laud moderation. Convocation was allowed to sit after the Short Parliament had been dissolved, thus giving colour to the view, sure to be resented by any future Parliament, that it was a legislative body independent of Parliament;[1] and Convocation proceeded to enact a series of Canons which justified all the features of church government and church ritual to which there was most objection; drew up the "et cætera" oath according to which the clergy and certain others were to swear to alter nothing in the government of the church; and asserted in the largest terms the doctrines of divine right and non-resistance.[2] The enactment of these canons was the last of Laud's activities. We have seen that the renewal of the civil war with Scotland, and the defeat of the king's forces, necessitated the summoning of the Long Parliament.[3] Thus, just as from a Scotch king had come that theory of divine right and royal absolutism which had upset the delicate balance of the Tudor constitution, so from the Scotch people came the beginnings of the movement which proved fatal to that theory. In Scotland the uprising was to some extent a national, but chiefly a religious movement.[4] As we have seen, it was through the discipline of the Presbyterian church that Scotchmen had attained some measure of political organisation;[5] and it was the books and sermons of the Presbyterian divines which had given them their political education. No doubt the rising was helped forward by the nobility, who were jealous both of the bishops and of the growing power of the crown;[6] but its driving force came from the people and from religion. In England, on the other hand, the opposition to the crown was as much political as religious; and it was not national in the sense in which the Scotch rising was national. In Scotland the results aimed at were comparatively simple—the power of the crown must be curtailed in order that the church might regain its

[1] Gardiner, History of England ix 147.

[2] S.P. Dom. 1640 232, ccccIv 47; cp. ibid 234-237, ccccIv 55, 57.

[3] Above 82.

[4] "The new prayer book was detested because it was English, not merely because it was alleged to be Popish," Gardiner, Cromwell's Place in History 14.

[5] Above 8.

[6] Gardiner, History of England viii 304-305; Gardiner, Cromwell's Place in History 59, 60; as Gardiner says, ibid 13, "the discontent of the nobles was of greater effect in Scotland than it could be in England. No Scottish Henry VIII. had brought them low, and they still possessed heritable jurisdictions investing them with powers of life and death over criminals on their estates"; cp. above 6-7.

freedom under a purely Presbyterian organisation, and in order that the nobles might be relieved from their fear of oppression. In England, on the other hand, the results aimed at were not quite so simple. Not only must political and religious abuses be removed, but positive measures must be taken to prevent the possibility of the recurrence of these abuses. This involved the question of what positive changes (if any) must be made in the existing organization of church and state. That organization was far more complex in England than it was in Scotland. Change was therefore more difficult; and public opinion was by no means so unanimous as to the kind of changes which were desirable.

As to the removal of religious abuses, the Long Parliament showed the same unanimity as it had shown in the removal of political abuses.[1] The High Commission and the other ecclesiastical courts were swept away; Laud was impeached; and, later, a comprehensive bill on church reform was read twice in the House of Lords.[2] This bill showed that the majority of the House of Lords were in favour of reforming, but of preserving intact, the organization of the church of England; and that they had no intention of altering the liturgy of the church. But it had already appeared that there was a party in the House of Commons which wished for more extensive reforms.

In December, 1640, a petition for church reform and the abolition of episcopacy, signed by 15,000 inhabitants of London, had been laid before the House of Commons; and "for the first time opinion in the House was seriously divided."[3] In the February of the following year the debate as to whether this petition should be sent to a committee, showed that a party was forming which was prepared to resist radical reforms in the church.[4] On the other hand, it was clear also that a party in the House desired the total destruction of episcopacy, and the thorough remodelling of the church. The reasons for the growth of such a party are obvious. We have seen that all through James I.'s and Charles I.'s reign the alliance between the political and the religious opposition to the crown had been growing closer.[5] That religious opposition had always been composed of men inclined to the Calvinistic theology. Many of them, therefore, were inclined to favour the introduction of something like a Presbyterian system. In 1629 the resolutions on religion drawn up by a sub-committee of the House of Commons referred to the Church of Scotland as "that famous church."[6] But, though in 1629 it was

[1] Above 112-114. [2] Gardiner, Documents 167-179.
[3] Gardiner, History of England ix 247. [4] Ibid 276-281.
[5] Above 128-131. [6] Gardiner, Documents 78.

proposed to give a more Calvinistic interpretation to the doctrines of the church,[1] there was no thought of interfering with its government or its liturgy. Laud's activities, and the alliance with the Scotch Presbyterians, had now raised up a party which desired to reform both. It was not, as Gardiner has pointed out, a mere question of administrative machinery. "It was rather a question of influence. The possession of the pulpit brought with it the power of moulding the thoughts and habits of men, which can only be compared with the power of the press in modern times."[2] That was the main reason why Charles[3] and his party were so firmly attached to the episcopal organization: that was why his opponents desired to get rid of it.

In 1641 a bill to exclude the bishops from the House of Lords, and to incapacitate the clergy from all secular offices passed the Commons; but the House of Lords refused to pass the clauses excluding the bishops.[4] The resistance of the House of Lords to this measure called the attention of the Commons to the fact that the bishops were all appointed by the king, and that therefore the retention by them of their seats in the House of Lords meant the support of twenty-six votes to any policy which the king wished to pursue. It was the perception of this fact which was largely instrumental in securing an alliance between Pym and the political opposition on the one side, and the supporters of extensive ecclesiastical changes on the other.[5] This alliance secured the passage in the House of Commons, by a small majority, of a bill to extinguish episcopacy.[6] But though the House ultimately found it possible to vote down the bishops,[7] they found it impossible to agree upon any alternative form of church government.[8] Similarly, though there was little objection to the removal of some of the innova-

[1] Above 131. [2] Gardiner, History of England ix 282.

[3] In 1646 Charles wrote, "It is not the change of church government which is chiefly aimed at—though that were too much—but it is by that pretext to take away the dependency of the Church from the Crown; which, let me tell you, I hold to be of equal consequence to that of the military, for people are governed by pulpits more than the sword in times of peace," Gardiner, History of the Civil War iii 135.

[4] Gardiner, History of England ix 378, 382-383.

[5] Ibid 380-381; provided that the church was sincerely Protestant, Pym was indifferent as to the form of church government—"he was neither Episcopalian nor Presbyterian by conviction. . . . In the last speech which he is known to have uttered in Parliament, he based his acceptance of the abolition of Episcopacy solely on the strength which that abolition would give to those who were fighting against Charles," Gardiner, History of the Civil War i 258.

[6] Gardiner, History of England ix 382; above 114-115.

[7] Ibid; below 140.

[8] Gardiner, History of England ix 386, "Inside the House of Commons the party which advocated a thorough change in the system of church government was rather desirous of overthrowing an ecclesiastical despotism which they knew not how to remodel, than inspired with any strong preference for any other system to be established in its room."

tions in ritual which had recently been introduced, no agreement could be reached as to any measures of reconstruction. This was a question which aroused much greater feeling in the nation than the question of church government;[1] and it was quite obvious from the contrary petitions sent up to the House of Commons that the opinion of the country was hopelessly divided.[2] It was only natural that the existing confusion should be made the opportunity and excuse for all kinds of disorderly conduct, and for the growth of all kinds of fanatical opinions.[3]

It is not surprising that the confusion which thus prevailed in ecclesiastical affairs, should have convinced all those who desired to see the constitution settled upon its ancient lines, that further reform was dangerous. The lawyers, who had no desire to see a revolution in the state, combined with the very much larger party who either wished to retain intact the organization and liturgy of the church, or who disliked the domination of a Puritan party which was largely recruited from the lower middle classes.[4] The attitude of Hyde, the future Lord Clarendon, is typical of the attitude of many at this period. At the beginning of the Long Parliament he had vigorously attacked abuses, and concurred in the legislation which was designed to remove them. But he was a lawyer with all the prejudices of a lawyer; and he was sincerely attached to the church of England. The claims which the House of Commons was beginning to make to override the established prerogatives of the king, and to make itself the supreme power in the state, shocked his ideas of legal orthodoxy, as much as the proposals for extensive changes in the discipline, doctrines and liturgy of the church of England shocked his ideas of religious orthodoxy. That many thought with him the debate on the Grand Remonstrance showed.[5]

"If," says Gardiner, "no other question had been at issue than the political one there would have been no permanent division of parties, and no Civil War;"[6] and the truth of this dictum was even then recognized by some.[7] But the fact that

[1] Gardiner, History of England x 15.

[2] S.P. Dom. 1640-1641 528-529, cccclxxix 6, 7—two petitions from Cheshire, one in favour of, and the other against episcopacy; the numbers signing the latter are said to be double those signing the former; and it is probable that the latter is a Puritan forgery, S.P. Dom. 1641-1643 iv, v; Proceedings in Kent (C.S.) 30-38; cp. Fairfax Correspondence (Ed. Johnson) ii 184.

[3] Above 121; for some illustrations see Gardiner, History of England x 29-31.

[4] Gardiner, History of the Civil War i 6, 7.

[5] Above 120.

[6] History of England x 32.

[7] Gardiner, History of the Civil War i 4 and n. 2, cites Sir Edward Verney's dictum—"I do not like the quarrel, and do heartily wish that the king would yield and consent to what they desire . . . for I will deal freely with you—I have no reverence for bishops, for whom this quarrel subsists"; and also D'Ewes' opinion to

religious differences had created a royalist party, made all the questions at issue between the royalist and the Parliamentary party, insoluble by mere discussion. Those who carried the Grand Remonstrance designed a reformation of the church by means of a general synod of "the most grave, pious, learned, and judicious divines of this island, assisted by some from foreign parts." They were to draw up a scheme which was to be presented to Parliament and passed into law.[1] The views of those who voted against the Remonstrance were expressed in Charles's answer to the petition which accompanied the Remonstrance. "We are persuaded in our consciences that no church can be found upon the earth that professeth the true religion with more purity of doctrine than the Church of England doth, nor where the government and discipline are jointly more beautiful and free from superstition; than as they are here established by law, which, by the grace of God, we will with constancy maintain (while we live) in their purity and glory, not only against all invasions of Popery, but also from the irreverence of those many schismatics and separatists, where with of late this kingdom and this city abounds."[2] In an age which rejected the idea of religious toleration the sword alone could decide the issue thus raised.

The Immediate Causes of the Outbreak of Civil War

It was the indiscretions of Charles and his wife which gave Pym and the Parliamentary party the control of the House of Commons. The outbreak of the Irish Rebellion had made a military force necessary; but could Charles be trusted with it? The intrigues carried on by Charles and his wife both in Scotland and abroad proved that he could not.[3] It was rumoured that the Commons contemplated an impeachment of the queen;[4] and, just as the safety of the queen had been the final cause which determined Charles to assent to the attainder of Strafford,[5] so this contemplated impeachment was the cause which led him to take the resolution to impeach the five members.[6] And her impetuosity impelled him to take the still more rash step of

the effect that the Houses proceeded because the king, "too vehemently and obstinately stuck to the wicked prelates and other like looser and corrupter sort of the clergy of this kingdom, who doubtless had a design, by the assistance of the Jesuits and the Papists here at home and in foreign parts, to have extirpated all the power and purity of religion"; Gardiner also points out that "many contemporary pamphlets take a similar view of the situation."

[1] Gardiner, Documents 229.

[2] Ibid 235; it is clear that Charles's answer was approved in many parts of the country, Gardiner, History of England x 109.

[3] Above 115-117.

[4] Gardiner, History of England x 128.

[5] Above 116.

[6] Gardiner, op. cit. x 129.

going in person to seize them.[1] But, through the queen's own indiscretion, information was given to them,[2] and they escaped in time. The danger, thus narrowly escaped, cemented the alliance between those who pressed for more radical reforms in the state, with those who pressed for more radical reforms in the church; and thus the party which demanded complete control over the executive, complete control over the militia, and the exclusion of the bishops from the House of Lords, secured a majority in the House of Commons.

All these demands were resisted by the House of Lords. But the position which that House now occupied was very different from the position which it had occupied in the days of the Tudors.[3] It was very much larger, and it had long ceased to be the habitual supporter of the Crown.[4] During the early years of the seventeenth century, a large party in the Lords had gone into opposition in defence both of their own rights as a House, and of constitutional liberty.[5] But in defence of constitutional liberty the House of Commons and not the House of Lords was assuming the position of leader.[6] It was the House of Commons which drew up the Petition of Right, and the Lords had been obliged to acquiesce in the rejection of their proposed amendments to it.[7] In the Long Parliament the House of Commons had forced the Lords to pass the bill attainting Strafford, and the bill which provided that Parliament should not be dissolved without its own consent.[8] There had been outbreaks of mob violence while the bill for Strafford's attainder was being considered by the Lords.[9] A clause in the Grand Remonstrance complained that the bishops and the popish lords in the House of Lords "crossed and interrupted" all attempts at reformation;[10] and the refusal of the House to exclude them led to similar outbreaks of mob violence.[11] The House of Commons began to magnify itself at the expense of the Lords, because it was the representative House.[12] But, notwithstanding this pressure, the

[1] Gardiner, op. cit. x 136. [2] Ibid 136-137. [3] Vol. iv 92-93.
[4] Firth, The House of Lords during the Civil War 1-23, 33-73.
[5] Ibid 37 seqq.
[6] As late as 1607 the Lords had claimed to be the most important House, and the Commons had admitted that a certain matter, being a matter of state, was "fitter to have beginning from the upper House," ibid 34-35.
[7] Vol. v 451, 452. [8] Above 114 n. 6, 116. [9] Firth, op. cit. 86-87.
[10] Gardiner, Documents 228; cp. S.P. Dom. 1641-1643, 194, ccccIxxxvi 36—Smith writing to Pennington says, "There are divers Bills in the House of Peers which, by reason of the strong faction of the Bishops and Papists, cannot pass, though the Protestant Lords do much endeavour it. With this the House of Commons are much displeased, and I believe it will breed ill blood."
[11] Firth, op. cit. 103-106.
[12] A committee of the House was instructed to say that, "This House being the representative body of the whole kingdom, and their lordships being but as particular persons, and coming to Parliament in a particular capacity, if they shall not be

House of Lords maintained its opposition till its resistance was broken by the king's own acts. Sir Charles Firth says,[1] "the king's party in the House of Lords was broken up by his attempts to get possession of Hull and Portsmouth, by the discovery that he was plotting to introduce foreign troops into England, by all the evidence of a design to appeal to force which came to light during the latter part of January (1642)." Under these influences the Lords passed the militia bill, the bill for the exclusion of the bishops, and the bill for the impressment of soldiers. To the two latter bills the king gave his consent; but he resolutely declined to consent to the militia bill. When it was suggested to him that he might grant the control over the militia to Parliament for a short period, he replied, "By God! not for an hour."[2] Now that civil war was inevitable it was quite obvious that the king could not deprive himself of that power over the armed forces of the crown which was given to him by the law of the constitution.

The House of Lords, like the House of Commons and the rest of the country, was split into two halves by the outbreak of the civil war. Its history during the civil war emphasized its new position as an essentially second chamber. But it was still regarded as a necessary part of the constitution. Similarly, though antimonarchical sentiments had been expressed,[3] it was long before the impossibility of coming to any understanding with a king upon whose word no reliance could be placed, brought about the temporary abolition of both monarchy and House of Lords. But, in fact, it was the consciousness of the impossibility of working with such a king that had made it necessary for Pym and the majority of the House of Commons to insist upon the entire subjection of the king to the will of Parliament. The Nineteen Propositions[4]—the Parliamentary ultimatum—would, if accepted, have reduced the king to a figure head. Parliament would have controlled the appointment of the chief executive officers of state, and of the chiefs of the common law courts; it would have been the master of the military forces of the state; and it would have determined the policy to be pursued in the regulation of religion. No doubt the true solution would have

pleased to consent to their passing of these acts, and others necessary for the preservation and safety of the kingdom, then this House, together with such of the Lords as are more sensible of the safety of the kingdom, may join together and represent the same to His Majesty," cited Firth, op. cit. 101.

[1] The House of Lords during the Civil War 111.

[2] "By God! not for an hour. You have asked that of me in this, was never asked of a king, and with which I will not trust my wife and children," Gardiner, History of England x 170.

[3] Gooch, English Democratic Ideas 108-109.

[4] Gardiner, Documents 249-254.

been the deposition of the king, and the substitution of another who could have worked with Parliament under the altered conditions. But the split upon the religious question had given the king a party. While he had a party who would fight for him, it was impossible either to force him to accept terms which reduced him to a nonentity, or to depose him.

The assumption by the Lords and Commons who remained at Westminster of the powers of the state put them into a legally indefensible position, and gave the king a good argumentative basis of which he made the most. It was not difficult for Hyde, who now became a trusted adviser of the king, to demonstrate that the king was upholding the law and the constitution of the country.[1] His ideal, in defence of which, he argued, the king was fighting, was the constitution as settled by the legislation of the first months of the Long Parliament—an established church, a king who would work with Parliament, a Parliament in which the king the House of Lords and the House of Commons cooperated, neither king nor House of Lords nor House of Commons encroaching on one another's spheres, over all the supremacy of of the law. This ideal provided no solution for the burning question of sovereignty, and it did not touch the problem of religious nonconformity. "It was," as Gardiner says,[2] "the idea of an essentially mediocre statesman. It was based on negations, and provided so elaborately that nothing obnoxious should be done, that there was no room left for doing anything at all." For all that, it now gave the king a party;[3] and it was in appearance the ideal which was realised at the Restoration—but in appearance only. We shall see that the troublous eighteen years of civil war and constitutional experiment, which in 1642 lay before the English nation, left an ineffaceable impression upon the comparative strength, and therefore upon the working and mutual relations, of the institutions which were restored.

[1] See e.g. the king's reply to the demand of Parliament that the magazine should be removed from Hull to the Tower, which was probably drawn up by Hyde, Gardiner, History of England x 189-190—"Be sure you have an early and speedy care of the public, that is of the only rule which preserves the public, the law of the land; preserve the dignity and reverence due to that. It was well said in a speech made by a private person (Pym's speech against Strafford), but published by order of the House of Commons this Parliament: 'the law is that which puts a difference betwixt good and evil, betwixt just and unjust. If you take away the law all things will fall into a confusion, every man will become a law unto himself.' . . . So said that gentleman, and much more very well in defence of the law, and against arbitrary power."

[2] Ibid 169.

[3] Ibid 170.

II

The Period of The Civil War and Commonwealth

"Laws are commanded to hold their tongues among arms; and tribunals fall to the ground with the peace they are no longer able to uphold"[1]—the legal historian must pass briefly over the period of the civil war; and he cannot describe in any great detail the legislation of the Commonwealth, as that legislation was all swept away at the Restoration. It is only in so far as the events of this period influenced the future development of English public law that it is of importance in legal history. In this section, therefore, I shall describe the chief developments of the public law of this period from this point of view. With the developments of private law I shall deal in the following chapter.

The history of the developments of the public law of this period will not be intelligible unless we keep before our minds the political events to which they owed their origin. I shall, therefore, in the first place, give a slight chronological sketch of these events. In the second place, I shall give a short summary of the various written constitutions which were put forward during this period. In the third place, I shall endeavour to estimate the permanent effects of this period upon the development of English public law.

The Political Events of this Period

When the civil war began the two parties were fairly evenly matched; and so, during its first two years, its results were inconclusive. Both king and Parliament possessed certain advantages and suffered from certain difficulties. The nobility and gentry who flocked to the king's standard gave the king a force of cavalry which as yet the Parliament could not match;[2] and in those days superiority in cavalry meant everything. It was almost as important as superiority in artillery is at the present day.[3] The king also could command more strategical ability than the Parliament.[4] On the other hand, there was no unity in the command of his armies. The king himself wished to be supreme in

[1] Burke, Reflections on the French Revolution (7th ed.) 43.

[2] Cromwell, speaking to Hampden of the Parliamentary cavalry, said, "Your troops are most of them old decayed serving men and tapsters, and such kind of fellows, and their troops are gentlemen's sons and persons of quality. Do you think that the spirits of such base and mean fellows will ever be able to encounter gentlemen that have honour, and courage, and resolution in them? . . . You must get men of a spirit . . . that is likely to go on as far as gentlemen will go, or else you will be beaten still," cited Gardiner, Civil War i 41.

[3] Ibid 46-47.

[4] Ibid ii 62-64.

war as he had wished to be supreme in government; and, as Strafford and Laud had found to their cost, his only notion of the way in which supremacy was to be secured was never to give his entire confidence to any single person.[1] Moreover, though the king had good cavalry, and good material from which officers might have been made, there was little sympathy between the officers and the rank and file. "They could not inspire the common man with their own courage, because they had no living faith in which he was able to share."[2] The Parliamentary forces were as badly organized as those of the king; but the Parliament was better equipped for a long war. It had at its back the City of London; and the wealthier half of the country, including Norwich and Bristol, had rallied to its cause.[3] Above all, Parliament controlled the fleet. This enabled it to move troops freely by sea, to secure the customs revenue, and to prevent the king from getting foreign help.[4] Some of its members, like some of the members of the king's party, would have welcomed peace, and hesitated to push the war to a conclusive issue.[5] But the Puritan party, who considered it a religious duty to make their views prevail, had no such idea. They were the driving force of the Parliamentary armies, and they gave to all its ranks an enthusiasm and an ideal which might be matched amongst some of the higher ranks of the king's army, but was never possessed by his army as a whole. On the other hand, the Parliamentary armies suffered from the lack of unity of control even more than the royal armies.[6]

The decisive victories of the Parliamentary forces at Marston Moor (1644) and Naseby (1645) were due to three causes. In the first place, the two parliaments of England and Scotland had entered into an alliance known as the Solemn League and Covenant (1643).[7] In the second place, the Parliamentary armies had been new modelled;[8] and, as a result of the Self Denying

[1] Gardiner, Civil War i 3. [2] Ibid 217-218.
[3] Prothero, Camb. Mod. Hist. iv 302-303. [4] Ibid.
[5] Gardiner, Civil War i 26; thus Manchester and the elder Fairfax in 1644 refused to consider the idea of deposing the king, ibid 368-370.
[6] "In the Puritan armies, together with much unpromising material, there were men who were better soldiers than any who fought on the Royalist side. . . . Hitherto all their martial qualities had been neutralised by defective organisation. Unless military and financial centralisation could reduce the existing chaos to order, it was hardly likely that even Cromwell, splendid tactician as he was, could convert disaster into success," ibid ii 65.
[7] For its text see Gardiner, Documents 267-271.
[8] It was from Waller that the first suggestion of this came, Gardiner, Civil War ii 5; it was decided to have an army of 21,000 men, not counting local forces; and, this was the important matter, that its pay "should be dependent on the monthly payment of taxes regularly imposed, and not on the fluctuating attention of a political assembly, or the still more fluctuating good-will of county committees," ibid i 117.

Ordinance,[1] they had ceased to be commanded by politicians. In the third place, the Parliament had got in Oliver Cromwell a man who had shown himself capable of organizing, disciplining, and leading a body of cavalry inspired by a set of Puritan principles, which awakened in them as much enthusiasm as the principles of loyalty and honour awakened in the royal cavalry.[2] When this organization, this discipline, and this enthusiasm had been imparted to the new modelled army, the Parliament got an instrument of war which no royalist army could match. Led by Cromwell, who was now showing that he was an able tactician as well as an unequalled leader of cavalry, it was irresistible. The last royalist army was defeated in 1646 at Stow on the Wold. Astley, its leader, said to his captors, "You have now done your work, and may go play unless you will fall out amongst yourselves."[3]

The three causes which had given the decisive victory to the Parliamentary forces had rendered this falling out almost inevitable. The Presbyterian party, which commanded a majority in Parliament, wished to carry out the terms of the Solemn League and Covenant, and introduce into England a form of Presbyterian worship, under the control of Parliament, to which all must conform. On the other hand, the army was largely composed of Independents, opposed to Presbyterianism, and desirous of toleration for all sects within certain broad limits;[4] and with these demands of the army Cromwell sympathized.[5] The king had surrendered to the Scotch in 1646, and had, in the following year, when the Scotch army left England, been handed over to the Parliament. He naturally intrigued both with the Parliament and with the army. At first it seemed likely that the king and the Presbyterians would come to terms

[1] Gardiner, Documents 287-288; as Gardiner points out, Civil War ii 254, it is not quite accurate to say that Cromwell was exempted from this Ordinance, as it did not prevent the Houses from appointing their members to offices after they had resigned; Cromwell's Lieutenant-Generalship was simply renewed from time to time.

[2] Ibid i 142; above 142 n. 2. [3] Ibid iii 80.

[4] "The popular belief that the New Model was not merely a Puritan, but an Independent army is not without foundation. An army is to a great extent moulded by its officers, and the officers of this army were men of a pronounced, and especially of a tolerant Puritanism. The officers too, had on their side, if not the whole of the old soldiers, at least those who were most energetic and most amenable to discipline, more particularly the sturdier Puritans of the Eastern Association who were especially numerous in the ranks of the cavalry. It was by such as these that the whole lump was ultimately leavened," ibid ii 194; for the beginnings of the Independent party see Tanner, Constitutional Documents 186-190.

[5] After Naseby, Cromwell wrote to Lenthall, "He that ventures his life for the liberty of his country, I wish he trust God for the liberty of his conscience, and you for the liberty he fights for," cited Gardiner, op. cit. ii 252; it is significant that the House of Commons printed his letter without this passage.

on the basis of the re-establishment of his authority as it existed in August, 1641, and the establishment of Presbyterianism for three years.[1] But, before this scheme could be realized, the army must be got rid of. This the Presbyterian party failed to do.[2] The army carried off the king, excluded eleven Presbyterian members of Parliament, and put forward, in the document known as the Heads of Proposals,[3] its own scheme for a settlement. The king held out hopes to the army that he would accept its proposals; but at the same time he was negotiating with the Scotch for armed intervention in England in support of the Presbyterian party in Parliament. He attempted to escape from the custody of the army, but was captured and confined in Carisbrooke Castle.[4] While at Carisbrooke he concluded a treaty with the Scotch.[5] The Covenant was to be confirmed by Act of Parliament, though no one was to be forced to take it; Presbyterianism was to be established for three years; and the opinions of various enumerated sects, among which the Independents were included,[6] were to be suppressed. On the other hand, the Scotch were to support his demands that he should come to London to treat personally with the Parliament, and that the army should be disbanded. If these demands were refused, the Scotch were to declare themselves ready to support "the right which belongs to the Crown in the power of the militia, the Great Seal, bestowing of honours and offices of trust, choice of Privy Councillors, and the right of the king's negative voice in Parliament";[7] and, in pursuance of this declaration, they were to send an army to England to secure a free Parliament, to release the king, and to secure the dissolution of the present Parliament. Having made this treaty, the king refused his consent to the demands made by the Parliament, and the relations between them were broken off.[8]

This treaty with the Scotch was the cause of the second civil war. Royalist risings in many parts of the country were accompanied by a Scotch invasion, and a defection of part of the fleet. But the royalist risings were defeated in detail, and Cromwell won a decisive victory over the Scotch at Preston.[9] Parliament, however, reopened negotiations with the king, and tried to come to terms with him; but the king refused to consent

[1] Gardiner, Documents xlix, 311-316; Civil War iii 252-253.
[2] Gardiner, Documents xlix. [3] Ibid 316-326; below 152-153.
[4] Ibid li, lii. [5] Ibid 347-352.
[6] Anti-Trinitarians, Anabaptists, Antinomians, Arminians, Familists, Brownists, Separatists, Independents, Libertines, and Seekers.
[7] Ibid 349. [8] Ibid liii, 353-356, 356.
[9] Prothero and Lloyd, Camb. Mod. Hist. iv 348-351.

to its terms.[1] A similar attempt on the part of the army to treat with him on the basis of the Heads of Proposals was also frustrated by the king's refusal to comply with these proposals.[2] "Charles had made the path easy to those who were compassing his destruction."[3] The army had, from the outbreak of the new war, determined to take vengeance on the king; but up to then they had been held back by their leaders. Cromwell now came round to the opinion of the army,[4] and the House of Commons was purged by Colonel Pride. The House thus purged assumed sovereign power;[5] and, when a last overture made by Cromwell with a view to saving the king's life was rejected,[6] the High Court of Justice was set up, and the king was tried and executed.

The execution of the king destroyed the whole system of central government.[7] But, in contemplation of some such event, the army had put out a sketch of a Republican constitution known as the Agreement of the People.[8] After his execution the remnant of the Long Parliament assumed the government of the country. To some extent it carried out the wishes of the army. A Council of State was appointed,[9] king[10] and House of Lords[11] were abolished, and England was declared to be a Commonwealth.[12] All persons of eighteen and over were to take an engagement to be faithful to the Commonwealth;[13] and new treason laws were enacted.[14] All acts imposing penalties for not coming to church on Sunday were repealed.[15] So far the Parliament had carried out the wishes of the army. The one point in which it had not complied with their requests was in setting a limit to its own powers and its own existence.[16] It had stated that it intended to dissolve in the Act which abolished the monarchy;[17] but it did not do so; and it was this failure to redeem its pledge which was ultimately to prove fatal to it.

For the time, however, the whole energies of the Commonwealth were absorbed in the task of self-defence. But Crom-

[1] Gardiner, Civil War iv 222. [2] Ibid 241-242, 244.
[3] Ibid 245. [4] Ibid 247-252.
[5] Firth and Rait, Ordinances of the Interregnum iii xviii.
[6] Gardiner, Civil War iv 281-287.
[7] Shaw, Camb. Mod. Hist. iv. 435—"Beneath the Council and the concomitant Parliament the lower ranges of administration remained practically undisturbed."
[8] Gardiner, Documents 359-371; below 153.
[9] Firth and Rait, op. cit. ii 2. [10] Ibid 18. [11] Ibid 24.
[12] Ibid 122. [13] Ibid 325. [14] Ibid 120, 193-194.
[15] Ibid 423. [16] Gardiner, Documents lvi.
[17] "It is resolved and declared by the Commons assembled in Parliament, that they will put a period to the sitting of this present Parliament, and dissolve the same as soon as may possibly stand with the safety of the people that hath betrusted them, and with what is absolutely necessary for the preserving and upholding the Government now settled in the way of a Commonwealth," Firth and Rait, op. cit. ii 20.

well's victories over the Irish, and over the Scotch at Dunbar and Worcester, secured its position. The question of dissolution then emerged. After long and futile negotiations Cromwell finally, in 1653, dissolved Parliament by force. The nation as a whole agreed with Cromwell that this small knot of members who had sought to perpetuate their own power was "no Parliament."[1]

But what was to take its place? Cromwell at first fell back on the device of nominating an assembly. Members were nominated by the council of officers, from amongst persons submitted by the congregational ministers.[2] This assembly was, as Gardiner has said, "the highwater mark of Puritanism in Church and State."[3] But it proved to be a quite incompetent body. "To immature and reckless attempts at legislation for the abolition of tithes and for law reform it added impracticable conclusions on finance, and finally stultified itself by its hopeless divisions on church questions."[4] The more moderate section managed to snatch a vote in favour of the resignation of its powers, and it came to an end.[5] The next experiment tried by the council of officers was the creation of a written constitution. The document in which this constitution was embodied is known as the Instrument of Government.[6] Under it, as we shall see, Cromwell was to be Protector for life, there was to be an elected Parliament, and a council independent of both Protector and Parliament. But, when Parliament met, it refused to accept the constitution under which it was assembled. Eventually it was dissolved (1653), mainly because it attempted to deprive Cromwell of the sole control over the army;[7] and Cromwell found himself again obliged to rule by means of the army.

As experience showed, and as Cromwell well knew, no permanent settlement was possible so long as this form of government lasted. In obedience to the Instrument of Government, which had prescribed a Parliament once every three years, a new Parliament was summoned. The elections were carefully managed,[8] and members were refused permission to sit unless they were approved by the Council.[9] In this way a submissive assembly

[1] Gardiner, Commonwealth and Protectorate ii 265; for the detailed history of the dilatory manner in which Parliament dealt with the question of dissolution see Jenks, Constitutional Experiments of the Commonwealth 30-33.

[2] Gardiner, op. cit. ii 276, 281-282. [3] Ibid 340.

[4] Shaw, Camb. Mod. Hist. iv 438.

[5] Gardiner, Commonwealth and Protectorate ii 326-328.

[6] Gardiner, Documents 405-417; below 154-156.

[7] Ibid lxiv; Commonwealth and Protectorate iii 244-253.

[8] "So far as the electors were concerned, the Major-Generals did their best to popularize what they regarded as right opinions," ibid iv 267.

[9] Gardiner, Documents lxv.

was ensured. It was this assembly which drew up the document known as the Humble Petition and Advice. Under it Cromwell was to be king, and certain amendments were made in the Instrument of government.[1] Cromwell refused to take the title of king; but in other respects he in substance accepted the amendments suggested by the Humble Petition and Advice. One of these amendments was the creation of a second chamber nominated by the Protector;[2] and the chamber was accordingly nominated.[3] But, by virtue of another clause, members formerly excluded from the House of Commons were admitted.[4] This was fatal to the success of the new constitution. The republicans were hostile to the Protector and to the other House; and they began to intrigue with the army for the establishment of a Commonwealth, and for the limitation of Cromwell's power over the army. Parliament was consequently dissolved by Cromwell before it had sat a month (Jan. 20th to Feb. 4th, 1658).[5] Royalist plots which had been on foot for some time were quickly suppressed.[6]

In the following September Cromwell died. His death removed the only man who could control the army, and therefore the only man who could have any chance of establishing civil, as opposed to military government. Richard Cromwell, who had succeeded Oliver as Protector, was soon got rid of, and anarchy followed.[7] Finally, a section of the army under Monk united with the Presbyterian and royalist parties to effect the Restoration. The members of the Long Parliament excluded by Pride were restored, and the Parliament at length voted its own dissolution. The new Parliament resolved to restore the king on the terms drawn up by him at Breda. There was to be an amnesty for all except those excepted by Parliament, liberty of conscience according to laws to be drawn up by Parliament, such security for property acquired during the interregnum as Parliament might devise, and the payment of arrears to the troops.[8] What a combination of the Presbyterian and royalist parties had nearly effected in 1647 it now succeeded in effecting. The king was apparently restored to his old position as it existed after the legislative changes made by the Long Parliament in 1641, and before the outbreak of the civil war. The intervening period was apparently eliminated. But, though formally this result was effected, there were in fact very material differences between the constitution as it existed in 1641 and the constitution as it

[1] Gardiner, Documents lxv; below 156-157. [2] Below 157.
[3] For a specimen of a writ of summons see Gardiner, Documents 464.
[4] § 3; Gardiner, Documents 449.
[5] Shaw, Camb. Mod. Hist. iv 446-447. [6] Ibid.
[7] On this period see Firth, Camb. Mod. Hist. iv c. xix.
[8] Gardiner, Documents 465-467.

was restored in 1660. We cannot, however, estimate the nature and extent of these differences until we have glanced briefly at the constitutional experiments of this period.

The Constitutional Experiments

The execution of the king had made it necessary to construct a new constitution. This necessity naturally produced much speculation on political, legal, and social questions, and several constitutional experiments.

All through this period there was much speculative activity, which reached its height when the death of Cromwell had deprived the nation of the one man who could rule the country.[1] But the only speculative works of this period which have a permanent value are Harrington's; and of his works the most famous is his Oceana.[2] Harrington had spent much time in foreign travel, and he had used his opportunities to make a study of foreign constitutions. After the king's death he set to work to embody the results of his study in a book which contained a model for a new constitution. This book he called "The Commonwealth of Oceana." It describes the principles which underlay the formation of this Commonwealth, the debates which were held as to its laws, and the mechanism of its government. It is often tedious and pedantic; but, like many another book which describes an imaginary commonwealth, it contains ideas very much in advance of its age—examples are the provision of free education for all,[3] and the guarantee of almost complete liberty of conscience.[4] The state, Harrington holds, is a commonwealth;

[1] Ludlow says that in 1659, "the great officers of the army were for a select standing senate to be joined to the representative of the people. Others laboured to have the supreme authority to consist of an assembly chosen by the people, and a council of state chosen by that assembly to be vested with executive power, and accountable to that which should next succeed, at which time the power of the said council should determine. Some were desirous to have a representative of the people constantly sitting, but changed by a perpetual rotation. Others proposed that there might be joined to the popular assembly a select number of men in the nature of the Lacedemonian Ephori, who should have a negative in things, wherever the essentials of the government should be concerned, such as the exclusion of a single person, touching liberty of conscience, alteration of the constitution, and other things of last importance to the state," Memoirs (Ed. Firth) ii 99.

[2] Besides the Oceana there are some ten other works, see Harrington's Works in the edition of 1771; The Oceana is dedicated to the Protector and on the title page is the apposite motto "Quid rides? mutato nomine, de te Fabula narratur"; for some account of Harrington's life see Gooch, op. cit. 286-290; E.H.R. vi 317-318.

[3] Oceana 164-165; cp. E.H.R. vi 325.

[4] Oceana 118—"This council shall suffer no coercive power in the matter of religion to be exercised in this nation . . . nor shall any gathered congregation be molested or interrupted in their way of worship (being neither Jewish or idolatrous) but vigilantly and vigorously protected . . . in the practice and profession of the same"; Harrington regarded this freedom as a part of civil liberty, no more to be denied than any other part, see Political Aphorisms, Works 484, cited Gooch, op. cit. 294-295.

and to ensure the stability of such a state equality must be as far as possible secured. He saw, what few then perceived, that there could be no real equality amongst subjects unless some provision was made to secure a certain amount of equality in property—especially landed property.[1] Thus, by the agrarian laws in force in Oceana, no one was to be allowed to have an income of more than £2000 a year from land.[2] To ensure equality in distribution of the offices of the state they were to be filled by election and rotation; and thus, "as the agrarian answers to the foundation, so does rotation to the superstructures."[3] To ensure freedom of election the ballot was to be used.[4] The government was to be in the hands of a senate which proposed, a representative assembly which ratified or rejected these proposals, and an executive filled by rotation of office amongst those elected. Thus we get "an equal commonwealth," which is "a government established upon an equal agrarian, arising into the superstructures of three orders, the senate debating and proposing, the people resolving, and the magistracy executing by an equal rotation through the suffrage of the people given by the ballot."[5]

Harrington's book is not, like the books of Hobbes and Locke, primarily concerned with political theory. His object was practical—to produce a constitution of a republican type which should be permanent. And, just as many of his proposals foreshadow later ideas, so his method foreshadows the later methods of political thought. He relies, not on a priori speculation, but on the teachings of history and the experience of other nations. This gives his book a practical tone which is usually wanting to those who construct imaginary commonwealths.[6] The form into which he casts his work—the history of the con-

[1] As Mr. Dow says, E.H.R. vi 322, "From the general tenor of his debate as well as from desultory remarks elsewhere, it is apparent that . . . Harrington included limitations on private fortune in capital as well as land. His references to capital are subsidiary, because England was for him characteristically a 'commonwealth of husbandmen.' But in reference to Holland and Genoa he makes the balance of treasure hold the same function as the balance of land in England."

[2] Oceana 94-95; at p. 51 he says, "An equal Agrarian is a perpetual law establishing and preserving the balance of dominion by such a distinction that no one man or number of men, within the compass of the few or aristocracy, can come to overpower the whole people by their possessions in lands."

[3] Ibid 51—"Equal rotation is equal vicissitude in government, or succession to magistracy, conferred for such convenient terms, enjoying equal vacations, as take in the whole body by parts, succeeding others, through the free election or suffrage of the people."

[4] "The election or suffrage of the people is most free, when it is made or given in such a manner that it can neither oblige nor disoblige another; nor through fear of an enemy, or bashfulness toward a friend, impair a man's liberty," ibid.

[5] Ibid.

[6] Gooch, Democratic Ideas 297-298.

struction of the constitution of Oceana—is, it is true, unfortunate, because it makes his book tedious and difficult to read. The adoption of this form was, no doubt, caused by the strict censorship of the press during the Commonwealth period; but, as Mr. Gooch says, his books "were no mere speculative pastimes, but an earnest and practical exhortation to the Parliament and its governors." [1]

The book aroused enthusiasm—the Rota Club was formed to discuss its proposals.[2] But it also aroused much hostility. It pleased neither the adherents of Cromwell nor the royalists.[3] Cromwell temporarily confiscated the book while it was being printed; and, after the Restoration, the author was subjected to a rigorous imprisonment which broke his health. His suggestions were founded on far too optimistic a view of human nature ever to have worked as he expected them to work. As Mr. Gooch says,[4] he advocated the principle of rotation because he believed in "an inexhaustible supply of worthy and capable men ready to play their part in the drama of government"; and he advocated the elective principle "because he is convinced that men are wise enough to choose the wise, and good enough to choose the good." [5] Moreover, his ideas were too far in advance of his age to be practical even in that period of revolution. We shall see that many of the suggestions then made for reforms in the law failed to take effect for the same reason; [6] and, just as the reforms in the law actually effected were small compared with those suggested, so the actual experiments made in the manufacture of constitutions kept much more closely to the current political ideas of the age than the institutions of the Commonwealth of Oceana.

It would be out of place to attempt a detailed analysis of the various constitutional experiments of this period. I shall only attempt a brief description (i) of the chief types of constitution which were suggested or attempted; (ii) of the extent to which they anticipated future constitutional developments; and (iii) of the reasons why they all failed to become permanent.

(i) There were three chief types of constitution which were suggested or attempted during this period.

[1] Op. cit. 297.

[2] Ibid 301-302; in 1659 some proposed to carry out some of his proposals in England; Ludlow says, "some were of opinion that it would be the most conducing to the publick happiness if there might be two councils chosen by the people, the one to consist of about three hundred, and to have powers only of debating and proposing laws, the other to be in number about one thousand, and to have the power finally to resolve and determine," Memoirs (Ed. Firth) ii 99.

[3] E.H.R. vi 319.

[4] Op. cit. 299.

[5] Ibid.

[6] Below 422-423.

(*a*) We have seen that the aim of the leaders of the Long Parliament was to assume the practical control over the executive, the military forces of the crown, the bench, and the church.[1] The king was, in effect, to be reduced to the position occupied by him at the present day under the system of cabinet government. Though details differ, we can trace this aim in all the various negotiations between king and Parliament which took place during the course of the civil war.[2] In addition, after the Solemn League and Covenant, we get the demand for the establishment of the Presbyterian form of worship either for a period of years or in perpetuity. Throughout, the object aimed at by Parliament was the restoration of the monarchy upon such terms that, as against the crown, the predominance of Parliament, and the predominance of the religious scheme approved by Parliament, were secured.

(*b*) With the intervention of the army some very different types of constitution emerged. The reasons why they were so different are mainly two. In the first place, while the Parliamentary schemes were inspired mainly by jealousy of the king, the army schemes were inspired by jealousy of both the king and the existing Parliament. In the second place, all manner of fanatical opinions, religious and social,[3] were represented in the army; and some of them appear in the constitutions suggested by it.

The earliest of these constitutions is contained in the Heads of Proposals (1647).[4] It was proposed that the existing Parliaments should be dissolved, and that provision should be made for biennial Parliaments, which should sit for not less 120 and not more than 240 days.[5] There was to be a redistribution of seats "according to some rule of equality of proportion."[6] The judicial powers of the Lords and Commons were to be defined, and no person "adjudged by them" was to be capable of receiving pardon without their consent.[7] The naval and military power was to be vested in the Parliament for ten years; and during that period Parliament was to be able to raise money for the army, navy, and other public uses.[8] Executive power was to be in the hands of a Council of State.[9] Its members were to be agreed upon by the army and Parliament, and they were to hold office during good behaviour for a period not exceeding

[1] Above 117-120, 135-136, 138; see especially the Nineteen Propositions, Gardiner, Documents 249-254.

[2] See ibid xlii-xlvii, and the documents there cited.

[3] Below 412-413. [4] Gardiner, Documents 316-326.

[5] I. 1-2; it was provided (I. 3) that the king with the advice of the Council of State could call extraordinary Parliaments in the intervals of the biennial Parliaments.

[6] I. 5. [7] I. 9. [8] II. 1, 3. [9] III. 4-6.

seven years.[1] The great offices of state were to be filled by Parliament for ten years, and after that period the king was to choose out of three names submitted to him by Parliament.[2] The coercive authority of the bishops and the ecclesiastical courts in civil matters was to be taken away.[3] All Acts enjoining the use of the Prayer Book, and imposing penalties for not coming to church were to be repealed; and new laws against Papists were to be devised.[4] The taking of the Covenant was not to be enforced upon any.[5] Certain enumerated grievances were to be redressed.[6] It is clear that the army wished to guard itself, not only against an arbitrary king, but also against an arbitrary Parliament; that it wished to make this Parliament more representative; and that it wished for a wide toleration for divergent religious beliefs.

A large party in the army were in favour of very much more radical proposals. They put forward their demands in a document which they entitled, "An Agreement of the People for a firm and present peace upon grounds of common right."[7] It demanded the dissolution of the present Parliament, and the election of a representative assembly, which was to have the sole executive and legislative power of the state. Five topics were, however, declared to be "native rights," and were to be out of the power of this assembly to alter.[8] Cromwell knew very well that this crude scheme was wholly impossible;[9] and it was very considerably modified by the committee to which it was referred.[10] But, after the purging of the House of Commons by Pride, and the creation of the High Court of Justice (1649), a new edition of the Agreement of the People was presented to Parliament.[11] It is in substance, as Gardiner says, "based on the Heads of Proposals, omitting everything that had reference to the king";[12] but it adopted the proposal of the first Agreement of the People that there should be a single elected House. The House was to sit for two years and no longer. By this House a Council of State was to be appointed to hold office until the tenth day after the

[1] III. 4-6. [2] IV. [3] XI. [4] XII. [5] XIII.

[6] Those enumerated are the excise, forest laws, monopolies, inequality of rating, tithes, the expense of legal proceedings, imprisonment for debt; there was to be provision that no one be obliged to incriminate himself, and that in capital cases two witnesses be required; there was to be a reconsideration of statutes imposing oaths, Gardiner, Documents 324-325.

[7] Ibid 333-335.

[8] Matters of religion, the voluntary character of military service, indemnity for everything done or said before the dissolution of the present Parliament, laws to be equal for all, laws to be good and "not evidently destructive to the safety and well being of the people."

[9] Gardiner, Civil War iii 383-384; cp. Cromwell's Place in History 50.

[10] Gardiner, Civil War iii 384-391.

[11] Gardiner, Documents 359-371. [12] Ibid liii.

assembly of a new House, unless dismissed sooner by the new House. Certain principles of religious policy were laid down, with which, together with the rules relating to the elected House and the Council of State and six other matters, the elected House was to have no power to meddle. The present Parliament was to be dissolved on or before the last day of April, 1649.

We have seen that the Parliament adopted some of these principles after the king's execution. The government was vested in a council of state and in the remnant of the House of Commons, and a measure of toleration was granted.[1] But Parliament neither limited its own powers nor dissolved itself.[2] It was probably the difficulty of dealing with the Parliament which induced the army, after the Parliament had been expelled, and the Nominated Parliament had proved to be a failure,[3] to revert to the idea of a constitution based upon a single person—a Protector, and an elected House. This was the scheme contained in the Instrument of Government (1653).[4]

Under the Instrument the government was entrusted to a Protector, an elected Parliament, and a Council of State.[5] The executive authority was vested in the Protector assisted by the Council.[6] He was entrusted with the ordering of the army and the navy and foreign affairs.[7] All writs and processes were to run in his name.[8] Bills were to be presented to him for his consent; but if he did not consent or "give satisfaction to Parliament" within twenty days, they were nevertheless to become law.[9] Cromwell was declared to be Protector for his life, and future Protectors were to be elected by the Council.[10] A constant yearly revenue for defraying the cost of the army, navy, and the other expenses of the government was to be agreed on by the Protector and Council, which was not to be altered without the consent of the Protector and Council.[11] No laws were to be altered repealed or suspended, and no additional tax was to be imposed, without the consent of Parliament.[12] Parliament was to consist of representatives from England, Scotland and Ireland.[13] The places to be represented in England and Wales, and the number of representatives, were specified.[14] There was to be a uniform property qualification for voters of £200 a year from real or personal estate.[15] A new Parliament was to be summoned every third year; and, without its own consent, it could not be

[1] Above 146. [2] Ibid. [3] Above 147.
[4] Gardiner, Documents 405-417; Commonwealth and Protectorate ii 331-337.
[5] §§ 1 and 2. [6] § 2. [7] §§ 4, 5. [8] § 3. [9] § 24.
[10] §§ 32, 33. [11] § 27. [12] § 6. [13] § 9.
[14] § 10; the Protector and Council were to settle the places to be represented and the distribution of seats for Scotland and Ireland.
[15] § 18.

dissolved before it had sat five months.[1] Fifteen persons were nominated in the Instrument to form the Council of State, with whose advice the Protector must act.[2] The Protector and Council were to have the power of passing ordinances when Parliament was not sitting, which were to be in force till confirmed or disallowed by the succeeding Parliament.[3] On the death or removal of any of the fifteen councillors Parliament was to nominate six, from whom the Council was to choose two; and from these two the Protector was to appoint one.[4] Certain of the great officers of state and the chief justices were to be "chosen by the approbation of" Parliament, or, if Parliament was not sitting, by the Council, and afterwards approved by Parliament.[5] A wide toleration was given to all Christian sects.[6] Neither this nor any of the other constitutions devised by the army had any provision for its amendment, probably because, as Gardiner says,[7] their authors did not contemplate that the necessity for modification would arise.

This constitution was the most elaborate devised by the army. The impossible ideas, originating with the Levellers and other fanatical sects, which are present in the two Agreements of the People, disappeared—a short experience of the Nominated Parliament had taught a salutary lesson. Instead, there is an attempt to combine ideas suggested by the old constitution and by recent experience. The idea of an executive to some extent independent of Parliament, with a fixed income for the ordinary expenses of government, was borrowed from the old constitution.[8] But experience had shown that it was dangerous to divorce completely the executive from the legislature. Therefore a link between them was established by giving to the legislature some control over appointments to the Council, and by requiring its approbation of the persons appointed to hold the great offices of state. Experience had also shown that it was desirable to establish a system of checks and balances against arbitrariness on the part both of the executive and the legislature. Therefore the power of the Protector was restrained, both by the necessity of working

[1] §§ 7, 8; the Protector and Council could summon extraordinary sessions of Parliament when the necessities of State required, which must last at least three months.

[2] § 25; by § 26 the Protector and Council could co-opt not more than six members.

[3] § 30. [4] § 25. [5] § 34.

[6] § 37—"So as they abuse not this liberty to the civil injury of others and to the actual disturbance of the public peace on their parts: provided this liberty be not extended to Popery or Prelacy, nor to such as, under the profession of Christ, hold forth and practise licentiousness."

[7] Commonwealth and Protectorate ii 337.

[8] Ibid 331, 335, 337.

with a Council,[1] and by denying him a veto on legislation; the power of the Protector and Council was restrained by the necessity of meeting a Parliament at least once in three years, which Parliament must remain in session for at least five months; and the power of Parliament was restrained by restricting its duration to three years.

The Parliament, when summoned, proceeded to amend this constitution at many points;[2] but none of its amendments had become operative before it was dissolved. Cromwell was forced to govern the country through the army. But he regarded himself as bound by the provisions of the Instrument. Therefore, in accordance with its provisions, he summoned another Parliament, which produced a third type of constitution.

(*c*) Some years previously the project of making Cromwell king had been mooted, and had gained some support. We hear of the project at the time when the Instrument of Government was under consideration;[3] it was proposed in the Parliament of 1654,[4] which was summoned under the provisions of the Instrument; and the rule of the Major-Generals had increased its popularity. It was naturally approved by the lawyers, because in this way the country would get an executive with known powers and subject to known laws.[5] Parliament, therefore, with the idea of approximating as far as possible to the old order of things, drew up the Humble Petition and Advice, under which Cromwell would have become king. If Cromwell had accepted this position, a permanent settlement might have been attained. But Cromwell was undecided, and, unfortunately, the

[1] "That the restriction on the action of the Protector by his obligation to consult the Council was intended to be a real one there is every reason to believe. The notion which prevailed at the time, and which has continued to prevail in modern days, that Cromwell was a self-willed autocrat imposing his commands on a body composed of his subservient creatures, is consistent neither with the indications which exist in the correspondence of that day, nor with his own character," Gardiner, Commonwealth and Protectorate ii 337.

[2] See Gardiner, Documents lxii-lxiv, where the differences between the Instrument and the Parliamentary scheme are shown in tabular form.

[3] Gardiner, Commonwealth and Protectorate ii 278-280; Cromwell himself had thought of it, ibid 230.

[4] Ibid iii 225.

[5] Shaw, Camb. Mod. Hist. iv 443-444, cites contemporary newsletters to the effect that, "There are two to one for it. The souldgery are against it in the House and without doors. They mutter but I am of opinion it will passe. . . . They [the legally minded majority in the House] are so highly incensed against the arbitrary dealings of the Major-Generals that they are greedy of any powers that will be ruled and limited by law"; even in 1651 this difference between the lawyers and the army had emerged; Whitelocke, Memorials iii 372-374, tells us that, at a conference held after the battle of Worcester at the Speaker's house, between members of Parliament and officers of the army, "generally the soldiers were against anything of monarchy," while "the lawyers were generally for a mixed monarchical government."

hostility of the army induced him to refuse the office.[1] But he accepted the other clauses of the Humble Petition and Advice,[2] and also some further amendments to it.[3] This constitution, in its broad lines, followed the Instrument of Government. The main differences were that it provided for a second chamber to be nominated by the Protector;[4] that the Protector was given power to name his successor during his life;[5] and that Parliament got control over election disputes,[6] and a power to demand an account of the expenditure of the permanent revenue.[7]

(ii) It is obvious that many of these constitutions anticipated, firstly, many constitutional problems, and, secondly, many constitutional developments, of the nineteenth and twentieth centuries. Firstly, they were the first attempt that Englishmen had made to construct a written constitution, and therefore they raised for the first time all the problems connected with its construction. Thus we get the idea of a separation of powers as a safeguard against the tyranny both of a single person and a representative assembly;[8] the idea of stating certain fundamental rights of the subject; and the idea of rendering these rights permanent, by denying validity to any legislation which attempted to affect them. On the other hand, the problem of amending the constitution does not emerge, because none of these written constitutions attempted to deal with it. Secondly, they anticipate developments in our later constitutional law. The control of the executive, aimed at by the leaders of the Long Parliament,[9] anticipated the solution ultimately supplied by the growth of the system of cabinet government; and in the various written constitutions afterwards put forward we get similar anticipations of other developments of our public law. Thus, in the Instrument of Government, we get for the first time a Parliament which represented, or was supposed to represent,[10] the whole of the United Kingdom; and provision was made for a redistribution of seats and a uniform franchise. In the only constitution which provides for a second chamber, the "other House" is obviously less important than the elected

[1] "Once again the army officers had triumphed by deciding Oliver's indecision; once again their want of practical sense had frustrated a settlement of the nation," Shaw, Camb. Mod. Hist. iv 445.

[2] Gardiner, Documents 447-459. [3] Ibid 459-464.

[4] § 2. [5] § 1. [6] § 3.

[7] Additional Petition and Advice, Gardiner, Documents 461.

[8] The theory of separation of powers is clearly brought out in a pamphlet entitled, "The True State of the Case of the Commonwealth," cited Gardiner, Commonwealth and Protectorate iii 14.

[9] Above 117-120.

[10] As Gardiner points out, Commonwealth and Protectorate iii 173, "the Irish representation, and to a great extent the Scottish, served the purpose of the Ministerial pocket boroughs of the eighteenth century."

House. In all of these constitutions there is a wide toleration for many divergent religious sects.

All these problems and all these developments were very much in advance of the average political thought of the day. Gardiner, comparing the terms offered to Charles I. by the Presbyterian and Parliamentary party, with the Heads of Proposals prepared by the army, says[1] that the army plan was, from a constitutional point of view, very much superior; but that, "it was that very superiority which rendered it impossible to put it in execution. It contained too much that was new, too much in advance of the general intelligence of the times, to obtain that popular support without which the best constitutions are but castles in the air. . . . The Presbyterian plan was more suited to the slow and cautious progressiveness of human nature." As we shall now see, this was one of the main reasons for the failure of all these constitutional experiments.

(iii) For the stability of any sort of civil government the consent, though it be only the unconscious consent, of the bulk of the governed is needed; and obviously no system of government, in which the governed, through their representatives, take an active part, can be created without this consent. But, during the whole period of the Commonwealth and Protectorate, there were so many diversities of opinion in the nation and in the army upon the most fundamental political questions, that no such consent was possible. There was the royalist party—defeated and depressed, but still influential, and always ready to raise its head whenever it saw a chance to oppose or embarrass the authority by which it was held down. There was the Parliamentary Presbyterian party, equally hostile, and very ready to coalesce with the royalists; and to this party a large number of the lawyers were attached. There was the Republican party, which was the dominant party, because it commanded the assent of the greater part of the army. But the army was by no means united in its political opinions; and the wide tolerance maintained by it had given rise to a large number of divergent sects, both in the army and the nation, which advocated all sorts of wild schemes. There were the Fifth Monarchy men, who asserted the divine right of the religious to govern. Their government was, they considered, the rule of Christ and His Saints, which was to supersede the four monarchies of the ancient world.[2] They clamoured for "nothing less than an entire abolition of the existing law, and a substitution for it of a simple code based on

[1] Documents li. [2] Gardiner, Commonwealth and Protectorate i 29, 30.

the laws of Moses."[1] There were the Levellers, who suspected any permanent executive, and demanded direct government by a representative assembly elected on the broadest democratic basis. Lilburne, their most eminent representative, considered that the Council of State might be replaced by committees appointed for short periods by a Parliament, which was to remain in permanent session.[2] There was the socialist branch of the Levellers, who wished for a collectivist society, in which the institution of property did not exist.[3] In their society "the death penalty was reserved for two crimes, murder on the one hand, and buying and selling on the other."[4] We shall see that all these sects advocated all sorts of fantastic schemes of law reform.[5]

In a country thus torn by conflicting opinions no sort of constitutional government could be established. The two forces which maintained order were the army and Cromwell. It is no doubt true that the whole country was not composed of persons who held these extreme opinions. There were a very large number who were willing to support any authority which would keep the peace, and prevent a new outbreak of civil war.[6] But there was no active enthusiasm in favour of the government; and, as Cromwell found, the dislike of the active persons interested in politics, who vote at elections, was always reflected in the Parliaments which he called together. Cromwell, therefore, found it more and more necessary to rely upon the army. The organization of the Major-Generals, which he had instituted in 1655, after the dissolution of the first Parliament summoned under the provisions of the Instrument of Government, was an instrument ready to his hand. "The sword drew on the man; and he sought to use that organization, not merely to combat the partisans of the exiled claimant of the throne, or the partisans of the sovereignty of a single House, but the elements of society in which the moral and religious standard was lower than his own."[7] Such a course of procedure involved frequent collisions with, and frequent violations of, the law. Thus, all those who objected to strong government, united with all those who detested military rule and wished to see the rule of law re-established.[8]

[1] Gardiner, Commonwealth and Protectorate ii 314; below 413.
[2] Ibid i 30, 31.
[3] Ibid 42-43; below 413.
[4] Ibid ii 79.
[5] Below 413-422.
[6] "In 1650, says Gardiner, "we shall hardly be wrong in supposing that for every hundred convinced Royalists or Republicans, there were at least a thousand who were ready to accept whatever Government was actually in existence, rather than risk the disturbance of peace by a fresh civil war," Commonwealth and Protectorate i 251; ibid ii 13; cp. Jenks, Constitutional Experiments of the Commonwealth 20-21.
[7] Gardiner, Commonwealth and Protectorate iv 78.
[8] Ibid iii 332—"It is evident, even if we could close our eyes to the subsequent history of the nation, that there was growing up, even amongst those who were

The army became more and more unpopular; and its unpopularity produced a feeling against a standing army which lasted right down to the nineteenth century.[1]

The project to make Cromwell king was backed by all those who wished to see the establishment of a settled civil government. And it cannot be doubted that of all these projected solutions of the constitutional tangle it was the one which had the best chance of success.[2] It would have replaced a strange new form of constitution by a constitution which was both an amended edition of the old constitution, and one to which old common law rules were applicable. Cromwell made the greatest mistake of his life when he failed to see this, and when he allowed the army's wish that he should not take the title of king to prevail. Neither Cromwell nor the army were able to appreciate the strength which the government would have got by a return to the older order. To attain their ideals they had never hesitated to break with the past, and to devise the new machinery which they thought would be best fitted to secure their attainment. Like most radical reformers, they were wholly unable to grasp the strength of those conservative forces which oppose a passive resistance to all violent dislocations of institutions, habits, and modes of thought. They were wholly unable to appreciate the strength which they would have acquired by making some concessions to them.

Thus these new constitutions prepared by the army and Cromwell, not only gained no popularity, but even became more and more unpopular, as Cromwell found himself obliged to rely more and more on the army for their maintenance. Cromwell himself was sincerely anxious to establish some settled form of civil government.[3] He wished to establish a state in which the fullest toleration of divergent opinions consistent with orderly government was guaranteed, in which men of Puritan principles would rule. But the attitude of the nation made the realization of this object impossible. If it was not actively hostile it was, at best, very sullenly acquiescent.[4] Marvel spoke truly when he wrote :—

> The same arts that did gain
> A power must it maintain.

The army remained the sole source of his authority; and therefore his position to the end continued to be that of a general

averse to Charles's restoration, a feeling, in some cases, of active hostility towards the Protectorate, and, in still more, of simmering dissatisfaction with the prevailing conditions of government."

[1] Gardiner, Cromwell's Place in History 105-106.

[2] Above 156.

[3] Gardiner, Cromwell's Place in History, 98.

[4] Gardiner, Commonwealth and Protectorate iii 253-255, 333-334.

in command of occupied territory, and not that of a sovereign to whom the bulk of the political society give willing and habitual obedience. It is the best testimony to Cromwell's capacity as a general and his sagacity as a statesman that he was able, during his life, to maintain a semblance of civil government, which kept the peace at home, and gave England an honourable position among foreign states.

Cromwell's death soon showed that the whole edifice of his government depended solely on himself. The army got out of control, and set up and pulled down the civil government at will. The constitution which it had created, and with which Cromwell had tried to work, disappeared as soon as its support was withdrawn.[1] Naturally the old combination of the Royalist and Presbyterian parties again appeared; and when the support of the section of the army led by Monk was secured, the Restoration was assured.[2] All these experimental constitutions disappeared, and apparently left no trace behind. Would it then be true to say that this period of political controversy and legislative activity left no mark upon English public law?

The Permanent Effects of this Period upon the Development of English Public Law

Cromwell's figure dominates the whole of this period. He won the first and the second civil wars for the Parliament. He struck down the monarchy. He subdued both Ireland and Scotland to the Commonwealth government. He prevented the remnant of the Long Parliament from making themselves into a permanent ruling oligarchy. By means of his control over the army he governed the country while he lived under a republican constitution. But the Restoration, which brought back the monarchy and the church as they existed in 1641, seemed to have destroyed the whole of his achievements. Would it not then have been better if, in 1641, the views of Hyde and the conservative minority in the House of Commons had prevailed? To this question a negative answer must be given. Although the positive results of Cromwell's work disappeared at the Restoration, the negative results, as Gardiner has pointed out, survived.[3] He made personal monarchy, both as the Tudors and as Charles I. had understood it, impossible for the future. He made it impossible for a Parliament again to attempt to perpetuate itself in defiance of public opinion. Thus, when the monarchy was restored, the whole position both of the monarchy and the Parliament was altered.

[1] Above 148. [2] Ibid.
[3] Cromwell's Place in History 102.

This comes out clearly enough in the Declaration of Breda.[1] Indemnity, a measure of toleration, and a measure to quiet titles were promised; but the details were all referred to Parliament. It is clear that Parliament has attained a position in the state which it never possessed under the Tudors or the two first Stuart kings. It was no longer a body to be called in occasionally to assist the king's government by sanctioning the new legislation, or by voting the supplies which that government considered to be necessary. It was as much a permanent part of the government as the king himself, with an initiative of its own, and an acknowledged right to survey the whole field of political action. The experience which it had gained during this period made its survey intelligent. It had become familiarized with all parts of the machine of government. The mysteries of state, to which James I. was so fond of referring, were now no mysteries for it.[2] And in its survey must now be included ecclesiastical as well as political questions. The king could no more stop the discussion of questions affecting the church, than he could stop the discussion of questions affecting his prerogative. It follows therefore that, for the future, neither church nor king could, for any great length of time, use their powers to pursue a policy of which the nation disapproved. The development both of the church and of the prerogative were now subject to, and would be moulded by, the will of the nation as expressed in Parliament.

And just as the authoritative position of Parliament had been secured, so had the supremacy of the law. The Act of the Long Parliament which abolished the Star Chamber, and the Star Chamber jurisdiction exercised by the provincial Councils,[3] had secured this result. But the experience of the nation under a Protectorate, which had constantly found itself under the necessity of violating the law, had increased the national desire to see the law really supreme. Juries during the Protectorate had shown this as clearly as a jury was afterwards to show it in the *Case of the Seven Bishops*;[4] and the feeling that the restoration of the monarchy meant the restoration of the supremacy of the ordinary law was one of the chief reasons why the nation was practically unanimous in demanding it.

The conditions, therefore, under which the continuous development of English Public Law was resumed at the Restoration, were very different from the conditions under which it would have

[1] Above 148.
[2] See Jenks, Constitutional Experiments of the Commonwealth 2-5.
[3] Above 112.
[4] For instance, Lilburne's two trials and acquittals, Gardiner, Commonwealth and Protectorate i 165-169; ii 297-298.

been resumed if an agreement had been made with the king in 1641, or even in 1647. Formally perhaps the law would have been the same; but substantially the difference was immense. These eighteen years had permanently altered the relations of king, Parliament, and courts to one another. As a result of this alteration the executive, legislative, and judicial powers in the state begin to assume the legal position which they hold in our modern law. The conditions under which our modern law of the constitution has grown up have been reached.

III

The Reigns of the two Last Stuart Kings and the Revolution Settlement

The evolution of public law during this period, and its final settlement upon its modern basis, were influenced, to a greater extent than at any other period in our history, (i) by the ecclesiastical, and (ii) by the foreign policy of the state.

(i) We shall see that the ecclesiastical policy pursued by Charles II., in the earlier part of his reign, was influenced by the fact that, if he had any religion at all, he was a Roman Catholic [1] —though, from motives of policy, he was never publicly reconciled to that church till he was dying. We shall see, too, that all James II.'s actions were governed by the fact that he was a fanatical Roman Catholic, and wholly under the influence of the Jesuits.[2] In Charles II.'s reign these facts had aroused a formidable opposition to the crown; and, in James II.'s reign, it caused the church of England, which was usually the firmest supporter of the king, to pass over to the opposition. A union of Whigs and Tories, who acted together in domestic politics for the first and only time in their history, succeeded in effecting a bloodless Revolution. But though James II.'s policy had aroused a universal opposition, there was a widespread legitimist feeling in the country, which shrank from any interference with the right line of the succession to the throne. The Revolution could not have been so easily and so peacefully effected, if it had not found in William of Orange a leader whose mother was a daughter of Charles I., and whose wife was the eldest daughter of James II., and, till the birth of a son to James, the next heir to the throne. The fact that that son was born so opportunely for James that he was generally regarded as suppositious, reconciled much of this strong legitimist feeling to what was, in its view, not a break, but only an anticipation in the order of succession.

[1] Below 180-181. [2] Below 191-192.

(ii) William would never have come forward as the leader in an English Revolution, if he had not been driven to take this course by the exigencies of European politics. The governing factor in the European politics of the day was the danger arising from the growth of the power of France under Louis XIV. Charles II. was quite ready to use the ambitions of Louis XIV. to attain the object which he had most at heart—freedom from the control of Parliament. Obviously he could not attain this object unless he could render himself in some measure financially independent; and he found that he could accomplish this by the sale to Louis of the neutrality of England. By abandoning all his earlier schemes to establish Roman Catholicism in England, and all his attempts to favour or even to protect the Roman Catholics;[1] by allowing Parliament to disgust the nation by its violence, and by appealing to the strong legitimist feeling prevailing in the country;[2] he was able, with the help of Louis's subsidies, to crush the opposition, and to dispense with Parliament during the last four years of his reign (1681-1685). James, who had none of Charles's political ability, with even greater eagerness pursued the same foreign policy, not so much in order to render himself independent of Parliament, as to effect what Charles had seen to be impossible—the establishment of Roman Catholicism. It was therefore obvious that William could not secure the adhesion of England to his great continental alliance against Louis XIV. while James was on the English throne. It was this fact which induced him to take advantage of the national detestation of James's ecclesiastical policy, and accomplish the Revolution.

Thus the ecclesiastical and foreign policy of the two last Stuart kings made the Revolution possible; European politics gave it a leader; and the matrimonial alliances of the Stuart family enabled the majority of the nation to accept that leader as their king.

It is clear, therefore, that we cannot understand the evolution of the public law of this period without a firm grasp of the political events which shaped it, and of the characters and aims of the actors who made those events. I shall, therefore, in the first place, sketch briefly the political, constitutional, and religious environment in which it was evolved. In the second place, I shall sketch the development of the principles of that law during this period. In the third place, I shall consider the influence which political theories, during this period, exercised on the development of those principles.

[1] Below 182, 189.

[2] Below 187-189.

The Political, Constitutional, and Religious Environment

The Declaration of Breda had, as we have seen,[1] laid down four principles as the conditions under which a Restoration was to be effected—a general amnesty, liberty of conscience, security of property, payment of arrears to the army; but we have seen that the manner in which these principles were to be applied was left to Parliament. Parliament, therefore, had a very free hand to settle the limits of their application. The work was done partly by the Convention Parliament which had recalled the king, and partly in the first sessions of the Long Parliament of Charles II.'s reign, which sat from 1661-1679.

The first Act of the Convention Parliament was to regularise its existence by declaring that the Long Parliament was dissolved, and that it was a true parliament, "notwithstanding any want of the Kings Majesties writ or writs of summons . . . or any other defect or default whatsoever."[2] In 1661, to prevent any possible doubt as to the validity of the most important Acts of the Convention Parliament, divers statutes passed by it were confirmed.[3]

The Convention Parliament, having regularised its existence, set to work (i) to settle to what extent the legislation of Charles I.'s Long Parliament, and other legislative Acts of the Interregnum, should be accepted as valid; (ii) to introduce new laws on these and other cognate topics; (iii) to carry out the principles laid down by the Declaration of Breda; and (iv) to settle the royal revenue. It was dissolved before it could finish this work; and that work was taken up in a new spirit by the Parliament which succeeded it. I shall consider the effects of the work of these two Parliaments under these four heads.

(i) The general principle upon which these Parliaments proceeded was that all the Acts of the Long Parliament, which had received the royal assent, were valid, and that all other legislation was invalid.[4] But to both branches of this principle important modifications were made. In the first place, certain Acts of the Long Parliament, which had received the royal assent, were repealed. Thus in 1661 the Act preventing persons in Holy Orders from exercising temporal jurisdiction,[5] and the Act abolishing the jurisdiction of the ecclesiastical courts (except in so far as it related to the court of High Commission)[6] were repealed; in 1662 the Act attainting Strafford was repealed;[7]

[1] Above 148.
[2] 12 Charles II. c. 1.
[3] 13 Charles II. st. 1 cc. 7 and 11; though apparently such confirmation was held not to be legally necessary, below 170 n. 3.
[4] See 13 Charles II. st. 1 c. 1 § 3; below 166.
[5] 13 Charles II. st. 1 c. 2, repealing 16 Charles I. c. 27.
[6] 13 Charles II. st. 1 c. 12, repealing 16 Charles I. c. 11.
[7] 14 Charles II. c. 29.

and in 1664 the Triennial Act of 1641 was repealed (because, the preamble states, it was derogatory to "his majesty's just rights"), and for it was substituted an Act which declared that Parliaments should "not be intermitted or discontinued above three years at the most."[1] In the second place, to the principle that all intervening legislation was invalid, some important exceptions were made, partly on grounds of necessity, and partly from motives of policy. On grounds of necessity provision was made for the continuance of judicial proceedings begun under the Commonwealth and of certain ordinances relating to them,[2] for the confirmation of certain judicial proceedings and completed acts in the law which had taken place,[3] and for the validity of marriages celebrated since 1642 under the authority of any Act or Ordinance.[4] From motives of policy the Commonwealth's Navigation Act was in substance re-enacted.[5] Also the legislation of the Long Parliament and of Cromwell, which abolished the incidents of tenure, was confirmed by the Act which abolished the court of Wards, certain of the incidents of tenure, and purveyance; turned all tenures by knight service and serjeanty into tenure in socage; and compensated the king for the consequent loss of his feudal revenue by an excise on beer.[6] The abolition of the incidents of tenure was designed to conciliate the commercial, the compensation clauses, the land-owning classes.

(ii) New laws, upon these and cognate topics, were passed to deal with the new situation created by the repeal or the enactment of some of the statutes which I have just enumerated; to settle in a sense favourable to the king matters which had been the subject of controversy in the Long Parliament, or which the history of the Long Parliament showed that it was necessary to regulate; and to provide for the better protection of the king and his government. Thus, the abolition of the

[1] 16 Charles II. c. 1, repealing 16 Charles I. c. 1; Hallam, C.H. ii 332 says, "This clause is evidently framed in a different spirit from the original bill, and may be attributed to the influence of that party in the House which had begun to oppose the court, and already showed itself in considerable strength."

[2] 12 Charles II. c. 3.

[3] Ibid c. 12; the statute enumerated fines, recoveries, verdicts, judgments, statutes, recognizances, inrolments of deeds and wills, inquisitions, indictments, presentments, informations, decrees, sentences, probates, letters of administration, writs orders and proceedings of courts of law and equity; but the Act was not to apply to illegal proceedings of High Courts of Justice, or to indictments or convictions of persons for adhering to the king or to both Houses of Parliament; for various suggested provisos to the Act see Hist. MSS. Com. 7th Rep. 98-100.

[4] 12 Charles II. c. 33.

[5] Acts and Ordinances ii 559; 12 Charles II. c. 18; below 317-319.

[6] Acts and Ordinances i 833, ii 1043; 12 Charles II. c. 24; vol. iii 51, 53, 61, 66, 67; a proposal to compensate the king by a tax on the lands benefited was rejected, Marvel, Letters, Works ii 21.

military tenures made it necessary to provide other sources of revenue for the king. This was done by imposing an excise on beer and other liquors which was given to the king in perpetuity ;[1] and, to meet the necessity caused by the abolition of purveyance, provision was made in 1661 for providing necessary carriages for royal progresses and other journeys.[2] The immediate occasion for the outbreak of the civil war had been the controversy as to the control of the militia. A statute of 1661,[3] which provided for the control of the militia, asserted the king's prerogative over the military forces in wide terms. It was clear, too, from the history of the Long Parliament that, "tumultuous and other disorderly soliciting and procuring of hands by private persons to petitions, complaints, remonstrances and declarations and other addresses to the king or to both or either Houses of Parliament for alteration of matters established by law, redress of pretended grievances in church or state, or other public concernments, have been made use of to serve the ends of factious and seditious persons . . . and have been a great means of the late unhappy wars, confusions, and calamities."[4] It was therefore enacted that no one should get a petition for the alleviation of matters established in church or state signed by more than twenty persons, unless three justices of the peace, the major part of the grand jury, or, in London, the mayor, aldermen and common council, had consented to it; and that no petition should be presented by more than ten persons.[5] Further, it was obvious that the corporate towns were the strongholds of both political and religious dissent from the re-established order in church and state. It was therefore enacted that the officials of these towns should be required to take the oaths of allegiance and supremacy, to swear that they believed it unlawful under any pretence to take up arms against the king, and to sign a declaration that the oath imposed by the Solemn League and Covenant was an unlawful oath.[6] A commission was appointed to see that these oaths were taken, and it was given power both to remove officials even if they were ready to take these oaths,[7] and to restore officials who had been unduly removed.[8] For the

[1] 12 Charles II. c. 24 §§ 14-40. [2] 13 Charles II. c. 8.
[3] Ibid st. 1 c. 6; 14 Charles II. c. 3. [4] 13 Charles II st. 1 c. 5 Preamble.
[5] Ibid; the clause of the Act relating to the presentation of petitions did not extend to petitions for the redress of public or private grievances presented by a member of Parliament while Parliament was sitting, or to petitions by members of Parliament to the king, § 2.
[6] 13 Charles II. st. 2 c. 1 § 3; the oath ran as follows, "I A. B. do declare and believe that it is not lawful upon any pretence whatsoever to take arms against the king, and that I do abhor that traitorous position of taking arms by his authority against his person or against those that are commissioned by him."
[7] §§ 1 and 5. [8] § 6.

future no one was to be eligible for office unless he not only took these oaths, but also, within a year before his election, had taken the sacrament according to the rites of the church of England.[1] For the better protection of the king's person the scope of Edward III.'s statute of treasons[2] was considerably enlarged;[3] and occasion was taken to assert the principle that neither the two Houses of Parliament together, nor either of them separately, have any legislative authority without the king.[4] We shall see that in 1662 the control formerly exercised over the press, both by the prerogative and by the ordinances of the Long Parliament, was regularized and strengthened by a comprehensive Act "for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating of printing and printing presses."[5]

(iii) The manner in which these Parliaments proceeded to carry out the provisions of the Declaration of Breda may be grouped under the four heads of the army, the amnesty, property, and religion.

The Act passed for the disbanding of the army appointed commissioners for this purpose, and laid down certain rules and instructions for their guidance.[6] Another Act permitted disbanded soldiers, who "used trades," to follow these trades, though they had not served their time of apprenticeship, or complied with the by-laws of the towns in which they proposed to carry on their trades.[7] The financial provision, which this disbandment necessitated, was made by a poll tax,[8] and by monthly assessments of £70,000, first for two months,[9] and then for a further six months.[10] The disbandment was accomplished by February, 1661.[11]

The amnesty was provided for by a comprehensive Act of Indemnity and Oblivion,[12] the broad effect of which was to pardon all treasons and other crimes committed in the course and by reason of the civil wars, and to stop all civil proceedings arising out of acts done in connection therewith. It did not, however, protect persons guilty of designing or plotting the Irish Rebellion of 1641,[13] and it did not protect persons guilty of ordinary crimes unconnected with the civil wars.[14] Further, offences committed by Romish priests[15] contrary to the Act of 1585,[16] infringements

[1] § 9.
[2] Vol. iii 287-291.
[3] 13 Charles II. st. 1 c. 1; below 399.
[4] § 3.
[5] 14 Charles II. c. 33; below 372.
[6] 12 Charles II. c. 15.
[7] Ibid c. 16.
[8] Ibid cc. 9 and 10.
[9] Ibid c. 20.
[10] Ibid cc. 27 and 28.
[11] Firth, Camb. Mod. Hist. v 95.
[12] 12 Charles II. c. 11.
[13] § 25.
[14] §§ 10, 15.
[15] § 18.
[16] 27 Elizabeth c. 2; vol. iv 496.

of the law relating to highways and bridges,[1] receivers of money for the king's use since 1648,[2] and persons commissioned by the king who had traitorously held intelligence with foreign states,[3] were excepted from the operation of the Act. These exceptions did not cover any very wide ground, and occasioned no serious dispute. The great contest came over the question, What political crimes if any were to be excepted? It was generally understood that those who had been actively concerned in the trial and execution of Charles I. could not expect to be included in the amnesty.[4] However, hopes had been held out to them by a proclamation issued June 6th, 1660, which named those actively concerned in the trial of the king, and ordered them to surrender within fourteen days on pain of being excluded from the amnesty.[5] Notwithstanding this proclamation, the House of Commons began by naming seven who were to be executed.[6] The rest of the king's judges were to be punished, but not capitally.[7] The House then began to consider other exceptions; and the list gradually swelled.[8] The House of Lords wished to make the exceptions even more numerous.[9] But there was good ground to think that, if the Houses had their way, serious disturbances would arise.[10] At this point Charles intervened; and, reminding the Lords of the contents of the Declaration of Breda, he persuaded them to resolve that all the murderers of his father should be punished, but no others.[11] The Commons wished to save the lives of those who had surrendered, but they gave way on this point, only stipulating that they were not to be executed without the consent of Parliament.[12] In addition, Lambert and Vane were excepted wholly from the Act;[13] certain others were excepted, but were not to be punished capitally;[14] and certain others were made incapable of accepting any office, civil or military, in the state.[15] In the end, fourteen persons, including Vane, were executed, and about twenty-five were imprisoned

[1] 12 Charles II. c. 11 § 21. [2] § 30. [3] § 32.
[4] Ranke, History of England iii 323.
[5] Ibid 324; Tudor and Stuart Proclamations i no. 3224.
[6] Ranke, op. cit. iii 324. [7] Ibid.
[8] "The list of accused . . . grew longer and longer. From the king's judges it passed on to the members of the other high courts of justice, then to those who had abjured the king and who had petitioned against him; it attacked next the major-generals and those who had assisted them in collecting the taxes, the officers and commissioners who had thus enriched themselves. The well filled sponge, so it was said, must be squeezed dry. The members of the Parliament of 1648 brought forward claims for compensation against those who had then arrested, imprisoned, or ejected them," ibid 324-325.
[9] Ibid 325-326; for a long list of suggested exceptions to the Act see Hist. MSS. Com. 7th Rep. 95-98.
[10] Ranke, op. cit. iii 326. [11] Ibid.
[12] Ibid 327; 12 Charles II. c. 11 § 35. [13] Ibid § 41.
[14] §§ 38, 39. [15] §§ 40, 42.

for life.[1] It was necessary for Charles again to intervene before the Parliament of 1661 would consent to confirm this Act.[2] It was thus due to the statesmanship of both Charles and Clarendon that the question of amnesty was settled upon a liberal basis. Both saw that the stability of the Restoration settlement depended in no small degree upon the liberality of the measure of amnesty, and the promptness with which it was passed.

The settlement of the question of property was more difficult. Special statutes were passed to settle questions relating to ecclesiastical benefices[3] and glebe,[4] and to leases made by colleges and hospitals.[5] But the general principle applied to settle this question was either laid down in the Act of Indemnity and Oblivion, or followed from its general provisions. With respect to chattels, the provisions of the Act effectually barred any action for tort, by which the original owners of such chattels might otherwise have recovered them, or damages for their taking or detention, whether they were taken or detained by private persons[6] or under the authority of the government.[7] There was, however, an exception made in favour of chattels which were the private property of the king and the royal family. They could be recovered unless they had been sold or given to servants or other creditors in payment of what was due to them.[8] Also money actually in the hands of the accountants to the crown could be recovered.[9] With respect to land the principles applicable were laid down in § 48 of the Act.[10] Under that section the king, the church, and persons whose lands had been seized and sold by the state, were allowed to recover their estates; but all lands sold by their owners, even though these sales had been practically forced by fines for delinquency imposed by the government,[11] were made irrecoverable. All attempts to

[1] Firth, Camb. Mod. Hist. v 94; it may be noted that § 36 of the Act excepted Oliver Cromwell, Ireton, Bradshaw, and Pride from its provisions, and § 37 excepted the lands and goods of these and certain other deceased persons; they and the other regicides were dealt with by 12 Charles II. c. 30 passed to attaint all those "guilty of the horrid murther of his late sacred Majestie King Charles the First."

[2] Ranke, op. cit. iii 366.

[3] 12 Charles II. c. 17; cp. Hallam, C.H. ii 318; this Act was not confirmed by the ensuing Parliament; but the judges decided that Acts passed by the Convention Parliament could not on that account be held to be void, Heath v. Pryn (1669) 1 Vent 14.

[4] 14 Charles II. c. 25.

[5] 12 Charles II. c. 31.

[6] Ibid c. 11 § 3.

[7] § 29.

[8] § 16.

[9] §§ 10, 17, 31; cp. also 13 Charles II. st. 1 c. 3; "An Act for the declaring vesting and settling of all such moneys goods and other things in his Majesty which were received levied or collected in these late times and are remaining in the hands or possession of any Treasurers Receivers Collectors or others not pardoned by the Act of Oblivion."

[10] 12 Charles II. c. 11.

[11] Firth, Camb. Mod. Hist. v 95.

settle terms as between the old and the new owners failed.[1] Thus a large transfer of landed property ensued. Both those who were ejected, and those who, because they had themselves sold their land, were barred by the Act from recovering it, considered themselves hardly used. It was a rough and ready settlement which inflicted much hardship, and left a legacy of grievance. But, in the circumstances, it is difficult to see what other settlement could have been made. The state was, as we shall see,[2] so nearly bankrupt that no scheme of state compensation was possible. There can, however, be no doubt that the grievances, both of those who were ejected and of those who could not recover their property, promoted a widespread discontent, which seriously affected the stability of the Restoration settlement. "The permanent feud," says Sir Charles Firth,[3] "between the Royalists who had sold their lands and the Roundheads who had bought them, embittered English politics for the next generation, and underlay the later animosities of Whig and Tory."

The religious question was settled in a manner even more unsatisfactory than was the question of property. Charles had promised in the Declaration of Breda that "no man shall be disquieted or called in question for differences in opinion in matters of religion, which do not disturb the peace of the kingdom." No doubt the king would have liked to see a policy of toleration. While in exile he had promised the Pope and other sovereigns to repeal the laws against the Roman Catholics;[4] and it was obvious that some sort of union between the Anglicans and the Presbyterians, who had combined to restore him,[5] would have helped immensely to secure the stability of the Restoration settlement. It was certain that no measure of relief for the Catholics would have got a hearing; but, in the Convention Parliament, the prospects of a union between Anglicans and Presbyterians were by no means hopeless. A bill to settle the Protestant religion was dropped in committee;[6] but the whole matter was left to the king and a committee of Divines selected by him.[7] The king issued a Declaration[8] in which he outlined a scheme of union. The church was to be under episcopal government, but the bishops were to be assisted by presbyters; the liturgy was to be revised; a discretion was to be allowed

[1] An attempt to pass a bill for "the satisfaction of purchasers of public lands" failed; and a commission to arbitrate between the purchasers and owners of church lands failed to effect anything, Firth, Camb. Mod. Hist. v 95.

[2] Below 173.

[3] Camb. Mod. Hist. v 95.

[4] Ibid 99.

[5] Above 148.

[6] Firth, Camb. Mod. Hist. v 96.

[7] Ibid.

[8] For its text, which was settled after a conference between the bishops and the Presbyterian leaders, see 6 S.T. 11-21.

to ministers in the use of such ceremonies as kneeling at the communion, the cross in baptism, and the wearing of the surplice; a relaxation in the subscription and oath of obedience required by the canons from the clergy or from candidates for ordination was to be allowed. A bill was introduced by Hale to enact these concessions, but it failed to pass.[1] Probably it might have passed if Charles had given it an active support. But the opposition of the Presbyterians to a more general scheme of toleration had made Charles less desirous to support a scheme from which the Roman Catholics could derive no benefit;[2] and thus a unique opportunity was lost for ever.

In the ensuing Parliament the royalist and Anglican majority made the prospects of any scheme of comprehension quite hopeless. At the Savoy conference the bishops rejected all the principal proposals of the Presbyterians.[3] Convocation revised the prayer book in such a way that it was made more distasteful than ever to them.[4] Parliament passed an Act of Uniformity which compelled all clergymen (and others) to consent to the whole contents of the revised prayer book, to take the oath of non-resistance, and to renounce the covenant.[5] As a result some 2000 persons forfeited their livings.[6] Neither to the Roman Catholics nor to the Protestant nonconformists would Parliament make any concessions; and, royalist as it was, it rejected a bill to give the king power to grant dispensations from the law in favour of Protestant nonconformists.[7] Thus to Roman Catholics and Protestant nonconformists alike toleration was denied. Against both, as we shall see,[8] new legislation was directed. The intolerant spirit thus displayed by the Anglican church was in no small degree responsible for the political turbulence of the reign, and for the dangerous increase in the power of the crown at its close. Religious fanaticism, thus encouraged, embittered political controversy. It contributed to the disgraceful excesses of the Popish Plot and the Exclusion projects; and these in their turn led to a royalist reaction, which, if James II. had been a wiser man, might have had serious effects upon the development of the constitution. It was not until the Anglicans

[1] Firth, op. cit. v 96.
[2] Ibid.
[3] 6 S.T. 25-44.
[4] Firth, op. cit. v 98-99.
[5] 14 Charles II. c. 4; below 197.
[6] Firth, op. cit. v 99.
[7] Hist. MSS. Com. 7th Rep. App. 167-168; the bill proposed to give the king power to dispense with the Act of Uniformity, "and with any other laws or statutes concerning the same, or requiring oaths or subscriptions, or which do enjoin conformity to the order discipline and worship established in this church," and allowed him to "grant licences to subjects of the Protestant religion, of whose inoffensive and peaceable disposition His Majesty shall be persuaded, to enjoy the use and exercise of their religion and worship, though differing from the public rule"; Firth, Camb. Mod. Hist. v 100.
[8] Below 197-199.

and the nonconformists were compelled to unite to meet a common danger, that the evil effects of the Anglican intolerance of 1661 were undone,[1] and the cause of constitutional government was finally secured.

(iv) The hereditary revenue of the crown—the revenue, that is, from which the current and normal expenses of the government in time of peace were defrayed—was settled on the following basis. An income of £1,200,000 was estimated to be needed to defray these expenses, and Parliament voted taxes which it thought would produce this amount.[2] But it was soon found that the taxes voted fell short of this amount by some £265,000 a year.[3] Parliament then voted taxes which it thought would make up the deficiency; but they still fell short of the £1,200,000 required by some £175,000.[4] An attempt was made to meet this deficit by improvements in the methods of collection;[5] but, in spite of all efforts, Mr. Shaw has estimated that the average yearly income from the hereditary revenue for the first six and three quarter years of the reign amounted only to £837,777 a year.[6] If we remember that the government started with a burden of debt inherited from the reign of Charles I.,[7] and that the extraordinary revenue voted for the Dutch war was always anticipated, and was only sufficient to meet the ordinary expenses of government,[8] we cannot wonder that the financial condition of the country went from bad to worse. The growing deficit, and the disastrous results of the Dutch War, which were the consequence of that deficit, exasperated the House of Commons on the one side, and, on the other, made Charles the more ready to bargain with Louis XIV. for subsidies in return for the adoption of an anti-national foreign policy.[9]

Thus it happened that the settlement made by Parliament at

[1] Below 199-201.

[2] W. A. Shaw, The Beginnings of the National Debt 393, citing Commons Journal viii 150; Calendar of Treasury Books i 1660-1667 xxv.

[3] Beginnings of the National Debt 393, citing Commons Journal viii 273-274.

[4] Beginnings of the National Debt 394.

[5] Ibid 395; 15 Charles II. cc. 11, 12, 13.

[6] Calendar of Treasury Books i 1660-1667, xxxv; the amount was £739,675 per annum, excluding hearth money.

[7] Ibid xv-xxiv; ibid 1681-1685 vii Pt. i ix-xv.

[8] Ibid ii 1667-1668, x, xi, xvi; at p. lxvii Mr. Shaw concludes that "Charles actually spent on the war, not only all the money which the House of Commons granted him for it, but also a matter of a million and a half more—money which he transferred from, and which was badly needed by, the ordinary departmental peace establishments of the country; for an account of the extraordinary supply voted by Parliament 1660-1668 see Beginnings of the National Debt 395; the statutes imposing it are 12 Charles II. c. 20; 13 Charles II. c. 4; 13 Charles II. st. 2 c. 3; 15 Charles II. cc. 9, 10; 16, 17 Charles II. c. 1; 17 Charles II. c. 1; 18, 19 Charles II. cc. 1, 13; 19, 20 Charles II. c. 6.

[9] Calendar of Treasury Books i 1660-1667 xlii.

the Restoration was bound to provoke new causes of quarrel between the king and Parliament. The settlement of the property question gave a permanent grievance to many, which naturally disposed them to factious opposition. The settlement of the religious question threw into opposition that large minority, who found themselves exposed to many political and other disabilities, because they were outside the pale of the national church. The deficiency in the revenues of the crown, due mainly to economic depression, aroused suspicions of the honesty of the king, which were to a large extent unjustifiable;[1] and, when national disasters ensued, these suspicions created in the House of Commons an opposition which was often factious because it was always uninformed.[2] In fact, it was because the House of Commons was both powerful and ignorant, that, in a very short time, all these causes of discontent produced, in opposition to the Court, a powerful Country Party. The strength of that opposition was increased by the character and policy of Clarendon and of Charles II. himself. Let us glance at the position taken up by these three factors in the situation—the House of Commons, Clarendon, and Charles II.

The House of Commons no longer occupied the position which it had held under the Tudors and the two first Stuart kings. It was as necessary a part of the government of the kingdom as the king himself. During the preceding eighteen years it had, as we have seen,[3] become familiar with all branches of government, and it had directed the policy of the state. It therefore considered itself competent to supervise and criticize the conduct of all branches of the government, and it had some definite ideas as to the policy which that government should pursue, not only in domestic, but also in foreign affairs. In this it accurately represented its constituents. "Foreign observers," says Sir Charles Firth,[4] "who visited England after the Restoration noted with wonder the keen interest which all classes of the people took in public affairs." But the House of Commons had very little real knowledge of the details of the work of government, and no means of maintaining a control over its policy which was both constant and effective. The government was carried on by the king's

[1] Calendar of Treasury Books i 1660-1667, xxvi.

[2] See ibid ii 1667-1668, xxxix; "The administration left the Parliament practically without a lead . . . simply because the government did not understand the art of putting the government's case before the House. . . . It is therefore not at all surprising that, concurrently with the voting of supply, the Commons should have turned back again and again to the question of the accounts themselves. There were some members who could not digest these accounts at all, and there were others who simply desired to fish in troubled waters."

[3] Above 162.

[4] Camb. Mod. Hist. v 102.

ministers who were responsible to him; and there was no direct communication between their departments and the House of Commons.[1] The House was not yet organized into parties; and, because it had not got the discipline which party organization would in the future supply, it was unable, when it was roused to action, to act effectively. No doubt it could impeach a minister or stop supplies. But it was unable to enquire calmly and with knowledge into the causes of the evils which it denounced. Thus the commission, which was appointed in 1667 to enquire into the public accounts,[2] produced no adequate remedies. The House found it easier to attack individuals than to conduct a judicial investigation into the national balance sheet presented to it. It condemned Carteret, the Treasurer of the Navy, whom the House of Lords, justly in the opinion of Mr. Shaw,[3] acquitted.

The defects of the House of Commons tended to confirm Clarendon in all his preconceived ideas as to the proper relations of the House of Commons to the king.[4] Throughout the period of the Civil Wars Clarendon had given Charles I. and his son wise and practical advice. It was wise and practical because his prejudices and ideals were those of the great majority of lawyers and moderate men who had lived through those troubled times. When the Restoration came, these prejudices and ideals enabled him to resettle the government on the old foundations. To Charles he was indispensable;[5] and his strong, honest, and able counsel[6] was always at his service. But in domestic politics he was still the man of 1641. He was a firm supporter of the church, and, unlike his master, opposed any kind of toleration, whether based on legislation or on the prerogative.[7] He was an equally firm supporter of the prerogative of the crown. The working and policy of the government ought, he considered, to be under the sole control of the king, to whom and to the law his ministers were alone responsible. The idea that he or any one else should be appointed to hold a newly created post of premier or first minister, he considered to be unnecessarily

[1] Calendar of Treasury Books ii 1667-1668, xxxv-vi.

[2] 19, 20 Charles II. c. 1; for the history of the proceedings taken under the Act see Shaw, Calendar of Treasury Books ii 1667-1668, xxxiv-lxxxvi.

[3] Ibid lxxxiv-lxxxv. [4] Above 137, 141.

[5] Pepys, Diary ii 72 (Ed. Wheatley), wrote in 1661 that Clarendon was "much envied," and that "many great men do endeavour to undermine him"; but that they had no success, "for that the king (though he loves him not in the way of a companion as he do these young gallants that can answer him in his pleasures) yet cannot be without him, for his policy and service."

[6] Of his abilities Pepys, ibid vi 18, thus speaks, after attending in 1666 a meeting of the committee for Tangier, "I am mad in love with my Lord Chancellor, for he do comprehend and speak out well, and with the greatest easiness and authority that ever I saw man in my life."

[7] Firth, Camb. Mod. Hist. v 100, 101.

expensive and wholly unconstitutional.[1] At the same time he was prepared to uphold the powers and privileges of Parliament, provided it kept itself within its proper limits. It was, he considered, a partner in the work of legislation, it controlled taxation, and it could impeach ministers guilty of crimes. But it had no right to control or supervise the work of government. Still less had it any right to dictate the policy of the state. Thus he was wholly opposed to the clause in the Finance Act of 1665, proposed by Downing, by which the supply was appropriated to the war—in his opinion it was "introductive to a commonwealth and not fit for a monarchy";[2] and he quite failed to appreciate the fact that Downing's scheme, of which this appropriation clause was an essential part, would make the money voted immediately available, by enabling the Exchequer to borrow at first hand, and so become independent of the bankers.[3] He was scandalized by the demand made by the House of Commons in 1666 that it should appoint commissioners to examine accounts. The House of Commons, he thought, must be kept in its place;[4] and in 1667 he advised a dissolution, and maintained the legality of supporting the army by levying contributions, so long as the danger of a Dutch invasion was imminent.[5]

It was quite clear that Clarendon's old-fashioned constitutional ideas were quite unsuited to the new position in the state which the House of Commons had now the power and the will to assert. Charles was perfectly well aware of this fact; and for this and other reasons he was quite ready to dispense with Clarendon's services.

Charles was very anxious to extend England's foreign com-

[1] The Duke of Ormond had suggested that he should give up the Chancellorship and devote himself wholly to the king, in order to wean him, if possible, from his gay companions; Clarendon refused—"Whilst he kept the office he had . . . the king felt not the burden of it; because little of the profit of it proceeded out of his own purse. . . . Whereas if he gave over that administration and had nothing to rely upon for the support of himself and family, but an extraordinary pension out of the Exchequer, under no other title or pretence but of being first minister (a title so newly translated out of French into English, that it was not enough understood to be liked), the king would quickly be wearied of so chargeable an officer, and be very willing to be freed from the reproach of being governed by any . . . at the price and charge of the man who had been raised by him to that inconvenient height above other men," Life (ed. 1843) 1018-1019.

[2] Ibid 1167.

[3] Beginnings of the National Debt 452.

[4] Clarendon represents himself as urging "that he could not be too indulgent in the defence of the privileges of Parliament; that he hoped he would never violate any of them"; but he said the king ought, "to be equally solicitous to prevent the excesses in Parliament, and not to suffer them to extend their jurisdiction to cases they have nothing to do with; and that to restrain them within their proper bounds and limits is as necessary as it is to preserve them from being invaded," Life 1197; and others thought the same, cp. Pepys, Diary vi 5, where he relates that he talked with Carteret, "How the king hath lost his power by submitting himself to their way of examining his accounts, and is become but as a private man."

[5] Hallam, C.H. ii 369; Firth, Camb. Mod. Hist. v 113-114.

merce and colonies. His marriage with Catherine of Braganza had allied him with Portugal; and this alliance had brought him Tangier and Bombay, and commercial privileges in the Portuguese possessions in South America and the Indies.[1] But these privileges involved an increased commercial rivalry with the Dutch, which was the direct cause of the Dutch war. The course of the war had not been altogether favourable to England; and in 1665 had come the great Plague, and in 1666 the fire of London. Then, too, in spite of the money derived from the queen's dowry, from the sale of Dunkirk to the French, and from the sale of crown lands,[2] the financial position was very critical. Negotiations had been opened with the Dutch in 1666; and in 1667, to relieve the financial pressure, the government had decided to economize on the fleet.[3] The result was the appearance of the Dutch ships in the Thames, and the destruction of part of the English fleet in the Medway. This was the last straw. The Cavaliers had never forgiven Clarendon for securing the passage of the Act of Indemnity and Oblivion. The new Country Party accused him of corruption, and regarded him as responsible for all the mistakes and inefficiency of the government. His fellow-counsellors disliked his haughty and overbearing manners.[4] It was at one time thought that he might retire from politics, and devote himself to the judicial duties of his office.[5] But the opposition was too strong and too universal; and his ideas of his duty to the crown caused him to refuse the offer of some of his friends to defend him in the Commons by an attack on his chief opponents, Arlington and Sir W. Coventry, for which he was to supply the material.[6] He was impeached;[7] and, on his flight,

[1] Firth, Camb. Mod. Hist. v 107.

[2] Calendar of Treasury Books, 1667-1668 ii vii.

[3] Firth, Camb. Mod. Hist. v 112.

[4] Coventry told Pepys that while he was at the Council board, "there was no room for any body to propose any remedy to what was amiss, or to compass anything, though never so good for the kingdom, unless approved by the Chancellor," Diary vii 93; and Downing told him that "no body durst say anything at the Council table but himself, and that the king was as much afeard of saying anything there as the meanest privy councillor," ibid 103; cp. Hallam, C.H. ii 366-367.

[5] He tells us himself that, "he was weary of the condition he was in . . . and desired nothing more than to be divested of all other trusts and employments than what concerned the chancery only, in which he could have no rival, and in the administration whereof he had not heard of any complaint; and this he thought might have satisfied all parties; and had sometimes desired the king, that he might retire from all other business than that of the judicatory," Life 1229.

[6] "They were both privy counsellors and trusted by the king in his most weighty affairs; and if he discerned anything amiss in them, he could inform the king of it. But the aspersing or accusing them anywhere else was not his part to do," ibid 1246; cp. Burnet, Own Time i 169, "He had such regard to the king, that when places were disposed of, even otherwise than as he advised, yet he would justify what the king did, and disparage the pretensions of others, not without much scorn; which created him many enemies."

[7] 6 S.T. 291.

he was banished by Act of Parliament.[1] He died in exile seven years later.

Charles knew very well that most of the charges against Clarendon were false. The sale of Dunkirk was, considering the state of the Exchequer, wise. It was the same financial difficulties, for which Clarendon was by no means answerable, that had led to those naval economies which had made the Dutch raid possible. The Dutch war itself had been encouraged and approved by Parliament.[2] But the old-fashioned ideas and prejudices of Clarendon had become more and more irksome to Charles. He was wholly opposed to Charles's wish for some measure of religious toleration.[3] He was equally opposed to the open licentiousness of the king and his court.[4] When Parliament turned against him, Charles saw that any attempt to retain him would be dangerous. He therefore parted with him by no means unwillingly. He believed that, under the new conditions, which he now understood perfectly, he could manage Parliament very much better than Clarendon. His belief was correct; for he saw, what Clarendon could never have seen, that it was only by superior diplomacy that he could hope to free himself from Parliamentary control, and to win for the prerogative a position in the state independent of Parliament and co-equal with it.[5] From the date of Clarendon's fall in 1667, when he became his own first minister,[6] he kept this end steadily in view; and in 1681, after many vicissitudes, he attained it.

To say of Charles II. that he was the ablest of the Stuart kings would be to damn him unjustly with the faintest of praise. In fact he was, in many respects, the ablest statesman and diplo-

[1] 19, 20 Charles II. c. 2.

[2] Firth, Camb. Mod. Hist. v 108.

[3] Above 171.

[4] "Among all the causes of Clarendon's fall none appears to have been more potent with Charles than his belief that Clarendon had hastened this marriage (the Duke of Richmond and Miss Stuart) to foil his own designs on Miss Stuart," Christie, Life of Shaftesbury i 309-310; cp. Bramston, Autobiography (C.S.) 256; Clarendon, Life 1192; Pepys, Diary vii 84, had heard that Lady Castlemaine was at the bottom of the business, and that she "ran out in her smock into her aviary looking into Whitehall gardens . . . and stood joying herself at the old man's going away."

[5] "He was a thoroughgoing politican. All that he did in his government was founded on the fact that he could not bring himself to submit to the necessity of being simply a parliamentary king. Not that he imagined that he would be able to govern without Parliament, to which he owed his restoration, but he strove incessantly to procure for hereditary right, on the strength of which he had been restored, an independent importance, as equal, or even superior to Parliament," Ranke, op. cit. iv 203.

[6] "He lived with his ministers, as he did with his mistresses; he used them, but he was not in love with them. He showed his judgment in this, that he cannot properly be said ever to have had a *favourite*, though some might look so at a distance. . . . He tied himself no more to them than they did to him, which implied a sufficient liberty on either side," Halifax, Character of Charles II., Foxcroft ii 351.

matist of his day—far inferior no doubt to William III. in his aims and ideals, but in no wise inferior to him in ability. In many respects—in his genius for diplomacy in the conduct both of home and of foreign affairs, in his desire for religious toleration, in the manner in which he was always ready to subordinate his religious preferences to political needs, in his cheerful temperament and affable manners, in his gross licentiousness[1]—he was a true grandson of Henry IV. of France. It is not surprising that he was an abler foreign statesman than any of his ministers. His dealings with the Scotch factions in 1651 showed that he possessed considerable diplomatic talent;[2] and his long exile had taught him all there was to know of European politics. It is very much more surprising that, during the first seven years of his reign, when, to all appearance, he was devoting all his time to his mistresses and the other delights of a licentious court, he had come to some very accurate conclusions as to his real position in relation to his Parliament. He had learned that the House of Commons was in fact the strongest power in the state through its control of finance, and that he could not dispense with it unless he could get an adequate supply from some other source. On the other hand, he controlled the policy of the state; and he knew that Louis XIV. was prepared to pay for an alliance or even for the neutrality of England. But Parliament was growing more and more fearful of the growing power of Louis XIV., and more and more inclined to a policy of hostility with France. It was, therefore, possible to use Parliament to frighten Louis, and to use Louis to escape from the control of Parliament. This was the keynote of his policy after the fall of Clarendon. He pursued it with infinite patience and skill, and, in the end, succeeded so well that he made the crown stronger than it had ever been under any other king of the House of Stuart. In the pursuit of this object he was helped by his social gifts, and even by his vices. His capacity for summing up a situation in a witty epigram, his geniality, his cheerfulness in adversity, and his affability to all and sundry, endeared him to his people.[3] His

[1] Clarendon, Life 1192, relates that it was "daily insinuated to the king that princes had many liberties which private persons have not . . . and to this purpose the history of all the amours of his grandfather were carefully presented to him, and with what indignation he suffered any disrespect towards any of his mistresses"; as Halifax said (Character of Charles II., Foxcroft ii 348), "his inclinations to love was the effects of health and a good constitution, with as little mixture of the seraphic part as ever man had"; for the licentiousness of his conversation see ibid 352-353.

[2] Gardiner, Commonwealth and Protectorate i 353.

[3] See Halifax's Character of Charles II., Foxcroft ii 352-355; Reresby, Memoirs 245, tells that at Newmarket in 1682 the king, "mixed amongst the crowd, allowed every man to speak to him that pleased: went a-hawking in the mornings, to cock-matches in the afternoon (if there were no horse races), and to plays in the evenings acted in a barn, and by very ordinary Bartlemewfair comedians."

frivolities and immoralities, though they excited the displeasure of many,[1] led most to suppose that such a person need not be taken seriously. They blinded both the ambassadors of foreign states, and his own ministers and opponents, to his real abilities.[2] Some few no doubt saw more clearly. Halifax, who possessed in an eminent degree the power of passing judgments upon contemporary persons and events which the verdict of history has endorsed, who drew a finished picture of Charles from the life, was under no illusion as to his abilities and his success.[3] Killigrew saw that he had the ability to do the business of state more ably than anyone else if he chose to use it.[4] No doubt his policy was a selfish policy—desire for his own ease and quiet came first. But it should be remembered that, in his desire for religious tolerance, he was in advance of his contemporaries; and that his care for commerce and the navy conferred permanent advantages upon his country.[5] Unfortunately for his own reputation, fortunately for England and for Europe, his successor was so foolish that he destroyed in three years the position which Charles had won for the crown and the prerogative during the eighteen years of his personal rule.

Clarendon was followed by the Cabal ministry. In 1667 peace was made with the Dutch; and, in the following year, came the famous Triple alliance, which compelled Louis to make peace. But, in spite of a popular foreign policy, Parliament was intractable on the question of toleration. This led Charles, who wished to protect the Roman Catholics because he was a Catholic himself,[6] to turn to Louis. The Treaty of Dover was concluded.

[1] See the mock speech to Parliament which Marvel published in 1675, Works (Ed. Grosart) ii 431-433; cp. Clarendon, Life 1192; Marvel's Historical Poem, Works i 343-349, and Last Instructions to a Painter about the Dutch War, ibid i 253-285; see the letter to the king cited S.P. Dom. 1665-1666 xxxvi-xxxviii—"I must needs believe that you are not well informed of the sad discontents of the nation. . . . None of your courtiers will tell you how extremely you have lost yourself in the whole nation, for they say, 'Give the king the Countess of Castlemaine, and he cares not what the nation suffers.'"

[2] Pollock, The Popish Plot, 260-261; Mr. Pollock points out, ibid n. 1, that Barillon "thought when he first came to England that he could in every instance measure Charles's weight in the balance," but that, "before the Popish Plot had run its course he perceived he could not"; thus, Sept. 9, 1680, he wrote, "Le Roi de la Grande Bretagne a une conduite si cachée et si difficile à penetrer que les plus habiles y sont trompès."

[3] See especially "The Character of a Trimmer," Foxcroft ii 337-338.

[4] Pepys, Diary vi 94, tells us that Killigrew told the king that "There is a good honest able man that I could name, that if your Majesty would employ and command to see all things well executed, all things would soon be mended; and this is one Charles Stuart, who now spends his time in employing his lips about the Court, and hath no other employment, but if you would give him this employment, he were the fittest man in the world to perform it."

[5] Below 319-323.

[6] The facts as to Charles's religious belief are probably accurately summed up by Halifax in his Character of the king; he says, "There were broad peepings out,

War was to be made upon Holland in alliance with France; and, according to its secret provisions, Charles was to declare himself a Catholic, and Louis was to help him by force to make England Catholic and himself absolute.[1] To get money for a war, of which Parliament would certainly not have approved, payment of interest upon the bankers' loans was stopped in 1672.[2] From motives of policy the announcement of Charles's conversion to Catholicism was postponed;[3] but in the same year the Catholics were partially relieved by the issue of a Declaration of Indulgence, which suspended all the penal laws against all nonconformists. The alliance did not succeed in crushing Holland. The Prince of Orange was called to the government, and prepared to resist to the last.[4] The fact that Holland rejected overtures for peace enabled Charles to go to Parliament and to ask for a supply to carry on the war.[5] A supply was granted; but the Declaration of Indulgence was so fiercely attacked that Charles was obliged to withdraw it.[6] Fear of Catholicism was now so thoroughly aroused that Parliament even consented to consider a proposition for the toleration of Protestant nonconformists.[7] At the same time they inserted in a bill to stop the growth of Roman Catholicism, sent down by the House of Lords, a clause to the effect that no one could serve in any public office unless he took an oath denying the doctrine of transubstantiation.[8] The bill

glimpses so often repeated, that to discerning eyes it was glaring; in the very first year there were such suspicions as produced melancholy shakings of the head, which were very significant. His unwillingness to marry a Protestant was remarkable. . . . A thousand little circumstances were a kind of accumulative evidence, which in these cases may be admitted. . . . Men that were earnest Protestants were under the sharpness of his displeasure, expressed by raillery as well as by other ways. . . . It was not the least skilful part of his concealing himself to make the world think he leaned towards an indifference in religion. He had sicknesses before his death, in which he did not trouble any Protestant divines; those that saw him upon his death-bed saw a great deal," Foxcroft ii 346-347; there were constant rumours that the king was a Papist, see e.g. S.P. Dom. 1667 409, ccxiv 80; ibid 1667-1668 xxvi; he secretly avowed his religion in 1669, Pollock, Camb. Mod. Hist. v 202-203.

[1] Ibid 203-205.

[2] For a detailed account of the actual nature of this transaction see Shaw, Calendar of Treasury Book iii Pt. i 1669-1672 xlii-lxiii; Beginnings of the National Debt 391—"the Bankers' advances were loans made on the security of supplies, and the stoppage was a stoppage of payment upon assignation"; for the actual order see S.P. Dom. 1671-1672 87-88.

[3] Pollock, Camb. Mod. Hist. v 203; Ranke, op. cit. iii 498.

[4] Pollock, Camb. Mod. Hist. v 208.

[5] Ibid.

[6] Ibid 208-209; below 222.

[7] Ibid 209; cp. Foxcroft, Life of Halifax i 120 n. 1; cp. Hist. MSS. Com. 9th Rep. App. 44 no. 170; for a further effort in this direction in 1676-1677 see ibid 68 no. 315.

[8] Ranke, op. cit. iii 538-540; the oath took this form, Coventry explained, because the Pope might grant a dispensation for taking the oath of supremacy, but that transubstantiation, being an article of faith, the Pope could not grant a dispensation for making this declaration.

thus amended became the first Test Act.[1] The Act accomplished the purpose with which it had been passed. Clifford and the Duke of York resigned their offices. Shaftesbury, who had advocated its passage, perhaps because he had got some information as to the secret clauses of the Treaty of Dover, was dismissed and went into opposition.[2] Charles's Catholic schemes had failed; and it was quite obvious that, if Parliament was allowed to sit, it would demand a Protestant foreign policy. Louis paid Charles a subsidy which enabled him to dispense with Parliament from Jan., 1674, to April, 1675.[3]

Charles now adopted another line of policy. He threw over for ever his Catholic schemes, and appointed as his chief minister Sir Thomas Osborne who was soon after created earl and then marquis of Danby. He was a sturdy Anglican, and an opponent of France; and he had a genius for finance and for organization. For the first time in the reign, helped by a revival of trade, he put the government on a sound financial footing;[4] and, by a system of corruption, he organized a compact body in the House of Commons, who were ready to vote for any measure which the court proposed.[5] The idea of Charles and Danby was to get, by an alliance with the Anglican party, supremacy in the state for both church and king.[6] To effect this, they proposed to exact from all office-holders a non-resisting test, which would have shut out from office the Country Party and the Protestant nonconformists as effectively as the Test Act had shut out the Catholics.[7] The proposal aroused furious opposition in both Houses; but, though "disputed by inches,"[8] it was carried in the Lords; and it might have been carried in the Commons, if Shaftesbury had not managed to obstruct all business by his skilful use of the disputes as to jurisdiction which arose out of the case of *Shirley* v.

[1] 25 Charles II. c. 2; below 199; for the proceedings on the bill in the Lords see Hist. MSS. Com. 9th Rep. App. 29 no. 110; see ibid 42 no. 165, and S.P. Dom. 1673-1674 150-151 for a bill introduced to secure the Protestant religion, which, inter alia, provided that members of the royal family should not marry Roman Catholics and should be brought up as Protestants.

[2] Ranke, op. cit. iii 550-553.

[3] Pollock, Camb. Mod. Hist. v 212; as Ranke, op. cit. iv 19, says, "Infinitely more important to Louis was the neutrality of England than the sums of money which he paid."

[4] Shaw, Calendar of Treasury Books iv 1672-1675 xvii-xix.

[5] Burnet, Own Time ii 78-79; Hallam, C.H. ii 398-399; cp. Reresby, Memoirs 135, who complains that motions were sometimes lost by the slackness in attendance of the Court Party; for earlier attempts to keep together a Court Party see Foxcroft, Life of Halifax i 37.

[6] Pollock, Camb. Mod. Hist. v 215-216.

[7] Foxcroft, op. cit. i 118-121; for the proceedings in the House of Lords see Hist. MSS. Com. 9th Rep. App. 51 no. 208.

[8] Marvel's Letters, Works ii 442.

Fagg.[1] Parliament was prorogued; and when, on its meeting, the dispute again broke out, it was again prorogued from Nov., 1675, to Feb., 1677. Louis, who feared Danby's anti-French bias and his schemes for the control of the House of Commons, made the prorogation financially possible.[2]

The two great parties were forming. Danby had organized in the House of Commons the party who supported church and king—the future Tories. Shaftesbury organized the constituencies in the Protestant interest, and thus created the party destined to be known as Whig.[3] In the House of Commons Danby's party had the majority; and an attempt by Shaftesbury and some other peers to prove that, under a statute of Edward III.'s reign, the Parliament was, in consequence of so long a prorogation, ipso facto dissolved, ended in their committal to the Tower.[4] But, though Danby induced the House of Commons to vote a supply, he could not prevent an address to the king asking him to join the alliance against France; nor could he prevent a threat to refuse further supplies unless, in future, foreign alliances were submitted to it. Charles adjourned Parliament, and got a further supply from Louis. But, having got it, he tried to strengthen his position with Parliament by marrying the daughter of James to William of Orange, and by allying himself with Holland to compel France to make peace.[5] Charles was thus playing off Louis against the House of Commons; and he played his game with great skill. He got money from Parliament for a war with France. He got money from Louis to disband his army and dissolve Parliament. Peace was made at Nymegen (1678), and Charles was left master of the situation at home, with an army and plenty of money.[6]

Then came Oates's revelation of a Popish Plot, for the assassination of the king and the conquest of the country by an army of Roman Catholics. Throughout the reign there had been plots

[1] Foxcroft, op. cit. i 121; Pollock, Camb. Mod. Hist. v 217; for the dispute see vol. i 374-375.

[2] Pollock, Camb. Mod. Hist. v 217-218.

[3] Ibid 218; in S.P. Dom. 1679-1680 21, in a report to Williamson, we get an account of the sort of talk circulating in the party—"the Green Ribbon men meet at Starkie's and Collen's, booksellers within Temple Bar, and thence go to their clubs, where the ordinary discourses are that the nation is sold to the French; that at Whitehall, they look one way and act another, that whatever is pretended, Popery and arbitrary government is intended, that a Parliament is not to come again, if they at Whitehall can live without it, and if any be suffered to sit, it must be in effect a French Parliament or be gone, for all is governed by the Duchess of Portsmouth, the Duke of York, the Lord Treasurer, and the French ambassador, who all often meet the king at her lodgings, and what is there agreed is next to be put in execution."

[4] Pollock, Camb. Mod. Hist. v. 218; for the proceedings on the writ of Habeas Corpus brought by him see 6 S.T. 1270.

[5] Pollock, Camb. Mod. Hist. v 219.

[6] Ibid 219-220.

and rumours of plots.[1] Sometimes risings of the fifth monarchy men (such as Venner had led in 1661), and of other Protestant sects, had been feared; and sometimes plots and risings of the Papists. The rumours that Charles was a Catholic,[2] the certainty that James was a Catholic, and the French policy of the king,[3] had tended to spread abroad among the nation a nervous fear of Catholic designs. Thus the romances of Oates fell into a soil well prepared to receive them. When the fact of Catholic intrigue was in a manner corroborated by the letters of Colman, the Duchess of York's secretary, to Pere de la Chaise, the confessor of Louis XIV.;[4] and when the existence of the plot was thought to be proved by that unexplained mystery, the death of Sir Edward Berry Godfrey,[5] the nation went mad with terror.[6]

Shaftesbury and his party made the most of their opportunity. A second Test Act was carried, which excluded all Roman Catholics from both Houses of Parliament.[7] It was only by a

[1] For a good account of these see Pollock, The Popish Plot 174-176; cp. S.P. Dom. 1666-1667 127, clxxi 128; ibid. 268, clxxviii 103; ibid 568, cxciv 44; ibid 1671 239; ibid 1676-1677 xiii, xiv. It may be noted that anti-Catholic feeling was so strong that accusations of being a Papist were sometimes made for motives of private revenge, Bramston Autobiography (C.S.) 127-158—in this case Charles said "after Oates his plot was on foot, that the Popish Plott begann upon Sir John Bramston"

[2] Above 180 n. 6; S.P. Dom. 1675-1676 391.

[3] Fairly shrewd guesses had long before this been made as to the existence and contents of a secret treaty with France; Ranke, op. cit. iii 552, says that, in 1673, the secret schemes, though not known in words, yet, "with sure instinct the intention which had prevailed in them were discovered; in several pamphlets statements coming pretty near the truth might be read"; in 1671 the prorogation of Parliament was thought to be connected with "a French mystery," S.P. Dom. 1671 569; and in that year the Commons had sent up a bill to prevent the growth of Popery, Hist. MSS. Com. 9th Rep. App. 2 no. 12; ibid 25 no. 95—an address to the king in 1672-1673 on the same topic.

[4] Pollock, The Popish Plot 34-48.

[5] Mr. Pollock has offered an ingenious conjecture in his very able book on the Popish Plot; but there are difficulties in accepting it, see Andrew Lang, The Valet's Tragedy chap. iii; no certain conclusion has as yet been reached.

[6] Some few kept their heads; Charles knew very well that Oates was a liar, Pollock, The Popish Plot 77, though he knew too much not to be aware that there might be some truth behind his tissue of lies, ibid 78; we get a sane view of passing events in Evelyn's Diary, July 18th, 1679; "for my part," he wrote, "I look on Oates as a vain insolent man, puff'd up with the favour of the Commons for having discovered something really true, more especially as detecting the dangerous intrigue of Colman . . . and of a general designe which the Jesuited party of the Papists ever had and still have to ruine the Church of England; but that he was trusted with those great secrets he pretended, or had any solid ground for what he accus'd divers noblemen of, I have manye reasons to induce my contrarye beliefe"; Reresby, Memoirs 147, says, "Much appeared very improbable; but such was the torrent then, that no doubt was to be made of what was said"; see also a French pamphlet of 1678-1679 of which an account is given Hist. MSS. Com. 11th Rep. 97 no. 105; and S.P. Dom. 1679-1680 86-87—the writer truly says, "the quarrels of the ministers and the hatred against the Catholics predisposed them to believe everything of them. There was only wanting an impudent liar with a heart of iron and a face of brass, and then to shut the door by making out all those who endeavoured to justify the alleged criminals to be accomplices themselves."

[7] 30 Charles II st. 2 c. 1; Hist. MSS. Com. 11th Rep. 61 no. 26; a somewhat similar bill had been proposed in 1674, S.P. Dom. 1673-1675 136, 141-142.

majority of two votes, and contrary to most people's expectation, that the House of Commons assented to a proviso which permitted the Duke of York to retain his seat in the House of Lords.[1] Naturally the question of raising a military force to suppress a Catholic rising came to the front. The House of Commons favoured the plan of embodying the militia for a fixed period ;[2] but Charles objected to embodying a force which he could not completely control. The House also wished that the troops, which had been enlisted for a continental war, should be disbanded.[3] And here Louis XIV. saw eye to eye with the leaders of the opposition. He was not sorry to have his revenge on Charles, and he had the means of taking a very complete revenge. He bribed Montague, the ambassador at Paris, who was angry with Danby, to reveal to the House of Commons which had voted money for a war with France, the fact that Charles had offered to dissolve Parliament for a payment of six million francs.[4] Danby was impeached; and the Parliament, which had now lasted nearly eighteen years, was dissolved in order to save him (1679).[5]

In the new Parliament, which met in the same year, Shaftesbury and the Whigs had an immense majority.[6] Danby was again impeached ;[7] and a bill was introduced to exclude the Duke of York from the throne. For some years before this date, bills had been proposed to prevent any of the royal line marrying a Papist, and for the education of the children of certain of the king's relations as Protestants.[8] There had also been rumours of various expedients for preventing the succession of the Duke of York. It had been suggested that Charles's illegitimate son, the Duke of Monmouth, was, in fact, legitimate; and a royal divorce had been mooted.[9] The Duke of York's second marriage in 1673 to a Catholic had caused renewed interest to be taken in these projects.[10] But the Bills did not pass, and Charles would not hear of any of these expedients. The crisis of the Popish

[1] Gray's Debates vi 253 ; the numbers were 158 to 156.
[2] Hist. MSS. Com. 11th Rep. 64 no. 30.
[3] Pollock, Camb. Mod. Hist. v 222-223.
[4] Pollock, The Popish Plot 177-181.
[5] Ibid 183 ; for the lengthy proceedings connected with Danby see 11 S.T. 599; vol. i 382-383.
[6] "The government could rely upon a mere handful of twenty or thirty votes in the new Parliament as against a hundred and fifty in the old," Pollock, The Popish Plot 183-184.
[7] Ranke, History of England iv 77-78; he refused to surrender till a bill of attainder had passed both Houses; then he surrendered, and was committed to the Tower, where he remained for five years.
[8] Hist. MSS. Com. 9th Rep. App. 42 no. 165, 45 no. 182 (1673-1674); ibid 81 no. 352 (1676-1677).
[9] Pollock, Camb. Mod. Hist. v 212, 213. [10] Ibid.

Plot brought to the fore this new expedient—the exclusion of the Duke of York by Act of Parliament. During the last Parliament this expedient had been suggested during a debate on an address to the king to remove the Duke of York from his presence and counsels.[1] But to this expedient Charles was absolutely opposed. He saw that its adoption would entirely alter the position of the crown in the constitution. A king who held his throne by nothing but a Parliamentary title, could not claim the independent position of a king who claimed by a right superior to any human law.[2] The monarchy, he feared, might by degrees become elective.[3] He therefore refused to listen to a scheme which would have compromised both his own position and that of his successors; and he knew that he would have the support of the strong legitimist feeling prevailing in the country, if he took his stand on this ground. But he was willing to do anything short of this to conciliate Parliament and the nation;[4] and, with this object in view, he consented to try Temple's scheme of a remodelled Privy Council. The Privy Council was to be composed of thirty eminent persons, fifteen of whom held no office. Parliament, it was thought, would not be so ready to quarrel with so respectable a body.[5] But, as thus remodelled, the Privy Council was an impossible executive body. Charles was perfectly well aware of this fact. He had assented to the scheme to calm the nation; but he never intended the new Council to have any real power—"God's fish," he said, "they have put a set of men about me, but they shall know nothing."[6] The opposition were not deceived by this device; and they pressed on the Exclusion Bill.[7] To stop its progress Charles dissolved Parliament, but not before it had passed the Habeas

[1] Pollock, The Popish Plot 182; but cp. S.P. Dom. 1673-1675 619—a paragraph from the Latin gazette of Cologne, there calendared, from which it would appear that in 1675 or 1676 Parliament was contemplating the exclusion of the Duke of York from the throne, and that the Prince of Orange approved this design.

[2] See Burnet, Own Time ii 214-218, for a summary of the arguments for and against exclusion; the kind of feeling upon which Charles relied is well described by Burnet in the following passage: "Some argued against the exclusion that it was unlawful in itself, and against the unalterable law of succession (which came to be the common phrase). Monarchy was said to be by divine right: so that the law could not alter what God had settled. Yet few went at first so high. Much weight was laid on the oath of allegiance, that tied us to the king's heirs; and who so was the heir when any man took that oath, was still the heir to him. All lawyers had great regard to fundamental laws; and it was a maxim among our lawyers that even an Act of Parliament against Magna Carta was null of itself," a statement which, as we have seen, did not then and never had represented the opinion of the lawyers, vol. ii 441-446; vol iv 185-187.

[3] Burnet, Own Time ii 211.

[4] Ibid 210.

[5] Pollock, The Popish Plot 187-188.

[6] Ibid 189.

[7] Burnet, Own Time 210—"It was said the king was still what he was before; no change appeared in him; and all this was only an artifice to lay the heat that was in the nation, to gain so many over to him, and to draw money from the commons."

Corpus Act,[1] a measure which in the circumstances Charles did not dare to reject.

At the elections for the new Parliament the Exclusion Bill, and the recognition of the Duke of Monmouth as heir to the throne, was the programme put before the country by Shaftesbury and the Whigs. They secured a majority and carried the Exclusion Bill in the House of Commons.[2] It was at once carried up "with a great shout" to the Lords, who went into committee that there might be a freer discussion of the bill.[3] The crisis of the Exclusion contest had been reached. Godolphin, Sunderland, and the Duchess of Portsmouth had gone over to the Whigs, who appeared to be supported by a united nation.[4] But cooler observers could see that the nation was by no means so united as the Whigs supposed; and that, unless the king gave way, no such scheme could be carried through without civil war.[5] It was the perception of this fact by Halifax that induced him to desert "the popular and safe way,"[6] and to employ all his unrivalled powers of oratory and argument against the bill. He, as James II. afterwards said, "bore the burden of the day in the committee,"[7] and succeeded, almost unaided, in securing its rejection by the House of Lords.[8] The fact that Halifax—the prince of Trimmers—had thrown his weight against the bill, was a sure sign that the moderate men were coming over to the side of the crown. When the bill had been thrown out, Halifax tried in vain to induce the House to adopt some scheme for the limitation of the Duke's powers if he succeeded to the throne.[9] Neither the Court party nor the Whigs were in a mood to consider compromises of this kind. The House of Commons refused supplies,[10]

[1] 31 Charles II. c. 2; vol. i 227-228; Pt. II. c. 6 § 3.

[2] For the bill see Hist. MSS. Com. 11th Rep. 195 no. 283.

[3] See Foxcroft, op. cit. i 245-249. [4] Ibid 235.

[5] "It is practically certain that, had the Exclusion Bill passed into law, the Duke of York, supported by a vigorous minority of Old Cavaliers and of *Jure Divino* Anglicans, would have raised the standard of revolt; nor is it possible to doubt that he would have had behind him, not only the finances of Louis XIV., but the political sanction of a Parliamentary majority both in Scotland and Ireland," ibid 236.

[6] Letter from Lady Sunderland to Henry Sidney, cited ibid 245—"In a point, he says, he [Halifax] has studied more than ever he did any, and would have been glad if he could have gone the popular and safe way."

[7] Macpherson's Original Papers i 108, cited ibid 246; cp. Reresby's Memoirs 191.

[8] Macaulay in his Essay on Temple, wrote, "Old men who lived to admire the eloquence of Pulteney in its meridian, and that of Pitt in its splendid dawn, still murmured that they had heard nothing like the great speeches of Lord Halifax on the Exclusion Bill"; Mr. Foxcroft has not been able to find the authority for this statement, op. cit. i 247 n. 2; but it may well have been true, and been handed down as a tradition.

[9] Burnet, Own Time ii 265; see Hist. MSS. Com. 11th Rep. 209 no. 297, 210 no 298, 220 no. 318, 222 no. 321.

[10] "The leading men thought they were sure of the nation, and of all future elections, so long as popery was in view. They fancied the king must have a Parliament

and Parliament was dissolved. It looked as if a civil war could hardly be avoided.[1] But Charles had the situation in hand.

He summoned a new Parliament to meet at Oxford. In his speech from the throne he adhered to his refusal to alter the established order of succession. "But," he said, "to remove all reasonable fears that may arise from the possibility of a Popish Successor's coming to the crown; if means can be found, that in such a case the administration of the government may remain in Protestant's hands, I shall be ready to hearken to any such expedient, by which religion might be preserved, and the monarchy not destroyed."[2] He concluded with a hit at the arbitrary conduct of the opposition—"I may the more reasonably require that you make the laws of the land your rule, because I am resolved they shall be mine."[3] The Commons refused to hear of any compromise, and, after a week's session, Parliament was dissolved. Charles issued a Declaration in which he vindicated his course of action, by showing that the result of the attitude adopted by the Commons would inevitably have been civil war.[4] The country rallied round him in defence of hereditary

and money from it ere long, and that in conclusion he would come in to them," Burnet, op. cit. ii 266.

[1] Reresby, Memoirs 193 says, "He (Halifax) told me it was to be feared some unhappy differences might arise in the nation from these disputes about the succession; and in case it should come to a war, it might be convenient to form something of a party in one's thoughts"; after considering the state of opinion in Yorkshire, "He did agree with me that the loyal interest was not only much more numerous, but consisted of more wealthy and active men; and that those who were so busy in Parliament against the Court, were men of little power or esteem in their country."

[2] Cited Echard, History of England (ed. 1720) vol. iii Bk. ii c. 3 p. 1005.

[3] Ibid; for an account of some of the arbitrary acts of the House of Commons done under cover of privilege see 8 S.T. 1-13; this point is put very well by the author of "A Seasonable Address to both Houses of Parliament," attributed, incorrectly in Mr. Foxcroft's opinion, op. cit. ii 532, to Halifax; the author says, "if I must be a slave and forfeit my liberty, 'twere, at least, as good to do so under a single person as more: the tyranny of many is much more intolerable than the tyranny of one. 'Tis equally destructive of my liberty, whether the king or the House of Commons take away Magna Charta; I am against arbitrary government, ruling according to pleasure, not the laws and known constitutions of the land, whether assumed by king or commons. . . . And to speak truth, by what has passed since the plot, any one in his wits would believe the king is invaded not an invader; that his frequent prorogations and dissolutions have been his legal defensive weapons, used as much for his subjects security as his own honour; that arbitrary power is a delicous thing, and therefore aimed at by our demagogues and tribunes of the people, bad and to be decryed only while in the sovereign," Somers' Tracts viii 228-229.

[4] Echard, History of England vol. iii Bk. ii c. 4 p. 1008; he said, "We saw that no expedientwould be entertained but that of a total exclusion, which we had so often declared was a point that in our own royal judgment, so nearly concerned us both in honour, justice, and conscience, that we could never consent to it. In short, we cannot, after the sad experience we have had of the late civil wars . . . consent to a law, that shall establish another most unnatural war, or at least make it necessary to maintain a standing force for the preserving of the government and peace of the kingdom"; Burnet tells us, Own Time ii 288-289, that the archbishop of Canterbury moved in Council that the clergy should publish the Declaration in their churches; this Burnet calls a pernicious precedent—it was not long before the clergy were to find that this was indeed the case.

right, and loyal addresses poured in from all sides. The power of the Whigs was broken.

Charles had secured this result by skilful diplomacy. He had reassured the Protestants by declining to interfere in favour of any of the victims of the Popish Plot,[1] and by offering to consent to the amplest safeguards for the Protestant religion in the event of his brother's succession. He had conciliated the large number who believed in the divine right of kings by refusing to interfere with the order of succession. He had brought over to his side all the moderate men who were disgusted by the violence and arbitrary conduct of the House of Commons, and who feared above all things the outbreak of a new civil war. At the same time he had concluded another deal with Louis XIV. for subsidies in return for neutrality.

For many years Louis, in pursuance of his aim to dominate Europe, had made his profit from the internal dissensions of foreign states;[2] and in England the dissensions between Charles II. and his Parliament had given him great advantages. In fact, it is obvious that a foreign sovereign, who sets this aim before him, could in the seventeenth century effect much by intrigues either with the king, or with the party in Parliament which was in opposition to his government. In the earlier part of the reign Louis had intrigued first with "disappointed commonwealth's men" and then with Charles.[3] More recently intrigues with the Whigs had seemed to offer the best chance of reducing England to impotence.[4] At the end of the century an intrigue with the high Tories was obviously the right move. Indeed it is not one of the least of the disadvantages of Parliamentary government that it is generally easy to induce a party to embarrass a government by pretending to further its party aims.[5] In the seventeenth century the agents of Louis could do a good deal by the judicious bribery of individual members.[6] In our own days this crude method would probably be impossible. But probably much the same purpose could be effected by contributions to the funds of the party whose programme seemed most likely to prevent interference in continental affairs; and these contributions could be made by agents who would, no doubt, when that party

[1] Charles admitted that he dared not interfere, Burnet, Own Time ii 178, 292 n. 3.

[2] See Halifax, Character of a Trimmer, Foxcroft ii 332-333.

[3] Hallam, C.H. ii 404; above 180-181, 183.

[4] Hallam, C.H. ii 405-406.

[5] Macaulay, Hist. (ed. 1864) iv 336 points out that in 1701 there were agents of France in the House of Commons, who, "though few, had obtained so much influence by clamouring against standing armies, profuse grants, and Dutch favourites, that they were often blindly followed by the majority."

[6] Hallam, C.H. ii 406-409.

obtained office, be suitably rewarded with the title, which, according to the prevailing tariff, the amount of the contribution had earned. But the seventeenth century differed from our days, not only in the methods of corruption which it was possible to use, but also in the persons or bodies whom it was most profitable to corrupt. It was then, not the House of Commons, but the king which controlled the policy of the state. It was therefore, if possible, better to make a bargain with him. Therefore, although Louis had often been deceived by Charles,[1] he found it better worth while to pay him, to be rid of Parliament, than to pay the Whigs to oppose the king. Though they took his money, their anti-Catholic feeling was closely allied to an anti-French feeling, which might at any time lead England to interfere in continental affairs. On the other hand, James was thoroughly pro-French. Obviously, therefore, it paid Louis to take measures to prevent the demand for Exclusion from ever being heard of again.

Thus Charles redeemed a situation that at one time seemed almost hopeless. His financial position was now secure; and he was supported by the large majority of his subjects. He soon carried the war into the enemy's camp. The charters of London[2] and sixty-six other towns,[3] which were the strongholds of the Whigs, were forfeited, and their constitutions were remodelled in such a way that the Tory interest was made predominant. Shaftesbury, thus deprived of his main support, fled, and died an exile in Holland. The intrigues of some of the Whig leaders, which came to light when the Ryehouse Plot was discovered, were avenged by a series of arrests for treason.[4] Russell[5] and Sidney[6] were executed, Essex destroyed himself in the Tower,[7] and Monmouth was driven into exile.[8] On the day of Russell's execution the University of Oxford solemnly condemned twenty-seven propositions taken from various writers, which it regarded as justifying such treasonable attempts, and asserted that unconditional obedience under the divinely appointed king was, under

[1] See Louis' instructions to Barillon, March and April, 1680, cited Ranke, op. cit. iv 103.

[2] 8 S.T. 1039; below 566; but before this case was decided London had been captured by the Tories; "On Midsummer day 1682 by a combination of force and fraud the Lord Mayor . . . foisted two Tory sheriffs on the City and, before the year was out, made sure that a Tory Mayor would succeed him," Pollock, Camb. Mod. Hist. v 229; cp. The Trial of Pilkington and others (1683) 9 S.T. 187; in some cases, e.g. at Tiverton, forfeiture of charters was urged on the government by the Deputy Lieutenants, S.P. Dom. 1679-1680, 499-500; below 210-211.

[3] Pollock, Camb. Mod. Hist. v 229.

[4] (1683) 9 S.T. 358 seqq. [5] 9 S.T. 578. [6] Ibid 818.

[7] Many believed, apparently without warrant, that Essex was murdered. See The Trial of Braddon and Speke for suborning witnesses to prove that the earl was murdered, (1684) 9 S.T. 1127.

[8] Pollock, Camb. Mod. Hist. v 230.

all circumstances, the duty of the subject.[1] "The Whigs," says Ranke,[2] "were preached at as much as the dissenters. From all parts of the country and from all classes the king received addresses, expressing hatred of their opinions and tendencies. That the doctrine of the lawfulness of resistance threatened the country with disorders which might lead to civil war, procured for the doctrine of passive obedience a momentary supremacy in social life."

During the closing years of the reign the party of the stricter Tories, led by the Duke of York, was in the ascendant.[3] In spite of the Test Act, the Duke of York was in 1684 made Lord High Admiral.[4] In spite of the Triennial Act, Parliament was not summoned.[5] Rochester, the Duke of York's brother-in-law, and Jeffreys, gained in power and influence at the expense of more moderate men like Halifax and North. But Charles did not decisively commit himself to either party. Parties were in a balanced state when the king died February, 1685.[6] His brother James quietly succeeded to the throne.

When Charles died the monarchy was stronger than it had ever been since the death of Elizabeth; and the Parliament which James summoned shortly after his accession showed that the nation acquiesced in this state of affairs. No doubt care had been taken with the elections. No doubt the remodelling of the corporations had had a powerful influence.[7] But, when all such allowances have been made, it is quite clear that the nation regarded a strong monarchy as the best security against a recrudescence of the turmoil and violence of the Exclusion agitation. The suppression of Monmouth's rebellion still further increased the strength of the monarchy. Secured by means of his cordial relations with France from all danger of foreign war, with money enough to support an army to repress all disturbances at home, there is no doubt that, as Ranke says,[8] James "would have ensured himself a peaceful and perhaps a glorious reign if he could have prevailed on himself to treat his religion as a private matter." But, though he had so treated his religion so long as he was Duke

[1] Somers' Tracts viii 420; cp. Echard, History of England, vol. iii Bk. ii c. 5 p. 1036.

[2] Op. cit. iv 182.

[3] Foxcroft, op. cit. i 357.

[4] Reresby, Memoirs 303—"The name and patent not being given, because of the Act of Parliament for taking the oaths and the sacrament. However, this did dissatisfy some people."

[5] Character of a Trimmer, Foxcroft ii 300; Halifax gave the king good reasons why he should summon a Parliament, see Reresby, Memoirs 293-294; cp. Ranke, op. cit. 190, 191.

[6] Foxcroft, op. cit. i 420-435.

[7] Ranke, op. cit. iv. 230, 231.

[8] Ibid 216.

of York, he could not prevail upon himself so to treat it when he became king. Such a course he considered to be both cowardly, and contrary to his duty to God who had given him his throne.[1]

James had a few good qualities. He was industrious and personally brave, and had won some praise for his services in connection with the navy. But, such good qualities as he had, were entirely overshadowed by his moral and intellectual shortcomings. He was as impatient of contradiction as his grandfather, without his grandfather's geniality. He was as bigoted as his father, but in a cause which was feared and hated by all but the most insignificant minority of his subjects. He had some of his father's dignity, but none of his moral purity or his moral courage in adversity. His religion came first: the welfare of his country a bad second. And, such was his impatience to further the cause of his religion, that in three years he had united the nation against him.

Even his subservient Parliament began to murmur when the king's intentions to favour the Catholics became obvious.[2] The persecution of the Huguenots in France, and the presence of the refugees in England, brought home to all the peril of Protestantism, and aroused a fiercer hostility to France.[3] The king had already a standing army, which was largely officered by Catholics; and he avowed his intention of procuring, if possible, the repeal of the Test Act and the Habeas Corpus Act[4]—the two statutes which were the chief guarantees for a Protestant and a constitutional government.[5] As Parliament would obviously refuse to consent to repeal either of these statutes, it was prorogued. When it was found to be impossible to induce its members to promise to vote for such measures as these, it was dissolved;[6] and active measures were taken to secure the return of a more compliant assembly.[7] In the meantime James set about his design of restoring Catholicism by means of his prerogative and a packed bench of judges. By the exercise of the dispensing and suspending powers the Test Act was practically repealed; and all ministers—even uncompromising Tories like Rochester[8]—were dismissed if they adhered to their religion. In defiance of the statute of 1661, the court of High Commission was re-

[1] Ranke, op. cit. iv 216, 217. [2] Ibid 270-276. [3] Ibid 266-267.

[4] In 1685 Halifax wrote to the earl of Chesterfield, "I will onely tell you in short, that I have a fayre fall, and am turned away, because I could not prevayle with myselfe to promise before hand to bee for taking away the Test and the bill of Habeas Corpus," Foxcroft, op. cit. i 454; cp. Reresby, Memoirs 323-324.

[5] Foxcroft, op. cit. i 468.

[6] Reresby, Memoirs 370; cp. Macaulay, Hist. ii 24; Ranke, op. cit. iv 309.

[7] Ibid 332-333; Bramston, Autobiography (C.S.) 301-302; Macaulay, Hist. (ed. 1864) ii 76-77, 81-82, 85-87.

[8] Ranke, op. cit. iv 307-309.

established in 1686 by an exercise of the powers belonging to the king as supreme head of the church;[1] and thus the royal supremacy, which had been sanctioned by statute for the preservation of the Reformation settlement, was used to destroy it. By means of the issue of a Declaration of Indulgence, James hoped to unite Roman Catholics and Protestant nonconformists against the church of England. But Charles II. had already found that this scheme was hopeless;[2] and Halifax's "Letter to a Dissenter" convinced all thinking Protestants that such an alliance would be dangerous alike to their liberties[3] and their faith.[4] Nothing, however, could convince James that his hopes were vain. He reissued his Declaration, and ordered the clergy to read it in their churches.[5] He then proceeded to prosecute the Seven Bishops for seditious libel because they had presented to him a respectful petition[6] against this order, in which the existence of his prerogative to suspend laws was questioned. Even their acquittal, and the outburst of popular feeling with which it was accompanied, taught him nothing.

In the same month as the bishops were acquitted (June, 1688) a son was born to James. As he would certainly be brought up a Roman Catholic, it became clear that active steps must be taken to guard against a continuance of a Roman Catholic dynasty.[7] William of Orange, who, in a tract which had an immense circulation, had pronounced against the Declaration,[8] was invited to come over to preserve the Protestant religion and the liberties of England. William accepted the invitation, and got the consent of his people to undertake his great adventure, because its success would mean the adhesion of England to the grand alliance against Louis XIV., of which he was the acknowledged leader. As Ranke has said, "Parliamentary principles in England had the advantage and the good fortune to enter into alliance with the general interests of Europe."[9] The diplomatic blunders of James, and the mistake made by Louis XIV. in not

[1] See 11 S.T. 1143 for the order establishing it. [2] Above 172.

[3] "Where to rescue yourselves from the severity of one law, you give a blow to all the laws by which your religion and liberty are to be protected; and instead of silently receiving the benefit of this Indulgence you set up advocates to support it, you become voluntary aggressors, and look like counsel retained by the Prerogative against your old friend Magna Charta, who hath done nothing to deserve her falling thus under your displeasure. If the case then should be, that the price expected from you for this liberty is giving up your right in the laws, sure you will think twice you go any further in such a losing bargain," Foxcroft, op. cit. ii 372.

[4] "If they [the Roman Catholics] do not succeed in their design they will leave you first; if they do, you must either leave them when it will be too late for your safety, or else after the queaziness of starting at a surplice you must be forced to swallow transubstantiation," ibid 376.

[5] For the order see 12 S.T. 278; for the petition of the bishops see ibid 239.

[6] Ibid. [7] Temperley, Camb. Mod. Hist. v 241-242.

[8] Ibid 239. [9] History of England iv 443.

attacking Holland, enabled William's fleet to sail; and fortunate changes in the wind enabled him to land without any opposition from the English fleet.[1] Too late James tried to conciliate his subjects by concessions.[2] Deserted even by his own daughter, he gave up the struggle and took flight for France. His flight helped to convince the country that James looked to French arms, both to restore him to the throne, and to make it possible for him to re-establish Roman Catholicism. It enabled William to claim, not a mere regency, but the throne. But James was captured and brought back to London. William took care that every facility should be offered to James for a second flight. James fell into the trap, joined his wife in France, and thus left the way clear for William.[3]

A Convention Parliament was summoned, drew up the Declaration of Rights, and offered the throne to William and Mary. The offer was accepted, and the Convention was declared, as the Convention which effected the Restoration had been declared, to be a true Parliament.[4] The Parliament turned its Declaration of Rights into the Bill of Rights;[5] passed other statutes, such as the first Mutiny Act[6] and the Toleration Act,[7] which laid the foundations of the Revolution settlement; and some other temporary Acts,[8] which were made necessary by the exigencies of the situation. As at the Restoration, the Revolution was formally completed and regularized by an Act of the succeeding Parliament, which recognized all the Acts of the Convention Parliament as valid;[9] and as it had been found impossible to induce the Convention Parliament to pass a comprehensive Act of Indemnity, like that passed at the Restoration, William took the initiative, and sent down an Act of Grace, which it was

[1] Temperley, Camb. Mod. Hist. v 243-246.

[2] Ranke, op. cit. iv 422-425. [3] Temperley, Camb. Mod. Hist. v 248.

[4] 1 William and Mary c. 1; for a summary of the debate on this Bill see Macaulay, Hist. of England (ed. 1864) ii 256-257; it is, as Macaulay says, a good illustration of that legal conservatism which is the dominant note of the Revolution.

[5] 1 William and Mary, sess. 2 c. 2.

[6] 1 William and Mary c. 5. [7] Ibid c. 18.

[8] E.g. 1 William and Mary cc. 2, 7, 19—giving powers of arrest to the government; c. 28—payment to the States General of the cost of William's expedition; 1 William and Mary, sess. 2 c. 8, 2 William and Mary, sess. 2 c. 13, 4 William and Mary c. 19, Hist. MSS. Com. 14th Rep. 125 no. 608—indemnity for officials; 2 William and Mary c. 6—arrangements for the government during the king's absence; and c. 8—reversal of the judgment in the quo warranto proceedings against the City of London. In 1695-1696 apprehension of Jacobite activities gave rise to an Act, 7, 8 William III. c. 15 for continuing Parliament after the King's death, or, if no Parliament was sitting, for reviving the last Parliament.

[9] 2 William and Mary c. 1; the passage of the Act was violently opposed, Hallam, C.H. iii 122 and n. (f), and was probably as unnecessary as the similar Act passed in 1661, above 170 n. 3; cp. Somers' argument summarized by Macaulay, Hist. (ed. 1864) iii 155-156.

necessary for both Houses to pass without amendment or not at all. Both Houses passed it unanimously.[1]

The Revolution was a Whig victory; but it was a victory won with the assistance of the Tories and the church. Hence the settlement effected by it was necessarily somewhat of a compromise. Subject to the provisions of the Toleration Act, the Tories secured for the Church of England the retention of its privileged position; as at the Savoy conference, they successfully resisted all attempts at a relaxation of doctrines or formularies which would have permitted Protestant nonconformists to become its members;[2] and in 1700, they secured the insertion of a clause in the Act of Settlement which made it obligatory on the king to join in communion with it.[3] The Whigs secured what was far more important—a Parliamentary settlement of the succession to the throne, and, consequently, the final rejection of the idea that the king's title depended upon a divine right superior to the law of the land.[4] This victory permanently secured both the superiority of the Parliament in the constitution and the supremacy of the law, because, in the new situation created by the Revolution, the Tories found it to their interest to maintain these Whig ideals.[5] They found it to their interest to use the opportunities given to them by the new and independent position of Parliament to criticize the policy of a king whom Parliament had created; and they were glad to take advantage of the supremacy of the law, administered by independent and impartial judges, to protect themselves against their political opponents. Thus, from the political struggles and religious controversies of Charles II.'s and James II.'s reign, and from conditions created by the Revolution settlement, there emerged in their final form a large number of the most fundamental principles of our public law. The constitutional position of the church, the king, Parliament, and the courts were defined. The supremacy of the law, guaranteed by the security of tenure given to the judges,[6] afforded the best of all safeguards for the maintenance of the rights and liberties of the subject.

We must now turn from the history of the environment in

[1] 2 William and Mary, sess. 1 c. 10; Macaulay, Hist. iii 159.

[2] See 6 S.T. 47-61; cp. Hallam, C.H. iii 173-174; Macaulay, Hist. ii 285-290.

[3] 12, 13 William III. c. 2 § 3.

[4] Above 186; below 209, 230-231.

[5] "The Tories throughout the reign of William evinced a departure from the ancient principles of their faction in nothing more than in asserting to the fullest extent the powers and privileges of the commons; and, in the coalition they formed with the malcontent Whigs, if the men of liberty adopted the nickname of the men of prerogative, the latter did not the less take up the maxims and feelings of the former," Hallam, C.H. iii 143.

[6] Below 234.

which these principles grew up to the history of the principles themselves.

The Principles of Public Law

We have seen that the ecclesiastical history of Charles II.'s and James II.'s reigns played a great part in shaping the constitutional settlement made at the Revolution. I shall therefore, in the first place, give some account of the legislation which resulted from that history. Secondly, I shall describe the position which the king and his prerogative took in the state as the results of the constitutional conflicts of the seventeenth century. Thirdly, I shall describe the position in the state which Parliament secured, and its relation to the prerogative. Fourthly, I shall describe the change in the position of the law courts and the law, and the manner in which that change enabled the courts to provide adequate securities for the liberties of the subject as against both the prerogative and Parliament.

(1) *The ecclesiastical legislation and the position of the Church of England.*

We have seen that the two great causes for the unpopularity incurred by the Church of England during the reigns of the first two Stuart kings had been removed. Firstly, Laud and his system had been swept away;[1] and a better and more broad minded set of bishops were set to rule over the church. Secondly, the court of High Commission had been abolished,[2] so that, even if the bishops had been so minded, they could not have hoped to enforce the rigid discipline which Laud attempted to impose on both the clergy and the laity. But we have seen that the efforts of the adherents of the church, helped by the royalists and the king, had stopped proposals for legislation which would have remodelled the church and her formularies.[3] All that the opponents of the church had been able to secure was the exclusion of the bishops from the House of Lords, and of the bishops and clergy from secular offices, and the abolition of the ecclesiastical courts.[4] This legislation was repealed at the Restoration,[5] so that, except for the abolition of the court of High Commission, the church stepped back into the place which it occupied at the outbreak of the Great Rebellion.

The civil wars had not diminished the hatred and fear which all classes felt towards the Roman Catholics; and they had left

[1] Above 132-133.
[2] Above 112.
[3] Above 121-122, 137-138.
[4] Above 114-115, 136, 140.
[5] 13 Charles II. st. 1 c. 2, repealing 16 Charles I. c. 27; 13 Charles II. st. 1 c. 12 repealing 16 Charles I. c. 11, except as to the court of High Commission.

a legacy both of political and theological hatred towards the nonconformists. Both church and king had been restored. They had been allies in adversity. They were still to be allies in prosperity. The church taught the doctrines of the divine right of kings, passive obedience, and non-resistance.[1] In return the king must, if he could not compel all his subjects to conform to the church, at least make it unpleasant for those who refused to conform. Church and king must thus act together to make their own standards of political and theological orthodoxy the conditions precedent for full citizenship. It was these ideas which wrecked the attempts at comprehension for Protestant nonconformists which were made at the beginning of Charles II.'s reign.[2] We have seen that Charles II. would have been willing to use his influence to secure a general toleration for Roman Catholic as well as Protestant nonconformists; but that, as no party would concede anything to the Roman Catholics, he lost interest in all such schemes, and thereby gave a free hand to the cavalier and Anglican majority in the Parliament of 1661.

The laws already in force pressed severely upon the Roman Catholics. The new laws enacted during the first years of Charles II.'s Long Parliament were aimed at the Protestant nonconformists, and proceeded on the assumption that "it was impossible for a Dissenter not to be a rebel."[3] We have seen that in 1661 the Corporation Act had required all holders of offices in corporate towns to take the sacrament according to the rites of the Church of England.[4] In the following year came the Act of Uniformity.[5] It enacted that all ministers should use the revised book of common prayer,[6] and that every minister should declare his unfeigned assent to all things contained therein, on pain of deprivation.[7] The clergy, the heads and tutors of colleges, and private tutors and schoolmasters, must renounce the doctrine that it is lawful to take up arms against the king, to promise to conform to the liturgy, and to make a declaration against the Solemn League and Covenant.[8] No person who had not had episcopal ordination was to hold any benefice.[9] Heads of colleges must, within one month of election, subscribe the thirty-nine articles.[10] This Act aimed at maintaining a strict standard of Anglican orthodoxy, and at securing for the members of the Anglican church a privileged position in the state. Other Acts were directed against the attempts of Protestant nonconformists to conduct their worship in their own way. To allow this, it was thought, not unreasonably,

[1] Below 276-280.
[2] Above 171-173.
[3] Halifax, A Letter to a Dissenter, Foxcroft ii 376.
[4] 13 Charles II. st. 2 c. 1 § 9; above 167.
[5] 14 Charles II. c. 4.
[6] § 1. [7] §§ 2-4. [8] §§ 6-8. [9] § 9. [10] § 13.

would give facilities for plots against the government.[1] In 1662[2] Quakers who refused to take an oath, or who maintained the doctrine that the taking of oaths was unlawful, or who assembled together to the number of five or more, were made liable on a third offence to transportation. In 1664[3] the holding of a seditious conventicle—by which was meant any assembly for the exercise of religion "in other manner than is allowed by the liturgy or practice of the church of England"—was made punishable, on a third offence, by transportation for seven years, or a fine of £100. In 1665[4] penalties were imposed on preachers in conventicles, or persons teaching in schools, who came within five miles of a corporate town without taking the oath set out in the Act.[5] There is no doubt that these Acts inflicted an immense amount of suffering on the nonconformists.[6] Occasionally judges were merciful;[7] in some places the feeling in favour of the nonconformists was so strong that it was impossible to put them in force;[8] and sometimes they were evaded.[9] But in most places the magistrates and the judges were only too ready to use the weapon of revenge which political and theological rancour had

[1] See the trial of John James (1661) 6 S.T. 67; for different reports of the happenings at conventicles see S.P. Dom. 1664-1665 461, cxxvi 13; ibid 476, cxxvi 109; ibid 183, cxi 67—a note of 17 conventicles held in and near London January 10-29, 1665; we are told in 1664 that, at a conventicle held near London, the return of the king was lamented, that "they talk of the time of liberty drawing nigh and of the king by this late Conventicle Act having gone to the limit of his chain," and that "Talbot, a fifth monarchist, keeps a diary of all transactions of judges and others against fanatics to produce when times change," S.P. Dom. 1663-1664 603, xcix 7; it is quite clear that the doings of some of the sects required to be watched carefully, S.P. Dom. 1664-1665 293, cxvii 37; ibid 344, cxx 24; 1665-1666 xxvi-xxxv.

[2] 14 Charles II. c. 1; 16 Charles II. c. 4 § 18 provided that a single refusal to take an oath recorded by a court should be equivalent to a conviction and be punished by transportation; see the Trial of Margaret Fell and George Fox (1664) 6 S.T. 629.

[3] 16 Charles II c. 4; further powers for the suppression of conventicles were given by 22 Charles II. c. 1.

[4] 17 Charles II. c. 2; in 1671 there was an attempt to make the Act more severe by giving additional powers to the magistrates to levy fines imposed by the Act; a bill to this effect passed the Lords, but was lost by two votes in the Commons, Hist. MSS. Com. 9th Rep. App. Pt. ii 9 no. 35.

[5] "I, A.B., do swear that it is not lawful upon any pretence whatsoever to take arms against the king, and that I do abhor that traitorous position of taking arms by his authority against his person or against those that are commissionated by him in pursuance of such commissions. And that I will not at any time endeavour any alteration of government in church or state."

[6] See S.P. Dom. 1663-1664 63-65, lxix 5—an account in a letter to Boston "of the sufferings of God's people from the Act of Uniformity"; S.P. Dom, 1664-1665 20, cii 137.

[7] Hale was instrumental in getting some Quakers acquitted who were charged with offences against the Conventicle Act, S.P. Dom. 1664-1665 20, cii 137.

[8] E.g. at Newcastle, S.P. Dom. 1668-1669, 342.

[9] "I have been informed of several ways they have of avoiding the (Conventicle) Act, one of which is to choose a convenient house where others are pretty thick on either side and opposite, and so hear the preacher from the window," ibid.

placed in their hands.[1] Many were imprisoned; and the state of the prisons was such that a sentence of imprisonment too often meant a sentence of death.

In the second decade of Charles II.'s reign it was Roman Catholicism rather than Protestant nonconformity which excited the greatest fear. In 1672 the first Test Act was passed.[2] It required that all persons holding any office under the crown, and all persons employed by the Duke of York, should take the oaths of supremacy and allegiance, and subscribe a declaration against transubstantiation.[3] It was further provided that, if persons converted to Roman Catholicism brought up their children as Roman Catholics, they and their children should, so long as they were Roman Catholics, be disabled from holding any office in church or state.[4] We have seen that the second Test Act[5] required members of both Houses of Parliament to make a declaration against transubstantiation. It enacted that any person who disobeyed the Act should be deemed to be a popish recusant convict,[6] and be subjected to other disabilities.[7]

From time to time during Charles II.'s reign attempts had been made to relieve the Protestant nonconformists from some of their disabilities. In 1667 Bridgman, Wilkins, and Hale endeavoured to secure a measure of comprehension and toleration.[8] But the church party raised the cry of "the church in danger"; and though Marvel effectually ridiculed Parker, the champion of the church party, in his "Rehearsal Transposed,"[9] the House of Commons was so bigoted that it declined even to receive any bill on this subject.[10] Fear of the Roman Catholics, however, produced a more charitable spirit. Several bills providing a measure of relief for Protestant nonconformists were considered in the latter part of Charles II.'s reign;[11] but none of them matured. The crisis came when James II. sought to win the support of the

[1] "The statute would do little hurt if put in execution by impartial judges," S.P Dom. 1664-1665 20, cii 137.

[2] 25 Charles II. c. 2; above 181-182. [3] §§ 1 and 8. [4] § 7.

[5] 30 Charles II. st. 2 c. 1; above 184-185.

[6] For the statutes defining the position of a popish recusant convict see vol. iv 495-496, 507.

[7] They could not hold any place of profit or trust, sue at law or in equity, take any gift or legacy, or be guardians or executors.

[8] Burnet, Own Time i 466-468.

[9] See ibid i 467 n. 2; "Charles himself interfered when the licenser L'Estrange wished to suppress the second edition of the first part of the *Rehearsal Transposed*," ibid.

[10] Ibid i 468.

[11] A religious comprehension Bill was before the House of Lords in 1674, Hist. MSS. Com. 9th Rep. App. Pt. ii 44 no. 170; see ibid 68 no. 315 for another bill in 1675; in the 11th Rep. App. Pt. ii 203 no. 289 *c*, there is calendared an amended draft of an Act for distinguishing Protestant dissenters from Popish Recusants, which was brought before the House of Lords in 1680.

Protestant nonconformists for his Declaration of Indulgence. "There are certain periods of time," wrote Lord Halifax, "which being once past, make all cautions ineffectual and all remedies desperate. Our understandings are apt to be hurried on by the first heats, which, if not restrained in time, do not give us leave to look back till it is too late. Consider this in the case of your anger against the Church of England, and take warning by their mistake in the same kind when, after the late King's restoration, they preserved so long the bitter taste of your rough usage to them in other times that it made them forget their interest and sacrifice it to their revenge."[1] The Dissenters took this wise advice; and the refusal of all but an insignificant minority to be thus deluded ensured them a measure of relief after the Revolution had been accomplished.

This relief was given by the Toleration Act of 1688.[2] It applied to all nonconformists who took the oath of allegiance, and swore that they renounced the deposing power of the Pope, and the belief that he had jurisdiction in England;[3] and to Quakers who made an affirmation to the same effect.[4] Persons who complied with these conditions were exempted from the penalties of certain enumerated acts of Elizabeth, James I., and Charles II.'s reigns, but not from the two Test Acts of 1673 and 1678.[5] Meetings of nonconformists were thereby made legal; but it was specially provided that no such meeting should take place behind locked doors.[6] Nonconformist preachers and teachers (including baptist ministers) who complied with these conditions, and subscribed to certain of the thirty-nine articles, were not to be liable to the penalties imposed by the legislation of Charles II.'s reign,[7] and were exempted from serving as jurors or in parochial offices.[8] Places of worship allowed by the Act were to be certified to the bishop or archdeacon,[9] and penalties were provided for disturbing the conduct of the services in any church or congregation permitted by the Act.[10] In 1695[11] a further measure of relief was extended to Quakers. In civil, but not in criminal proceedings, they were allowed to affirm. But

[1] A Letter to a Dissenter, Foxcroft ii 373; see above 193.
[2] 1 William and Mary c. 18. [3] § 1. [4] § 10.
[5] §§ 1-3; the acts were 1 Elizabeth c. 2 § 14; 23 Elizabeth c. 1; 29 Elizabeth c. 6; 35 Elizabeth c. 1; 3 James I. cc. 3, 4, 5; 22 Charles II. c. 1.
[6] § 4.
[7] §§ 6 and 7; the Acts enumerated are 14 Charles II. c. 4 § 10; 17 Charles II. c. 2; 22 Charles II. c. 1.
[8] § 8. [9] § 16. [10] § 15.
[11] 7, 8 William III. c. 34, continued for seven years by 13, 14 William III. c. 4; for details as to the passage of the latter Act through the House of Lords see House of Lords MSS. iv no. 1740; for a somewhat similar Bill which failed to pass in 1690 see Hist. MSS. Com. 13th Rep. App. Pt. v 170 no. 328.

they were not allowed to serve on juries, or to hold office; and a special procedure was devised against those of them who refused to pay tithes.

The effect of this legislation was to legalize the worship of Protestant nonconformists, and to relieve them from the penalties to which they had formerly been subject. But the provisions of the Corporation[1] and Test Acts[2] still debarred them from holding office, if they declined to take the sacrament according to the rites of the church of England; and, as we have seen,[3] the church of England resisted all attempts to modify its formularies with a view to comprehension. As Macaulay has pointed out, this legislation "will not bear to be tried by any principle, sound or unsound"; and yet, as he rightly says, it successfully accomplished, without creating any further excitement, the difficult feat of introducing a large measure of toleration. It succeeded where a larger, a more comprehensive, and a more logical measure would have roused the passions of religious bigotry, and have seriously compromised the success of the Revolution settlement.[4]

It is obvious that the Roman Catholics could take no benefit from the Toleration Act; and, to make this quite clear, an express clause to this effect was inserted.[5] Roman Catholicism, as the result of the Revolution, had come to be more closely connected than ever with treasonable designs. Therefore it is not surprising to find that the laws against Roman Catholics were made more severe. Thus, in 1688, it was enacted that Roman Catholics who refused to make the declaration set out in the Test Act should not reside within ten miles of London,[6] and should not be allowed to have arms or munitions, or horses above the value of £5.[7] In 1698-1699 [8] it was enacted that a Roman Catholic bishop or priest who said mass, or a Roman Catholic who kept a school, should be liable to perpetual imprisonment;[9] and that Roman Catholics should be incapable of holding and purchasing land.[10] It was further provided that if Roman

[1] Above 167, 197. [2] Above 181-182. [3] Above 172, 197.

[4] Macaulay, Hist. (ed. 1864) ii 283-284. Its provisions "removed a vast mass of evil without shocking a vast mass of prejudice; they put an end at once and for ever, without one division in either House of Parliament, without one riot in the streets, with scarcely one audible murmur even from the classes most deeply tainted with bigotry, to a persecution which had raged during four generations.

[5] 1 William and Mary c. 18 § 14; this section also enacts that it shall not extend to persons who deny the doctrine of the Trinity; a Papists' Toleration Bill had been introduced into the House of Lords in 1689 (perhaps with the support of Halifax, see below 288 n. 5) but was dropped, Hist. MSS. Comm. 12th Rep. App. Pt. vi 385 no. 194.

[6] 1 William and Mary c. 9. [7] Ibid c. 15.

[8] 11 William III. c. 4. [9] § 3.

[10] § 4—unless they took the oaths of allegiance and supremacy and made the declaration against transubstantiation—a condition they obviously could not fulfil.

Catholic parents endeavoured to change the religion of their Protestant children by refusing them maintenance, the lord chancellor should have power to order maintenance.[1]

If we confined our attention to the legislation of William III.'s reign we should be inclined to say that the Revolution had made little difference in the ecclesiastical policy of the state. The constitutional position, the doctrines, and the formularies of the established church were unchanged; and communion with that church was still necessary to secure full rights of citizenship. The position of the Roman Catholics was altered only for the worse. The only direct change was the measure of toleration accorded to the Protestant nonconformists. But to estimate the effects of the Revolution upon the ecclesiastical policy of the state simply from a review of this legislation would be altogether misleading. With the overthrow of the theory of divine right of kings, and its accompanying doctrines of non-resistance and passive obedience[2]; and with the disappearance of the more acute political and theological grievances of the Protestant nonconformists brought about by the change of dynasty and the Toleration Act; religious controversies gradually ceased to exercise that dominating influence upon politics which they had exercised throughout the sixteenth and seventeenth centuries. That influence had embittered political controversy. It had had, as we have seen,[3] no small share in causing the outbreak of the Civil War, and it had determined the course of English political history since the Restoration. Its gradual elimination tended, in course of time, to create an atmosphere in which the idea of a larger toleration could grow up, till that idea ceased to be the visionary hope of a few speculative thinkers, and became a measure demanded by statesmen. This change of feeling was helped forward by the fact that, as a result of the Revolution, the fundamental principles of English public law were now finally settled. This settlement furnished a basis of agreement, which rendered it possible to develop a system of government under which parties peaceably contended in Parliament for the victory of their respective political views. The victory of the one or other party gradually ceased to be accompanied and followed by the proscription of their opponents. The opposition peacefully succeeded to the places of their opponents without danger to the stability of the government. Stagnation was avoided, and at the same time an orderly and a continuous development of the constitution was secured.

[1] § 7; the severe provisions of this Act were rarely enforced, see Hallam, C.H. iii 179.

[2] Below 279.

[3] Above 121-122, 137-138.

This change in ideas took many years to accomplish fully. There was an outburst of Anglican intolerance towards the Protestant nonconformists at the end of Anne's reign, which resulted in the passing of the Occasional Conformity[1] and Schism[2] Acts. Throughout the eighteenth century any attempt to pass a measure of relief for the Roman Catholics was bitterly opposed. But we can see the beginnings of the change at the Revolution. Already in the Parliaments of William III.'s reign topics of religious, were tending to fall apart from topics of political, controversy; and, though in Sacheverell's impeachment,[3] they united again, it was but a momentary revival. We shall now see that, just as this elimination of the *odium theologicum* settled the constitutional position of the established church for upwards of a century, so it helped to settle, and for the most part to settle finally, most of the political and constitutional controversies of the seventeenth century.

(2) *The constitutional position of the king and his prerogative.*

The legislation of the Long Parliament, the Interregnum, and the Restoration had contributed towards the settlement of the constitutional position of the king and his prerogative; but these events had by no means completely settled it. There were many outstanding questions, both as to the relation of the prerogative to Parliament and the law, and as to the actual contents of particular prerogatives, which still awaited settlement; and, in the heated political and theological atmosphere of Charles II.'s and James II.'s reigns, many of these questions were furiously debated by the rival political and religious parties. Amidst the turmoil of these contests it sometimes almost seemed that the events which had happened between 1641 and 1660 had been forgotten; and that the same contests between Parliament and the prerogative, which had been fought out in the earlier Stuart period, were being fought over again. In reality it was not so. These events had altered entirely the nature of the contest, and the aims of the contending parties.

We have seen that under the earlier Stuart kings a theory had been elaborated which would have made the king, by virtue of his extraordinary powers, the sovereign power in the constitution, and would have enabled him to over-ride, and if necessary dispense with Parliament.[4] Neither Charles II. nor even James II. laid claims to such powers as these. Even the judgment of Herbert, C.J., in *Godden* v. *Hales*,[5] which may be taken as the

[1] 10 Anne c. 5. [2] 12 Anne c. 7.
[3] (1710) 15 S.T. 1; see Hallam, C.H. iii. 204-208.
[4] Above 20-29. [5] (1686) 11 S.T. 1166; below 223-225.

highwater mark of prerogative pretension in the latter half of the seventeenth century, made no such claim as this. It asserted the particular prerogative to grant dispensations in the widest of terms, and asserted that the kings of England, being sovereign princes, had certain inherent prerogatives (of which this was one) which could not be taken away even by Parliament. It made no assertion, such as was made in the *Case of Ship Money*, that the king, whenever he deemed it necessary, could override Parliament.[1] Similarly, the sovereignty which the Long Parliament in fact exercised during the Civil Wars and up to the time when it was expelled by Cromwell,[2] also disappeared at the Restoration. The king was restored to all the prerogatives of his predecessors, except in so far as they had been modified by the legislation of the Long Parliament to which Charles I. had assented. The independent position which he occupied in the state was guaranteed by the belief held by a large, and perhaps the largest number of his subjects, that he was king by divine right, that it was both a crime and a sin to resist his commands, and that, even if active obedience to them could not be given, passive obedience was always due.[3] The lawyers recognized that he was the head of the government and the state.

It was thus generally recognized that both king and Parliament were necessary parts of the constitution, each occupying an independent sphere of its own; each possessed of the powers and privileges necessary for the fulfilment of its appointed functions. This new conception of the constitutional position of king and Parliament, which had emerged at the Restoration, comes out very clearly in Hale's tract "Of Soveraigne Power."[4]

Hale begins by pointing out that the kinds of government are very various—there are monarchies, aristocracies, and democracies, "and some mixt of all, and those mixtures are or may be infinitly various." "In some Constitutions one part of the Soveraigne Power is in one part of the government, another part in another."[5] These variations have arisen sometimes by the "original institution of the government," sometimes by "long custom and usage," sometimes by conquest, sometimes by "concessions and naturall agreement between the governors and governed."[6] In England Hale has no hesitation in attributing "Soveraigne Power" to the king. "No good subject that under-

[1] Above 28, 52, 53. [2] Above 144-146. [3] Below 276-279.

[4] Harleian MS. 711 ff. 418-439; vol. v App. III.; Hales tract is entitled, "Reflections by the Lord Cheife Justice Hale on Mr. Hobbes his Dialogue of the Lawe"; the first part—"Of Laws in Generall and the Law of reason," I have already noticed, vol. v 482-485; the second part, which I describe here, is entitled "Of Soveraigne Power"; in this separate tract it consists of 21 pages (22-43).

[5] P. 22. [6] Pp. 23-26.

stands what he sayes can make any question where the Soveraigne Power of this kindom resides. The laws of the land and the oath of supremacy teach us that the king is the only supreame governour of this realme, and as incident to that supreame power he hathe among others these greate powers of Sovereignty. 1. He hath the only power of makeing peace and declareing warr. 2. He hath the only power of giveing the vallue and legitimation to Coyne. 3. He alone hath the power of pardoning the punishments of publique offences. 4. From him originally is derived all jurisdiction for the administration of the common justice of the kingdom whether civil or ecclesiasticall, whether ordinary or delegate. 5. In him alone is the power of the militia of this kingdome, and the raiseing of forces both by land and sea. 6. In him resides the power of making lawes. The laws are his laws enacted by him. These are the greate Jura Summi Imperii that the laws of this kingdome have fixed in the crown of England. Butt yett there are certaine qualifications."[1] Thus, though the laws have no coercive power over the king, they have a directive power over him—he is bound by his coronation oath and the laws that "concerne the liberties of his subjects"; and the laws "in many cases hinder the kinges acts and make them void if they are against law."[2] Then, too, his power over the militia is restrained by the fact that he cannot compel his subjects to serve out of the kingdom, and that he cannot raise money without the consent of Parliament;[3] while his power over legislation is also qualified by the necessity of getting the same consent.[4] Hale will have none of the fancies of those speculators who maintain that "there can be noe qualifications or modifications of the power of a soveraigne prince, but that he may make repeale and alter what laws he please, impose what taxes he pleases, derogate from his subjects propertie how and when he please. That he alone is judge of all publique dangers and may appoint such remedyes as he please and impose what charges he thinkes fitt in order thereunto."[5] He has no difficulty in proving from English law and history that such "wild propositions are: 1. Utterly false. 2. Against all Naturall justice. 3. Pernicious to the government. 4. Destructive to the common good and safety of the government. 5. Without any shadow of law or reason to support them."[6]

It is probable that Hale was by no means unique in his views as to the constitutional position of king and Parliament. North, whose political views were a good deal more royalist than those of Hale,[7] would probably have agreed with him. He was in

[1] Pp. 26, 27. [2] P. 26. [3] P. 28. [4] Pp. 28, 29.
[5] Pp. 29, 30. [6] Pp. 30-43. [7] Below 531-532.

favour of a strong executive, because a strong executive was necessary to the preservation of the peace.[1] He held, and rightly held, that "there cannot be a more false illusion than it is to suppose that what power the crown lost was so much liberty gained to the people."[2] His political creed was a reasoned creed based, like Hale's, on a study of legal history.[3] He saw that that history, rightly read, was by no means so conclusively in favour of Parliamentary claims as was generally supposed. On the other hand, he had no idea of depriving Parliament of any of its powers and privileges. At the end of Charles II.'s reign he advised the king not to sacrifice the position he had won by doing anything which could be construed as a breach of the law.[4] At the beginning of James II.'s reign he opposed the levy of customs duties before they had been formally voted by Parliament.[5]

Now if we look at the views of these two representative lawyers, from the point of view of our modern constitutional law, we shall be apt to call them both muddled and confused. Hale had obviously misunderstood Hobbes's theory of sovereignty. He seems to have thought that the sovereignty, analysed and explained by Hobbes, necessarily meant that sovereignty of the king, which the royalist lawyers of the earlier Stuart period had maintained.[6] To the term sovereignty he attached quite a different meaning. He interpreted it as meaning simply a supremacy, which was not incompatible with the supremacy of Parliament or the law in their respective spheres. As the king was personally above the law, as the sphere of his supremacy was wider, more active, and more general than the sphere of the supremacy of Parliament or the courts, it was natural to speak of the king as sovereign, and of his supremacy as sovereignty. Because Hale was a common lawyer, his political conceptions were naturally of a somewhat mediæval type.[7] In

[1] "He was sincerely of opinion that the crown wanted power by law; so far was it from exceeding. It was absolutely necessary that the government should have a due power to keep the peace without trespassing upon the rights of any one," Roger North, Lives of the Norths i 316.

[2] Ibid 317. [3] Below 532 and n. 3.

[4] "He urged continually the same doctrine that, holding to the law . . . his majesty was not only safe, but growing in power and credit; which if he forsook the law, would all fall retrograde and scarce ever be recovered," Lives of the Norths i 318; "As there was a necessity of calling a Parliament soon, his lordship often put his majesty in mind of that, and to have a care that no unpopular steps might corrupt the next elections," ibid 319, 320.

[5] Ibid 324.

[6] He is obviously thinking of the arguments in the Case of Ship Money, above 28, 52, 53; see his Tract pp. 40, 41, vol. v App. III.

[7] The common lawyers had not got rid of the idea that limitations were imposed upon king, Parliament, or other merely human law-making agencies by the law of God, see the remarks of Vaughan, C.J., in Thomas v. Sorrell (1674), Vaughan at p. 339; above 67-69, 83-84; below 218-219; such ideas are indeed implicit in the

fact, neither the common lawyers nor the majority of statesmen of this period had really assimilated Hobbes's theory of sovereignty, or attempted to apply it to the concrete facts of English public law—a fact which the Bill of Rights and some of the clauses in the Act of Settlement will make abundantly clear.[1] But, if we look at the constitutional facts of the latter part of the seventeenth century, it is difficult to see to what other conclusion Hale could have come. No doubt he would have admitted, with Sir Thomas Smith,[2] that king and Parliament acting together were the most "absolute" power in the constitution. But in this part of his tract he was concerned with the king and his prerogative, and not with the powers of king and Parliament; and, if we look at the position of the king as the head and director of the government, we must admit that it was not a wholly false representation of the facts to describe him as sovereign, i.e. supreme, in his own sphere, although his powers were limited by law and by the necessity of getting the consent of Parliament to some of his acts. Even at the present day we say that, from some points of view—e.g. from the point of view of the conduct of foreign affairs—the king is sovereign. We all admit that personally he is sovereign, and speak of him as the sovereign.

At first sight it may seem that we are back again in the Tudor period;[3] and that Clarendon's ideal[4] of a restored Tudor monarchy had been realized. If we look simply at the legal theory of the constitution there would be some truth in this view. But if we look at the actual strength of the various parts of the constitution we can see that in the world of fact changes had taken place which had entirely altered their relative positions. In the Tudor period the king was certainly the predominant partner in the constitution. In Charles II.'s reign the respective strength of king and Parliament was very much more on equality. In the Tudor period the king was the permanent government of the country: Parliament was a body only occasionally summoned to vote taxes and pass laws. In Charles II.'s reign the king still conducted the government; but Parliament was almost as permanent an institution, and exercised a general supervision over the conduct of the government. In the Tudor period Parliament was a less organized and a more easily managed body than in Charles II.'s reign. Charles II. could not hope to override his Parliament whenever he differed from it; nor could he

legitimist theories which asserted the king's divine right, above 11, 12, 127, 131, 186; below 276-280; all such ideas show a fundamental misapprehension of the true bearing of Hobbes's analysis of sovereignty.

[1] Below 258-262.
[2] Vol. iv 181-182.
[3] Ibid 208-209.
[4] Above 175-176.

dispense with it permanently, or act without it in matters where its consent was necessary. It is true that Charles II., at the end of his reign, and James II. managed to dispense with Parliament;[1] but that was due to a combination of special circumstances. Both kings had a permanent revenue voted by Parliament, the country was at peace, and Louis XIV. was willing to pay for its continued neutrality. Normally, Parliament could not be dispensed with for any length of time. Thus, although the legal position of the prerogative could be stated in terms which would not have astonished a Tudor lawyer, its actual position was radically altered by the increase in the power and permanence of Parliament.

The constitutional questions at issue, therefore, in the latter half of the seventeenth century differed from those at issue in the first half of the century. The question at issue was no longer whether the prerogative should be the sovereign power in the state, but which of the two independent powers—prerogative or Parliament—should be the predominant partner in the state. The two claimants to this position were fairly equally matched, so that we cannot regard the ultimate decision in favour of the Parliament as in any way a foregone conclusion. In fact, Charles II. temporarily decided it in favour of the crown. It was mainly due to the folly of James II. that that decision was so soon reversed.

No doubt Parliament had a strong position. It represented the nation. It controlled finance and legislation. By means of an impeachment it could take criminal proceedings against the king's ministers if, in its opinion, they had broken the law. During the civil wars and the commonwealth period it had governed the country; and both the experience and the organization, which it had gained during that period, led it to make claims to advise upon and to supervise both the domestic and the foreign policy of the state.[2] On the other hand, a prudent king had an even stronger position. In the first place, he could take advantage of the semi-religious halo with which he and his office were invested by a large section of his subjects, and of the widespread fear of a renewal of civil war. In the second place, he could take advantage of the defects in the representative system, the defective organization of both Houses of Parliament, and the corruptibility of a large number of the members of the House of Commons. In the third place, he could take advantage of his position as the head of the judicial system, and the large powers of control which he had over the courts. In the fourth

[1] Above 191, 192.

[2] Above 174-175.

place, he could press to the utmost those large prerogatives which belonged to him by the law of the constitution. Charles II. used mainly the first three of these expedients, and gained his end by means of them. James threw away the great advantages which the first gave him, by his attempt to use his prerogative in the interests of Roman Catholicism; and he had little opportunity to use the second, because he declined to meet a Parliament which would have demanded the reversal of the religious schemes on which he had set his heart. He was therefore thrown back upon the third and fourth expedients, which he pressed for all they were worth. It is hardly surprising that the total disregard of the national feeling, which this course of policy involved, ended in a rapid and complete failure.

If we look at the way in which Charles II. and James II. used these four different expedients to make the prerogative the predominant partner in the state, we shall be in a position to understand both the character of the constitutional controversies of these two reigns, and the form and contents of the Bill of Rights, the Act of Settlement, and the other statutes, which finally settled the controversies of the seventeenth century, and laid the foundations of our modern constitutional law.

(i) Of the strength which the crown gained from the widespread feeling in the country in favour of divine right, and the accompanying doctrines of passive obedience and non-resistance, and from the equally widespread fear of a renewal of civil war, I need say but little. We have seen that they were the decisive factors in giving Charles II. the victory in the contest over the Exclusion bill.[1] We have seen too that his victory emphasized the fact that the king was king by a title which was superior to that which any merely human law could give him.[2]

(ii) The government of the country was the king's government, and he therefore controlled its whole machinery. It is obvious that this gave great opportunities to a king who was willing to take advantage of the defects which existed either (*a*) in the representative system, or (*b*) in the composition of Parliament. Of the great defects in both Charles II. skilfully and successfully took advantage; and James II. tried with but small success to follow the same policy.

[1] Above 187-189.

[2] Above 186; we find a strong statement of this view in Sir Leoline Jenkins' speech on the Exclusion bill in 1680; he said, "I am of opinion that the kings of England have their right from God alone; and that no power on earth can deprive them of it. And I hope this House will not attempt to do anything which is so precisely contrary, not only to the law of God, but the law of the land too," Cobbett, Parlt. Hist. iv 1190-1191.

(*a*) We have seen that, during the latter half of the sixteenth century, the crown, in order to gain influence in the House of Commons, created boroughs with the right to return members to Parliament.[1] This method of influencing the House of Commons was not much used by the Stuarts.[2] Newark was created a borough with the right to return members to Parliament in 1673; and this was the last time that this power was exercised by the crown.[3] Other methods of influencing elections were, however, freely resorted to. The fact that many of the boroughs were rotten,[4] and the very restricted franchise prevailing in many others, made them very amenable to influences of various kinds, of which the crown naturally attempted to take advantage.[5] But the fact that, in the earlier part of the seventeenth century, nonconformity had gained a great hold on the boroughs prevented the attempts of the crown from attaining much success.[6] The Corporation Act of 1661[7] was designed to counteract the influence of the nonconformists. But it did not succeed in its object;[8] and the crown found it necessary to have recourse to more direct methods. As early as 1661 a warrant had been issued directing that, in all future charters for boroughs, the king was to have the first nomination of aldermen recorders and town clerks, all future nominations of recorders and town clerks, the first appointment of common councillors on the nomination of the town; and that the elections to Parliament were to be made by the common councillors only.[9] This course could only be pursued in the case of the grant of a new charter.[10] But, at the end of the reign, the device of procuring a forfeiture of the borough charters by means of quo warranto proceedings, and then granting a new charter, in which the control of the borough and of the elections to Parliament was given to royal partisans, was carried out on a great scale. Jeffreys in the north and the earl of Bath in the west of England procured very many voluntary surrenders by

[1] Vol. iv 96.

[2] Porritt, The Unreformed House of Commons i 382, 391.

[3] Ibid 392; Hallam, C.H. iii 40.

[4] "To what gross absurdities the following of custom when reason has left it may lead, we may be satisfied when we see the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheepcote, or more inhabitants than a shepherd is to be found, send as many representatives to the grand assembly of law-makers as a whole county numerous in people and powerful in riches," Locke, Two Treatises of Government Bk. ii § 157.

[5] Porritt, op. cit. i chap. iii.

[6] Ibid i 392. [7] 13 Charles II. st. 2 c. 1; above 167.

[8] "Some of them [the nonconformists] were excluded, but most of them found pretexts for qualifying themselves; and in the reign of Charles II. the corporations continued to be the Parliamentary strongholds of the non-conforming interests," Porritt, op. cit. i 393.

[9] S.P. Dom. 1660-1661 608, xxxvi 85.

[10] Porritt, op. cit. i 393.

threats of such proceedings.[1] James reaped the benefit of Charles's preparations; and, when he was considering the question of summoning a second Parliament, he resumed them with great vigour. "Some of the corporations were remodelled twice or three times, when it was seen that the nonconformists or the Roman Catholics, who had taken the places of the ousted churchmen, were not to be relied on for subserviency to the court."[2]

In addition, all through the Stuart period, the court tried to induce both the counties and the boroughs to elect its nominees. James I., Buckingham, Buckingham's agent Bagg, and Charles I., all followed the example of the Tudors in trying to get their nominees elected.[3] Charles II. and Danby[4] directly interfered in the same way;[5] and James II. interfered even more actively.[6] In 1687 he went on a great electioneering tour in the west and north-west of England.[7] In addition, he used the lord-lieutenants and judges of assize as his agents. They were directed to get if possible the electors and candidates to vote for the repeal of the laws against nonconformity, and to support the Declaration of Indulgence.[8]

The subservience of James II.'s Parliament would seem to show that the crown could use all these methods with success if it avoided a policy which stirred up national feeling against it; and, if James II. had avoided such a policy, he might perhaps have organized on these lines a formidable machinery for the control of Parliament. But the ill success of the efforts of the

[1] Porritt, op. cit. i 394-395; it is possible that in some cases a borough may have abused its franchise to exclude the justices, and become, as North said (Examen 624), "the ordinary asylum for all sorts of rogues that fled from the justice of the Sessions"; on the other hand, probably the grand juries of country gentry who presented some of them as common nuisances, ibid, were very likely moved by political bias, cp. S.P. Dom. 1679-1680 499-500—a petition from the Deputy Lieutenants of Devon; they were troubled at the "increase of conventicles, faction, and disorder in Tiverton"; they cited the opinion of lawyers that the corporation was dissolved; and they recommended that a new charter should be granted, in order that the government might be put into the hands of loyal and honest men; for the confusion which resulted in consequence of these proceedings, and their subsequent reversal at the Revolution see Webb, Local Government, the Manor and Borough 269-270.

[2] Porritt, op. cit. i 400; cp. Hist. MSS. Com. 12th Rep. App. Pt. vi 298-300 for a list of charters granted by Charles II. and James II. from 1680 to 1688; for an attempt of the Whigs after the Revolution to turn the tables on their opponents, and exclude the Tories, see Macaulay, Hist. (ed. 1864) iii 131-133.

[3] Porritt, op. cit. i 381-382, 382-383, 386-388; vol. iv 94-95; we have seen, vol. v 448-449, that Charles I. also endeavoured to exclude his leading opponents by picking them as sheriffs.

[4] Reresby, Memoirs 143.

[5] Porritt, op. cit. i 395-396.

[6] "James may not inaptly be described as having been engaged in electioneering from the beginning to the end of his ill-starred reign," ibid i 396; for William III.'s electioneering tour in 1695 see Macaulay, Hist. iv 110.

[7] Porritt, op. cit. i 399.

[8] Reresby, Memoirs 387-388; cp. Porritt, op. cit. i 403.

two earlier Stuart kings, and the failure of James II. to get a Parliament to endorse his religious policy, show that these methods could not overcome a really national opposition.

(*b*) The composition of Parliament gave the king equally great opportunities. In the House of Lords Charles II. became a constant attender at the debates, and used his personal influence with the peers. "He went constantly," says Burnet,[1] "and he quickly left the throne, and stood by the fire; which drew a crowd about him, that broke all the decency of that house. . . . He became a common solicitor, not only in public affairs, but even in private matters of justice. He would in a very little time have gone round the house, and spoke to every man that he thought worth speaking too. . . . He knew well on whom he could prevail: so being once in a matter of justice desired to speak to the earl of Essex and Lord Holles, he said they were stiff and sullen men: but when he was next desired to solicit two others, he undertook to do it, and said . . . 'they are men of no conscience, so I will take the government of their conscience into my own hands'." In the House of Commons a lavish use was made of royal patronage and bribery. Even in the Long Parliament the tone of public morals was low;[2] and it was still lower during the latter part of the century.[3] Roger North, who had sat in Parliament, tells us[4] that, "the most indifferent of the English gentry were perpetually hunting projects to make their estates richer to themselves without regard to others: some to have wool dear, others corn, and the like. One cannot without the very thing imagine the business that was in all their faces." Systematic bribery was resorted to both by the king

[1] History of My Own Time i 492-493.

[2] Cunningham, Industry and Commerce ii 183, n. 1, citing Milton, History of England Bk. iii.

[3] Ibid ii 404-405; above 182, 189; Marvel, in August, 1671, wrote, "Such was the number of the inconstant courtiers increased by the apostate patriots, who were bought off, for that turn, some at six, others ten, one at fifteen thousand pounds in money, besides what offices, lands, and reversions to others, that it is a mercy they gave not away the whole land, and liberty of England," Works ii 394; July, 1675, he writes, "Articles of Impeachment against the Treasurer, but which were blown off at last by great bribing," ibid ii 466.

[4] Lives of the Norths iii 181; cp. Pepys, Diary vii 180—his cousin told him "he never knew what it was to be tempted to be a knave in his life till he did come to the House of Commons, where there is nothing done but by passion, faction, and private interest"; ibid 381, where a good deal of the evil was ascribed to the abandonment of the custom of paying wages and exacting an account from members —"then they chose men that understood their business and would attend it." Apparently members often appeared at the House half drunk after dinner, Pepys, Diary vii 351; cp. S.P. Dom. 1670 88 where there is an entertaining account in a newsletter of how, in order to celebrate a reconciliation with the king, the House of Commons, with the Speaker and the Mace, all adjourned to drink in the king's wine cellars; note Halifax's remark that "Great drinkers are less fit to serve in Parliament than is apprehended," Foxcroft ii 471.

and the ambassadors of foreign powers.[1] Danby created his party by this means;[2] and the attempts made by the House of Commons to exclude placemen[3] were caused by the constant use of royal patronage to create a majority. We shall see that these attempts were constantly resisted by the crown both before and after the Revolution, because the exclusion of placemen would have deprived it of its best means for creating and keeping together a party in the House.[4]

(iii) The use which the king made of his large prerogatives in relation to the judicial system to increase his power, is somewhat analogous to the manner in which he used his position as the controller of the machinery of government to influence Parliament. We shall see that, in the latter part of Charles II.'s reign, when political passions were beginning to grow fiercer, judges were appointed and dismissed purely for political reasons;[5] and that James II., in his efforts to get decisions in favour of his Romanizing policy, carried this policy to even greater extremes than his brother.[6] It is true that the Whigs were hardly in a position to blame the king for thus using his prerogatives. We have seen that they had made the privileges of Parliament the cloak for arbitrary acts.[7] In the city of London, when party feeling had begun to run high, they had been careful to secure men of their own party as sheriffs, in order that they might impanel juries whom they could trust.[8] So well did they do this work that the king complained that he was the "last man to have law and justice in the whole nation."[9] There was considerable

[1] Above 182, 189. [2] Above 182. [3] Below 231-232.
[4] Below 231 n. 11. [5] Below 503-511. [6] Below 509-511.
[7] Above 188 and n. 3.

[8] Their proceedings are thus described by Jeffreys (who had been Recorder of London and knew what he was talking about) in Pritchard v. Papillon (1684) 10 S.T. at p. 359—"It is notoriously known to all that have had any dealing in London . . . that till within these six or seven years last past, the lord Mayor and court of aldermen, and the common hall used to go a birding for sheriffs (you very well know what the phrase means), and perhaps it was not once in ten times that those that were chosen sheriffs held; but generally every year, there were I know not how many elections upon fining off, or swearing, or some reason or other. . . . And the way was to consider, such a one hath most money in his pocket; Oh, then put him up for sheriff, and then if he went off another would be found out, And there was one old deputy Savage, that used to keep a black book, that would furnish names for I know not how many elections. And who should be sheriff, so as to divide into parties, and poll, was never a question before such times as Mr. Jenks that they speak of, came to be put up, and there the dispute began; then the faction began to appear."

[9] Reresby, Memoirs 221, "the king talked to me a great while that evening. . . . The subject was mostly of the late unjust verdicts and proceedings of the juries in London and Middlesex, as to which he used this expression: It is hard case that I am the last man to have law and justice in the whole nation"; see 8 S.T. 759 for the proceedings of the grand jury which ignored an indictment against

justice in this complaint; for, now that juries could no longer be questioned for their verdicts, the crown had no means of controlling them.[1] The only remedy open to him was to get control of the machinery by which they were appointed. This was effected by the remodelling of the corporations. This expedient thus ensured not only the return of the court candidates to Parliament, but also the impanelling of juries who could be trusted to give verdicts favourable to the crown. In this way the best security which the subject had for the maintenance of his liberties was almost destroyed. The administration of the common law, upon which those liberties depended, was tainted at the source. Those who were arrested and imprisoned by the king or his Council could get no redress,[2] and, when the Habeas Corpus Act of 1679[3] prevented the evasions to which the judges had previously had recourse, they still endeavoured to nullify its provisions by the requirement of such excessive bail that it was difficult or impossible for the prisoner to find it.[4]

The law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government.[5] Privilege of Parliament was as straitly restricted by the judges as formerly it had been largely extended by the House of Commons.[6] Punishments were proportioned rather to the wishes of the crown than to the

Shaftesbury for high treason in 1681; cp. Luttrell's Diary i 182-183, 185-186 for two cases in which the court changed the venue because, Shaftesbury being plaintiff, there could be no fair trial in London or Middlesex.

[1] Bushell's Case (1670) Vaughan 135; vol. i 344-347. Judges who tried to browbeat a jury occasionally got the worst of it—at any rate in the country, see Reresby, Memoirs 186-187.

[2] This was a long standing abuse; persons were kept in prison a long time without trial, see S.P. Dom. 1664-1665 103, cvi 21; ibid 1665-1666 33, cxxxv 99, 416, clvii 33, 438-439, clviii 96; ibid 1667-1668 23-24; ibid 1670 264; persons arrested by the Council found it difficult to get release on bail, see Jenkes's Case (1676) 6 S.T. 1190; the refusal of bail was made one of the articles of the impeachment of Scroggs (1680) 8 S.T. 170, 199, 200, and the general warrants under which several persons were arrested were declared by the House of Commons to be illegal, ibid 200; it was one of the articles of Clarendon's impeachment that he "procured divers of his majesty's subjects to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law," 6 S.T. 330.

[3] 31 Charles II. c. 2; vol. i 228; Pt. II. c. 6 § 3.

[4] See the impeachment of Scroggs (1680) 8 S.T. 191.

[5] Ibid 187-192; article iv of the impeachment, ibid 199, alleged that, "in the terms of Easter last past, he did openly declare in the said court, in the case of one Jessop, who was convicted of publishing false news, and was then to be fined, that he would have regard to persons and their principles in imposing of fines, and would set a fine of £500 on one person, for the same offence for which he would not fine another £100"; see also the proceedings against Samuel Johnson (1686) 11 S.T. 1339.

[6] See the proceedings against Sir William Williams for having, as Speaker and by order of the House, printed the information against Dangerfield, 8 S.T. 16, 17, and 13 S.T. 1370; S.C. 2 Shower K.B. 471; see also the case of Jay v. Topham 8 S.T. 18-19 and 12 S.T. 822; on the whole subject see below 268-272.

gravity of the offence.[1] No redress could be got against the misdeeds of favourites of the king whom he chose to protect;[2] and, a fortiori, no proceedings could be taken against servants of the crown who had acted in obedience to the orders of the crown. Danby, when impeached,[3] contended that the king's orders were a complete defence to the charge of instituting negotiations with France after Parliament had voted supplies for a war with that country;[4] and, though possibly the king's orders might be a good defence to that particular charge, because the act of writing to suggest a treaty with France was one which the king could lawfully do, it is clear that Danby and others thought that it would be a good defence to any act whatever; and the king and Council sometimes acted as if they thought that this was the law.[5] Such an admission would have surrendered the whole principle of the supremacy of the law over all subjects, whether they were servants of the crown or not, which had been secured by the Act abolishing the court of Star Chamber and the jurisdiction of the Council in England. The House of Commons upheld this principle; but it is more than doubtful whether it would have been upheld by the judges of the latter part of Charles II.'s and of James II.'s reigns.

Neither Charles II. nor James II. had an administrative court to which they could withdraw from the cognizance of the common law courts cases which, for reasons of state, they considered ought

[1] Above 214 n. 5; cp. 9 S.T. 1371; 11 S.T. 1354-1371; the case of Oates is notorious, cp. Macaulay, Hist. iii 68-71; Hist. MSS. Com. App. Pt. vi. at pp. 78-80, no. 54; Jeffreys said that when he returned from his bloody assize in the West he was reprimanded for his leniency, Macaulay, op. cit. iii 75.

[2] See Pepys, Diary viii 129; ibid 329-330, where he relates how Sir Edmund Bury Godfrey, having directed the arrest of one of the king's physicians for debt, the bailliffs who effected the arrest were beaten by the king's orders, and Godfrey very nearly suffered the same fate; however, Godfrey justified his act, citing the opinion of the lord chief justice—"which makes the king very angry with the chief justice as they say."

[3] Above 185.

[4] The first article of the impeachment was that "he hath traitorously encroached to himself regal power, by treating in matters of peace and war with foreign ministers and ambassadors, and giving instructions to his majesty's ambassadors abroad, without communicating the same to the secretaries of state, and the rest of his majesty's council, against the expressed declaration of his majesty and his parliament; thereby intending to defeat and overthrow the provision that has been deliberately made by his majesty and his parliament for the safety and preservation of his majesty's kingdoms and dominions," 11 S.T. 621-625; to this Danby replied, "the first [article] which is the assuming regal power, I confess I do not understand; having never in my life done anything of great moment, either at home or relating to foreign matters, for which I have not always had his majesty's command . . . I have not been so wanting of common prudence, as in the most material things not to have had his majesty's orders and directions under his own hand, and particularly for the letters now made use of against me," ibid 627.

[5] See S.P. Dom. 1673 xxiii 369.

not to be judged by the rules of the common law.[1] But the large control which they had over the judicial system, and the manner in which they exercised it, almost restored the old conditions which prevailed when the Star Chamber and the Council were active courts. Neither Charles II. nor James II. seriously attempted to restore the Star Chamber.[2] A frontal attack upon this particular restriction upon their prerogative they knew would be hopeless. But they followed the example of their father and grandfather, and turned the flank of this restriction, by the misuse of prerogatives in relation to the judicial system which had not been curtailed. We shall see other and more glaring instances of the same manœuvre if we look at the fourth of the expedients which they employed to make the prerogative the predominant partner in the state — the extensions of certain of their recognized prerogatives.

(iv) There were, of course, certain well ascertained limits to certain of the prerogatives of the crown. The question of taxation direct and indirect had been settled by the Petition of Right and the legislation of the Long Parliament;[3] and we have seen that Hale set out with great clearness the generally recognized limitations upon the king's prerogatives in relation to legislation, and to the army.[4] But the king still had prerogatives, by the judicious use of which he might, with the help of his judges, still hope to circumvent some of these restrictions. Thus, although he had no power to legislate without the consent of Parliament, he had a wide suspending and dispensing power, the

[1] However, they did their best to exercise some such authority; Burnet, History of My Own Time i 603 (Airy's Ed.), relates that Whatley, a Lincolnshire J.P., had disregarded Charles II.'s Declaration of Indulgence, and fined certain persons present at a conventicle in accordance with the Act; "upon which he was brought up to council to be reprimanded for this high contempt of his majesty's declaration, and some privy councillors showed their zeal in severe reflections on his proceedings"; Marvel, Works ii 483, relates that in 1675 the House of Commons complained of "instructions sent into the country touching the gathering of excise and chimney-money, stretching those laws beyond the proper intention."

[2] In 1662 a committee of the House of Lords had reported, "that it was fit for the good of the nation that there be a court of like nature to the late court called the Star Chamber," Hallam, C.H. ii 333; and in that and the following session a bill was before the House to repeal all Acts of the Long Parliament, and to re-enact such as should be thought fit, ibid; nothing more was then done; and probably Hallam is right in his view that even the Royalist House of Commons of 1661 would not have consented to restore the Star Chamber—they refused to restore the High Commission, above 165.

[3] However, between the years 1673 and 1675 the House of Commons thought it necessary to consider a bill to prevent the exaction of money from the subject, see Commons Journals ix 304 (first reading), 324 (second reading); it would appear that the bill was too wide in its scope, and much too severe—offenders were made liable to the penalties of high treason, S.P. Dom. 1675-1676 145; in 1680 a committee was ordered to prepare a similar bill, Commons Journals ix 681-682.

[4] Above 205; vol. v App. III. pp. 508-509.

limits of which had never been accurately ascertained. If this did not enable him to make laws, it at least enabled him to get rid of statutory restrictions which he disliked. Then, too, he was the recognized head of the military power in the state. It is true that he could not compel his subjects to serve abroad;[1] but there was nothing to prevent him from hiring soldiers and forming a standing army if he could pay them.[2] The existence of such an army raised questions as to his powers to discipline these forces, and as to the jurisdiction of the common law courts in cases where these soldiers had committed offences against civilians. Could the king assume sole control, and oust the common law in such cases? It is quite obvious that if Charles II. and James II. could have established their right to an unlimited suspending and dispensing power, and to all the powers necessary to maintain discipline among a standing body of troops, they would have gone a long way in the direction of emancipating themselves from the control of Parliament. Their efforts to do this gave rise to developments of the law upon these two topics which must here be briefly summarized.

(*a*) *The suspending and dispensing power.*

At the outset it will be as well to define the terms "suspend" and "dispense." The former term is generally applied to the abrogation of a statute or statutes, so that they lose altogether their binding force—the Declaration of Indulgence is the best illustration of the exercise of this power. The latter term is generally applied to a permission given to an individual to disobey a statute. The difference, therefore, between these two powers consists rather in the extent to which the law is abrogated than in the quality of the prerogative exercised. In both cases the law is put out of action; but while, in the former case, it is in substance repealed, in the latter it is merely made lawful for a particular person to disobey it. On the other hand, there is a wide difference between both these powers and the power to pardon. Both these powers affect the legality of the act done. They make legal what would otherwise be illegal. A pardon does

[1] Above 205; vol. v App. III. p. 508.

[2] Hallam, C.H. iii 105-106, seems to be quite right when he says of the clause of the Bill of Rights, which declared a standing army illegal without the consent of Parliament, below 241, that it was "a most questionable proposition"; "It seems difficult," he says, "to perceive in what respect this infringed on any private man's right, or by what clear reason (for no statute could be pretended) the king was debarred from enlisting soldiers by voluntary contract for the defence of his dominions, especially after an express law had declared the sole power over the militia without giving any definition of that word, to reside in the crown. This had never been expressly maintained by Charles II.'s Parliaments."

not affect the legality of the act. It simply frees a guilty person from the legal consequences of his illegal act.[1]

That in the Middle Ages a suspending and dispensing power was vested in the king is unquestionable. Such a power is, as Maine has pointed out,[2] an early and a universal attribute of kingship. The king was always supposed to possess a reserve of power which enabled him to correct the deficiencies of the ordinary law; and the King of England was no exception to the rule.[3] To the existence of this power the jurisdiction both of the courts of common law and of the court of Chancery owed something; and all through the Middle Ages it was needed to correct the defects both of the common law and of the statute law. Parliament sat irregularly, and the language of the older statutes was brief and careless.[4] But was this power unlimited? The mediæval lawyer would have given a clear negative answer to this question. But, if we had asked him what the limitations were, he would have returned an answer which the modern lawyer would consider to be both vague and inconclusive. He would have said that the king's power to suspend or dispense was limited by his incapacity to dispense with or suspend the law of Nature or the law of God;[5] that though he might thus deal with merely human laws and the offences created by them (*mala prohibita*), he could not so deal with the offences created by these higher laws (*mala in se*).

A Year Book case of 1496[6] illustrates this point of view. "There is," said Fineux, C.J., "a diversity between *malum prohibitum* and *malum per se*. For it is *malum prohibitum* when a statute prohibits the coining of money, and enacts that, if a man do so, he shall be hung, that is *malum prohibitum*. For before the statute it was a lawful act to coin money, but now it is not so; and with this offence the king can dispense. So if our ships take cloth to any other place than to Calais it is *malum prohibitum;* for it is prohibited by statute; and with this offence the king can dispense. So the king can dispense with the law which prohibits a priest from holding more than two benefices, or which disqualifies a bastard from the priesthood; and these

[1] "A dispensation obtained doth *jus dare*, and makes the thing prohibited lawful to be done by him who hath it. . . . A pardon frees from the punishment due for a thing unlawfully done," *per* Vaughan, C.J. (1674), Thomas v. Sorrell, Vaughan at p. 333.

[2] Early Law and Custom 164.

[3] Vol. ii 443 and n. 5; for illustrations of the exercise of the Crown's dispensing power in ecclesiastical matters in the Middle Ages, see E. F. Churchill in L.Q.R. xxxviii 297-302.

[4] Hallam, Middle Ages iii 60.

[5] Vol. ii 442 n. 2, 443-444, and App. II.

[6] Y.B. 11 Hy. VII. Mich. pl. 35, ff. 11, 12.

and the like cases are *mala prohibita*. But with *malum in se* neither the king nor any other can dispense. As if the king were to wish to allow[1] a man to kill another, or to make a nuisance on the highway, a dispensation in these cases would be void. And yet when the offences have been committed the king may pardon them. So if a man, at the suit of another, be bound in a recognizance in the Chancery to the king to keep the peace, the king cannot release that duty, by reason of the prejudice which might thereby be caused to the other; and yet, when a forfeiture has been incurred, he may well release it, but not before it has been incurred. Similarly neither king, bishop, nor priest can give licence to commit fornication, because it is *malum in se* by the law of Nature. But after it has been committed they can pardon it well enough."

This limitation upon the king's powers conveyed a more precise meaning to the mediæval lawyer than it conveys to us; and it imposed a more definite restriction. By many persons the law of Nature and the law of God were regarded as similar, in that their provisions overrode all merely human laws;[2] and they were no mere philosophical abstractions. The canonists set out to state the law of God in elaborate rules, and to enforce them all over Europe, in the courts and by means of the spiritual powers and jurisdiction of the church. To disobey the law of God might mean excommunication; and a king or other ruler who deliberately continued to defy it might expose his territory to an interdict. Just as the mediæval lawyer would have denied that the legislature could infringe the law of God or of Nature,[3] so, on precisely the same grounds, it confined the power to dispense or suspend within the same limits.

In the sixteenth century this limitation upon the king's power tended to become much less distinct than it had been in the Middle Ages. In the first place, the Reformation caused a considerable divergence of opinion as to what was and what was not commanded by the law of God or Nature. In the second place, the state was assuming power to determine the contents of these laws.[4] This tended to render somewhat hazy the older limitations, not only upon the sovereignty of the legislature, but also upon the power of the king to dispense and suspend. Thus in England the legislature established the relations between church and state upon a wholly new basis, by a set of laws which, to Catholics of the old school, were clearly contrary to the law of God.[5] This

[1] The printed Y.B. reads "pardoner"; but as Vaughan, C.J., observed in Thomas v. Sorrell (1674) Vaughan at p. 337, this is a misprint for "powar doner."
[2] Vol. ii App. II.
[3] Vol. ii 444.
[4] Vol. iv 185-186.
[5] Vol. ii 444; vol. iv 198-199, 216.

enlargement of the powers of the legislature operated indirectly to enlarge the power of the king to dispense and suspend, because it necessarily tended to weaken the one restriction to which it was subject.

In England these prerogatives were also directly enlarged by the manner in which the Reformation was effected. It was effected by the subservient Parliament of a despotic king. Though the king destroyed the power of the pope in England, he realized that the wide powers which the pope had exercised over the church were too useful to be likewise destroyed. These powers were therefore maintained wherever possible and consistent with the new settlement, and transferred bodily to the king. But the suspending and dispensing powers of the pope were of the widest description. Being the representative of God upon earth, and the final court of appeal as to the application of His laws,[1] he was less fettered than any other sovereign by the law of God or Nature. These wide powers in the ecclesiastical sphere were now annexed to the crown as supreme head or governor of the church. Thus over ecclesiastical laws the king gained a suspending and dispensing power even wider than than which he had over temporal laws.[2]

The Tudors and the earlier Stuarts do not seem to have made any great use of the suspending power; and no discussion arose concerning it during that period. On the other hand, they made considerable use of the dispensing power;[3] and there was a certain amount of discussion in the courts as to its limits. It was decided in 1541 that the king could not dispense "with a new law to be made by Act of Parliament before that the Act be made."[4] It was decided in 1602, in the *Case of Monopolies*,[5]

[1] Vol. i 583.

[2] Comyn, Digest *Prerogative* D. 11, says, "Forasmuch as ecclesiastical laws are the king's laws . . . the king hath power to dispense with Ecclesiastical Law"; Charles II. referred to this power in his Declaration of Indulgence, below 222 n. 2; vol. i 592, 597; that extensive use was made of it by the Tudors and Stuarts, both in relation to the Universities, and in relation to penal and other laws dealing with ecclesiastical matters is proved by E. F. Churchill, L.Q.R. xxxviii 302-316, 420-434.

[3] Ibid; below 221 n. 6.

[4] Anon. Dyer 52a.

[5] 11 Co. Rep. 84b—"the licence to have the sole importation and merchandising of cards notwithstanding the said Act of Edward IV. (3 Edward IV. c. 4) is utterly against law: for it is true, that forasmuch as an Act of Parliament which generally prohibits a thing upon penalty, which is popular or only given to the king, may be inconvenient to divers particular persons, in respect of persons, time, place, etc., for this reason the law has given power to the king to dispense with particular persons. . . . But when the wisdom of Parliament has made an Act to restrain *pro bono publico* the importation of many foreign manufactures, to the intent that the subjects of the realm might apply themselves to the making of the said manufactures. . . . Now for a private gain to grant the sole importation of them to one or divers . . . notwithstanding the Act, is a monopoly against the common law, and against the end and scope of the Act itself;" for the law as to monopolies see vol. iv 343-354.

that a dispensation which defeated the whole spirit and intent of an Act of Parliament was void; and in 1605, in the *Case of Penal Statutes*,[1] that the crown could not give to another its power to dispense with a particular statute. On the other hand, in the *Case of Non Obstante*,[2] it was laid down that any Act of Parliament which attempted to bind the king not to exercise a prerogative which was inseparably[3] annexed to his person—such as the prerogative to command any of his subjects to serve him, or the prerogative of pardon—could be dispensed with; and that even an express clause in an Act of Parliament restricting this power of dispensation was invalid.[4] Further, in the debates on the Petition of Right, the existence of a very wide dispensing power was admitted by the House of Commons;[5] and a wide dispensing power in the case of statutes passed for the defence of the realm, such as the Navigation Acts and the Acts against the export of munitions of war, was in fact used.[6]

The law was clearly in a most uncertain state; and its uncertainty remained as great as ever at the Restoration, because there had been no serious constitutional controversy between the earlier Stuarts and their Parliaments upon this question. The vagueness of these prerogatives made them most convenient instruments in the hands of kings who wished to make themselves the predominant partners in the state. Let us look at the use which Charles II. and James II. attempted to make (i) of their suspending, and (ii) of their dispensing power.

(i) We have seen that Charles II. desired to secure a measure of toleration for the Roman Catholics, but that it was hopeless to expect that Parliament would sanction any such measure.[7] A bill, introduced into the house of Lords in 1662-1663, to give the king a wide suspending and dispensing power, failed to pass,[8]

[1] 7 Co. Rep. 36.

[2] 12 Co. Rep. 18; the phrase "non obstante" often occurs in connection with the dispensing power—in fact it was the phrase usually used to grant a dispensation; but it also acquired a quasi-technical sense because in some cases a special "non-obstante" clause was supposed to be necessary; as to this see vol. iv 205 and n. 2.

[3] For the notion of "inseparable" powers, see vol. iv 204-206; above 20, 28.

[4] Below 224.

[5] Glanvil in his speech before a committee of both Houses said, "When statutes are made to prohibit things not *mala in se* but only *mala quia prohibita* under certain forfeitures and penalties to accrue to the king and to the informers that shall sue for the breach of them; the commons must and ever will acknowledge a regal and sovereign prerogative in the king, touching such statutes, that it is in his majesty's absolute and undoubted power, to grant dispensations to particular persons with clauses of *non obstante*, to do as they might have done before those statutes, wherein his majesty conferring grace and favour upon some, doth not do wrong to others," 3 S.T. 206.

[6] L.Q.R xxxvii 415-416, 418-419, 422-424, 439-440.

[7] Above 171, 181-182.

[8] Hist. MSS. Com. 7th Rep. App. 167-168.

although the power was not to be exercised in favour of Roman Catholics, nor to remove disabilities to hold offices in the state.[1] Charles, therefore, determined to make use of this prerogative, and of his ecclesiastical supremacy, to suspend all the penal laws against Roman Catholic and Protestant nonconformists. To effect this purpose he issued in 1672 a Declaration of Indulgence.[2] But the indignation of Parliament compelled him to withdraw it;[3] and a bill introduced into the House of Lords, to give him a carefully guarded power to suspend certain named statutes for five years, shared the fate of the bill of 1662-1663.[4] Charles never again attempted to exercise this prerogative. He abandoned it when he abandoned the Romanizing scheme of the treaty of Dover.[5] But necessarily this prerogative again came to the front when James II. attempted to carry out this same Romanizing policy. The validity of his Declarations of Indulgence[6] obviously depended upon its existence. It was for this reason that he indicted the Seven Bishops for a seditious libel when they threw doubts upon it.[7] It was quite clear from that case that the king could not get either any lawyer of repute or any jury to maintain its existence. Hale had said that "in noe case can the kinge without an Act of Parliament repeale an Act of Parliament, whether penall or other."[8] Finch in his argument in the *Case of the Seven Bishops* repeated the reasoning of the House of Commons in 1673,[9] and pointed out that a suspending power was in substance a power to repeal laws, which "is as much a part of the legislature as a power to make laws."[10] Powell, J., in

[1] "Provided that no such indulgence or dispensation shall extend to the tolerating or permitting the use or exercise of the Popish or Roman Catholic religion, or to enable any person to hold any office of public trust, who at the beginning of this Parliament was by law disenabled thereunto," Hist. MSS. Com. 7th Rep. App. 167.

[2] For the text of this Declaration see C. G. Robertson, Constitutional Documents 75-77; in the declaration the king declared that he was making use of "that supreme power in ecclesiastical matters which is not only inherent in us, but hath been declared and recognised to be so by several statutes and Acts of Parliament"; it was held by many that his ecclesiastical supremacy gave him wider powers of suspension or dispensation in ecclesiastical matters than he had in temporal matters, see S.P. Dom. 1660-1661 461, xxvi 94; vol. i 592, 597; above 220 n. 2; below 223; L.Q.R. xxxviii 428-429.

[3] Above 181.

[4] Hist. MSS. Com. 9th. Rep. App. Pt. ii 25 no. 94*b*; Marvel tells us, Works ii 472, that in 1675 there was a bill before the House of Commons, "that nothing concerning the religion now established can, or shall, or ought to be altered, or suspended, but by Act of Parliament."

[5] Above 180-182.

[6] Their text will be found 12 S.T. 231-237.

[7] (1688) 12 S.T. 183.

[8] Vol. v. App. III. p. 510.

[9] Hallam, C.H. ii 392; see the resolution in 12 S.T. 385-386.

[10] "I have always taken it that a power to abrogate laws is as much a part of the legislature as a power to make laws; a power to lay laws asleep, and to suspend laws, is equal to a power of abrogating them: for they are no longer in being as laws, while they are so laid asleep or suspended; and to abrogate all at once, or to do it time after time, is the same thing; and both are equally parts of the legislature," 12 S.T. at p. 367; cp. Levinz's argument, ibid at p. 395.

his summing up, dealt trenchantly with the view that the king's power to suspend ecclesiastical laws was, by virtue of his ecclesiastical supremacy, wider than his power to suspend other laws. "I can see no difference," he said, "nor know of none in in law, between the king's power to dispense with laws ecclesiastical and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no Parliament; all the legislature will be in the king, which is a thing worth considering." [1]

(ii) The law as to the limits of the dispensing power was by no means so clear. But its uncertainty had been to some extent diminished by the distinction, hinted at in the Year Book of Henry VII.,[2] and clearly drawn by Vaughan, C.J., in *Thomas* v. *Sorrell*, between the case where a dispensation does, and the case where it does not, operate to inflict a special and particular damage upon a private person. In the first case the dispensation was void, in the second valid.[3] But this distinction put no very large restriction upon the king's power to use his dispensing power to further his political objects. It was possible for Herbert, C.J., and all the judges, except Street, J., to decide in the case of *Godden* v. *Hales* [4] that the king's power to dispense with the Test Act was practically unlimited, and to defend with some success the technical correctness of this decision.[5]

There is no doubt at all that the decision was wholly contrary to the view of the law taken by the House of Commons in 1663, in answer to Charles II.'s declaration in favour of liberty of conscience,[6] and in 1685, in answer to James II.'s practice of

[1] 12 S.T. at p. 427. [2] Above 218-219.

[3] (1674) Vaughan at pp. 334, 341-344; the following passage makes his position clear: "When the suit is only the king's for the breach of a law, which is not to the particular damage of any third person, the king may dispense; but when the suit is only the king's but for the benefit and safety of a third person . . . the king cannot dispense with the suit, but by consent and agreement of the party concern'd. . . . The statute of 12 Car. 2 c. 25, upon which this case ariseth, hath examples of penal laws in both these kinds. Every man is prohibited to sell wine by retail, contrary to the Act, upon forfeiture of five pounds for every offence; from which offence no third man can possibly derive a particular damage to himself, for which he can have an action upon his case. . . . Whence it follows, that the offence wrongs none but the king, and therefore he may, as in like cases, dispense with it. By a second clause in that Act, the mingling of wine with several ingredients therein mentioned, is penally prohibited; as by another clause the sale of wine at greater prices than the Act limits. He that shall offend, either by unlawful mixtures, or by selling dearer than the law admits, doth a particular wrong to the buyer, for which he may have his action; and therefore the king cannot dispense with either of those offences;" this view of the law is concurred in by Hale, vol. v App. III. p. 510.

[4] (1686) 11 S.T. 1166; it may be observed that Powell, J., who was strongly against the crown in the Case of the Seven Bishops, after hesitation, concurred in this decision, 11 S.T. 1198.

[5] Ibid 1251-1267.

[6] Hallam, C.H. ii 346-347; Commons Journals viii 440-444; S.P. Dom. 1663-1664 58, lxxii 123; from the beginning of his reign Charles II. wished to get an

employing Roman Catholic officers in the army.[1] Possibly Herbert considered that the House of Commons in 1663 was considering, not the dispensing, but the suspending power, as to which he was careful to say he expressed no opinion.[2] At any rate he would have been entitled to argue that resolutions of the House of Commons cannot make law; and he did point out quite correctly, that the speech, in which Glanvil expressed the sense of the House in 1628,[3] was wholly in favour of the correctness of the decision.[4] Obviously the offence created by the Test Act was *malum prohibitum;* and this speech admitted an unlimited dispensing power in such cases. The decision, he quite rightly maintained, was not contrary to the decision of Vaughan, C.J., in *Thomas* v. *Sorrell.*[5] The action in *Godden* v. *Hales*, being an action by a common informer for a penalty, was brought in the king's name as well as his own, and could therefore be barred by a dispensation granted (as this was)[6] before the action was begun.[7] Finally, it was clearly correct if the *Case of Non Obstante*,[8] was good law. The Test Act did clearly deprive the king of his power to command the service of his Roman Catholic subjects; and the *Case of Non Obstante*[8] as clearly decided that, "No Act can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*; as a sovereign power to command any of his subjects to serve him for the public weal. . . . And this royal power cannot be restrained by any Act of Parliament, neither in *thesi* nor in *hypothesi*, but that the king by his royal prerogative may dispense with it; for upon the commandment of the king, and obedience of the subject, doth his government consist." No

increased dispensing power that he might give some relief to his Roman Catholic subjects, see S.P. Dom. 1661-1663 603, lxv 55; above 222; but, as early as 1662, the idea that a power to dispense even with such Acts as the Navigation Acts was incompatible with the legislative supremacy of Parliament, was coming to the front, see L.Q.R. xxxvii 424.

[1] L.Q.R. xxxviii 433.

[2] "And this I mention, because of an unreasonable mistake of most people that talk of the dispensing power, as though the king's declaration of liberty of conscience, whereby all the laws that concern religion are at once totally suspended and laid asleep, were warranted by it; let that declaration stand or fall upon its own bottom, I am sure the case I am now speaking of has nothing to do with it," 11 S.T. 1253.

[3] Above 221 n. 5.

[4] 11 S.T. 1261-1262.

[5] (1674) Vaughan 330.

[6] See the defendant's plea 11 S.T. at pp. 1178-1179.

[7] "And even in the case of a common informer, who cannot sue but in the king's name, as well as his own, when he is once entitled to action, which he never is but by commencing suit, for then the action popular is become his proper action, the king can neither pardon, release or otherwise discharge his right in the suit," Thomas v. Sorrell (1674) Vaughan at p. 343; thus it could fairly be argued that, as the dispensation was in this case granted before action brought, the plaintiff was never "entitled to action"; this seems to have been the view taken in 1628, 3 S.T. 206; above 221 n. 5.

[8] 12 Co. Rep. 18.

doubt it might have been argued that the dispensation in the case of *Godden* v. *Hales* conflicted with the *Case of Monopolies*,[1] because dispensations with the Test Act defeated its whole spirit and intent. No doubt it might have been argued that the Test Act was vital to the safety of the nation; and that therefore it came within another part of Glanvil's statement of 1628, in which he laid it down that there could be no dispensation with Magna Carta, or any of those other statutes upon which the rights and liberties of the subject were supposed to depend.[2] No doubt it was only a king quite devoid of political tact who would have been so foolish as to make such a use of his dispensing power. But it might fairly be said that the application of the *Case of Monopolies*, and of the part of Glanvil's statement relating to Magna Carta and similar statutes, to the facts of *Godden* v. *Hales* was at least doubtful in the face of the *Case of Non Obstante*; and it is quite clear that the court could take no account of the policy or impolicy of the dispensation upon which it was asked to adjudicate. On the whole I am inclined to think that the weight of authority is in favour of the technical correctness of Herbert's decision.[3]

It is clear that a dispensing power of these dimensions was an excellent weapon with which to counteract any restrictions upon the prerogative which the king found to be inconvenient. In particular, it enabled him to get rid of statutes which prevented him from using the services of the only men who were likely to further his political and religious schemes. By means of it he could staff the civil service and the universities with Roman Catholics; and, what was perhaps even more important, he could secure for his army a set of Roman Catholic officers. With the help of an army thus led he might hope to accomplish much.

(*b*) *The discipline of the army.*

That the king had the sole control over the military forces of the state was recognized in the amplest terms by statutes of Charles II.'s reign.[4] But, after the disbandment of the Republican armies, the only military force left was the militia, which was a

[1] 11 Co. Rep. 84b; above 220 n. 5.

[2] 3 S.T. 205—"Statutes incorporate into the body of the common law, over which (with reverence be it spoken) there is no trust reposed in the king's 'sovereign power,' or 'prerogative royal,' to enable him to dispense with them, or to take away from his subjects that birthright or inheritance which they have in their liberties, by virtue of the common law and of these statutes."

[3] This is also Mr. Churchill's view, L.Q.R. xxxviii 434; as he points out, ibid at p. 316, "When Charles II. . . . used the prerogative power to purge the Universities of the Puritan, Parliament was only too delighted to bless the work."

[4] Above 167.

purely defensive force, and not available for foreign service.[1] There was, however, nothing to prevent the king from hiring soldiers if he could afford to do so.[2] Both Charles II. and James II. made use of this power, and kept on foot a certain number of troops. This at once raised the legal question of the king's power to discipline these troops.

The experience of the civil wars had shown that the rules of the common law were wholly inadequate for this purpose. The Petition of Right had made it quite clear that the rules of martial law were inapplicable to such an army in time of peace within the kingdom;[3] and it was deemed to be a time of peace whenever the courts at Westminster were open, or, "if war be in any part of the kingdom," whenever the sheriffs could execute the king's writ.[4] The impossibility of maintaining any sort of discipline in an army in the face of these rules was strikingly illustrated in the Scotch war of 1640.[5] Shortly after the outbreak of the Great Rebellion, Parliament found that it was necessary to draw up a code of rules for the government of its troops. It drew up and issued such a code in 1642,[6] which did not differ very materially from the Laws and Ordinances of War issued by Charles I. in 1639;[7] and Charles II. in 1666 issued a similar code, which was modelled on that of 1642.[8] Other similar codes were drawn up in 1672 and 1686.[9] A similar course was pursued in the case of the navy. The series of ordinances, issued during the Great Rebellion by the generals at sea, were codified in Charles II.'s reign in the Duke of York's fighting instructions.[10] But while the code of Naval Discipline got statutory authority,[11] this authority was, in the case of the army codes, deliberately withheld.[12] The result was that the

[1] Above 205. [2] Above 217 n. 2.

[3] Above 54; vol. i 576.

[4] Rushworth, vol. ii Pt. ii App. 79, 81, citing Coke and Rolle; Hale, 1 P.C. 344; History of the Common Law 42-43.

[5] Lord Conway, in a letter to Archbishop Laud, says, "My lord of Northumberland did write to me, that having had occasion to look into the power he hath to give commissions, the lawyers and judges are all of opinion that martial law cannot be executed here in England, but when an enemy is really near to an army of the king's and that it is necessary that both my lord of Northumberland and myself do take a pardon for the man that was executed here for mutiny; if this be so, it is all one as to break the troops, for, so soon as it shall be known, there will be no obedience," Rushworth, vol. ii Pt. ii 1199.

[6] Clode, Military Forces of the Crown i 24; Military and Martial Law (2nd ed.) 10-12. [7] Ibid.

[8] Ibid 15-19; cp. S.P. Dom. 1673-1675 74. [9] Ibid.

[10] Clode, Military and Martial Law (2nd ed.) 42; cp. Forsyth, Cases and Opinions on Constitutional Law 193-194.

[11] 13 Charles II. st. 1 c. 9; 16 Charles II. c. 5.

[12] Marvel wrote in 1660, "The Act for the Militia hath not been called for of late, men not being forward to confirm such perpetuall and exorbitant power by a law, as it would be in danger if that Bill should be carryed on. 'Tis better to trust his

position of the soldier in relation to these military codes gave rise to conflicts and disputes with the civil authorities, and to legal problems to which it was difficult to find an answer. But it was not difficult for a king who had secured a subservient bench of judges to solve most of these problems in his own favour.

It is clear from a tale told by Bramston in his autobiography [1] that, in the army, an opinion was gaining ground that soldiers were exempt from all civil jurisdiction.[2] He tells us that on one occasion the justices sent for a trooper, who was accused of rape, upon which, "the officers came and expostulated the matter with the justices, insisting upon their being exempt from the jurisdiction of the justices, and punishable only by martial law." At another meeting of officers the same views were expressed, and were justified by saying that otherwise it would be hard upon the soldiers "to be subject both ways, to a Counsel of war, and the other power, too." James II. seems sometimes to have been prepared to act on this theory;[3] and it is clear that, against officers who acted on it, it might be very difficult for a civilian to get the redress to which he was legally entitled.

That this view held by the officers was erroneous, and that soldiers were amenable to the jurisdiction of the civil courts, was forcibly stated by Hale, C.J., in a case in which a captain was brought before him for having commanded the rescue of one of his men from the officers of the Compter by a troop of soldiers. "You are the king's servants," he said to the captain, "and intended for his defence against his enemies, and to preserve the peace of the kingdom; not to exempt yourself from the authority of the laws. And indeed it were a vain thing to talk of Courts and laws, if military men shall thus give the law, and control legal proceedings. . . . Whatever you military men think, you shall find that you are under civil jurisdiction, and you but gnaw a file, you will break your teeth, ere you shall prevail against it."[4] The correctness of this view was, as Bramston

Majesty's moderation, and that the commissioners if they act extravagantly, as in some countyes, should be liable to actions at Law," Works ii 30.

[1] Autobiography (C.S.) 126-127.

[2] Reresby tells us, Memoirs 254, that, when made governor of York, he informed the mayor that he was willing to deliver up to justice soldiers charged with capital crimes, if notice was first given to him; but that "for less crimes, as batteries, quarrels, or smaller misdemeanours, I expected complaint to be made to me, and to have the punishment of them myself"; cp. Clode, Military Forces of the Crown i 77; Military and Martial Law (2nd ed.) 17, 18, citing a Proclamation of 1672 that subjects were to appeal to an officer for protection against injuries committed by soldiers; for some difficulties at Hull in 1668 see Marvel's Letters, Works ii 257-265.

[3] See Rex v. Browne, Corbet and others (1687) 2 Shower 484.

[4] The Case of Captain C. (1673) 1 Ventris at p. 251. Note that both Coke, Third Instit. 52, and Hale, P.C. i 500, agreed that to put a soldier to death under martial law in time of peace was murder.

records,[1] stated by Clarendon, and admitted even by the crown. In 1672 it was announced that the provisions of the military code, drawn up in that year, were only intended to be applied to soldiers abroad.[2] And though no doubt soldiers were tried for minor military offences by court martial,[3] it seems to have been assumed that more serious crimes must be dealt with by the courts of common law. Thus in 1685, after the suppression of Monmouth's rebellion, Kirke was directed to send soldiers guilty of such crimes to the ordinary courts for trial, as the military code was in force only during the actual rebellion.[4] Under these circumstances it was important that the common law should be so interpreted that it was possible by its means to keep the army together. It was possible to contend that the provisions of certain statutes made desertion a felony. Obviously, if this contention were upheld, the soldiers could be kept together, and the task of the officers in subjecting them to the discipline of the military codes would be much facilitated.

The question whether or not desertion was felony is by no means clear. A statute of Henry VII.'s reign[5] had enacted that if a soldier "immediately retained with the king, which shall be in wages or retained or take any present to serve the king upon the sea or upon the land beyond the sea," deserted, he should be guilty of felony. Obviously this statute did not apply to a soldier in England who deserted. But a subsequent statute of Henry VIII.'s reign[6] enacted that the desertion of a soldier retained to serve the king "upon the sea or upon the land or beyond the sea" should be felony. Obviously this statute might be interpreted to apply to a soldier in England who deserted. But it might be argued that these statutes of Henry VII. and Henry VIII.'s reigns had been repealed by statutes of Edward VI. and Mary's reigns, which abolished all new felonies created since 1 Henry VIII.[7] It was, however, held in 1601, in the *Case of Soldiers*,[8] that Henry VIII.'s statute was not repealed because it only created a felony which was a felony by Henry VII.'s statute. Hale, however, had grave doubts as to whether this construction was correct, because the statute of Henry VIII. was by no means a mere

[1] Autobiography (C.S.) 127; and cp. Ekins v. Newman (1680) Th. Jones 147.
[2] Clode, Military and Martial Law (2nd ed.) 15.
[3] Above 227 n. 2.
[4] Clode, Military Forces of the Crown, i 478.
[5] 7 Henry VII. c. 1.
[6] 3 Henry VIII. c. 5 § 2; this difference of wording is not observed by Coke, Third Instit. 86; it is noted by Hale, 1 P.C. 673, who says that this Act "is larger than 7 H. 7 for it extends to land service."
[7] 1 Edward VI. c. 12 § 3; 1 Mary st. 1 c. 1; cp. Hale, 1 P.C. 673-674.
[8] (1601) 6 Co. Rep. 27a.

repetition of the statute of Henry VII.[1] And it seems to me that, if the treatment of the desertion of a soldier in England as a felony was the result of a change made by the statute of Henry VIII., then clearly the statute of Henry VIII. created a new felony, which was abolished by the legislation of Edward VI. and Mary.[2] But it would seem that what James II.'s judges did was to look at the words of the statutes of Henry VII. and VIII., to rule in accordance with the *Case of Soldiers*[3] that both these statutes were in force, and to decide that therefore the desertion of a soldier in England was a felony.[4] Holt resigned the recordership of London rather than concur in such a decision.[5] We do not know the grounds of his dissent; but probably they were those which Hale has set out in his Pleas of the Crown. Having got this decision, James took it upon himself to interfere with the execution of the sentences pronounced by the courts of common law in a manner which was wholly unwarrantable, and aroused some feeling even among his subservient judges.[6]

The whole position was thoroughly unsatisfactory. It was obviously expedient, if the crown retained troops, to prevent them from deserting; and it was still more expedient to discipline them by a military code. But the legality both of the ruling of the courts of common law that desertion was a felony, and of the codes of military discipline, was more than doubtful. It was a clear case for the intervention of the legislature. But there was not the least chance that the legislature would intervene in the only way in which the king would have permitted its intervention. All through Charles II.'s reign Parliament had shown the greatest jealousy of an army controlled by the crown.[7] It is just possible that, after Monmouth's rebellion, James II. might have induced Parliament to concur in some kind of settlement, if he had abandoned his Romanizing policy. But all chance of this disappeared when, by the help of his dispensing power, he proceeded to introduce Roman Catholic officers into his army.

[1] Alluding to other variations, he says, "If this variance by the statute of 3 H. 8 be a repeal of the statute of 7 H. 7 then they are both repealed, that of 7 H. 7 by 3 H. 8, and that of 3 H. 8 by 1 E. 6 and 1 Mar.," Hale, 1 P.C. 674.

[2] Hale, as we have seen (last note), had noted other variations which in his opinion prevented the statute of 3 H. 8 from being a mere repetition of 7 H. 7; he does not, however, lay much stress on this particular variation; but obviously if, owing to this difference of wording in the later Act, the desertion of a soldier in England had been made a felony, it, in effect, created a new felony.

[3] (1601) 6 Co. Rep. 27a.

[4] See Rex v. Beal (1687) 3 Mod. 124; S.C. 2 Shower 511.

[5] Bramston, Autobiography (C.S.) 245, 276; Bramston also mentions, ibid 276, a case in which a grand jury refused to find a true bill in such a case.

[6] Ibid 273; cp. Rex v. Beal (1687) 3 Mod. 124.

[7] See references cited by Hallam, C.H. iii 106 n. *f*.

Therefore both Charles II. and James II. found it necessary to attempt these unwarrantable extensions of their military prerogatives, if they were to preserve discipline among their troops. That they were unwarrantable is fairly obvious. Even if the legality of the decision that desertion could be treated as a felony could be defended, it is clear that no defence is possible of the extension of a prerogative, limited to the government of troops by martial law abroad or in time of war, to the government of troops in England and in time of peace.

If we remember that, from 1660 to 1688, the crown had been making use of these four different expedients to make itself and its prerogative the predominant partner in the state, we shall appreciate the true meaning and historical explanation of the provisions of the Bill of Rights and the Act of Settlement. They were designed to make it impossible for any future king to rely upon any such expedients. Let us analyse their provisions from these four points of view.

(i) The fact that James II. was in substance deposed gave a fatal blow to the theory of divine right, and the legitimist notions based upon it. No doubt, the formula adopted by the House of Commons[1] endeavoured decently to veil the fact of his deposition, and the fact that Parliament had created a new king. But, as against the House of Lords, the House of Commons insisted successfully on its resolution that the throne was vacant;[2] and this was decisive. The throne had been vacated, and Parliament had filled it. As the judges and lawyers, when consulted by the House of Lords, admitted, none of the rules of the common law were applicable to such a case.[3] It was a Revolution; and the people, through their representatives in Parliament, had assumed the right to make and unmake kings. The Whig position was still further emphasized when a Tory Parliament passed the Act of Settlement, and entailed the crown upon a family that had no kind of claim to it except by virtue of this Act of Parliament.[4] The two breaks thus created in the order of succession by these

[1] "That king James II., having endeavoured to subvert the constitution of this kingdom, by breaking the original contract between king and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant."

[2] Hallam, C.H. iii 95-97; Halifax was mainly instrumental in bringing the House of Lords into line with the House of Commons, Foxcroft, op. cit. ii 54-55; Clarendon, Diary ii 260 (cited Foxcroft, loc. cit.), says, "the great argument used by my lord Halifax (who was at the head of the prevailing party, and drove furiously) was necessity; and that the crown was only made elective *pro hac vice*, and then reverted to its hereditary channel again.

[3] Hist. MSS. Com. 12th Rep. App. Pt. vi 15-17.

[4] 12, 13 William III. c. 2.

two Acts of Parliament were fatal to the supra-legal position which the Stuarts had always claimed for the crown. It reversed, as Hallam has said,[1] the maxim "A Deo rex a rege lex," and made the crown the creature of the law.

(ii) The various ways in which Charles II. and James II. had sought either to influence or to muzzle Parliament were dealt with by certain clauses in the Bill of Rights and Act of Settlement, and by the Triennial Act.

The Bill of Rights declared that the election of members of Parliament ought to be free;[2] that freedom of speech and debate and proceedings in Parliament ought not to be questioned in any court or place out of Parliament;[3] and that Parliament ought to be held frequently.[4] The last declaration was made more specific by the Triennial Act of 1694,[5] which not only prohibited the intermission of Parliament for a longer period than three years, but also limited its duration to the same period. It is obvious that these enactments were designed to put a stop to the methods which the Stuart kings had employed to control elections,[6] to make it impossible to institute criminal proceedings against officers of the House of Commons for matter published by them by order of the House,[7] and to declare the illegality of such an intermission of Parliament as had occurred at the end of Charles II.'s reign.[8] The limitation of the duration of Parliament to three years was designed, both to limit the opportunities of the king for the corruption of members, and to make it less profitable for candidates to spend money upon the corruption of the electors.[9] This was also one of the three main objects of § 3 of the Act of Settlement.[10] The other two were the securing of the legal responsibility of the king's ministers for their acts, and the prevention of any interference on the part of the crown with criminal proceedings instituted by the House against ministers or others. In order to secure the first of these objects many attempts had been made during the reigns of Charles II. and William III. to exclude place men from the House of Commons.[11] But, though, during

[1] Hallam, C.H. iii 92; the conflict between the views of the Whigs and the Tories is clearly brought out by the debate on the Bill for settling the oaths of allegiance, see Macaulay, Hist. ii 290-293.

[2] 1 William and Mary sess. 2 c. 2 § i 8. [3] § i 9. [4] § i 13.

[5] 6, 7 William and Mary c. 2; for an account of the previous attempts to pass such a measure see Hist. MSS. Com. 14th Rep. App. Pt. vi, xiii-xv; House of Lords MSS. (N.S.) i xxi, xxii, and p. 51 no. 759; it was proposed in 1689 to revive 16 Charles I. c. 1, Hist. MSS. Com. 12th Rep. App. Pt. vi 343 no. 171; cp. Macaulay, Hist. iii 396-398, 408-410, iv 48, 73.

[6] Above 210-213. [7] Above 214 and n. 6; below 269-272.

[8] Above 191.

[9] Foxcroft, Life and Works of Halifax ii 185.

[10] 12, 13 William III. c. 2.

[11] See generally Porritt, The Unreformed House of Commons i 205-206; for a bill of 1675 see Marvel, Works ii 439, 444, and Foxcroft, op. cit. i 121; for a bill of 1692,

William III.'s reign, certain minor officers had been excluded,[1] their complete exclusion was not secured until the passing of the clause of the Act of Settlement which provided that, "no person who has an office or place of profit under the king, or receives a pension from the crown shall be capable of serving as a member of the House of Commons." To secure the second of these objects it was enacted that "all matters and things relating to the well-governing of the kingdom, which are properly cognizable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken there upon shall be signed by such of the Privy Council as shall advise and consent to the same."[2] To secure the third of these objects it was enacted that no pardon under the great seal shall "be pleadable to an impeachment by the Commons in Parliament."[3]

(iii) The recent perversions of the judicial prerogatives of the crown were dealt with by clauses of the Bill of Rights enacting that excessive bail should not for the future be required, that excessive fines should not be imposed, and that cruel or unusual punishments should not be inflicted;[4] that jurors should be duly impanelled;[5] and that "grants and promises of fines and forfeitures of particular persons before conviction are illegal and void."[6] But the two most important measures taken to guard against the abuse of the judicial prerogative of the crown were (*a*) the Act for regulating trials for high treason, and (*b*) the clause of the Act of Settlement dealing with the judges' tenure of office.

(*a*) The measure for regulating trials for high treason, which finally became law in 1695-1696,[7] has a curious history. It had its origin in an attempt of the peers to secure for their members, accused of treason or felony, a trial before the whole or a large body of the peers, instead of a trial before the Lord High Steward and a jury of peers.[8] In 1667-1668[9] a bill passed the House of Lords providing that, whenever a peer was accused of treason or felony, the Lord High Steward should summon all peers who had

which was rejected by the House of Lords, see Hist. MSS. Com. 14th Rep. App. Pt. vi 279-281 no. 643; for a bill of 1693, which was vetoed by the king, see House of Lords MSS. (N.S.) i xxii, xxiii, p. 330 no. 786; the reason for the king's action is no doubt to be found in the fact that, like Charles II., he relied upon bribes and gifts of places to manage the House of Commons, Hallam, C.H. iii 189, 190; cp. also Macaulay, Hist. iv 49-51; it may be noted that both this bill and the bill of 1675 proposed to allow an official to seek re-election; see Macaulay, op. cit. iv 72 for a bill of 1694 which failed to pass the Commons.

[1] Porritt, op. cit. i 206-207.

[2] 12, 13 William III. c. 2 § 3. [3] Ibid.

[4] 1 William and Mary sess. 2 c. 2 § i 10; above 214-215. [5] § i 11.

[6] § i 12; for the sale of pardons after Monmouth's rebellion and bribes given to stop prosecutions see Macaulay, Hist. i 309-313.

[7] 7, 8 William III. c. 3.

[8] For these different methods of trial, see vol. i 388-390.

[9] Hist. MSS. Com. 8th Rep. App. Pt. i 113 no. 100.

attained their majority; and a similar bill was passed by them in 1673-1674.[1] In 1675[2] it was proposed that the court of the Lord High Steward should consist of forty members; that thirty of them at least must appear at the trial; and that twelve at least must agree in a verdict of guilty. An amended draft of this bill was again introduced in 1679;[3] and it was further amended in this and the following year.[4] None of these bills succeeded in passing the Commons. In 1688-1689[5] a further development took place. The substance of the preceding bills were combined with clauses drafted by Levinz, which were designed to protect all persons accused of high treason. They dealt with the property qualification of jurors in such cases; and they permitted the prisoner to have a copy of the indictment before trial, to be defended by counsel, and to have his witnesses on oath. This bill failed to pass the Commons; and an amended draft of this bill failed to pass the House of Lords in 1691.[6] But another bill, which passed the Commons in this session, begins to assume the features of the bill which was ultimately passed into law.[7] This bill, however, contained no clause dealing with the trial of peers before the court of the Lord High Steward, because the Commons were reluctant to add to the very large and oppressive privileges which the Lords already enjoyed in judicial proceedings. Therefore the Lords inserted a clause dealing with this matter, which the Commons rejected. A conference was held; and the Commons were induced to consent that there should be a jury of thirty-six in trials for treason in the court of the Lord High Steward; but they absolutely refused to give way to the Lords' proposal that all the peers should be summoned.[8] The result was that the bill was lost;[9] and another bill was lost in the Commons in the following year.[10] A similar bill, sent up by the Commons in 1693-1694, was lost in the Lords;[11] and in 1694 another bill was lost, because the Commons again refused to concur in the Lords' provisions as to the trial of peers.[12] In the following year the Commons at length gave way and the Act was passed.[13] Prisoners indicted for high treason

[1] Hist. MSS. Com. 9th Rep. App. Pt. ii 38 no. 143.
[2] Ibid 50 no. 203; this was amended so as to make condemnation or acquittal by a bare majority possible, ibid 66 no. 290.
[3] Ibid 11th Rep. App. Pt. ii 127 no. 144.
[4] Ibid 157 no. 239; 164 no. 250.
[5] Ibid 12th Rep. App. Pt. vi 31 no. 18.
[6] Ibid 13th Rep. App. Pt. v 278 no. 417.
[7] Ibid 319 no. 442.
[8] For this clause see ibid pp. 326-327.
[9] For an account of this episode see Macaulay, Hist. iii 305-307.
[10] Macaulay, Hist. iii 379, 380.
[11] House of Lords MSS. (N.S.) i 343 no. 798; Macaulay, op. cit. iv 47.
[12] House of Lords MSS. (N.S.) i 416 no. 865.
[13] 7, 8 William III. c. 3.

were allowed to have a copy of the indictment five days before trial, and to be defended by counsel.[1] They were allowed to have a copy of the panel of jurors two days before trial,[2] and to compel the attendance of their witnesses,[2] who were to be sworn.[3] Except in cases of an attempt to assassinate the king,[4] the indictment must be found by the grand jury within three years of the commission of the crime.[5] On trial of peers or peeresses for treason all peers entitled to vote were to be summoned.[6] The Act also settled several controverted points as to the evidence required to prove an act of treason.[7] In particular it settled the controversy as to whether two witnesses were required to prove such an act,[8] by providing that it must be proved by two witnesses deposing, either to the same overt act, or to two overt acts of the same kind of treason.[9] It did not apply to impeachments for treason,[10] nor to indictments for treason for counterfeiting the king's seals or his coin.[11]

(*b*) The Act of Settlement provided that "Judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."[12] This clause removed the Bench from the political arena, made it impossible for the crown, House of Commons, or House of Lords to exercise pressure upon it, and thereby guaranteed the impartial administration of the law. In consequence, the supremacy of the law has become the best of all securities for the liberties of the subject, against both the claims of the royal prerogative and the claims of Parliamentary privilege.[13] At the same time the independence of the judges was further safeguarded by the growth of the modern rule that the judges of the superior courts are immune from all actions for any acts done by them in their capacity as judges. This rule was by this period established almost in its modern form. But the manner in which it had been established, and the conditions under which it had come to be applied to the judges of different courts, make a curious piece of legal history which merits a slight digression.

We have seen that in early law this immunity of the judges

[1] § 1. [2] § 7. [3] § 1. [4] § 6.
[5] § 5. [6] § 10. [7] §§ 2, 4, 8. [8] Vol. iv 499.
[9] §§ 2 and 4. [10] § 11. [11] § 12.
[12] 12, 13 William III. c. 2 § 3; for a bill of 1691-1692 to ascertain the commissions and salaries of the judges see Hist. MSS. Com. 14th Rep. App. Pt. vi 76 no. 565; it was vetoed by the king because their salaries had been charged by it on the hereditary revenue, without the previous sanction of the crown, ibid xix; Macaulay, Hist. iii 319, 320; it may be noted that in this bill a clause to give a party aggrieved by a corrupt judgment a right of action against the judge, and providing that in that case no *nolle prosequi* should be allowed, was only rejected by one vote, Hist. MSS. Com. 14th Rep. App. Pt. vi 79.
[13] Below 262-272.

was not recognized—the procedure by which the decision of the court could be questioned took the form of a complaint against the judge.[1] But, long before the close of the mediæval period, the common law had learnt to draw a distinction between the correctness of a judge's decision and the rectitude of his conduct. The technical road by which it arrived at this distinction was an elaboration of the consequences of the sanctity of the records of courts of record.[2] In fact, just as the existence of these records determined the character of the proceedings in error permitted by the common law,[3] so it was from the sanctity of these records that the modern rules as to judicial immunity originated. That this is its origin is shown by the fact that, in the case of courts not of record, older ideas survived, and the judges had little if any of this immunity. They could be amerced for a judgment which was false, not only by reason of the fact that they had acted without jurisdiction, but also by reason of the fact that they had abused their jurisdiction;[4] and it is by no means certain that an action for damages would not lie at the suit of the litigant who is aggrieved by a decision which is open to attack upon either of these grounds.[5] In the case of courts of record, however, it was held, certainly as early as Edward III.'s reign, that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction. This is shown by a case reported in one of the books of Assizes,[6] which runs as follows: "J de R was arraigned for that, whereas he was a justice to hear and terminate felonies and trespasses, and whereas certain persons were indicted for trespass, he made entry in his record that they were indicted for felony. And judgment was demanded for him [for all that he did] from the time that he was justice by commission, and that which he [the accuser] presents will be to undo his record, which cannot be by law, if to such a presentment the law puts him to answer. And it was the opinion of the justices

[1] Vol. i 213-214; P. and M. ii 663-665.

[2] For the growth of the technical idea of a court of record see vol. v 157-160.

[3] Vol. i 214.

[4] "In an hundred court or other court which is not of record, there averment may be taken against their proceedings, for that it is no other than matter *in pais*, and not of record. . . . In a writ of false judgment the plaintiff shall have a direct averment against that which the judges of the inferior court have done as judges, *quia recordum non habent*," Floyd v. Barker (1608), 12 Co. Rep. at p. 24; P. and M. ii 664.

[5] See Clerk and Lindsell, Torts (7th ed.) 746-747 for a discussion of this question; as is there pointed out, 11, 12 Victoria c. 44 § 1 (an Act for the protection of justices of the peace) assumes that this is the law; on the other hand the decision in Haggard v. Pélicier Frères [1892] A.C. 61 gives the judge of a consular court, though not a court of record, the same position as the judge of a court of record.

[6] 27 Ass. pl. 18; cp. Y.BB. 9 Hy. VI. Hil. pl. 9; 10 Hy. VI. Mich. pl. 22.

that the presentment was bad." The only recourse open to the suitor in such a case was to attack the record by writ of error, founded either on the record or on a bill of exceptions to a ruling of the judge.[1] It was because this was his only recourse that the legislature provided a remedy against a judge who refused to seal such a bill;[2] just as, in later law, the importance of protecting the liberty of the subject induced it to depart from its usual practice, and to penalize a judge who in the vacation refused to issue a writ of Habeas Corpus.[3]

It will be observed that in the case just cited the judge was acting within his jurisdiction. It is quite clear from other decisions of the same period that the courts did not apply this reasoning to cases where a judge had acted wholly outside his jurisdiction.[4] In such a case the matter was not *coram judice*, the record could be traversed, and the judge was not protected from the aggrieved litigant's action. "If," said Pigot in 1482, "their patent does not give them power and authority, then it is *coram non judice*, as if in the Common Bench an appeal of death or robbery or any other appeal is brought, and the party is attainted, it is *coram non judice*, to which all assented."[5] "A man," said Suliard in the same case, "shall have a traverse to a matter of record, and also to a matter of fact, in order to avoid such a record, when the court has no jurisdiction."[6]

The rules laid down in the Year Books were elaborated and restated by Coke and many other judges of the sixteenth and early seventeenth centuries.[7] Thus, in *The Case of the Marshalsea*,[8] "a difference was taken when a court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, there . . . no action lies. . . . But when the court has not jurisdiction of the cause, then the whole proceeding is *coram non judice*, and actions

[1] For the bill of exceptions, which was given by Stat. West II. c. 31, see vol. i 223-224.

[2] Register of Writs f. 182; Co. Second Instit. 427; the statute provides a writ to compel a return, and Blackstone, Comm. iii 372, states that if the judge makes a false return an action will lie against him; this rests on a statement by the judges in Bridgman v. Holt (1693) Shower P.C. at p. 117; but the statute does not seem to contemplate such an action, nor have I seen any case reported in which such an action was brought; for difficulties made by the judges in the fourteenth century when asked to seal such bills, see Plucknett, Statutes and their Interpretation in the Fourteenth Century 67-68.

[3] 31 Charles II. c. 2 § 10, 2.

[4] See Y.BB. 9 Hy. IV. Mich. pl. 1; 21 Ed. IV. Mich. pl. 49 *per* Pigot *arg.*

[5] Y.B. 22 Ed. IV. Mich. pl. 11 (p. 33). [6] Ibid.

[7] Windham v. Clere (1589) Cro. Eliza. 130; Metcalfe v. Hodgson (1633) Hutton 120; Nichols v. Walker and Carter (1635) Cro. Car. 394; and see the cases cited by Powell, J., in Gwinne v. Poole (1693) 2 Lut. at pp. 1565-1567; the number of actions brought against justices of the peace and other officers was the cause of the Act 7 James I. c. 5, vol. iv 524.

[8] (1613) 10 Co. Rep. at f. 76a.

will lie." For this Pigot's dictum in the Year Book of Edward IV.,[1] and other Year Books, were vouched, and further illustrations were given. Thus "if the court of Common Pleas holds plea in debt trespass, etc., without an original, it is not void for they are judges of those pleas, and it cannot be said that the plea is *coram non judice.*"[2] But there is little doubt that, at the beginning of the seventeenth century, there was a tendency to magnify the consequences of the immunity of the judges which flowed from their status as judges of a court of record. As we have seen, the consequences of this status were a useful argument to prove the independence of these courts from the interference of rival courts, such as the court of Star Chamber.[3] Therefore, in the case of *Floyd* v. *Barker*,[4] Coke emphasized this immunity; and though he did not wholly dissociate it from its early dependence upon the technical conception of a court of record, he put it for the first time on its modern basis of public policy. "Records," he said,[5] "are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver anything against the record itself; and in this point the law is founded upon great reason; for if the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there will never be an end of causes; but controversies will be infinite." The judges are "to make an account to God and the King" only.[6] Otherwise "those who are the most sincere would not be free from continual calumniations."[7] Clearly we have reached the basis upon which this immunity is based by the modern cases.[8]

But two characteristics of the law as laid down in *Floyd* v. *Barker*, and the later seventeenth century cases, should be noted. In the first place, though the law had thus been placed on its modern basis by the beginning of the seventeenth century, though this modern basis led the courts to give a wide construction to this immunity both in the seventeenth century and later,[9] it did not enlarge this immunity so as to include a case

[1] Above 236.
[2] At f. 76b.
[3] Vol. v 159-160.
[4] (1608) 12 Co. Rep. 23.
[5] At p. 24.
[6] At p. 25.
[7] Ibid.

[8] "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. . . . The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions," Fray v. Blackburn (1863) 3 B. and S. at p. 578 *per* Crompton, J.; and this language is in substance repeated in Scott v. Stansfield (1868) L.R. 3 Ex. at p. 223 *per* Kelly, C.B.; and in Anderson v. Gorrie [1895] 1 Q.B. at p. 670 *per* Esher, M.R.

[9] See e.g. Gwinne v. Poole (1693) 2 Lut. at p. 1566, where it was laid down by Powell, J., that, when the jurisdiction of the inferior court is limited in respect of place, the judge is only liable if it appeared or might reasonably appear that he had

where a judge had acted without jurisdiction. From the days of the Year Books [1] to the present day, this distinction between an abuse of jurisdiction and an absence of jurisdiction has been maintained.[2] Indeed, the fact that, from the sixteenth to the nineteenth centuries, a large part of the local government of the country was carried on by justices of the peace acting under judicial forms,[3] made the preservation of this distinction and its consequences a necessary safeguard to the liberty of the subject. In the second place, neither the Year Books nor the sixteenth and early seventeenth century cases draw any distinction between judges of the superior courts of record and the judges of any other courts of record.[4] As late as 1840, in the case of *Calder* v. *Halket*,[5] Parke, B., laid it down without qualification that English judges, "when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege";[6] and it is clear from the context that he meant to include judges of the superior courts of record.[7]

Nevertheless, during the latter part of the seventeenth century, we can see the beginnings of the modern distinction between the immunity accorded to the judges of the superior courts of record, and the judges of inferior courts. That distinction springs from the two connected but divergent roots upon which Coke had grounded the immunity of all judges of courts of record. In the first place, it is grounded upon the fact that, while the jurisdiction of the judges of inferior courts is limited by definite restrictions of subject matter, persons, or place, the jurisdiction of the judges of the superior courts is not so limited. Hence we get the rule, stated in 1666 in the case of *Peacock* v. *Bell*,[8] "that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be

knowledge of his lack of jurisdiction; Groenvelt v. Burwell (1698) 1 Ld. Raym. 454; Doswell v. Impey (1823) 1 B. and C. 163.

[1] Above 235-236.

[2] Terry v. Huntington (1668) Hardres 480; Houlden v. Smith (1850) 14 Q.B. 841.

[3] Vol. iv 144, 165.

[4] In Y.B. 2 Rich. III. Mich. pl. 21 a distinction is drawn in that, "Omnes curiæ ad communem legem sunt Curiæ Domini Regis, et quilibet Curia ligatur cognoscere consuetudines alterius Curiæ. Sed non de aliis Curiis in civitatibus et patriis"; there is no hint of any other distinction; we have seen that in the Case of the Marshalsea (1613) 10 Co. Rep 76b Coke copies the Year Book of Edward IV. (above 236-237), and uses as an instance of a court acting without jurisdiction the case of the Common Pleas entertaining a criminal appeal.

[5] 3 Moore P.C. 28. [6] At p. 75.

[7] "Thirdly, the object may have been to put the judges of the native courts on the footing of judges of the superior courts of record . . . protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but leaving them liable for things done wholly without jurisdiction," ibid at pp. 74-75.

[8] 1 Wms. Saunders at p. 74.

so ; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." It follows that a superior court has jurisdiction to determine its own jurisdiction ; and that therefore an erroneous conclusion as to the ambit of its jurisdiction is merely an abuse of its jurisdiction, and not an act outside its jurisdiction. On the other hand, as an inferior court cannot determine its own jurisdiction, an erroneous conclusion as to its ambit is an act outside its jurisdiction. In the second place, it is grounded upon the fact that, while the judges of the superior courts are answerable only to God and the king,[1] the judges of the inferior courts are answerable to the superior courts for any excess of jurisdiction. They can obviously be controlled by the prerogative writs,[2] so that it cannot be said that they are not amenable to the jurisdiction of any court. It follows that their judges can be made liable by the machinery of the courts if they have acted outside their jurisdiction, so that their acts are *coram non judice.* Theoretically the judge of a superior court might be liable if he acted *coram non judice* ; but there is no legal tribunal to enforce that liability. Thus both lines of reasoning led to the same conclusion—the total immunity of the judges of the superior courts.

I think that, at the end of the seventeenth century, the courts were feeling their way to the distinction upon which the total immunity of the judges of the superior courts rests ; but that the gradual way in which it was being arrived at prevented any very clear apprehension of its juridical basis.[3] Indeed, though we get statements of this rule in the eighteenth century,[4] I doubt whether we get any very clear statement of its juridical basis until the judgment of Willes, J., in 1867, in the case of *The Mayor of*

[1] Floyd v. Barker (1608) 12 Co. Rep. at p. 25 ; so also it was said in Hamond v. Howell (1677) 2 Mod. at p. 221, "If he [the judge] doth anything unjustly or corruptly, complaint may be made to the king, in whose name judgments are given, and the judges are by him delegated to do justice."

[2] Vol. i 226-231.

[3] This can be illustrated by what was said by the court in Hamond v. Howell (1677) 2 Mod. at p. 220—"There hath not been one case put which carries any resemblance with this ; those of justices of the peace and mayors or corporations are weak instances ; neither hath any authority been urged of an action brought against a judge of record for doing anything *quatenus* a judge" ; as justices of the peace were judges of record, this sentence seems to make a distinction without a difference ; but I think it shows that the court is feeling its way to the distinction between superior and inferior judges.

[4] Thus in Miller v. Seare (1777) 2 W. Bl. at p. 1145, De Grey, C.J., said, "First, it is agreed that the judges in the king's superior courts are not liable to answer personally for their errors in judgment. . . . Second, the like in courts of general jurisdiction as gaol delivery. Third, in courts of special and limited jurisdiction . . . a distinction must be made, but while acting within the line of their authority they are protected as to errors in judgment ; otherwise they are not protected."

London v. *Cox*.[1] The fact that this distinction between the judges of the superior and inferior courts was not directly laid down, but only established as the indirect result of the ambit of the jurisdiction of these superior courts, and the absence of any judicial tribunal to which they could be made legally accountable, explains why so many cases have arisen in the nineteenth century in which the extent of this immunity has been questioned. The older authorities limited the immunity of all judges of courts of record to their acts in matters which fell within their jurisdiction; they drew no distinction in this respect between the judges of superior and the judges of inferior courts; and so a trap was laid for those who had not fully considered the consequences of the differences between the extent of the jurisdiction, and nature of the control to which these two classes of judges were subject. I think, therefore, that although it cannot be said that the modern immunity of the judges of the superior courts was fully established at the time of the Revolution, its juridical basis existed, and the judges were gradually becoming conscious of it. To the other effects of the Revolution settlement we must now return.

(iv) The two branches of the prerogative which Charles II. and James II. had most signally abused were specifically dealt with by the Bill of Rights. The suspending power was absolutely condemned.[2] The dispensing power was not condemned absolutely, but only "as it hath been assumed and exercised of late."[3] It was intended to regulate this power by further legislation.[4] But the task was found to be too difficult; and the attempt was abandoned.[5] The result is that the recent dispensations were

[1] "Another distinction is, that whereas the judgment of a superior court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an inferior court, involving a question of jurisdiction is not final. If the decision be for the defendant there is nothing to estop the plaintiff from suing over again in a superior court, and insisting that the decision below had turned, or might have turned, upon jurisdiction. If the decision were in favour of the plaintiff it is not conclusive, because the rule that in inferior courts . . . the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction, never has been questioned," L.R. 2 H. of L. at pp. 262-263; hence "there is yet another difference worth noticing between courts of general and courts of limited jurisdiction, namely . . . that the judge and officers [executing the process of the court] are liable to a civil action if they knew of the defect of jurisdiction," ibid at p. 263.

[2] 1 William and Mary sess. 2 c. 2 § i 1—"That the pretended power of suspending of laws, or the execution of laws, without consent of Parliament, is illegal."

[3] § i 2; cp. as to the interpretation of this clause the case of Eton College (1815) Special Report by Williams; for a list of James II.'s dispensations and pardons see Hist. MSS. Com. 12th Rep. App. Pt. vi 300-308.

[4] 1 William and Mary sess 2 c. 2 § 12—"From and after this present session of Parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament."

[5] The judges agreed that the king had a dispensing power, Hist. MSS. Com. 12th Rep. App. Pt. vi 29, 346-347, 348-349; a bill was introduced to get rid of certain

declared to be invalid; and that no future dispensation is valid, unless it is specially provided in the statute dispensed with that a dispensation is permissible. The question of the army was dealt with by the clause that, "the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law."[1] The fact that Parliament, from that day to this, has never consented to the raising or keeping of a standing army for more than a year,[2] has proved to be one of the strongest sanctions for Parliament's annual session.[3]

The remaining clauses of the Bill of Rights and the Act of Settlement are of comparatively minor importance. The events of James II.'s reign sufficiently explain the insistence of both these enactments upon a Protestant dynasty;[4] and the fact that the Act of settlement was passed by a Tory Parliament explains the clause requiring the king to be a member of the Church of England.[5] Similarly the condemnation of the court of High Commission;[6] of the levying of money without the consent of Parliament, or for a longer time or in other manner than the same is granted of Parliament;[7] of the denial of the right of the subject to petition the king;[8] and of refusal to allow Protestants the right to carry arms for self-defence[9]—were all caused by notorious events in James II.'s reign. In defiance of an Act of Charles II.'s reign, James had, in reliance upon his ecclesiastical supremacy, erected a new court of High Commission.[10] He had levied customs duties before they had been regularly granted to him by Parliament. He had prosecuted the Seven Bishops who had presented a respectful petition. He had allowed Papists to be officers in his army, and refused Protestants the right to carry arms.

We look in vain for any statement of constitutional principle in the Bill of Rights. "Some controverted points of law were decided according to the sense of the best jurists; and there had

statutory restrictions on pardons and grants, but it did not get through the committee stage, Hist. MSS. Com. 12th Rep. App. Pt. vi. 361, no. 183.

[1] 1 William and Mary sess. 2 c. 2 § i 6.

[2] Apparently there was a short break in the Mutiny Act at the end of 1689, Hist. MSS. Com. 12th Rep. App. Pt. vi xix.

[3] "In some of the earlier triennial bills, which failed to pass, there was a clause providing for annual session; but this was dropped in the bill which became law, probably because such a clause was seen to be unnecessary, ibid 14th Rep. App. Pt. vi xv.

[4] 1 William and Mary sess. 2 c. 2 § 9; 12, 13 William III. c. 2 § 1.

[5] Ibid § 3. [6] 1 William and Mary sess. 2 c. 2 § i 3.

[7] § i 4.

[8] § i 5; with singular inconsistency the House of Commons in 1701 voted a petition of the grand jury of Kent that they would turn their loyal addresses into Bills of Supply to be scandalous, insolent, and seditious, see Hallam, C.H. iii 272.

[9] § i 7.

[10] See 11 S.T. 1143-1155 for James II.'s commission.

been a slight deviation from the ordinary course of succession." In the Act of Settlement one or two general principles are laid down—the clauses as to the Privy Council, as to placemen, and as to the judges' tenure of office, are examples. But these principles are, after all, only of secondary importance. The most fundamental principles—the position and functions of the king and his prerogative, of Parliament, and of the courts, and the existence of the rights and liberties of the subject—are all assumed. The reason is to be found in the constitutional history of the reigns of the last two Stuart kings. These fundamental principles had in substance been settled by the legislation of the Long Parliament, and by the results of the Great Rebellion. They had not really been matters of controversy since the Restoration. What had been in controversy was the relative weight in the constitution of the prerogative and Parliament, the control of the courts, and the manner in which the rights and liberties of the subject should be secured. All these matters of political controversy were dealt with by this legislation. But, because it was legislation enacted solely from the point of view of past conflicts, some parts of it were found to be unnecessary, and even mistaken, almost as soon as they had obtained legislative sanction. The old conflicts were over. Parliament, as the result of the Revolution, had finally won the contest for predominance in the state. It had therefore become quite unnecessary to enact that "Parliament ought to be held frequently," because it was impossible to carry on the business of the state without Parliament.[1] For the same reason it soon appeared that the clauses in the Act of Settlement as to the Privy Council, and as to the disqualification of placemen for membership of the House of Commons, were mistaken. It was found necessary to repeal the former, and to modify materially the latter, before they came into operation.[2]

The victory of Parliament necessarily had large effects upon both the legal and the political status of the prerogative.

Its effects upon the legal status of the prerogative have not, as we shall see,[3] been wholly satisfactory. All the statements of the Tudor lawyers as to the corporate capacity of the king, as to his immortality, and his impeccability, were still accepted as part of the law.[4] But, throughout the seventeenth century, Parliament had relied upon mediæval precedents in support of its claims. Therefore, as a result of its victory, certain of the mediæval ideas, which regarded the king as a natural man, rather than as the

[1] Below 261.

[2] 4 Anne c. 8 §§ 24, 25; these clauses had not yet become operative as they were only to take effect from the time when the Hanoverian dynasty succeeded.

[3] Pt. II. c. 6 § 1.

[4] Vol. iv 202-203.

corporate head and representative of the state, survived. Hence much legislation has been necessary to prevent the death of the king from causing "all the wheels of the State to stop or even to run backwards."[1] Then, too, Parliament had always contended for the mediæval idea of the supremacy of the law.[2] It was admitted that the king was personally above the law, and that personally he was the sovereign representative of the state.[3] But the victory of the Parliament made it quite clear that his prerogative was subject to the law. For these reasons an extraordinarily complex body of legal doctrines has grown up round the prerogative, with which I shall deal in the second Part of this Book.[4]

The effects of the victory of Parliament upon the political status of the king, and the relation of his prerogative to Parliament, the courts, and the subject, will be explained in the two following sections.

(3) *Parliament; and the relation of Parliament to the Prerogative.*

The fact that Parliament had, as a result of the Great Rebellion, won a position in the state on an equality with that of the king and the courts; and that it had, as a result of the Revolution, won a position of predominance in the state; are illustrated by the tendency of the fashionable world, during the latter part of the seventeenth century, to move westwards in the direction of Westminster. "Until the reign of Charles I.," says Porritt,[5] "what we know as the London season had centred, not as to-day about Parliament, but about the Inns of Court. The lawyers set the fashion in dress and amusements. They chiefly constituted the fashionable world of London; and while they were socially supreme, the eastern side of Temple Bar was the centre of fashionable society. After the Restoration this supremacy of the Inns of Court passed to Parliament. . . . With the passing of this supremacy from the Inns of Court to Parliament, the fashionable world gradually moved westward of Temple Bar." This increase in the importance of Parliament had two important effects. In the first place, it tended both to provoke and to settle questions relating to its constitution, to the relations between the two Houses of Parliament, to their powers, and to their procedure and privileges. In the second place, it raised the question of the future relations of Parliament to the crown and its prerogative—of the relations, that is, of the legislative power in the state to the executive.

[1] Maitland, L.Q.R. xvii 136.
[2] Above 83-84, 206-207.
[3] Above 204-205, 207.
[4] Pt. II. c. 6 § 1.
[5] The Unreformed Parliament i 566-567.

(i) Questions relating to the constitution of Parliament, to the relations between the two Houses of Parliament, to their powers, and to their procedure and privileges.

The manner in which these four questions were settled will illustrate the gradual settlement of many of those parts of our public law which centre round Parliament, and will show that Parliament has now begun to assume its modern position in the constitution. A brief account of their settlement is all that will be necessary. To enlarge upon them would be to encroach unduly upon the provinces of the constitutional historian and the constitutional lawyer.

The Constitution of Parliament.

The latter part of the seventeenth century saw the constitution of the House of Lords settled in almost its final form. It saw the beginnings of the legislation as to disqualifications for membership of the House of Commons, and as to the conduct of elections; but it saw hardly any change in the representative system.

Anson points out that it was in the seventeenth century, and especially during the latter half of the century, that "the customs of the peerage were defined and reduced to the form in which they appear in modern text books."[1] This was effected chiefly by two series of decisions. Firstly, there is a series of cases upon the question of the alienation or surrender of peerages. In 1641 the House resolved that a peer cannot alien or transfer his peerage to the king "by surrender, grant, fine, or any other conveyance."[2] But, down to 1678, there were some doubts as to whether or not a peer could surrender his dignity to the king by fine. Such a fine had in fact been held to be valid by the law officers in 1660.[3] But in 1678, in the *Purbeck Case*, the House of Lords decided that a peer could not by fine bar, either his own title to his peerage, or that of persons claiming through him.[4] Secondly, there is a series of cases as to the mode in which a person may entitle himself to a peerage, and as to the proof of such title. In 1669 the Privy Council, assisted by the judges and the law officers of the crown, came to the conclusion that barony by tenure had "been discontinued for many ages, and was not in being, and so not fit to be revived, or to admit any pretence of right to succession there-upon."[5] The question was finally decided by

[1] The Parliament (5th ed.) 209-210.
[2] Pike, Constitutional History of the House of Lords 271.
[3] Ibid. [4] Ibid 271-272. [5] Ibid 130.

the House of Lords in the same way in 1861 in the *Berkeley Case*.[1] In the *Clifton Case* (1673), and the *Freschville Case* (1677) it was decided that the issue and receipt of a writ of summons, and the taking of his seat by the recipient in obedience to the summons, would create an hereditary peerage.[2] In the *Ruthyn Case* (1670) it was decided that the title to a peerage must be proved by matter of record, i.e. either by writ or letters patent.[3]

During this period we get the beginnings of the statutory disqualifications for membership of the House of Commons. Minors were disqualified by an Act of 1696,[4] and aliens, even though naturalized, by the Act of Settlement.[5] The Test Act[6] excluded Roman Catholics. The oath abjuring the title of the descendants of James II. to the throne, required by a statute of 1701,[7] excluded Jews, because it was required to be taken "on the true faith of a Christian." We get also a few statutory rules as to elections. In 1689 the claim of the Lord Warden of the Cinque Ports to nominate a member for each Port was disallowed, and the inhabitants were allowed to elect.[8] In 1695,[9] the decision in *Barnardiston* v. *Soame*,[10] in which it was held that no action lay against a sheriff for making a double return, was reversed by a statute which gave a right of action against returning officers who made false or double returns. The same statute also declared it to be illegal for a returning officer to make any return which conflicted with "the last determination in the House of Commons of the right of election."[11] Another statute of the same year contained some regulations

[1] Anson, op. cit. 190.

[2] Ibid 189.

[3] Ibid; but the writ must be a writ to an assembly to which the Commons were summoned, St. John Peerage Claim [1915] A.C. 282.

[4] 7, 8 William III. c. 25 § 7; the practice of "sending such to Parliament as are scarce old enough to be sent to the University daily increaseth," says Halifax, Foxcroft ii 474; he thought that no one under thirty should be eligible.

[5] 12, 13 William III. c. 2; in 1695-1696 a bill had passed both Houses to exclude aliens from membership of the House of Commons; to make it necessary for knights of the shire to have a freehold estate of £500 a year, and borough members to have a similar estate of £200 a year; and to penalize corrupt practices and treating; but the king refused his assent, House of Lords MSS. (N.S.) ii no. 1016; cp. Macaulay, Hist. iv 148-149; a somewhat similar bill dealing with the disability of aliens, and property qualification for members, was lost in the House of Lords, ibid no. 1092; Macaulay, Hist. iv 187-188. It was held in R. v. Speyer [1916] 2 K.B. 858, that § 7 of the Naturalization Act, 1870 (33 Victoria c. 14) had impliedly repealed this clause of the Act of Settlement, though the Act of Settlement is not mentioned in the schedule of Acts repealed by the Naturalization Act.

[6] Above 181-182.

[7] 13 William III. c. 6 § 1.

[8] 2 William and Mary sess. 1 c. 7.

[9] 7, 8 William III. c. 7, made perpetual by 12 Anne st. 1 c. 15; a somewhat similar bill had passed the Commons, but had failed to pass the Lords in 1692-1693, Hist. MSS. Com. 14th Rep. App. Pt. vi no. 722.

[10] (1674) 6 S.T. 1063.

[11] § 1; cp. Porritt, The Unreformed Parliament i 8, 9.

as to the procedure to be followed in an election by sheriffs and other returning officers,[1] and prohibited the practice of making conveyances of freeholds in order to multiply votes.[2] Further regulations as to the conduct of elections were made by a statute of 1698.[3] A statute of 1695 begins the long line of enactments which attempt to suppress bribery and treating by candidates for Parliament.[4]

There was but little change in the representative system. We have seen that the last occasion upon which the crown exercised its old prerogative of creating boroughs, with the right of returning members to the House of Commons, was in 1673.[5] A few boroughs, which had once returned members to the House but had ceased to do so, had been restored to their right by resolutions of the Commons in the earlier half of the century.[6] By a statute of 1672[7] the county palatine and city of Durham were each given the right to return two members. These were all the changes made during this period; so that none of the anomalies which disfigured the representative system was remedied. The reasons for this absence of reform are obvious. In the first place, William, like Charles II. and James II., had found that it was necessary to corrupt the House of Commons in order to manage it.[8] It is clear that neither he nor the larger landowners[9] were willing to give up the opportunities for management afforded by the anomalies of the representative system. In the second place,

[1] 7, 8 William III. c. 25; cp. Porritt, op. cit. i 186-187. [2] § 6.

[3] 10 William III. c. 7; a similar provision to § 2 of this Act occurs in an abortive bill of 1696, House of Lords MSS. (N.S.) ii 377 no. 1093.

[4] 7, 8 William III. c. 4; before this date the House had attempted to repress this evil by its own standing orders; Marvell tells us that in 1677 the House agreed to "a standing order to the Committee of Privileges for the judging of all elections to Parliament for the future, that if any one should spend before the day of the election above £10, except in his own dwelling house, in order to such election, or shall make or give any reward or promise, that it shall be accounted bribery and vacate his choice," Works ii 538; the order was renewed in 1678, ibid 622; see above 245 n. 5.

[5] Above 210. [6] Porritt, op. cit. i 382.

[7] 25 Charles II. c. 9.

[8] Burnet, Own Time (folio ed.) ii 42, says that Speaker Trevor (for whom see below 549-550) "began the practice of buying off men, in which hitherto the king had kept to stricter rules. I took the liberty once to complain to the king of this method; he said he hated it as much as any man could do, but he saw it was not possible, considering the corruption of the age, to avoid it, unless he would endanger the whole"; see ibid 86 where Burnet notes that, "the taking off Parliament men, who complained of grievances, by places and pensions, was believed to be now very generally practised"; on the whole subject see Macaulay, Hist. (ed. 1864) iii 143-145.

[9] "Nominations by patrons can be traced back to the time of the Tudors (vol. iv 96); and there is proof that in the closing year of the reign of James II., the duke of Newcastle was regarded by the Court as in a position to influence the election of sixteen members; the earl of Aylesbury, eight; Lord Teynham, eight; the earl of Huntingdon, six; Lord Preston, six; Sir Robert Holmes, six; and a number of heads of landed families, known to be in sympathy with the Court, a lesser number each," Porritt, op. cit i. 309; Halifax condemns the practice of "recommending letters," Foxcroft ii 468-469.

it was beginning to be seen that the power to dispose of a seat in Parliament was pecuniarily valuable.[1] As the House of Commons increased in importance, it soon came to be openly recognized that a seat in Parliament was a piece of property of constantly increasing value, for which there was a ready and a regular market.[2] These reasons combined to prevent any extensive reform of the House of Commons till 1832; and they naturally produced, during the whole of the eighteenth and the first quarter of the nineteenth centuries, large direct effects upon the development of the public law of this country, and almost equally large indirect effects upon the development of many branches of its private law. In particular, this failure to pass any measure of Parliamentary reform had, as we shall now see, a considerable influence upon the relations between the two Houses of Parliament.

The relations between the two Houses of Parliament.

We have seen that, even before the outbreak of the Civil War, the authority of the House of Commons had been increasing at the expense of the House of Lords.[3] The Restoration did not arrest this process.[4] During Charles II.'s reign the authority of the House of Commons was evidently growing greater than that of the House of Lords, and the initiative was passing to it. To some extent the House of Lords contributed to this result by its own slackness—"By not," as Clarendon complains,[5] "enquiring into or considering the public state of the kingdom, or providing remedies for growing evils, or indeed meddling with anything in the government, till they were invited to it by some message or overture from the House of Commons: in so much that they sat not early in the morning, according to the former customs of Parliaments, but came not together till ten of the clock; and very often adjourned as soon as they met because nothing was brought from the House of Commons that administered cause of consultation: and upon that ground often adjourned for one or two days together, while the other House sat, and drew the eyes of the kingdom upon them, as the only vigilant people for their good." There was no thought, indeed, of dispensing with a second chamber. The recent experiences of the doings of a single chamber had quite convinced the majority of English men of the

[1] The earliest instance of a direct sale of a seat comes from 1698, but Porritt, op. cit. i 354, considers that as yet their sale was not "open and frequent."

[2] At the general election of 1701 Davenant said that it was reported that "there were known brokers who have tried to stock job elections upon the exchange and that for many boroughs there was a stated price," Works iii 326, cited Porritt, op. cit. i 354.

[3] Above 139.

[4] Firth, The House of Lords during the Civil War 291-296.

[5] Continuation of Life §§ 960, 992, cited Firth, op. cit. 295.

need for some such check upon the tyrannous activities of such a chamber.[1] But it was quite clear that the House of Lords was becoming simply a second chamber which acted as a check upon the House of Commons, and that it could no longer claim to possess co-ordinate authority—still less to be an "upper" House.

Two illustrations will make this clear. The conduct of the House of Lords in rejecting the Exclusion Bill in 1680, is the action expected of a second chamber, which is not convinced that the country has made up its mind.[2] Similarly its conduct in giving way to the House of Commons in 1688, and accepting its resolution as to the vacancy of the throne, is the action expected of a second chamber, which has reason to think that the House of Commons has the nation behind it, and knows that a decision is a matter of great urgency.[3] But, though the House of Lords was thus coming to hold, in relation to the House of Commons, its modern position of a delaying and revising body, its position in this period was not quite the same as that which it has ultimately taken. During the whole of this period the king still played an active part in the government. He could and did perform the same sort of function in relation to the House of Commons as was performed by the House of Lords. By the use of his prerogative of prorogation or dissolution, and by refusing his consent to bills, he could in substance refer back to the country bills passed by both Houses, or by one or other House. Thus in the Oxford Parliament it was certain that the House of Commons would again pass the Exclusion Bill. If it had done so, the House of Lords, according to the modern theory of the constitution, would have had no option but to concur. But Charles took the matter into his own hands, stopped the progress of the Bill by a dissolution, and thus, in substance, appealed to the country. As we have seen, there is no doubt that he had more correctly appreciated the "will of the people" than the House of Commons, and that his action saved the country from a second civil war.[4] It is not until the king ceases to play an active part in the government that the relations between the two Houses will be completely settled upon their modern basis.

It was hardly to be expected that the House of Lords would submit to this change in its constitutional position without a struggle. Struggle it did; and it is largely for this reason that we find more controversies between the two Houses during this

[1] Firth, op. cit. 296, citing a treatise on government by Neville, which was published in 1680, in which the author declares that, "if we had no such peerage now, upon the old constitutions, yet we should be necessitated to make an artficial peerage or senate instead of it."

[2] Above 187. [3] Above 230. [4] Above 188-189.

period than at any other period in their history. It is not till the struggle over the reform bill of 1832, and the late controversies of the nineteenth and the present centuries, that there have been so many quarrels between them. No doubt some of these quarrels were engineered for party purposes. Probably Charles II. was not sorry to use the dispute between the two Houses in the case of *Skinner* v. *the East India Co.*[1] as an excuse for lengthy prorogations; and it is probable that Shaftesbury deliberately fomented the dispute, which arose over the case of *Shirley* v. *Fagg*, for purposes of obstruction.[2]

Disputes, such as were common during the whole of this period, ceased in the eighteenth century. The reason is to be found in the fact that the defects in the representative system, which were left untouched at the Revolution, provided a means by which both the king and the House of Lords could exert a large indirect influence over the House of Commons. From this point of view we may even say that these defects helped to secure the orderly development of the constitution. A constitution in which a representative House was the predominent partner was as yet a very new phenomenon in constitutional law. A long period, in which the peaceful working of such a constitution was assured, was essential to its stability. The unacknowledged and often corrupt methods, by which harmony was secured between this representative House and the other branches of the constitution, secured this period of peaceful working; accustomed a representative House to rule, and the nation to be ruled by it; and thus paved the way for the more complete assertion of the predominance of that House, when these defects in the representative system were swept away.

The fact that the king and the House of Lords were obliged to have recourse to these methods of influencing the House of Commons to preserve their power, is the best proof of the predominant position in the state which, as a result of the Revolution, the House of Commons had secured. To understand the nature of this position, and the manner in which it was consolidated during this period, we must glance briefly at some of the powers exercised by the two Houses of Parliament during this period.

The Powers of the two Houses of Parliament.

We have seen that it had long been well recognized that the judicial powers of Parliament belonged solely to the House of Lords.[3] We have seen, too, that it was during this period that their extent was finally ascertained.[4] It was recognized also that

[1] Vol. i 367.
[2] Above 182-183; vol. i 374.
[3] Ibid 362-364.
[4] Ibid 365-392.

bills affecting the peerage should originate in the House of Lords, and should not be amended, though they might be rejected, by the House of Commons.[1] But these were small matters compared with the complete control over finance which the Commons acquired during this period (*a*) as against the House of Lords, and (*b*) as against the king.

(*a*) As against the House of Lords, the Commons established their right to originate all bills which in any way laid a charge upon the people, and successfully resisted the claim of the House of Lords to amend such bills. In 1661 the Commons rejected a bill for the paving of streets in the neighbourhood of Westminster because it imposed a rate, and prepared a similar bill of their own. When their bill came up to the House of Lords, the House inserted a proviso to the effect that it "should not be drawn into example to their Lordships' prejudice." The Commons refused to accept this proviso, and the bill failed to pass.[2] In 1671 the Commons denied the rights of the Lords to amend a money bill. A conference was held, but neither side gave way.[3] In 1678 the Lords again amended a money bill. Several conferences were held, but no agreement was reached.[4] But the substantial victory remained with the Commons. They have ever since been governed by the rule, which they laid down on this occasion, to the effect that, "all aids and supplies to His Majesty in Parliament are the sole gift of the Commons; and all bills for granting any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills, the ends, purposes, and considerations, conditions, limitations, and qualifications, of such grants, which ought not to be changed or altered by the House of Lords."[5]

It can hardly be contended that the claim of the Commons was good in law. No doubt, as a general rule, grants of money had, from the latter part of the fourteenth century, originated with the Commons;[6] and this had been recognized by Henry IV. in 1407.[7] But there is no mediæval authority in favour of their claim that such grants could not originate from the Lords, and that the Lords could not amend these grants.[8] In 1661 the

[1] Porritt, op. cit. i 562; as is there pointed out, this usage was ignored by the Long Parliament when the House of Commons introduced measures for depriving the bishops of their votes, and otherwise affecting the House of Lords.

[2] Ibid i 548-550.

[3] Ibid i 550-552.

[4] Ibid i 552-554.

[5] Ibid i 553, citing Commons Journals ix 509.

[6] Stubbs, C.H. iii 282.

[7] Ibid iii 66, citing R.P. iii 611.

[8] "It may be questioned whether Henry's dictum in 1407 was at the time understood to recognize the exclusive right of the Commons to originate the grant," ibid iii 282-283; there is a case in 1472 in which the Commons originated a grant to

Lords could show cases in which similar bills had originated from them;[1] and in 1671 they asked in vain for documentary evidence that such claims had ever been conceded by the Lords.[2] But the claims of the House of Commons were not therefore wholly without substantial justification. They can be to some extent justified by the change in political conditions which had taken place in the latter half of this century. It was quite obvious that the crown could no longer be expected to "live of its own." The money needed to maintain the government must be raised by taxation direct or indirect; and the House of Commons in theory represented all but an insignificant fraction of the persons upon whom the taxes were laid. As the House had the power to enforce its claims, it might be contended that it was only fair to its constituents to enforce them.[3] But no defence is possible of the wholly unjustifiable use which, during this period, the House of Commons made of these powers, when they forced the House of Lords to pass measures which they disliked by tacking them to money bills.[4] It was a peculiarly unprincipled and unpatriotic form of duress.

(*b*) As against the king, the Commons had, in Charles II.'s reign, occasionally asserted their rights to appropriate supplies for specific purposes, and to examine the accounts to see if the money had been properly expended.[5] But this course could not be pursued with respect to the hereditary revenue, or the revenue granted at the beginning of the king's reign for his life; and it was not pursued in the case of any of the supplies granted by James II.'s Parliament of 1685.[6] It was obvious at the Revolution that, if, as against the king, the control of the House of Commons over finance was to be made effectual, some changes must be made in methods of granting supply.

The changes made can be grouped under two main heads.

be assessed on the property of commons, and the lords originated another to be assessed on their own property, ibid iii 283; and in the convention Parliament the Lords had amended money bills without objection, Hallam iii 30.

[1] See Porritt, op. cit. i 549.

[2] Ibid i 551; Hallam says of the controversies which arose on this occasion that, "the limits of the exclusive privilege claimed by the commons were discussed with considerable ability, and less heat than in the disputes concerning judicature; but, as I cannot help thinking, with a decided advantage both as to precedent and constitutional analogy on the side of the peers," C.H. iii 31.

[3] "Everything that was necessary for the public service had now to be raised by taxation in some form; and the members of the House of Commons represented almost the whole of the persons who were to be taxed. When, therefore, they claimed exclusive privileges in regard to Money Bills, they had not only some historical grounds for their pretensions, but also a powerful argument in the interests with which they were charged," Pike, Constitutional History of the House of Lords 342.

[4] See Hallam, C.H. iii 142-143.

[5] Above 175, 176; Redlich, Procedure of the House of Commons iii 161.

[6] Hallam, C.H. iii 117.

In the first place, the revenue granted to the king in perpetuity decreased, and that granted annually for a limited term increased. In the second place, the rule of strict appropriation, universally applied to the annual or limited grants, resulted in securing for the House of Commons permanent control over the amount and kind of expenditure which the crown could incur.

(a) The Commons had granted both to Charles II. and to James II. taxes estimated to produce £1,200,000 a year, out of which the ordinary expenses of government were to be defrayed. Extraordinary expenses were defrayed by special grants.[1] Thus, as Redlich says, down to 1688, "the financial action of the House of Commons had been substantially confined to making a life grant on the King's accession of certain customary taxes, and to granting special subsidies from time to time upon the request of the Crown."[2] As Hobbes had pointed out, it was not a satisfactory system. It is hardly possible to estimate the probable expenses of the state over a long series of years—"Commonwealths," as he said, "can endure no diet."[3] And in England, during the last two reigns, the political consequences of the system had not been happy. We have seen that, in the earlier part of Charles II.'s reign, the yield of the taxes estimated to produce the £1,200,000 fixed by the House of Commons, fell considerably short of the required sum; and that this had naturally led to misunderstanding and friction between the king and the House of Commons.[4] On the other hand, during the latter part of his reign, and during the reign of James II., it exceeded this sum. James II. enjoyed an average annual income of £1,500,964;[5] and, as he was free to spend this income as he saw fit, he had a very large discretion in the conduct of the government. It was this consequence of the old system of supplying the needs of the state which led the Commons, after the Revolution, to make some very radical changes.[6]

The accession of William and Mary to the throne put them into possession of the hereditary revenue, which was estimated to

[1] Redlich, op. cit. iii 161. [2] Ibid.

[3] "The nature of men being as it is, the setting forth of Publique Land, or of any certaine Revenue for the Commonwealth, is in vaine; and tendeth to the dissolution of Government, and to the condition of meere Nature, and War, as soon as ever the Soveraign Power falleth into the hands of a Monarch, or of an Assembly, that are either too negligent of money, or too hazardous in engaging the publique stock, into a long or costly war. Commonwealths can endure no Diet: for seeing their expence is not limited by their own appetite, but by externall Accidents, and the appetites of their neighbours, the Publique Riches cannot be limited by other limits, than those which the emergent occasions shall require," Leviathan 129.

[4] Above 173. [5] Hallam, C.H. iii 115.

[6] See generally Macaulay, Hist. iii 150-151; for the question whether the revenue granted to James for his life expired when he was deposed see ibid ii 258-259.

yield between four and five hundred thousand a year. In addition, the Commons granted to them for their lives, and for the life of the survivor, that portion of the excise which had been settled on James II. for his life.[1] This was estimated to yield about three hundred thousand a year. From this income the expenses of the royal household and the civil service were to be defrayed, and the list of expenses thus charged on this fund was known as the civil list. In 1698 an income of £700,000 a year was settled on William for his life, out of which the expenses of the civil list were to be defrayed.[2] Any surplus from the sources of revenue, from which this £700,000 was to be produced, was to be disposed of as Parliament might direct.[3] For any extra income for any other purpose the king must come to Parliament; and Parliament only made special and temporary grants. "It was taken up," says Burnet,[4] "as a general maxim that a Revenue for a certain and short term was the best security that the nation could have for frequent Parliaments." Thus the expenses of the army and the navy, and any further sums needed for the upkeep of the civil government, were made to depend upon such special and temporary grants. William was naturally displeased. "He said to myself," says Burnet,[5] "why should they entertain a jealousy of him who came to save their religion and liberties, when they trusted King James so much, who intended to destroy both? I answered, they were not jealous of him, but of those who might succeed him; and if he would accept of the Gift for a term of years, and settle the Precedent, he would be reckoned the Deliverer of succeeding ages, as well as of the present."

(*β*) The special and temporary grants which Parliament made for the upkeep of the army, the navy, and all other expenses of government, not comprised in the civil list, were always strictly appropriated to the specific purpose for which they were granted;[6] and, from time to time, Acts were passed for an audit by Parliamentary commissioners of the expenditure of the sums so granted.[7] Thus the practice of appropriation, which had only been occasional during the past two reigns, now became normal. It was, as Hatsell has said, "made part of that system of government which was then established for the better securing the rights, liberties, and privileges of the people of this

[1] 2 William and Mary sess. i c. 3.

[2] 9 William III. c. 23—this, as Redlich observes, op. cit. iii 161, was the first civil list Act.

[3] § 11.

[4] History of My Own Time (folio ed.) ii 43.

[5] Ibid ii 43.

[6] Redlich, op. cit. iii 168-169.

[7] See e.g. 2 William and Mary sess. ii c. 11; 4, 5 William and Mary c. 11; 5, 6 William and Mary c. 23; 6, 7 William and Mary c. 9.

country."[1] And more was involved in this change than a mere legal security that the money voted by Parliament was devoted to the purposes for which it was given. The very act of appropriating specific sums to this or that need of the government, involved a decision upon the question which need was more, and which was less pressing; and the right to make these decisions gave a power, not only to criticize, but also, in some measure, to control the conduct of the government. "The Commons," says Hatsell,[2] "took upon themselves the authority of judging as well of the nature, as of the *quantum*, of the particular services recommended to them by the crown; and voted, of the army, navy, and ordnance, such proportions only as appeared to them, upon due consideration of the state of this country with respect to its foreign enemies and internal defence, necessary and expedient for those purposes."

It is not surprising to find that a House which had gained these powers assumed a right to inquire into the working of all parts of the government. Thus they inquired into the miscarriages of the war in Ireland in 1689;[3] and they "went fully into the dispute between the board of admiralty and admiral Russell after the battle of La Hogue."[4] In 1694 they fully examined the policy of the admiralty during the preceding year, and, after this examination, voted their approval of it.[5] They even considered the creation of a board of trade to be nominated by Parliament, with wide powers to make recommendations for the preservation and improvement of commerce.[6] That the House of Commons could thus take upon itself this survey over and control of the conduct of the government, was due to the fact that the contests of this century had given it an efficient code of procedure, and had established it firmly in the possession of the privileges necessary for the effective exercise of these various powers.

Procedure and Privileges.

We have seen that, during the first half of the seventeenth century, the creation by the House of Commons of a workable code of procedure, and the assertion by it of its privileges, were the conditions precedent for success in its struggle with the crown for an independent constitutional position.[7] This procedure and these privileges were found sufficient for the new and enlarged activities of the House of Commons both after the Restoration and after the Revolution.

[1] Precedents (3rd ed.) iii 179, cited Redlich, op. cit. iii 169.
[2] Ibid. [3] Hallam, C.H. iii 143. [4] Ibid 144.
[5] Ibid. [6] Ibid 145. [7] Above 88-100.

The only two developments in procedure which need here be noticed are of comparatively minor importance; but both illustrate the growing independence of the House of Commons.

In the first place, the Speaker ceased to be the nominee of the crown, and the go-between between the crown and the House.[1] He became the nominee of the House, owing duties to the House alone.[2] In 1679 the Commons elected Seymour—the Speaker of the preceding Parliament. The king, knowing that he was an enemy of Danby, objected to their choice, and ordered the House to make another election. By order of the king Sir John Meres was proposed; but the House refused to elect him, and again elected Seymour. Again the king refused to accept him; and, as the Commons insisted, prorogued Parliament. Eventually the Commons chose a third person, serjeant Gregory, whom Charles accepted. As Porritt says, "the king gained his end in so far as he prevented the enemy of Danby from being again installed in the chair. But the permanent gain lay with the House of Commons."[3] It is true that, in later days, the influence of the court sometimes affected the choice by the House of their Speaker. But no king again issued a direct order for the choice of a certain person; and when, in 1694, a nominee of the crown was proposed, the House resolved that "It was contrary to the undoubted right of the House of choosing their Speaker, to have any person who brought any message from the king to nominate one of them."[4]

In the second place, during this period the House of Commons finally made good its claim that it could only be adjourned by its own act. The king could, of course, end the session by a prorogation, or the Parliament by a dissolution. But in both these cases all the business before the House must be begun *de novo*. On the other hand, if the House merely adjourned, the business before the House was resumed, when the House met again, at the stage which it had reached when the adjournment took place.[5] On several occasions the king had assumed the power to adjourn the House. James I. pursued this course in 1621.[6] The attempt of Finch in 1629 to obey the order of Charles I. to adjourn the House, had occasioned the riotous scene which marked the close of that Parliament.[7] Charles II. on several occasions ordered the adjournment of the House. In 1670 his order was obeyed

[1] Above 90.

[2] See Porritt, op. cit. i 437-444; Redlich, op. cit. ii 162-163; Hatsell, Precedents ii 153-161.

[3] Op. cit. i 443.

[4] Porritt, op. cit. i 444, citing Commons Journals xi 272.

[5] Anson, Parliament (5th ed.) 72.

[6] Prothero, Documents 316.

[7] Above 90.

without question;[1] and in 1677 he ordered adjournments on four several occasions,[2] which the Speaker obeyed without putting the question whether or no the House wished to adjourn. This episode gave rise to debates, which ended without any resolution.[3] But it was generally recognized that, as Marvel puts it, "adjournments are the act of the House."[4] This has always been accepted as the rule since the Revolution,[5] and its establishment is one more illustration of the complete control which the House had by this time established over the ordering of its own business.

After the Restoration the privileges of both the Houses of Parliament were for the most part unquestioned. We have seen that certain proceedings in the courts against Speaker Williams, and some other officials of the House, gave rise to a clause in the Bill of Rights.[6] But we shall see that there was something to be said for the action of the judges in those cases.[7] There are no such flagrant and indefensible violations of privilege as occurred in the earlier part of the century. On the contrary, what was to be feared was, not that the crown would encroach on the privilege of Parliament, but that either individual members of the Houses of Lords or Commons, or one or other House collectively, would, under cover of privilege, encroach upon the rights and liberties of the subject, and the supremacy of the law.

The privileges claimed by individual members of the House of Lords were both large and oppressive.[8] We have seen that resentment at the manner in which they were asserted had a good

[1] Commons Journals ix 158. [2] Marvell, Works ii 557, 558, 565, 569.

[3] Ibid 571, 577-578.

[4] Ibid 577-578—"Many insisted, as it hath been understood that his Majesty intended nothing by that command, but that it should be done after the usual method, and showed the ill consequences, if the Speaker might so leave the chaire of his own determination, without putting the question, adjournments being the act of the House."

[5] May, Law and Practice of Parliament (11th ed.) 46.

[6] Above 231. [7] Below 269-270.

[8] "No gentleman who had had a dispute with a nobleman could think, without indignation, of the advantages enjoyed by the favoured caste. If his Lordship were sued at law, his privilege enabled him to impede the course of justice. If a rude word were spoken of him, such a word as he might himself utter with perfect impunity, he might vindicate his insulted dignity both by civil and criminal proceedings. If a barrister in discharge of his duty to a client, spoke with severity of the conduct of a noble seducer, if an honest squire on the race course applied the proper epithets to the tricks of a noble swindler, the affronted patrician had only to complain to the proud and powerful body of which he was a member. His brethren made his cause their own. The offender was taken into the custody of the Black Rod, brought to the bar, flung into prison, and kept there till he was glad to obtain forgiveness by the most degrading submission," Macaulay, Hist. iii 305; cp. Pike, Constitutional History of the House of Lords 254 seqq.; vol. i 391; and for some illustrations of the obstructions to justice introduced by the privileges of the peers, and the protections granted by them to their servants, see House of Lords MSS. (N.S.) ii xxvii-xxx and references there cited; in all the volumes of these MSS. many such illustrations can be found.

deal to do with causing the dispute between the House of Lords and the House of Commons, which delayed the enactment of the very salutary law for the reform of the procedure in trials for high treason.[1] Moreover, members both of the House of Lords and of the House of Commons, and their servants, had large immunities from being sued in civil actions while Parliament was sitting, and for forty days before and after a session. This privilege may not have produced much hardship when the intervals between Parliaments were long, and sessions were short. It obviously amounted almost to a denial of justice, now that Parliament was in almost perpetual session. It was for this reason that an Act of 1700[2] provided that personal[3] actions could be brought against members of the House of Lords and Commons and their servants, immediately after a dissolution or a prorogation of Parliament, or an adjournment for more than fourteen days, and till Parliament again assembled.[4] If by reason of privilege a plaintiff was prevented from prosecuting his suit, his claim was not to be barred by any statute of Limitation, and he was not to be "nonsuited, dismissed, or his suit discontinued for want of prosecution," but he was "from time to time upon the rising of the Parliament to be at liberty to proceed to judgment and execution."[5] Nothing in the Act was to authorize the arrest of a member of either House on civil process.[6]

More important from the point of view of public law are the extensions of privilege, which both the Houses collectively sometimes sought to establish. We have seen that, during the Long Parliament, claims to sanction anything which the House wished, and to punish any conduct of which it disapproved, were justified under cover of the elastic phrase "privilege."[7] We have seen too, that, during the Exclusion Bill agitation, the House of Commons was guilty of much arbitrary conduct under cover of the same plea.[8] Privilege, in fact, in the eyes of the House of Lords and the House of Commons, comprised a set of powers almost as vague and elastic as those comprised in the prerogative. Like prerogative, its relations to the law had never been accurately ascertained. Nor was it possible that any certain conclusion as to its relations to the law should be reached under Charles II. and James II. The law courts were, from the middle of Charles II.'s reign, presided over by the partisans of the crown, and

[1] Above 232-234.

[2] 12, 13 William III. c. 3; for an earlier Bill which failed to pass see House of Lords MSS. (N.S.) ii 371 no. 1089.

[3] § 5 of the Act provided that it was not to extend to real or mixed actions; § 4 provided that proceedings at law or in equity against the "king's original and immediate debtor" were not to be stayed by privilege of Parliament.

[4] § 1. [5] § 3. [6] §§ 2 and 4.

[7] Above 141. [8] Above 188.

therefore any conclusions to which they came upon this topic were justly suspected. It was not till after the Revolution, when the Bench had been purged, and when the judges' tenure of office had been made secure, that any sort of settlement of the law upon this topic could be made.[1] Even then its settlement has been extremely slow and difficult. Assemblies, whether representative or otherwise, are as indulgent to their own claims to exercise arbitrary powers as they are severe upon the claims of others to exercise such powers. They are as impatient of the control of the law as they are indignant at any one else's attempts to evade this control. We shall see that the judges appointed after the Revolution—and especially Sir John Holt—ably and courageously vindicated the supremacy of the law as against arbitrary extensions of privilege attempted both by the House of Lords and the House of Commons.[2] By thus vindicating the supremacy of the law in these cases, they both laid the foundations for the ultimate settlement of the relations between privilege and the law, and effectually protected the liberties of the subject.

But, before I can deal with this topic, I must first say something of the effects which these various developments in the constitutional position of the two Houses of Parliament had upon the relations between Parliament on the one side, and the crown and its prerogative on the other.

(ii) The relations between Parliament and the prerogative.

We have seen that the constitutional law of Charles II.'s and James II.'s reigns did not effectively solve the question of the whereabouts of the sovereign power in the state.[3] Neither king nor Parliament could lay claim to it. Nor was it solved by the Revolution, and the legislation which settled the law of the constitution upon its modern basis. All that was established by this legislation was the view contended for by Parliament in the early part of the century, that the sovereign power in the state was the king in Parliament.[4] Neither the king nor the House of Lords nor the House of Commons was sovereign. If these three partners could not agree, there was no active sovereign. The existing law as administered by the courts was supreme.

In truth, the attainment of this result was the attainment of the ideal aimed at by a large, perhaps the largest number, of the Parliamentary statesmen of this century. A king and his ministers, a House of Lords, and a House of Commons, who

[1] Below 269-272. [2] Below 270-272; vol. i 393.
[3] Above 203-207.
[4] Above 84-86; cp. North, Examen 333, 334.

moved each in their allotted spheres, without encroaching upon the spheres of the others; and over all the law ready to punish any illegality committed by any minister or member of either House of Parliament—that was the ideal which floated before the minds of most of the constitutionally minded Englishmen of this period.[1] It was essentially a legal ideal, the product of that alliance between Parliament and the common law, which Coke had done so much to cement.[2] But, politically, it was an impossible ideal. Between three such partners no enduring harmony could be expected. If they fell out, one or other must prove the stronger, and cause his will to prevail. That one, whatever the law might say, must be politically the sovereign.

The history of the Long Parliament had proved this. We have seen that the logic of events had compelled the House of Commons in the Grand Remonstrance, and in the Nineteen Propositions, to demand that the king should appoint as his ministers only those men who were approved by the House of Commons.[3] They had seen that it was not enough to secure that the king's ministers obeyed the law. They must also secure that those ministers would follow the policy approved by the House—"It may often fall out that the Commons may have just cause to take exceptions at some men for being councillors, and yet not charge those men with crimes, for there be grounds of diffidence which lie not in proof."[4] But, at the Restoration, these ideas were considered to be revolutionary. As we can see from Hale's tract,[5] the strictly legal theory of the constitution revived. It was not to be supposed that Parliament had any right to indicate to the king the persons whom he should appoint to offices in the state, or to ask the king to dismiss them, unless it was able to prove that they had acted illegally. One of the fallacies that underlay Temple's scheme for the reform of the Privy Council,[6] was the idea that a Council of respectable men, whom no one could suspect of wishing to break the law, would put a stop to the quarrels between Parliament and the king's ministers.

As soon as an opposition to the crown developed, it became clear that the strictly legal theory of the constitution would not work. A power to impeach ministers guilty of crimes was not a very serviceable weapon to a Parliament which wished

[1] Cp. Macaulay, Hist. ii 249—"It was universally supposed that the government would, as in time past, be conducted by functionaries independent of each other, and that William would exercise a general superintendence over them all."

[2] Vol. v 444, 452-454.

[3] Above 117-120, 140.

[4] Grand Remonstrance § 198.

[5] Above 204-205; vol. v App. III.

[6] Above 186.

to control policy.[1] Occasionally, indeed, the Commons asked the king to remove an official whose acts they disliked without accusing him of any crime.[2] But such requests never produced much effect. The Commons found that, if they wished to get rid of a minister, they must proceed by way of impeachment, and accuse him of some crime. They were obliged therefore to work their power of impeachment for all it was worth. Never were impeachments so numerous as in the latter half of the seventeenth century: never were the criminal acts with which ministers were charged supported by such slender evidence. We have seen that it was almost forgotten that an impeachment was, after all, a criminal proceeding[3]; and that a man ought no more to be found guilty upon an impeachment than he ought upon an indictment, unless some definite crime could be proved against him. The results were unfortunate. The House of Commons was always complaining of the illegalities committed by the king's ministers, and of the manner in which the king's judges perverted the law; and, at the same time, instead of setting an example to those ministers and judges, it was constantly engaged in perverting the law on its own account, in order to get rid of persons whose political views and programme it disliked. If we blame the king for perverting the law to get rid of his political opponents, we must in fairness remember that the House of Commons was constantly trying to do exactly the same thing.

The legal theory of the constitution put the House of Commons in a thoroughly false position. And yet that theory was not in any way altered by the Bill of Rights, and was actually endorsed by the Act of Settlement. The clause of the Act of Settlement which relates to the Privy Council[4] is directed to securing evidence of the legal responsibility of the king's ministers for their acts. The clause providing that no royal pardon shall be pleaded in bar of an impeachment,[5] is aimed at preventing the king from stopping the hearing of such an impeachment, and so shielding his ministers from legal responsibility. The clause excluding placemen from the House of Commons[6] assumes that the House has nothing to do with the appointment of the king's ministers; that these ministers are the nominees of the king only; that the House must treat

[1] Vol. i 383-384.

[2] See 6 S.T. 1032—address in 1674 to remove the duke of Lauderdale; ibid 1054—address in 1674 to remove the duke of Buckingham; ibid 1062—proposal in 1674 for an address to remove the earl of Arlington negatived; 8 S.T. 217-218—address in 1680 to remove Sir George Jeffreys.

[3] Vol. i 384 and n. 2.

[4] Above 232.

[5] Ibid.

[6] Ibid.

them with suspicion as the emissaries of a rival power; and that their presence in the House can only have the effect of preventing the House from impartially exercising that control and criticism which is necessary to secure the proper working of the constitution.

We are sometimes inclined to wonder at the blindness of the House of Commons. It was obvious that it had become the predominant partner in the constitution. It was becoming more and more obvious that no government could work smoothly unless the king's ministers could command a majority in the House of Commons; and that the House could not adequately exercise the large powers of control, which it was assuming, unless the heads of the government departments were present in it to explain and defend the policy of the government. Why did not the House see all this? Probably the explanation must be sought, partly in the history of the constitutional controversies of this century, partly in the circumstances under which the Revolution was effected, and partly in the immediate circumstances under which the Act of Settlement was passed.

Throughout the constitutional controversies of this century the ideal of the Parliamentary statesmen and the common lawyers had been the establishment of the powers and privileges of Parliament, and the supremacy of the law over the king's ministers. There were precedents which proved the right of the House of Commons to impeach ministers who had acted illegally. There were precedents which proved its right to advise the king as to the policy which, in its opinion, he should pursue. There were no precedents for interfering with the king's free choice of his ministers. The circumstances under which the Revolution was effected tended to confirm the Parliamentary statesmen in this point of view. It was effected by a coalition of parties, and with the minimum of formal legal change. The men who effected it were as opposed to republican schemes of government as king James himself. The regicides were excepted from the Act of Grace.[1] The regicide Ludlow, who returned to England, found that hatred of the judges of Charles I. had in no wise abated; and he was obliged to return to Switzerland.[2] It was hardly likely, therefore, that the men who effected the Revolution would recognize that the predominant position in the constitution, which the House of Commons had secured, made the ministry as dependent upon its approval as upon the approval of the king. The statesman who propounded such a notion, would have seemed, in the opinion of many, to be treading the path

[1] 2 William and Mary sess. i c. 10 § 9.
[2] Macaulay, Hist. iii 126-127.

which in 1642 had led to civil war.[1] Therefore the true position remained unrecognized. In the Parliament which sat from 1695-1698 a Whig ministry, acting with a Whig majority in the House of Commons, had successfully carried the country through a period of great strain and stress.[2] But, when it lost its majority in the ensuing Parliament, no one considered that it was its duty to resign. Hence in that Parliament we get back to the old state of things. The ministry could not carry their measures in the House of Commons. The House of Commons, because it disliked the policy of the ministers, pursued them with the old weapon of impeachment. As it was under these circumstances that the Act of Settlement was passed, it is hardly surprising to find that the House of Commons wished to furbish up all its old weapons against ministers whom it disliked. The Tories had adopted the creed of the Parliamentary statesmen of the earlier part of the century.[3] They could hardly be expected to see that the very completeness of the victory which that creed had won necessitated a further development along the path trodden by the Long Parliament.

Very soon after the close of this century, the repeal or modification of some of these clauses in the Act of Settlement[4] shows that statesmen were beginning to see the necessity for some fresh developments. This step taken by the legislature was the condition precedent for the beginning of the last stage in the history of the relations of the prerogative to Parliament. It has rendered possible that gradual evolution of the machinery of Cabinet government, which has settled the controversies of the seventeenth century, by placing the powers contained in the prerogative at the disposal of the majority of the House of Commons. It has thus led to the growth of all those conventions of the Constitution which regulate the working of the Cabinet; and, by so doing, it has added a wholly new superstructure to that edifice of constitutional law which the Bill of Rights and the Act of Settlement seemed to have completed.

(4) *The Law Courts and the Liberties of the Subject.*

The maintenance of the supremacy of the common law, which the Parliamentary statesmen of this period erroneously thought

[1] This is illustrated by a debate in the House of Commons in 1692 summarized by Macaulay, Hist. iii 376-377; an address to the crown had been proposed to remove Solmes and put Talmash in his place—"Talmash's friends judiciously interfered. 'I have,' said one of them, 'a true regard for that gentleman; and I implore you not to do him an injury under the notion of doing him a kindness. Consider you are usurping what is peculiarly the king's prerogative. You are turning officers out, and putting officers in.'"

[2] Macaulay, Hist. iv. 261-262. [3] Above 101-103. [4] Above 242.

would reconcile all the differences between king and Parliament, afforded the best of all securities for the protection of the liberties of the subject. That supremacy had been secured by the abolition of the jurisdiction of the Council and the court of Star Chamber in 1641;[1] but the protection of this supreme law had been but a poor protection in the latter part of Charles II.'s and in James II.'s reigns. The independent position gained by the courts after the Revolution restored its efficiency. The judges had now nothing to fear, either from the crown, or from either one of the two Houses of Parliament. They could be removed only by the joint action of the three branches of the legislature.[2] Therefore they could develop by their decisions the principles of constitutional law, as freely and as impartially as they were accustomed to develop any of the other branches of English law. Sir John Holt[3] heads a long line of distinguished judges whose decisions have, with occasional assistance from the legislature, created some of the most important parts of our public law, and more especially those parts of it which deal with the position of the subject and his relations to the state.

Throughout the course of English history a large part of our constitutional law has been made by judicial decisions; for our constitutional law is simply a part of the common law. It was for this reason that the judges were forced to play a leading part in the constitutional controversies of this century;[4] and it was for this reason that the crown found itself obliged to appoint and dismiss them for political reasons—to the detriment both of the quality of the bench, and of the authority of the law.[5] Therefore it is to the arguments both of the bench and the bar in the great constitutional cases of this period, that we still look for the earliest authoritative statements of some of the leading principles of our modern constitutional law. Cases like *Bates's Case*, *Darnel's Case*, *Eliot's Case*, or the *Case of Ship Money* are still important, sometimes for the statement of legal principles to be found there, sometimes to enable us to understand legislation, such as the Petition of Right, which was passed to correct the law laid down in them. But, when the great constitutional controversies had been settled, and when the judges ceased to be appointed for political reasons, their decisions upon constitutional questions naturally acquired a different and a more permanent value than is possessed by many of these earlier decisions, which were given during this period of political conflict. The judges were able to confine themselves to the sphere to which they were

[1] Vol. i 515-516; above 112.
[2] Above 234.
[3] For his career see below 516-523.
[4] Vol. v 351-352, 354-355.
[5] Ibid 352; below 516-522.

more accustomed, and which they were better fitted to occupy. They were no longer dragged in to give the authority of the law to this or that party's views upon political questions. They were asked to develop, by the decision of concrete cases, those fundamental principles of constitutional law which had now become fixed.

These concrete cases arose from litigation initiated either by the crown against the subject, or by the subject against the crown or its officials, or by subject against subject. It is for this reason that, those parts of our constitutional law which deal with the rights and duties of the subject, depend so largely on case law, and to a very great extent on case law made since the Revolution. If we look at some of Holt's decisions in some of the constitutional cases which came before the courts immediately after the Revolution, we shall see the beginnings of some very important branches of the modern law. I shall consider these cases under two heads:—Firstly, cases which turn upon the rights and duties of the subject as against the crown; and secondly, cases which turn upon the rights and duties of the subject in relation to Parliamentary privilege.

(i) Cases which turn upon the rights and duties of the subject as against the crown.

(*a*) The growth of England's colonies raised some fundamental questions as to the position of English subjects residing in these colonies. What was their position as against the crown? Could they claim all the rights which English subjects had in England? In the case of *Blankard* v. *Galdy*[1] Holt answered this question by distinguishing settled from conquered colonies. In the former "all laws in force in England are in force there": in the latter, "the laws of England do not take place there until declared by the conqueror." If an infidel country is conquered, "their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases, where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity." Holt, thus, in substance anticipated Lord Mansfield's more famous judgment in the case of *Campbell* v. *Hall*.[2]

(*b*) It was also a case connected with colonial institutions which gave rise to what is perhaps the earliest direct judicial decision that English law does not recognize slavery. Slavery was known in many of the colonies. But what would be the attitude of the English courts to slaves brought to England? In 1677 it had been decided that English law would recognise the status of a

[1] (1694) 2 Salk. 411. [2] (1774) 20 S.T. 239.

slave.[1] But the Revolution had quickened the sense of personal liberty; and Holt anticipated Lord Mansfield's decision in *Sommersett's Case*[2] when he held that, "By the common law no man can have a property in another";[3] and that, "as soon as a negro comes to England he is free; one may be a villein in England but not a slave."[4] But general statements, such as this, as to the personal freedom of the subject are of little avail unless means are provided to assert them. In the writ of Habeas Corpus, as improved by the Legislature, the common law had acquired a remedy of the greatest power, the history of which I shall relate in the second Part of this Book.[5] As we shall see, the law on this topic centres principally round this writ.

We cannot, of course, expect that all the problems connected with the liberty of the subject should be finally settled immediately after the Revolution. The question whether a person could be arrested under a general warrant[6] was not settled till Lord Camden's decision in *Wilkes* v. *Wood*,[7] and Lord Mansfield's decision in *Leach* v. *Money*.[8] The question whether any member of the Privy Council could commit to prison on any charge was settled in the affirmative by Holt in *Rex* v. *Kendal and Row*;[9] but that case was overruled by Lord Camden who, in *Entick* v. *Carrington*,[10] held that, if such a power existed at all, it was confined to the case of a committal for high treason.[11] Holt was probably influenced by the fact that the practice of making these committals on this authority was constant throughout the seventeenth century.[12]

[1] Butts v. Penny (1677) 2 Lev. 201—"the Court held, that negroes being usually bought and sold among merchants, as merchandize, and also being infidels, there might be a property in them sufficient to maintain trover"; and this decision had been followed in Gully v. Cleve (1694) 1 Ld. Raym. 147; Hargrave points out in his argument in Sommersett's Case (1771) 1 S.T. at pp. 52-53, that the former case was probably brought for negroes in India, and that the latter case, if not brought for negroes in America, was decided without solemn argument.

[2] (1771) 20 S.T. 1; vol. iii 507-508.

[3] Smith v. Gould (1707) 2 Ld. Raym. 1274, which decided that trover does not lie for a negro; Holt had already decided in Chamberlain v. Harvey (1698) 1 Ld. Raym. 146, that trespass does not lie; in both cases Butts v. Penny (1677) 2 Lev. 201 was overruled.

[4] Smith v. Browne (1701) Holt, K.B. 495—assumpsit does not lie on a contract to sell a negro.

[5] Pt. II. c. 6 § 3; vol. i 227-228.

[6] See above 214 n. 2 for the view expressed by the House of Commons in 1680 that such warrants were illegal.

[7] (1763) 19 S.T. 1153.

[8] (1765) 19 S.T. 1001.

[9] (1696) 1 Ld. Raym. 65.

[10] (1765) 19 S.T. 1030.

[11] "I am forced to deny the opinion of my lord chief justice Holt to be law, if it shall be taken to extend beyond the case of high treason. But there is no necessity to understand the book in a more general sense . . . more especially as the case then before the court was a case of high treason," ibid at p. 1058.

[12] "This point was looked upon to be so clear law, that it was never drawn in question in his memory, but once by Sir Francis Winnington at the bar," Rex v. Kendal and Row 1 Ld. Raym. at p. 66.

(*c*) Similarly, the question of the subjects' right to freedom of discussion was not settled by Holt on its modern basis. The refusal of Parliament to renew the Licensing Act[1] had left this question to the common law. Discussion was free, except in so far as it was restrained by the law of libel as administered by the common law courts. But, as we shall see,[2] the common law courts had inherited the law which they administered from the Star Chamber. Naturally it was coloured by the prevalent political conceptions of the day. It is therefore not surprising that Holt laid it down, in *Rex* v. *Tutchin*,[3] that any criticism of the government amounted to a seditious libel.[4] We shall see that this was good law in Holt's day. It gradually became obsolete when, in the course of the eighteenth century, and as the result of the new political conceptions which the Revolution had introduced, men's ideas as to the relations of rulers to their subjects were fundamentally changed.[5]

(*d*) The question what remedies (if any) the subject has against the crown or its servants for wrongs committed by them against him, was adjudicated upon by Holt in two important cases.

The first of these cases raises the question whether the subject has any remedy against the crown for a breach of contract committed by the crown. We have seen that it had been recognized since the days of Bracton that the crown could not be sued by an ordinary action;[6] but remedies by way of petition of right and monstrans de droit were available, by which a subject could recover his property from the crown.[7] But could the crown be sued by petition of right for breach of contract? The question was raised and answered in the affirmative by Holt and the House of Lords in the *Bankers' Case*.[8]

The second of these cases raises the question what remedy the subject has against the crown or its servants for torts committed by the servants of the crown. It was well recognized that no tort

[1] Below 375-376. [2] Pt. II. c. 5 § 2. [3] (1704) 14 S.T. 1095.

[4] "To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it be punished," 14 S.T. at p. 1128; Holt's action in arresting or reprimanding persons who misrepresented or reflected upon his decisions is consistent with this view of the law, see Luttrell's Diary iv 55, 512.

[5] See Stephen, H.C.L. ii 299, 300.

[6] Vol. iii 463. [7] Pt. II. c. 6 § 1.

[8] (1700) 14 S.T. at pp. 29-38; for Lord Somers' judgment in that case see Pt. II. c. 6 § 1; Holt decided perfectly correctly, in the then state of the law, that the king could make the grant of his hereditary revenue under which the Bankers claimed, because such revenue was his own property.

could be imputed to the crown, because the king could do no wrong.[1] It was also fully recognized after the Revolution that all servants of the crown were personally responsible for torts committed by them, even though they had been in fact committed on the instructions of the crown.[2] That question had been settled once for all by Danby's impeachment.[3] But what were the limits of this principle? Suppose that the tort had been committed, not by the defendant in person, but by one of his subordinates. No doubt if the defendant had authorized the subordinate to commit the tort he would be liable; for to authorize wrong is to do wrong. But suppose that he had not authorized the commission of the tort, and that it had been done by the subordinate, in the course of his employment, without authority. This was the problem raised by the case of *Lane* v. *Cotton*.[4] Holt held that, in such a case, the defendant (in that case the Postmaster-General) was liable for the wholly unauthorized misdeeds of one of his subordinates. He considered that the Postmaster-General was on the same footing as a sheriff or a gaoler, both of whom were answerable for the misdeeds of their deputies;[5] and further, that he exercised a public calling, and could therefore be made liable like other persons (such as innkeepers or carriers), who exercised public callings, for any failure in performance, or for improper performance.[6] The other judges dissented. They took the view which has prevailed,[7] and held that the head of a department of the central government is not liable for the unauthorized misdeeds of his subordinates. It was pointed out by Powys, J., that the doctrine of employers' liability could not be applied to such a case, both for technical reasons, and on grounds of public policy. For technical reasons, because such employees are the servants, not of the head of the department, but of the crown; and on grounds of public policy, because it would be obviously unfair to make the head of a department personally liable to satisfy such claims.[8] Holt's reasoning in this case is perhaps an instance of

[1] Vol. iii 388, 465-466; above 101; cp. Locke, Two Treatises of Government Bk. ii §§ 202-206, who puts the principle into theoretical form.

[2] "All acts of the crown against the law are mere nullities; and all that act under them are obnoxious to the law," North, Examen 340.

[3] Above 215 and n. 4.

[4] (1701) 1 Ld. Raym. 646.

[5] "There is no difference between this case of the postmaster-general, and the gaoler, sheriff, etc., for he ought safely to keep the letters delivered to him, as the others ought safely to keep their prisoners or goods taken in execution," 1 Ld. Raym. at p. 651; for this liability of sheriffs and gaolers see vol. iii 387.

[6] 1 Ld. Raym. at pp. 652-654; vol. iii 385-386.

[7] Whitfield v. Lord le Despencer (1778) 2 Cowp. 754; Bainbridge v. Postmaster-General [1906] 1 K.B. 178.

[8] "The defendants have not the power of the management of the office according to their discretion, but are subject to the control of the King and of the Treasury. And because the inferior officers are servants of the King, and not of the defendants, their wages being paid to them out of the revenue of the post office, and the security

a strain of legal conservatism which, as we shall see,[1] characterizes some of his other decisions and dicta. But we should also remember three things. In the first place, the doctrine of employers' liability was then very new doctrine. Neither its real basis nor its limitations were clearly established.[2] In the second place, in the middle ages and later, these deputies of an official were in fact his servants employed and paid by him, and not servants of the crown.[3] In the third place, the immunity conferred upon departments of the central government by the established rule in many cases works injustice.[4] It may well be that a perception of this fact led Holt to think that it would be wise to follow the mediæval precedents, and helped him to decide the case in a way which would have avoided this injustice.

All these cases illustrate the manner in which the courts, after the Revolution, set about the task of settling the principles of our constitutional law upon their modern basis. They show that, as against the crown, the supremacy of the common law was fully established, and that it was both an impartial and an efficient protection of the liberties of the subject against the claims of the prerogative. We must now consider the question how far its supremacy was established as against the privileges claimed by both the Houses of Parliament, and how far it was able to protect the subject from arbitrary action based on claims of privilege.

(ii) Cases which turn upon the rights and duties of the subject in relation to Parliamentary privilege.

The rights and duties of the subject in relation to Parliamentary privilege depend upon the view which is taken of the relation of those privileges to the law. This was a new question in the seventeenth century, upon which there was little or no authority. It had never been really considered by the courts in the Middle Ages, because they had consistently declined to express any opinion upon it.[5] But, in the seventeenth century, it became a pressing question of much practical importance. If, as the Houses sometimes claimed, the courts could not go behind their assertion that any given question was covered by privilege, it was clear that the law might in effect be changed by the resolution of a single House, and that the subject had no protection against any sort of arbitrary act which that House might choose to say was privileged. Charles I. had the law on his side when

taken of them in the name of the King; and therefore it is unreasonable that the defendants should be answerable for the acts of the inferior officers," 1 Ld. Raym. at p. 650.

[1] Below 521-522.
[2] Pt. II. c. 5 § 6.
[3] For this mediæval idea see vol. i 250, 257; vol. iv 149 and nn. 6 and 7.
[4] Pt. II. c. 6 § 1.
[5] Vol. ii 561.

he protested against this claim ;[1] and both the Long Parliament and the Parliaments of Charles II.'s reign had shown that this was no imaginary danger.[2] When Parliament got an acknowledged predominance in the state, the danger was considerably increased.

Unfortunately the issue had been obscured by the manner in which such questions had been brought before the courts during the Stuart period, and by the bias of judges in favour of the crown. Thus, in *Eliot's Case*,[3] the charge of uttering certain seditious words in the House, which was fully answered by the plea of privilege, was mixed up with the charge of causing a riot in the House, which was not. Under these circumstances, the judges could hardly do otherwise than overrule a plea to the jurisdiction, because, as to part of the charge, they had jurisdiction ; and, as a matter of fact, their action in so doing was not assigned as a cause of error when that case was reversed by the House of Lords.[4] Similarly, after the Restoration, both the exaggerated ideas which the Houses held as to the immunity conferred by privilege, and their just suspicions of the impartiality of the judges, caused them to take legally indefensible exceptions to the conduct of the judges. Thus, in one case, an information was brought against Williams the Speaker for publishing, by order of the House, a seditious libel, to wit Dangerfield's narrative ;[5] and in others, plaintiffs had sued Topham, the serjeant-at-arms, and recovered damages for acts done by order of the House.[6] In all these cases the defendants had pursued the same course as that pursued by Sir John Eliot—they had pleaded to the jurisdiction. Pemberton, C.J., was examined by the House of Commons as to the reason for his decision in one of these actions against Topham. He explained that in such a case the defendant should have pleaded in bar and proved the facts; and that then, if the facts proved showed that the acts complained of were covered by privilege, he might have had judgment in his favour. By pleading to the jurisdiction he tied the hands of the court. The action was an action for trespass ; and it could not be maintained that

[1] See Charles I.'s answer to the Nineteen Propositions, Rushworth vol. i. Pt. iii 725 seqq. ; above 100, 141 n. 1.

[2] Above 141, 188 and n. 3.

[3] Above 97-98.

[4] (1668) 3 S.T. 331-333 ; Pemberton told the House of Commons in 1689 that, "there was no error assigned in overruling the plea to the jurisdiction of the court, but only this, that it was in the body of the information said, that they did speak some words in Parliament, which the court of King's bench could not try, because by the judgment of the lords' house they were not cognizable at law ; for the members of this house have always had a freedom of speech here : and upon that account it was reversed. But I must tell you that in my lord Vaughan's report he did allow that, as to the miscarriage that was alleged in laying hands upon the speaker, the court of King's bench had a jurisdiction," 12 S.T. at p. 828.

[5] (1684) 13 S.T. 1370.

[6] (1684) 12 S.T. 822 ; S.C. 2 Shower 471.

the mere assertion of privilege, contained in a plea to the jurisdiction, excluded the jurisdiction of the court, unless the defendant proved facts to show that the occasion was privileged.[1] Much the same reasoning was evidently applied in the case of Williams. He was charged with a seditious libel. By pleading to the jurisdiction he prevented the court from inquiring whether or not it was a libel, and whether or not it was privileged. It was a case in which the court prima facie had jurisdiction, and so they overruled the plea.[2] It is significant that a bill to overrule the decision in this case, which was sent up to the House of Lords in 1695-1696,[3] failed to pass.

No doubt these cases were inspired by political motives. The crown wished to make things unpleasant for the House of Commons and its officials. On the other hand, the House of Commons defeated its own ends by the unfounded notion that its assertion that an act was privileged ousted the jurisdiction of the courts. It was not likely that it would abate its claims after the Revolution.[4] But there was now a much better chance that the questions at issue would be impartially considered by the courts; and that some certain rules would be at last evolved, which would not unduly restrict the privileges of the House, and yet would maintain the supremacy of the law, and give some protection to the subject.

The first case—*Rex* v. *Knollys*[5]—arose in 1695 out of a claim made by the House of Lords to interfere with a decision of the court of King's Bench. Holt, C.J., and the other judges had decided that the defendant was a peer, and that, as he had been indicted as a commoner, the indictment must abate. The House of Lords had previously decided that the defendant was not a peer. But Holt held that, as the matter had not been referred to the House by the crown, it had no jurisdiction to decide this

[1] "Nothing which is pleadable in bar is pleadable to the jurisdiction. . . . The justification here is a proper matter of bar, and it is a good justification; but whether the court shall be excluded from their jurisdiction, that they shall not know whether this be true or no, is the question. For if this be pleaded to the jurisdiction there is an end of it. Whether Mr. Topham had such an order or not, cannot be a question upon a plea to the jurisdiction, for the hands of the court are tied up. . . . In this case if Mr. Topham comes and pleads this by way of bar, no court will deny but it is a good justification. . . . Your authority will be allowed; but the question is whether this shall stop the court that they shall not examine it. For any man living may plead such a plea. Now the putting him to plead this by way of bar is only to see whether what he has pleaded is true," 12 S.T. 826-827.

[2] 2 Shower 471.

[3] House of Lords MSS. (N.S.) ii 190 no. 998.

[4] They voted that Pemberton had been guilty of a breach of privilege and took him into custody, 12 S.T. 834.

[5] 1 Ld. Raym. 10; S.C. Skin. 517 *sub nom.* The King v. the Earl of Banbury; cp. Hatton Correspondence (C.S.) ii 233; Campbell, Lives of the Chief Justices ii 148-152.

question,[1] and that its allegation that it had such jurisdiction by the law and custom of Parliament must be disregarded.[2] The Lords were very angry with Holt. They summoned him before them, and required him to give reasons for his decision. But he stood his ground, and maintained that the Lords had no power to interfere with a decision of the court, unless it came before them by writ of error.[3] He thus successfully asserted the principle that the courts had the right to pronounce upon the existence of a privilege claimed by the House of Lords.

In 1704-1705 the two cases of *Ashby* v. *White*[4] and *Paty's Case*[5] were the occasion of a similar, but more important controversy with the House of Commons. Both these cases again involved the question whether the existence and extent of a privilege claimed by the House were matters determinable by the courts, or whether the jurisdiction of the courts was ousted by a claim of privilege made by the House. In both these cases Holt held that the courts had jurisdiction to determine this question. In *Ashby* v. *White* he decided, in substance, that, if the point at issue is the existence of a privilege, the court must decide it as a matter of law—for privilege of Parliament is part of the law; and that the resolution of the House that it is privileged to determine the matter cannot be regarded.[6] This view of the law

[1] Vol. i 392.

[2] "If there was any such law and custom of Parliament (the which Mr. Attorney said was *inter arcana imperii*, which is a strange notion of a law, though it may be good in politicks; and for which the Lords would not thank him, when they considered that the law which governs the inheritance of their dignities is *inter arcana*, for *misera est servitus ubi jus est vagum et incertum*), yet when this comes incidentally in question before them [the judges], they ought to adjudge, and inter-meddle with it, and they adjudge things of as high nature every day; for they construe and expound Acts of Parliament, and adjudge them to be void," Skin. at p. 526; the statement that they could adjudge Acts of Parliament to be void was an exaggeration, see vol. ii 442-443.

[3] "He said, that if the record was removed before the peers by error, so that it came judicially before them, he would give his reasons very willingly; but if he gave them in this case, it would be of very ill consequence to all judges hereafter in all cases," 1 Ld. Raym. at p. 18.

[4] (1704) 2 Ld. Raym. 938; 14 S.T. 695. [5] (1705) 2 Ld. Raym. 1105.

[6] "But they say that this is a matter out of our jurisdiction and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the Queen and the people: but sure we may determine on a charter granted by the King, or on a matter of custom or prescription, when it comes before us without encroaching on the Parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. . . . We do not deny them their right of examining elections, but we must not be frighted, when a matter of property comes before us, by saying it belongs to the Parliament, we must exert the Queen's jurisdiction. My opinion is founded on the law of England," 2 Ld. Raym. at pp. 956-957; his view is perhaps stated more explicitly in Paty's Case—"The privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law. . . . If they declare themselves to have privileges, which they have no legal claims to, the people of England will not be estopped by that declaration," 2 Ld. Raym. at pp. 1114-1115; cp. vol i 392-394.

was dissented from by the other judges; but it was upheld by the House of Lords; and it was followed in 1839 in the case of *Stockdale* v. *Hansard*.[1] In *Paty's Case* Holt, again dissenting from the other judges, decided that if the House commits a person, and specifies the ground of the commitment, the court can judge of its sufficiency; and that, if it sees that it is not sufficient, it must discharge the prisoner.[2] The probable correctness of this view of the law was admitted by the House when, in 1840,[3] on the suggestion of Lord Campbell, it applied the dictum of the court in *Burdett* v. *Abbot*,[4] and omitted all mention of the substantial cause of the commitment, and returned simply that the prisoner was committed for contempt of the House. In this way it turned the flank, so to speak, of Holt's decision, by showing that it had exercised an undoubted privilege. It could therefore take the benefit of the principle that, in the exercise of its undoubted privileges, it is the sole judge of the occasion and manner of their exercise.[5]

All these cases illustrate the determination of the courts to assert the supremacy of the law over the working of all parts of the constitution. They show that the privileges of each of the Houses of Parliament are as much subject to the rule of law as the prerogative of the crown; and that a subject, who complains that he is oppressed by an undue exercise of privilege, has the same right to apply to the courts for redress, as a subject who complains that he is oppressed by an undue exercise of the prerogative. The courts are subject to the enactments passed by King, Lords and Commons, for they are law; but they are subject to no other authority.

The principles of English public law, as they emerged at the close of this century of constitutional conflict, are the joint product of the contests of political and religious parties, of the characters of the leaders of those parties, of compromise, of the historical character of the English institutions of central and local government, and, to some extent, of the technical development of legal rules. No existing political theory could either classify or explain the resulting product. But, all through this century, political theory had been active—such speculation always appears

[1] 9 Ad. and E. 1.

[2] "Holt, C.J., said, that the legality of the commitment depended upon the vote recited in the warrant. . . . That this was not such an imprisonment as the freemen of England ought to be bound by; for that this, which was only doing a legal act, could not be made illegal by the vote of the House of Commons; for that neither House of Parliament, nor both Houses jointly, could dispose of the liberty or property of the subject; for to this purpose the Queen must join," 2 Ld. Raym. at p. 1112.

[3] The Sheriff of Middlesex's Case, 11 Ad. and E. 273; Lives of the Chief Justices ii 164 n.

[4] (1811) 14 East at p. 150.

[5] Vol. i 393-394.

in times of political or social unrest. And some of these political theories, by giving an ideal and a programme to the parties from whose conflicts our public law has emerged in its final form, have exercised a real, though an indirect, influence on that form. They have helped to group the combatants and to define the issues; and, therefore, we must take some account of their influence.

The Influence of Political Theories on the Development of English Public Law

We have seen that, during the sixteenth century, political speculation was more active on the Continent than in England;[1] and that this phenomenon was due to the fact, that on the Continent, the change from mediæval to modern political conditions, and the settlement of the strife between Roman Catholic and Protestant, had not been effected so gradually or so peacefully as in England.[2] On the Continent the contests, political and religious, which had accompanied the birth of the new territorial state, had produced rival theories as to the government of the state, and as to the relation of the people to their rulers.

Bodin's theory of sovereignty had given Europe a political philosophy which fitted the new political facts of the sixteenth century.[3] The sovereignty, which he analysed and explained, was not necessarily confined to a state in which a single person was sovereign. But Bodin considered this to be the best form of government, and it was certainly the prevalent form of government in the great progressive states of Europe. Under these circumstances, sovereignty came to be thought of as naturally annexed to the person of the king.[4] King and state were identified; and, since the new territorial state had assumed that divinity which, in the Middle Ages, had been largely intercepted by pope and emperor, the sovereign king could claim that he held his position by divine right, and that he was answerable for his conduct to God alone.[5]

On the Continent this theory of the state had come, by the end of the sixteenth century, to be the prevailing theory.[6] But it had naturally aroused opposition from many quarters. Writers like Hotman proved from history that, in the past, kings had never occupied this position in the state.[7] Others maintained that the relations of a king to his subjects were contractual in their

[1] Vol. iv 193-199, 214-215.
[2] Ibid 19-20, 47-48, 108-111, 166-173.
[3] Ibid 193-195.
[4] "Most men will arrive at the idea of sovereignty because they will seem to see it encircling the diadem of Henry VIII. or Elizabeth," Figgis, Divine Right of Kings, 234.
[5] Vol. iv 196, 215-216.
[6] Ibid 192.
[7] Ibid 197.

nature; and that the subject had, therefore, a moral or natural right, of a quasi-legal kind, to oppose a king who broke his contract by a tyrannical exercise of his powers.[1] We have seen, too, that the aid of religious opposition was invoked. Religious dissent from the creed of the state inspired political opposition on the part both of Roman Catholics and Protestants; and that opposition gave rise to much political theory, designed to emphasize the divine or natural rights of subjects, as against the divine right of their rulers.[2]

The political controversies of the Stuart period introduced England to these diverse continental political theories, and produced a general resemblance between English and continental political speculation. The Stuart kings wished to make England a state after the continental model; and their theory of divine right gave to the king and his prerogative the same sovereign power in the state as continental kings possessed.[3] To these claims, and to the theory upon which they were founded, the claims of the law and of Parliament to control the prerogative, were opposed; and their claims were based upon historical reasoning, upon theories of natural rights, and upon theories as to the contractual nature of the king's relations to his subjects.[4] Similarly, as we have seen, religion was the source of much political theory both in support of and in opposition to the claims of the king.[5] But, though there is a general resemblance between English and continental political speculation, English speculations are coloured by their environment. The mediæval views of the common lawyers as to the supremacy of the common law, and the development of Parliamentary power and privilege, gave a weight to arguments based on history and precedent which elsewhere they never possessed; and it was these arguments which finally prevailed at the Revolution.[6] It is true that religious opposition had a large effect upon the course of the political controversies of the century. The religious element in the political opposition to the earlier Stuarts destroyed the constitution for a short period;[7] and the fact that the church finally turned against James II. made the Revolution bloodless.[8] For all that, the Revolution was essentially the victory of the lawyers and Parliament. It is true also that some of the continental political theories emerge and influence the course of the constitutional controversy; but they cannot be said to have had any decisive effect upon the settlement reached. The original contract be-

[1] Vol. iv 198, 199. [2] Ibid. [3] Above 68-69.
[4] Vol. iv 197, 216; above 68, 83, 205-206, 230; below 282-284.
[5] Vol. iv 215-216; above 127-131, 197. [6] Above 241-242.
[7] Above 137-138. [8] Above 193-194; below 277.

tween king and people was used to justify James II.'s deposition; and Locke borrowed it to construct a theoretical justification for the results actually achieved by the Revolution.[1] Hobbes, the one really great English political theorist of this period, analysed for Englishmen in masterly style the conception of sovereignty.[2] But, during this period, his influence was comparatively small. His theory of sovereignty was not fully grasped by the majority of English lawyers and statesmen. It is, as we shall see, quite incompatible with the widely accepted theory put forward by Locke to justify the Revolution.[3] The older and vaguer view, held throughout the century by the Parliamentary statesmen, that the king in Parliament is supreme in the state,[4] was still thought by many to be sufficient; and even if the sovereignty of the king in Parliament was admitted, the idea that their powers were legally illimitable was not very firmly grasped. Therefore, the old ideas that they must somehow or other be controlled by natural or moral laws still lingered on.[5]

Thus, at the end of the seventeenth century, English political theory had, like English public law, diverged from continental political theory. A new political theory was needed to explain the government of a state in which a Parliament was the predominant partner. This theory Locke attempted to supply;[6] and his treatment of the subject foreshadows a change in the character of political speculation. Throughout the seventeenth century, the speculations of political theorists had been based on the mediæval view that problems of political theory—problems as to the form of government and as to the relations of the people to the government—were quasi-legal or quasi-moral problems, to which only one absolutely right conclusion was possible.[7] But the Revolution settlement was a compromise; and the party government which succeeded it, tended to introduce the idea that such problems were, not so much problems of absolute right and wrong, as questions to be decided by asking what in the circumstances was expedient or possible. As yet, however, we see only the beginnings of this change.[8] Its full effects for good and evil will not appear till the nineteenth century.

This summary sketch of the relations of political theory to the development of public law indicates the main lines upon

[1] Below 284-287.
[2] Below 296-298.
[3] Below 298-299.
[4] Above 204-207, 260-262.
[5] "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these," Bl. Comm. i 42.
[6] Below 284-287.
[7] Above 104, 106-107; below 290-292.
[8] Below 292-294.

which this subject must be treated. In the first place, it will be necessary to deal with the theory of the divine right of kings; and, in the second place, with the opposing theories which were called forth by the Stuart insistence on this theory of divine right. In the third place, something must be said of the change in the character of political speculation which is foreshadowed at the close of this period; and, in the fourth place, some account must be given of Hobbes, and of the reasons why his theories failed to exercise any very appreciable influence during this century.

(1) *The Theory of the Divine Right of Kings.*

That the king, as the representative of the state, had in some sort a divine right was fully admitted in the Tudor period.[1] As we have seen, such a theory was a necessary consequence of the Reformation settlement.[2] But we have seen that the Tudors were hardly in a position to insist upon the divinity of hereditary right.[3] James I., however, could fairly contend that his accession, in the face of an existing Parliamentary settlement of the crown, was due entirely to the divinity of his hereditary right. This view fitted in exactly with the theory, which his characteristically Scotch intellect had evolved, as to the position of the king in the state;[4] and therefore we are not surprised to find that the theory of the divine right of the king emerges in his writings in its final form.[5] "The kingly power," to use Filmer's words, "is by the law of God, so it hath no inferior law to limit it."[6] He is above the law of the state, which he can mitigate or suspend at his will.[7] This doctrine developed with the development of the opposition to the crown; but it did not become a really popular doctrine till the period of the Civil War.[8] Then the assertion of extreme republican doctrines made the assertion of the divinity and sovereignty of the king the creed of all those who supported his cause. For this reason the theory of divine right was elaborated, and certain consequences, implicit in it, assumed great importance. In the first place, the denial of the hereditary right of the king was answered, not only by the assertion of the divinity of this right, but also by the denial of any right whatsoever to a merely de facto government existing

[1] Vol. iv 215.
[2] Ibid.
[3] Ibid.
[4] Above 11-12.
[5] Figgis, Divine Right of Kings 136, cited above 12.
[6] Patriarcha, chap. iii § 1; cp. ibid chap. iii § 6, "although a king do frame all his actions to be according to the laws, yet he is not bound thereto but at his good will and for good example or so far forth as the general law of the safety of the commonweal doth naturally bind him."
[7] Ibid chap. iii §§ 6 and 8.
[8] Figgis, op. cit. 139-141.

in contravention of this right.[1] In the second place, the assertion of the right to resist the king was met by the doctrines of passive obedience, and of the duty of non-resistance.[2] Even if the king ordered his subjects to do acts which were contrary to the law of God, he must not be actively resisted,[3] although it might be necessary to refuse active obedience to such a command.[4] These corollaries of the theory gained support from the misery necessarily entailed by the Civil War, and from the unpopularity of Cromwell's military rule. To many who had lived through this period Filmer's contention that, "the greatest liberty in the world (if it be duly considered) is for a people to live under a monarch," and that, "all other shows and pretexts of liberty are but several degrees of slavery, and a liberty only to destroy liberty,"[5]—would have appeared to be an obvious truism.

It is not therefore surprising that the years following the Restoration are the palmy days of the theory of divine right. The divinity of hereditary right had been signally proved by the Restoration itself, and the dire consequences of resistance to the powers that be had been proved by the anarchy of the preceding years. The strength of the supporters of the theory is shown by the manner in which Charles II. was able to bring the Exclusion contest to a victorious issue.[6] There can be little doubt that they would have kept James II. on his throne, in spite of all his unconstitutional acts, if he had not attempted "to use this theory of divine right against the church, in whose defence it was formed, and in favour of the very power it was fashioned to attack."[7]

It was during the period of the Commonwealth that the most popular exposition of the theory was written by Filmer. The book was entitled *Patriarcha*, and was published by his son after his death, at the height of the Exclusion controversy. Filmer rested the theory upon a new basis. He did not rely, as most

[1] In James I.'s reign Overall's Convocation Book shows that the divinity of any *de facto* government was asserted by the Church of England, Figgis, op. cit. 137; but, "the execution of Charles I. and the exclusion of his heir led men to dwell upon the distinction between a *de facto* and a *de jure* authority. . . . The confusion apparent in *Overall's Convocation Book* has now disappeared from the popular mind. No one now, whichever party he favours, but has a clear enough sense that it is possible to assert Divine Right for the lawful heir without predicating it of an usurper," ibid 141.

[2] Ibid 141.

[3] The doctrine of passive obedience is really a necessary consequence of the religious character of the theory of divine right—"When civil obedience is inculcated as part of God's law, the case cannot be ignored of the government's endeavouring to persecute the true religion," ibid 206.

[4] As Figgis points out, op. cit. 219-225, no one disputed the thesis that the law must not be resisted, the question which was in dispute was whether the king's commands could be resisted; this ultimately resolves itself (like the rest of the constitutional questions at issue) into the question whether or no the king is sovereign.

[5] Patriarcha, chap. i § 1.

[6] Above 188-189.

[7] Figgis, op. cit. 209; above 191-194.

writers before him had relied, upon the words of a number of texts which seemed to support the doctrine, but upon the theory that any natural right has divine approval, that the king's right to rule is a natural right, and that therefore it is divine.[1] He supported this theory by the contention that society originates in the patriarchal family, which is ruled by a monarchical head. The rights of that head are natural and therefore divine. Adam ruled his family by his divine right; and, by the same right, the king, as the heir and representative of Adam, rules his kingdom.[2] Thus, as Figgis says,[3] "for direct divine right he substituted a constructive theory of divine approval." The fact that this new argument was welcomed on all sides shows that the age was becoming more rational and less theological.[4] A catena of textual authority did not carry so much weight in 1681 as it had carried earlier in the century. Hobbes's skilful use of texts had shown that they were double-edged weapons. Reason rather than authority was required to persuade; for, "though," says Halifax,[5] "in some well-chosen auditories good resolute nonsense backed with authority may prevail, yet generally men are become so good judges of what they hear, that the clergy ought to be very wary before they go about to impose upon their understandings."

The use of this new argument of Filmer's is, as Figgis points out,[6] the herald of the decadence of the theory. The older argument, which rested the theory upon the very words and commands of the Deity, was less open to criticism and answer than this new argument, which rested it upon the divinity of a natural order of society. The premises of the new argument could be denied—it was arguable that no such natural order of society could be deduced from the arrangements of the patriarchal family. Its conclusions could be attacked both historically and logically—it was arguable that there was as much evidence for the more reasonable right of the subject to resist tyranny, as for the less reasonable right

[1] Figgis, op. cit. 146-147.

[2] "The subjection of children, being the fountain of all royal authority, by the ordination of God himself; it follows that civil power, not only in general is by divine institution, but even the assignment of it specifically to the eldest parents, which quite takes away that new and common distinction which refers only power universal and absolute to God, but power respective in regard of the special form of government to the choice of the people," Patriarcha, chap. i § 4; "It is true, all kings be not the natural parents of their subjects, yet they all either are, or are to be reputed the next heirs to those first progenitors who were at first the natural parents of the whole people, and in their right succeed to the exercise of supreme jurisdiction," ibid chap. i § 8.

[3] Op. cit. 150.

[4] Ibid 149; as Figgis, ibid 161-163, points out, this "changed method of conducting the controversy appears also in an earlier work—Nalson's Common Interest of King and People."

[5] Character of a Trimmer, Works (ed. Foxcroft) ii 308.

[6] Op. cit. 150.

of the king to tyrannize; and that the former right was more conducive than the latter to the well-being of the state. By the use of these arguments Locke completely demolished Filmer's work.[1] As Figgis says,[2] "No arguments from expediency, no fresh reading of history, could affect the elaborate accumulation of texts made by Mainwaring in support of his doctrine. The only possible way to meet him was to deny the interpretation or the applicability of the passages quoted. In fact, considerations of utility or historical circumstances could not affect the ordinary argument for divine right. But with Filmer's arguments this is not the case. For the whole question of what constitutes the law of nature is involved; and it is easy to argue, as did Locke, for the principle of utility, the instinct of self-preservation, as of natural and therefore divine origin."

The strength of the theory is evidenced by the fiction of abdication which appears in the Bill of Rights, and the insistence on the story that James's son was supposititious.[3] But though it inspired the schism of the non-jurors, and though it lingered on as a religious sentiment, it ceased to be a political force after the Revolution. It was inconsistent with the Parliamentary settlement of the succession to the throne, and with the obvious fact that James had been deposed; and it was abandoned by enlightened Tories like Swift and Bolingbroke.[4] But, in its day, the theory had done much for the development of English public law; and the ideas which underlay it, differently expressed, were destined, in the future, to have a considerable effect.

In the seventeenth century it had helped to assert the independence of the state as against the claims of religious bodies —whether Roman Catholic or Presbyterian—to dictate to it; for it had enabled the state to meet those churches' claim to divinity by its counterclaim to a like divinity.[5] It had helped to familiarize English public law with the theory of sovereignty, and thus to complete the edifice of the modern English state.[6] The Whig theorists, as we shall see, never really grasped this theory.[7] But it is enunciated quite clearly by Filmer,[8] and it

[1] Two Treatises of Government, Bk. i. [2] Op. cit. 153-154.

[3] "It must not be forgotten, that the English clergy claimed the phraseology of the Bill of Rights in support of their contention that the Revolution did not transgress the principle of non-resistance. The strength of popular belief in the principle is attested by the very insertion of the word 'abdicated' in that document. Again, the fiction of the supposititious birth of the Pretender is a proof of the influence the Whigs felt it necessary to counteract," ibid 170.

[4] Ibid 168-169. [5] Ibid 255-256.

[6] Ibid 235-239. [7] Ibid 240; below 287-289.

[8] "There can be no laws without a supreme power to command or make them. In all aristocracies the nobles are above the laws, and in all democracies the people. By the like reason in a monarchy the king must of necessity be above the laws," Patriarcha, chap. iii § 8.

was admitted by enlightened politicians after the Revolution. It is quite clear, for instance, that Halifax understood it thoroughly.[1] In the latter half of the seventeenth century it helped indirectly to secure the stability of the state. At the time of the Exclusion Bill, it gave no small support to Charles II. in his successful resistance to a measure, the passing of which would have produced an outbreak of civil war;[2] and at the Revolution, the fact that it was a theory of divine right designed to secure the state against papal encroachments, and not a merely secular theory of royal absolutism, deprived James II. of all his adherents, and so made the Revolution bloodless.[3]

In the succeeding centuries the ideas which underlay this theory were destined to have a large influence. Those who in the seventeenth century would have supported the theory of divine right were the backbone of the Tory party in the eighteenth century. In their support of Church and king, in their reverence for custom and tradition and sentiment, in their feeling that the state is an organism, the machinery of which is not lightly to be tampered with—we have a set of ideas which, because they helped men to reverence the state, added immensely to its stability.[4] This creed is founded on a set of ideas about the state which are similar to those which had helped, in an earlier and a more theological age, to form the theory of divine right of kings. In this its new non-theological form, it found its greatest exponent in Burke.[5] Burke, when he started his political career, was nominally a Whig.[6] But he saw the baselessness of the theory of natural rights based on original contract;[7] and he managed to combine an almost mystic reverence for the state and its authority[8] with a contempt for all general theories of govern-

[1] "He believeth no government is perfect except a kind of omnipotency reside in it to be exercised upon great occasions. Now this cannot be attained by force alone upon the people. . . . There must be their consent too," Character of a Trimmer, Foxcroft ii 298-299; "There can be no government without a supreme power. . . . Supreme power can no more be limited than infinity can be measured because it ceaseth to be the thing; its very being is dissolved when any bounds can be put to it," Anatomy of an Equivalent, Foxcroft ii 439; "I lay it down then as a fundamental—first that in every constitution there is some power which neither will nor ought to be bounded;" "for this world, there can be no government without a stated rule, and a Supreme Power not to be controlled neither by the dead nor the living;" "to say a power is supreme and not arbitrary is not sense," Political Thoughts, Foxcroft ii 495-497.

[2] Above 187.

[3] Above 191-194.

[4] Figgis, op. cit. 250-252; cp. Lecky, History of England i 3.

[5] Ibid iii 413-414; cp. Figgis, op. cit. 253.

[6] Bishop Watson, with some reason, "declared that long before the French Revolution he had come to regard Burke as a High Churchman in religion, and a Tory, perhaps indeed an aristocratic Tory, in the state," Lecky, op. cit. iii 414.

[7] Below 299 n. 3.

[8] Lecky, op. cit. iii 413, 435; the best illustration is the passage in the Reflections on the French Revolution (7th ed.) 143-144, in which he describes the state as a partnership in all science and art, in every virtue and perfection; and "as the ends of such a partnership cannot be obtained in many generations, it becomes a

ment.[1] This led him to judge each problem on principles of expediency or utility with a strong bias in favour of things established. Thus, he managed to combine in his political theory the strong points of the old methods of political reasoning, which based theories of the state upon divine or natural rights of rulers or people, with the strong points of the new methods, which based these theories on utility.[2] This characteristic has helped him to acquire a unique reputation amongst Whigs and Tories alike—both could point in his works to sentiments of which they approved;[3] and it enabled him to combine in his political practice an equal readiness to defend anomalies and to reform abuses.[4] But unfortunately this attitude is a little difficult to maintain. A defence of anomalies can very easily degenerate into an unreasoning refusal to make even the most necessary reforms; and, under the stress of the terror inspired by the French Revolutionary ideas, that is what happened in the early years of the nineteenth century. The result was that the triumph, in 1832, of the "New Whigs," who sympathized with these ideas, introduced new modes of political thought, which have tended by degrees to eliminate much of that reverence for the state and much of that law-abiding habit, which in the seventeenth century the theory of the divine right of kings had helped to implant, and in the eighteenth century the sentiments voiced by Burke had helped to maintain.[5] Burke appealed from the New Whigs to the Old—from those who sympathized with the new modes of political thought, to those who based their political faith on history, precedent, and the observed facts of human nature. And, just as the new modes of thought, which came with the French Revolution, are the spiritual parents of the modern Liberals, so Burke is the spiritual father of the modern Conservative party which arose after 1832.

(2) *The Opposition to the Theory of the Divine Right of Kings.*

In England, as on the continent, the opposition to the theory of the divine rights of kings was based on different principles.

partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primæval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place. This law is not subject to the will of those, who by an obligation above them, and infinitely superior, are bound to submit their will to that law;" this comes very near to the famous passage in Hooker cited above, vol. iv 212-213.

[1] Lecky, op. cit. iii 417-419.

[2] Below 291-292.

[3] Lecky, op. cit. iii 417, 418.

[4] "With Burke an extreme dread of organic change co-existed with a great disposition to administrative reform," ibid 415.

[5] Below 299.

There is, in the first place, the opposition of Parliament and the lawyers, and, in the second place, the opposition of the religious non-conformists; and both these forms of opposition gave rise to political theories, based on supposed inalienable natural or divine rights, contractual or otherwise, formed to justify resistance to any attempt by the government to contravene these rights.

Of the opposition of the lawyers in alliance with Parliament I have already spoken at length.[1] We have seen that, at the Revolution, their contention that the prerogative was subject to law, and that the law was supreme, was realized.[2] We have seen, too, that Parliament asserted its right, not merely to an independent position, but to the position of predominant partner in the state. The views for which the Stuart kings had contended, and which Filmer had maintained, were decisively rejected. The king could not suspend or modify the law as he saw fit—on the contrary the law controlled the acts of the king. Parliament with its powers and its privileges was not dependent solely on the king's will—on the contrary it was a more essential part of the government than the king, and capable of regulating even the succession to the throne. It is the legislature and not the king which, according to Locke, "gives form, life and unity to the commonwealth."[3] Thus it happens that the practical results secured by the lawyers, in alliance with Parliament, dominate all the political theories of the latter half of the century, which opposed the theory of the divine right of kings.[4]

This is illustrated by the comparatively small permanent effect which political theories based on religious opposition have had on the development of our public law. No doubt, in the earlier half of the century, the theory of the sovereignty of the people, and their right to depose a tyrannical or an idolatrous king, preached by Knox and Buchanan,[5] had a large influence upon the events which had led up to the Great Rebellion, and upon the course of the civil war.[6] No doubt these same theories, preached by the Jesuits, had helped on the continent to keep alive a body of political theory opposed to absolutist claims.[7] But Presbyterian politics were at a discount after the Restoration;

[1] Above 82-86, 88, 101-103. [2] Above 241-242, 258-262.

[3] Two Treatises of Government, Bk. ii § 212.

[4] See Halifax, Some Cautions, etc., Foxcroft ii 479-480, for the large part which the lawyers continued to play in Parliament, "They have not only engrossed the chair of the Speaker, but that of a committee is hardly thought to be well filled except it be by a man of the robe;" see vol. ii 430-434; vol. iv 174, 184, 187-189, for the same phenomenon in earlier days.

[5] Gooch, Democratic Ideas 44-48, 114-115.

[6] Above 137-138, 143-146.

[7] Gooch, op. cit. 20-29; cp. Figgis, Divine Right of Kings 177 seqq.

and the resemblance between their political theories and those of the Jesuits[1] was a controversial weapon of no mean force, ready to the hands of the upholders of the divine right of kings. The use which they made of it is illustrated by the opening sentences of Filmer's *Patriarcha*.[2] "Since the time that school divinity began to flourish, there hath been a common opinion maintained . . . which affirms—'Mankind is naturally endowed and born with freedom from all subjection, and at liberty to choose what form of government it please, and that the power which any one man hath over others was at first bestowed according to the discretion of the multitude.' This tenet was first hatched in the schools, and hath been fostered by all succeeding Papists for good divinity. The divines, also, of the reformed churches have entertained it. . . . Upon the ground of this doctrine, both Jesuits and some other zealous favourers of the Geneva discipline have built a perilous conclusion, which is, that the people or multitude have power to punish or deprive the prince if he transgress the laws of the kingdom; witness Parsons and Buchanan; the first under the name of Dolman, in the third chapter of his first book, labours to prove that kings have been lawfully chastized by their commonwealth. The latter, in his book 'De Jure regni apud Scotos,' maintains a liberty of the people to depose their prince. Cardinal Bellarmine and Calvin both look asquint this way." It was hardly likely that an opposition theory, handicapped by the support of Jesuits and Presbyterians, would have carried much weight in England. Thus it happens that the opposition in England to the theory of the divine right of kings was of a purely secular character, based on the traditional reverence of Englishmen for the common law, and on the ascertained powers and privileges of Parliament.

But the position in the state secured by Parliament and the law needed a theoretic basis to support it. It was inevitable that that basis should be found in some sort of divine or natural right of the subject; for a divine right of the king could only be met by the assertion of a counter-right which could claim an equally good sanction.[3] The period of the Commonwealth familiarized men with the theory that all mankind had certain natural inalienable rights, which it must be the first business of the state to safeguard; and, as we have seen, some of these rights appeared,

[1] At the time of the Exclusion Bill the Jesuit Dolman's Conference about the next Succession to the Crown of England, published in 1593, was reprinted, Figgis, op. cit. 101, 145.

[2] Chap. i § 1.

[3] Figgis, op. cit. 11, "Until towards the close of the seventeenth century, the atmosphere of the supporters of popular rights is as theological as that of the upholders of the Divine Right of Kings."

in some of the constitutions of this period, as fundamental principles, which no power in the state could change.[1] Further, all these constitutions assumed that men were free, and that the basis of all government was consent.[2] It was not difficult to combine these ideas into the theory that the state originates in a contract, made by the members of a state with each other,[3] that they shall all submit to a common authority; but that, by making this contract, they do not give up the natural rights which they enjoy as human beings. These natural rights, therefore, are precedent to the powers exercisable by the state, and the powers of the state must be so exercised as not to contravene them. Indeed their better maintenance is one of the main objects which men had in view when they agreed to form a state. Thus, while the royalists saw the essence of the state in the sovereignty of the divinely appointed king, those who held this view saw it in the machinery set up by the people for the maintenance of their natural rights. These natural rights, and not the prerogative of the divinely appointed king, were above the law of the state and its mechanism. The theory of the divine right of the king was thus countered by the theory of the natural rights of the subject. It followed that the government of the state, so far from being the superior of the subject, was his agent or delegate to carry out certain purposes, and that that agent or delegate could be dismissed if it failed to carry out the functions for which it was appointed.[4] It was this theory of the state which the framers of the Bill of Rights adopted—James II. had broken the original contract; and it was this theory which Locke elaborated and used to explain and justify the Revolution settlement.

Locke necessarily begins his theory of politics by an account of the condition of mankind in a state of nature. It was a state of perfect freedom and equality;[5] but it was not a state of license.[6] For "the state of nature has a law of nature to govern it which obliges everyone, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and

[1] Above 153, 157. [2] Above 152-157.

[3] Thus differing from the older forms of the contract theory which supposed that the contract was made with the king, vol. iv 198; as Leslie Stephen says, Life of Hobbes 177, the contract theory, "Had acquired especial currency from the great book in which Grotius had adopted it, when applying the Law of Nature to regulate the ethics of peace and war"; for Grotius see vol. v 27, 55-58.

[4] "All power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew when they shall think best for their safety and security. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject," Locke, Two Treatises of Government, Bk. ii § 149.

[5] Ibid § 4. [6] Ibid § 6.

independent, no one ought to harm another in his life, health, liberty, or possessions."[1] In this state of nature the execution of the law of nature is "put into every man's hands."[2] This state differs from a state of war, in that the laws of nature hold in the former state, but not in the latter.[3] But in a state of nature there is not much security for the observance of the laws of nature;[4] and so men agree with each other "to join and unite into a community for their comfortable, safe, and peaceful living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it."[5] Men thus submit themselves to a state, and thereby debar themselves from the power, which they had in the state of nature, to take what measures they please for their self-preservation, and to enforce their own rights.[6] But they do not thereby deprive themselves of the other natural rights which belong inalienably to all men. The state must govern in accordance with the laws which secure these natural rights of life, liberty, and property.[7] Its powers are limited by these conditions; for these powers are conferred upon it by the agreement of the community, and "nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or to take away the life or property of another."[8] Hence if governments act "contrary to their trust," they are ipso facto dissolved;[9] and as to whether or no they have acted contrary to their trust the people is judge—"for who shall be judge whether his trustee or deputy acts well and according to the trust reposed in him, but he who deputes him and must, by having deputed him, have still a power to discard him when he fails in his trust?"[10] It follows that, if the object of creating a political society is to provide a security for the peaceful enjoyment of life, liberty, and property, absolute monarchy is inconsistent with this object; and a society so governed can hardly be considered to be a political society.[11] For, in such a society, there is no security at all that the monarch will not violate all those

[1] Locke, Two Treatises of Government, Bk. ii § 6.

[2] Ibid § 7.

[3] Ibid § 19, "Here we have the plain difference between the state of Nature and the state of war, which, however some men have confounded, are as far distant as a state of peace, goodwill, mutual assistance, and preservation; and a state of enmity, malice, violence, and mutual destruction are one from another."

[4] Ibid §§ 123-126. [5] Ibid § 95.

[6] Ibid §§ 129, 130. [7] Ibid § 131. [8] Ibid § 135.

[9] Ibid § 221, "There is another way whereby governments are dissolved, and that is, when the legislative or the prince, either of them act contrary to their trust."

[10] Ibid § 240.

[11] "Absolute monarchy, which by some men is counted for the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil government at all," ibid § 90.

natural rights which it is the chief object of the state to maintain.[1]

The fact that Locke's book is a justification of the constitutional results of the Revolution, is clearly shown by the nature of the fundamental laws, by which, according to his theory, the action of the state must be governed. "These are the bounds which the trust that is put in them by the society, and the law of God and Nature, have set to the legislative power of every commonwealth, in all forms of government. First: they are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court and the countryman at plough. Secondly: these laws also ought to be designed for no other end ultimately but the good of the people. Thirdly: they must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies. . . . Fourthly: Legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."[2] These conditions are, so to speak, the memorandum of association of the State, and any breach of them will be not only ultra vires, but a cause for the dissolution of the state. Obviously there is no sovereign in such a state. Indeed Locke seems to deny that a state in which the government is legally omnipotent is a true political society.[3] He makes no attempt to determine how disputes as to the limits of the natural rights of the subject are to be settled; and though, to secure the better observance of the law, the legislative and the executive powers are divided,[4] he makes no attempt to provide a method for settling disputes between them. The general statement that the legislature is supreme[5] does not carry us very far; and he admits that, as

[1] "If it be asked what security, what fence is there in such a state against the violence and oppression of this absolute ruler, the very question can scarce be borne. They are ready to tell you that it deserves death only to ask after safety. . . . As if when men, quitting the state of Nature, entered into society, they agreed that all of them but one should be under the restraint of laws; but that he should still retain all the liberty of the state of Nature, increased with power, and made licentious by impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay, think it safety, to be devoured by lions," Locke, op. cit. Bk. ii § 93.

[2] Ibid § 142.

[3] Above 284 n. 4; cp. 285 n. 11.

[4] Op. cit. Bk. ii §§ 143-148; "the more closely Locke's treatise is studied, the more clearly will it be seen that it is an attack directed far more against the idea of sovereignty than against the claims of monarchy. The notion of legal omnipotence is abhorrent to him; and he is guilty of a confusion between law natural and law positive from which the extremist and most reactionary royalist would have been free," Figgis, Divine Right of Kings 240.

[5] "In all cases whilst the government subsists, the legislative is the supreme power. For what can give laws to another must needs be superior to him. . . . The legislative must needs be the supreme, and all other powers in any members or parts of the society derived from and subordinate to it," Locke, op. cit. Bk. ii § 150.

between an executive armed with the extensive powers vested in the king by his prerogative, and a legislature which depends upon his will for their convening, there can be no judge. The only remedy is for the people to use their inalienable natural rights and rise in revolution. To the objection that this lays "a perpetual foundation for disorder," he can only reply that this course will never be pursued "till the inconvenience is so great that the majority feel it and are weary of it," and that wise princes will never run this risk.[1]

The theoretical objections to Locke's views are obvious. But, in spite of these objections, they have had an enormous influence both in England and abroad. This is due mainly to two causes. In the first place, they reflected the political ideas of the Whig party of the period. In the second place, they put into a popular and semi-scientific form the ideals of that party

(i) That they reflected the political ideas of the Whig party of the period we can see clearly enough if we look at the writings of one of the most eminent of its representatives—the Marquis of Halifax. From the point of view of political theory, Halifax's political views are open to the same sort of theoretical objections as those of Locke. Though, as we have seen, he had a firm grasp of the conception of sovereignty,[2] he can yet praise "our mixed government,"[3] and "our blessed constitution in which dominion and liberty are so happily reconciled"[4]—the government which has attained the happy mean between monarchy—"a thing that leaveth men no liberty," and a commonwealth—which "alloweth them no quiet";[5] and he can acquiesce in the view that sovereignty is in the king in Parliament, without considering that, if the king and Parliament fall out, there is in fact no sovereign.[6] In such a case the sovereignty is in fact in the law and its interpreters; and yet he ridiculed the notion that government could be left to an undefinable common law.[7] He would have admitted that Parliament was the predominant power in the constitution;[8] but he condemns the party system

[1] Locke, op. cit. Bk. ii § 168.
[2] Above 280 and n. 1.
[3] Rough Draft of a New Model at Sea, Foxcroft ii 461.
[4] Character of a Trimmer, Foxcroft ii 296.
[5] Ibid 287.
[6] Ibid 298-300.
[7] "You must either make the Common Law . . . a thing that all men know it before hand, or else universally acquiesce in it whenever it is alleged, from the affinity it hath to the law of Nature. Now I would fain know whether the Common Law is capable of being defined, and whether it doth not hover in the clouds, like the prerogative, and bolteth out like lightning, to be made use of for some particular occasion? If so, the government of the world is left to a thing that cannot be defined; and if it cannot be defined, you know not what it is; so that the supreme appeal is—we know not what," Political Thoughts and Reflections, Foxcroft ii 496.
[8] Ibid 496-497.

without which a large assembly would be an unorganised mob;[1] and his view that no placeman should be admitted in the House of Commons,[2] would have left the House without any guidance from the executive; and, by irrevocably separating the executive from the legislature, would have left the House no means of peaceably asserting its power. Locke's political theories really reflect a good deal of the inconsequence of the political ideas of the party to which he belonged.

(ii) The great merit of Locke's political theories is the clear manner in which they state the ideals of the Whig party—the freedom of the individual from arbitrary interferences with person and property,[3] the supremacy of the law,[4] religious tolerance,[5] and insistence on the idea that the well-being of the subject is the aim of government—the power of the legislature, he says, "in the utmost bounds of it, is limited to the public good of the society."[6] The conception of an original contract, as he expressed it, is of course wholly unhistorical; but it was a conception which did explain rationally the de facto basis of government, and was excellently fitted to justify the Whig ideals.[7] Further, the idea that the officials of the state were merely the agents and delegates of the subject, and that therefore it was the right and the duty of the subject to remove or punish them if they

[1] Some Cautions offered to the considerations of those who are to choose members to serve in the ensuing Parliament, Foxcroft ii 480-481; cf. Political Thoughts, ibid ii 505-507; at the same time some of his criticisms are very true, e.g. "Party turneth all thought into talking instead of doing," "It maketh a man thrust his understanding into a corner and confine it, till by degrees he destroys it," "It is generally an effect of wantonness, peace and plenty, which beget humour, pride, etc., and that is called zeal and public spirit;" cp. Hobbes, Leviathan 122, "All uniting of strength by private men, is, if for evill intent, unjust; if for intent unknown, dangerous to the Publique and unjustly concealed."

[2] Some Cautions, etc., Foxcroft ii 487, "It is not less sure that a Member of Parliament, of all others, ought least to be exempted from the rule that no man should serve two masters."

[3] Above 284 n. 4; cp. Character of a Trimmer, Foxcroft ii 295.

[4] Above 286; cp. Character of a Trimmer 284-286.

[5] Ibid 302-322; Halifax advocated tolerance even to lay papists, but not to popish priests—"they are to be looked upon as men who will continue in an eternal state of hostility till the nation is entirely subdued to them," ibid 318; with regard to the lay papists he finely says, "There is a smell in our native earth better than all the perfumes of the East; there is something in a mother, though never so angry, that the children will naturally trust sooner than the most studied civilities of strangers, let them be never so hospitable; therefore it is not advisable, nor at all agreeing with the Rules of Governing Prudence, to provoke men by hardships to forget that nature, which else is sure to be of our side," ibid 319; for Locke's position on this matter see his Letters on Toleration, and Leslie Stephen, English Thought in the Eighteenth Century ii 145-151.

[6] Locke, Two Treatises Bk. ii § 135; cp. Halifax, Political Thoughts, Foxcroft ii 490-497, "Of Fundamentals."

[7] "The social compact has long been obsolete, but the doctrines which it covered became the permanent creed of the Whigs, and were accepted more systematically both by the English utilitarians and the French revolutionists," Leslie Stephen, English Thought in the Eighteenth Century ii 149.

exceeded their commissions, fostered that spirit of self-reliance in the nation which centuries of self-government had implanted.[1] Locke's political theories thus set up a rational ideal of government, and made for a practical business-like manner of dealing with political problems. These were virtues which compensated for any amount of merely logical imperfection. The manner in which the question of sovereignty, misunderstood by Locke and ignored by the statesmen who made the Revolution settlement, was peaceably settled by the growth of the Cabinet system of government, is the best illustration of the manner in which the theoretical defects in the Whig theory of government were remedied by the practical common-sense in political matters which that theory helped to develop.

But the Whig theory of government had its defects. It tended to produce a spirit which led men to regard politics as guided, not by certain divine or natural principles, but by utilitarian principles, which altered with altered circumstances.[2] "Circumstances must come in," wrote Halifax,[3] "and are to be made a part of the matter of which we are to judge; positive decisions are always dangerous, more especially in politics"; and he scoffed at the idea of "fundamentals".[4] No doubt this spirit made for tolerance. No doubt it helped to keep the machine of government running smoothly. But it tended to lower the ideals of statesmen at a time when they could least bear to be lowered. The Whigs were not at the time of the Revolution the majority of the nation;[5] and, in order to maintain their position, they used all the methods of corruption which the defective representative system, and the low public morality both of members of Parliament and their constituents, afforded.[6] The Whig party thus gradually degenerated into a body of politicians whose main concern was to keep themselves in office. It was not surprising that they succumbed when, at the beginning of George III.'s reign, the influence of the crown was turned against them. The Tory party had absorbed some of the Whig views and had, at the same time, retained a few of its

[1] Above 59-61; cp. vol. iv 163-165, 181.

[2] "A constitution cannot make itself; somebody made it, not at once, but at several times. It is alterable; and by that draweth nearer perfection; and without suiting itself to different times and circumstances, it could not live. Its life is prolonged by changing seasonably the several parts of it at several times," Halifax, Political Thoughts, Foxcroft ii 494.

[3] Rough Draft of a New Model at Sea, ibid 458.

[4] Political Thoughts, ibid 490-497.

[5] Lecky, History of England i 7, "The great triumph of Whig principles that was achieved at the Revolution was much less due to any general, social, or intellectual development, than to the follies of a single sovereign, and the abilities of a small group of statesmen."

[6] Above 209-213.

own ideals. With the help of the king it was able to triumph over a party, which had come to think more of perfecting the machinery of corruption by which it retained office, than of the principles for which it had once stood. As we shall now see, the opportunism, and the appeals to reason and utility, which we find in Locke's political theories and in the Whig outlook on government, foreshadow a great change in the character of political speculation.

(3) *The Change in the Character of Political Speculation.*

The Renaissance, the Reformation, and the rise of the modern territorial state, had overthrown the mediæval idea that all Western Europe was one political community under pope and emperor, guided by the same set of divinely dictated religious and moral laws; and that it was the object of the state to maintain and enforce by apt rules these divinely dictated laws. Europe was no longer one community, and the different states, into which it had split up, were by no means agreed as to the contents of the divinely dictated laws which should govern their action.[1] The result was that the relations of the various independent states among themselves were, in fact, guided by considerations of self-interest and expediency. It is true that Grotius and the other writers on international law maintained that certain moral rules ought to govern these relations.[2] It is true that these rules were sometimes observed, and became the foundation of those international customs and treaties which are the real sources of the international law of the present day. But neither then, nor at any other time, have those rules succeeded in doing more than prove to these independent nations that it is in some cases expedient to observe certain laws in their dealings with one another. They have not succeeded in inducing states to regulate their dealings by reference to any principle or principles higher than that of safeguarding their material interests.

But the mediæval view, that political questions should be determined by fixed moral or religious standards, lasted much longer in the case of questions which arose as between different parties in the same state. Both the government and the opposition to the government based their claims on natural or divine laws; and they endeavoured to prove their claims, both by an appeal to biblical texts, and by the authority of precedents, drawn either from biblical history, or from the history of ancient or modern states. History was ransacked for instances to prove particular theses as to the meaning and contents of this or that moral or religious law, from which the writer

[1] Vol. iv 11-23. [2] Vol. v 27, 50-60.

hoped to prove the correctness of his political faith. And this method of political reasoning was employed, not only when the government or the opposition to the government sought to prove its case by reference to natural or divine laws, but also when they sought to base their respective claims upon the law of the particular state. History was wilfully misread by all parties in order to prove a particular interpretation of the law. In England, where the main weight of the constitutional controversy turned upon the interpretation of the common law and Parliamentary history, this misuse of history by both sides is especially marked. Coke and Prynne are as flagrant offenders as Finch or Berkeley or Herbert; and the House of Commons as any Stuart king.

It is obvious that this method of political reasoning is directly inherited from the mediæval view that the supremacy of law, divine or human, must be maintained. It borrows both the language and the concepts of its mediæval past. But political theory necessarily follows very closely the facts of contemporary political life. It is made with a view to contemporary problems, and is therefore cast in the mould of contemporary ideas. Hence, in spite of the use of mediæval language and mediæval concepts, we can see in this century a change in the nature of the problems which political theorists were trying to solve, and a consequent change in the character of their speculations. The coming of the territorial state had made the problem of sovereignty the political problem of the century. That tended to make the mediæval ideal—the securing of the supremacy of law divine or human—sink into the background. The maintenance of that supremacy was not regarded, as in the Middle Ages, as an end in itself; but rather men argued for the supremacy of this or that version of divine or human law, in order to prove a thesis as to the balance of power, or the whereabouts of the sovereign power in the state. Obviously, theories of the divine right of kings or of a social compact, used to prove theses of this kind, are very different in their orientation from similar theories used, as they were used in the Middle Ages, to justify particular expedients for securing the supremacy of law.

This change in the character of political speculation, which we can see in the seventeenth century, will pave the way to yet further changes. The analysis of sovereignty will tend to separate morals from law, and to draw a hard and fast line between moral right and legal right; and the insistence on the legal supremacy of the sovereign will tend to banish ethical ideals from political reasoning. It will tend to substitute for these ethical ideals considerations of utility or expediency, and to make the dominant aim of politics the securing of the greatest material advantage

for the strongest party in the state. Necessarily this change will react on methods of political reasoning. Both in the Middle Ages and in the seventeenth century political theories were deduced logically from fixed postulates. But in modern times, when no such fixed postulates are recognized, they have tended to become merely a series of generalizations arrived at inductively from the teachings of history and considerations of expediency. But the conclusions of a science, which proceeds on these lines, are far more indefinite and far less authoritative than they were in the days when its conclusions were assumed to be logical deductions from great moral or religious principles. In fact, under the influence of the indeterminate and conflicting ideals of various groups of modern politicians, they tend to become merely a repertoire of arguments for the particular thesis which the writer happens to favour. Political reasoning tends more and more to turn upon considerations of expediency; and its conclusions can only be justified or condemned by their results. Thus somewhat the same set of principles which have long been applied to settle the international relations of states, tend more and more to be applied to settle political questions arising within the state.

We see the beginnings of this change at the close of this period. We have seen that Filmer's new argument for the divine right of kings was assailable by arguments as to its improbability based on grounds of utility.[1] We have seen that Locke's conception of the original contract, and of the contents of the natural rights of the subject, were also based on obvious grounds of utility.[2] Halifax,[3] like Selden, was wholly sceptical as to the existence of these divine or natural or fundamental rights. In his writings the law of nature is reduced to a preference for virtue or an instinct of self-preservation.[4] The only fundamental principle in politics which he admits is the principle of sovereignty.[5] Fundamental principles designed to keep a constitution unchanged he will have none of—constitutions must be changed "as often as the good of the people requireth it";[6] and the sovereign power will certainly make these changes whenever it sees fit to do so.[7] Fundamental laws of nature cannot be settled by men, for all

[1] Above 278-279. [2] Above 284-287.

[3] Above 289; for Selden's views see vol. v 409-410.

[4] "All laws flow from that of Nature, and when that is not the foundation they may be legally imposed, but they will be lamely obeyed. By this Nature is not meant that which fools, libertines, and madmen would misquote to justify their excesses; it is innocent and uncorrupted Nature—that which disposeth men to choose virtue without its being prescribed, and which is so far from inspiring ill thoughts into us that we take pains to suppress the good ones it infuseth," Character of a Trimmer, Foxcroft ii 283-284.

[5] Above 280 n. 1.

[6] Political Thoughts, Foxcroft ii 494.

[7] Anatomy of an Equivalent, ibid 439-442.

such laws "must vary for the good of the whole." [1] But as yet the change is only beginning. Locke is still at pains to show that there is some historical basis for his conception of the original contract, from which the rights and liberties of the people flow.[2] The original contract has not yet been reduced, as Blackstone reduced it,[3] to a mere method of expressing the truth that all government is founded on the consent of the governed. Locke, therefore, cannot frankly base his political theories upon the principle of utility.[4] Leslie Stephen found it "strange to see a man of such vast intellectual vigour, and, above all, with so firm a grasps of facts, allowing himself to be trammelled with this vexatious figment." [5] But two sufficient reasons compelled him to use the machinery of natural rights and original contract to justify the practical conclusions which flow more naturally from the principle of utility. In the first place, it was the accepted method of political reasoning; and, long after the original contract was recognized to be a fiction, reverence for church and king, and for custom and tradition, helped to counteract the view that state machinery and political programmes were matters depending solely upon logic and utility. In the second place, it was necessary for Locke to adopt this method of reasoning from the purely forensic point of view. So long as a Stuart restoration was a possible thing, the maintenance of the theory of the divine or natural rights of the people was needed as a counterpoise to the theory of the divine right of the king.[6] We shall now see

[1] "Some would define a fundamental to be the settling the laws of Nature and common equity in such a sort as that they may be well administered: even in this case there can be nothing fixed but it must vary for the good of the whole," Political Thoughts, Foxcroft ii 494.

[2] Two Treatises of Government, Bk. ii §§ 101-111.

[3] "Though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that, therefore, is the solid and natural foundation, as well as the cement of society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together," Bl. Comm. i 47-48; the death-blow to the theory of original contract and the supposed natural rights which flowed from it was given by Hume and Burke, below 299 nn. 2 and 3.

[4] "Vigorously as Locke can put the utilitarian argument, we become sensible that it somehow fails to give him complete satisfaction. He wants some binding element to supplement the mere shifting considerations of expediency. We constantly meet with rights of an indefeasible nature, which have somehow obtained an authority independent of the source from which they are derived. He is forced to alternate between simple utilitarianism and an odd system of legal fictions," Leslie Stephen, English Thought in the Eighteenth Century ii 138; the best concrete illustration of the effects of this attitude of mind is his denial to the legislature of the power to change its constitution, and get rid of the anomalies which disfigured the representative system, and his assertion that these anomalies could only be remedied, if at all, by the prerogative, Locke, op. cit. Bk. ii §§ 157, 158.

[5] Ibid ii 140.

[6] Above 283; cp. Figgis, Divine Right of Kings, 175-176.

that it was largely because Hobbes attempted, in the middle of this century, to construct a political theory on the sole bases of logic and expediency, that his influence over his own generation was so small; and that it was for exactly the same reason that his merits came to be fully appreciated at the beginning of the nineteenth century.

(4) *Hobbes, and his Influence on Political Theory.*

Hobbes was perhaps the greatest, and certainly the most original and stimulating political philosopher, that England has ever produced. Like Bentham, he claimed to be much more than a political philosopher. His political philosophy, as expounded in the Leviathan and his other works, is a deduction from, and an application of, the general principles by which he sought to explain the genesis of human knowledge, and the evolution of human life.

He was a thorough-going materialist,[1] and a worshipper of logical reasoning.[2] Matter and motion were for him the two ultimate facts of the universe;[3] and all human activities, intellectual or otherwise, he considered to be forms of motion. Man differed from the beasts in that his intellectual motions were somewhat different. Firstly, he is curious.[4] "The beast flies from or approaches a new object, only considering whether it will 'serve his turn.'" The man endeavours to discover the cause. Hence arises all philosophy, "which is . . . the theory of consequence in general."[5] Secondly, he has the gift of speech, which enables him to gratify his curiosity, and thus to acquire knowledge by which he can ameliorate his condition. Without it, "there had been amongst men neither Commonwealth, nor Society, nor contract, nor peace, no more than amongst Lyons, Bears and Wolves."[6] Speech enables men to give names to things;[7] and this power in its turn enables them to reason.[8]

[1] Leslie Stephen, Hobbes 82.

[2] Ibid 70-71—"He was a born logician. He loved reasoning for its own sake. His great aim was to be absolutely clear, orderly, and systematic. . . . Euclid fascinated him as constituting a complete chain of demonstrable propositions, each indissolubly linked to its predecessor, and everyone confirming and confirmed by the others. A complete theory of things in general should, he thought, be a philosophical Euclid; and he hoped to lay down its fundamental principles and its main outlines."

[3] Ibid 82-84; Leviathan, Introd.

[4] Ibid (1st ed.) 26.

[5] Leslie Stephen, Hobbes 133.

[6] Leviathan 12.

[7] Ibid.

[8] "The manner how Speech serveth to the remembrance of the consequence of causes and effects, consisteth in the imposing of *Names*, and the *Connection* of them," Leviathan 13; "By this imposition of names, some of larger, some of stricter signification, we turn the reckoning of the consequences of things imagined in the mind, into a reckoning of the consequences of appellations," ibid 14; "The Greeks have but one word λόγος, for both *Speech* and *Reason;* not that they thought there was no Speech without Reason; but no Reasoning without Speech: and the

Indeed the power to reason rightly, and thus to ascertain truth, depends upon our capacity to "rightly order names in our affirmations." In other words, the power to frame correct definitions is a condition precedent to the attainment of all exact knowledge.[1]

In nature each name stands for a particular thing. But the faculties of speech and reason have enabled men, firstly, to invent universal names for all things of the same kind;[2] secondly, to deduce consequences from the thoughts and conceptions which are expressed in words;[3] and thirdly, to construct general rules called "theorems or Aphorismes."[4] These powers are not, like sense or memory, born with us. They are "attayned by industry; first in apt imposing of names; and secondly by getting a good and orderly method in proceeding from the elements, which are names, to assertions made by connection of one of them to another; and so to syllogismes, which are the connections of one assertion to another, till we come to a knowledge of all the consequences of names appertaining to the subject in hand; and that is it, men call Science."[5] Speech, reason, science—all ultimately depend upon names;[6] and, that being so, no science can give us absolute knowledge. It can never be anything but conditional.[7] But, it will be asked, are such things as Truth, Justice, and Virtue merely names? The answer is, Yes. Truth or falsehood are merely names which result from the use of language.[8] Justice or virtue are merely

act of reasoning they call *Syllogisme;* which signifieth summing up of the consequences of one saying to another," ibid 16.

[1] "Seeing then that *truth* consisteth in the right ordering of names in our affirmations, a man that seeketh precise *truth*, had need to remember what every name he useth stands for; and to place it accordingly; or else he will find himself entangled in words. . . . And therefore in Geometry (which is the onely science that it has pleased God hitherto to bestow on mankind) men begin at settling the significations of their words; which settling of significations they call *Definitions;* and place them in the beginning of their reckoning," Leviathan 15.

[2] Ibid 13, 14. [3] Ibid 14, 16, cited above 294 n. 8.

[4] "He [man] can by words reduce the consequences he findes to generall rules, called *Theoremes*, or *Aphorismes;* that is, he can Reason, or reckon, not onely in number; but in all other things, whereof one may be added unto, or subtracted from another," ibid 20.

[5] Ibid 21.

[6] "And therefore, when the Discourse is put into Speech, and begins with the Definitions of Words, and proceeds by Connexion, of the same into generall Affirmations, and of these again into Syllogismes; the End or last summe is called the Conclusion; and the thought of the mind by it signified, is that conditionall Knowledge, or Knowledge of the consequence of words, which is commonly called SCIENCE," ibid 31-32.

[7] "No man can know by Discourse, that this, or that, is, has been, or will be; which is to know absolutely; but onely, that if This be, That is; if This has been, That has been; if This shall be, That shall be: which is to know conditionally; and that not the consequence of one thing to another; but of one name of a thing, to another name of the same thing," ibid 31.

[8] Ibid 15.

descriptive names given to signify certain of our sensations. As men's sensations are differently affected by the same things, these descriptive names necessarily differ in meaning so widely that "they can never be true grounds of any ratiocination."[1] But, if this is so, what test have we as to the validity of our conclusions? The answer is, if we get our definitions exact, and reason from them correctly, we shall be able to detect a wrong conclusion by its absurdity—the sense of which is peculiar to man.[2]

Now the state of primitive man is a state of war. "Force and Fraud are in Warre the two Cardinall vertues."[3] Therefore everything is permissible in such a state. "The notions of Right and Wrong, Justice and Injustice, have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice."[4] Thus "the life of man is solitary, poor, nasty, brutish and short."[5] But men desire to preserve their lives; and their reasoning powers lead them to certain conclusions or precepts or laws of nature, as to the best way of attaining this result.[6] They conclude, for instance, that peace should be sought, that covenants should be kept, that a man will be wise not to do to another that which he would not like done to himself.[7] These conclusions are not properly laws. There can be no laws in a state of nature, for in a state of nature there is no sovereign; and it is upon the command of the sovereign that laws depend. But, if we regard these conclusions as the commands of God, we can call them the laws of Nature.[8] But, in a state of nature, there is no security that these laws of nature will be obeyed.[9] And so men at length come to see that, if they would get this security, they must consent to give up their natural power and liberty. Hence they agree to transfer absolutely and for ever all these natural rights to a sovereign.[10] This is the beginning of

[1] "In reasoning a man must take heed of words; which besides the signification of what we imagine of their nature, have a signification also of the nature, disposition, and interest of the speaker; such as are the names of Vertues, and Vices; For one man calleth *Wisdome*, what another calleth *Feare;* and one *cruelty*, what another *justice*. . . . And therefore such names can never be true grounds of any ratiocination. No more can Metaphors, and Tropes of speech," Leviathan 17.

[2] Ibid 20. [3] Ibid 63. [4] Ibid. [5] Ibid 62.

[6] "A Law of Nature is a precept or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved," ibid 64.

[7] Ibid chaps. xiv, xv.

[8] "These dictates of Reason, men use to call by the name of Lawes; but improperly: for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; whereas Law, properly is the word of him, that by right hath command over others. But yet if we consider the same theoremes, as delivered in the word of God, that by right commandeth all things; then are they properly called Lawes," ibid 80.

[9] Ibid 85. [10] Ibid 87, 88, and chap. xviii.

the state. Its essence is the sovereign thus created;[1] and differences between states turn wholly upon differences in the constitution of the sovereign power.[2]

There are no legal limitations upon the sovereign's power; for law is his command, and he can command what he likes.[3] He can make any course of conduct just or unjust.[4] A subject can have no legal rights as against him.[5] A limited right to disobey the sovereign in defence of his life or limb is practically all the liberty that the subject has.[6] Erroneous notions as to the doctrine of sovereignty, and, in particular, the erroneous idea that the sovereign power is divisible,[7] were a principal cause of the civil war. The laws which the sovereign makes, at length give us a certain method of distinguishing between right and wrong, between justice and injustice. It is a method a good deal more certain than the sense of absurdity produced by incorrect reasoning, which seems to be the only means of drawing those distinctions in the state of Nature.[8]

We have seen that Hobbes in his "Dialogue of the Common Laws" applied his conception of sovereignty, and his definition of law as the command of the sovereign, to prove the absurdity of the mysterious and obscure technicalities with which the lawyers had surrounded the rules of law.[9] If these were removed, he considered, great simplifications might be effected in the legal system. The same ideas appear in the Leviathan, but in a political rather than in a legal setting. His condemnation of the idea that judges can make law,[10] or interpret it authentically;[11] and his explanation of the existence of customary law,[12] are all directed to support his main contention that, as law depends upon the sovereign's command, it is absurd to suppose that he can be controlled by law.[13]

[1] "In him consisteth the Essence of the Commonwealth; which (to define it) is One Person, of whose Acts a great Multitude by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence," Leviathan 88.

[2] Ibid 94, 115. [3] Ibid 106-107, 137.

[4] Ibid 90, 137. [5] Ibid 90. [6] Ibid 111-112.

[7] Ibid 93, "If there had not first been an opinion received of the greatest part of *England*, that these Powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided, and fallen into this Civill Warre; first between those that disagreed in Politiques; and after between the Dissenters about the liberty of Religion."

[8] Above 296. [9] Vol. v 480-481.

[10] "It is not that *Juris prudentia*, or wisedome of subordinate Judges; but the Reason of this our Artificiall Man the Commonwealth and his Command, that maketh Law," Leviathan 140, criticizing Coke's dictum, Co. Litt. 97b; vol. v 481.

[11] Leviathan 143-144.

[12] "When long Use obtaineth the authority of a Law, it is not the length of Time that maketh the Authority, but the Will of the Soveraign signified by his silence (for Silence is sometimes an argument of Consent); and it is no longer Law, than the Sovereign shall be silent therein," ibid 138.

[13] Ibid 90, 138.

It is equally absurd to suppose that the sovereign can be controlled by religious rules. On the contrary, the sovereign, because he is sovereign, has the right to dictate the doctrines, religious or otherwise, which are preached in his state, and to choose the teachers.[1] In fact, the sovereign is "the supreme pastor."[2] All other pastors "are his ministers, in the same manner as magistrates of towns, judges in courts of justice, and commanders of armies."[3] As such supreme pastor, he has authority "not only to preach . . . but also to baptize, and to administer the sacrament of the Lord's Supper."[4] This despotic control over religion is justified in two ways. In the first place, the necessary articles of the Christian faith are whittled down to one only—a belief that Jesus is the Christ.[5] Other matters are, comparatively speaking, indifferent, and ordinances made as to them must be obeyed as law, as, by disobedience to law, we break the law of God.[6] In the second place, even if a sovereign is an infidel, resistance will be an offence against the law of God. Subjects must obey; "and for their faith it is internal and invisible; they have the licence that Naaman had."[7]

Hobbes thus abolishes all mysticism from law, religion, and the state. Man is simply a machine; and the state is likewise a machine manufactured by him.[8] It is "based upon selfish motives and is worked by individual interests." It is no living organism, but simply "organised force."[9] If this was the true theory of the state, Hobbes was fully justified in saying that civil philosophy was no older than his own books.[10] It is no wonder that he was suspected of atheism. It is no wonder that his speculations roused the fury of both lawyers[11] and churchmen. His political philosophy attacked the practice and the theories of both; for it was fatal, both to the technicalities of law and theology, and to those divine and natural rights upon which the political theories of lawyers and churchmen rested. No doubt his writings helped to teach Halifax and a few others the doctrine

[1] "It belongeth to him that hath the Sovereign Power, to be Judge, or constitute all Judges of Opinions and Doctrines, as a thing necessary to Peace"; for, "the Actions of men proceed from their Opinions; and in the wel governing of Opinions, consisteth the well governing of man's actions, in order to their Peace and Concord," Leviathan 91; cp. ibid 295.

[2] Ibid 295. [3] Ibid 296. [4] Ibid 297. [5] Ibid 322, 324.

[6] Ibid 330; cp. ibid 149, "In all things not contrary to the Morall Law (that is to say, to the Law of Nature), all Subjects are bound to obey that for divine Law, which is declared to be so, by the Lawes of the Commonwealth."

[7] Ibid 330-331. [8] Ibid, Introd.

[9] Leslie Stephen, Hobbes 211; as is there pointed out, Hobbes's position may be compared "to that of the old economists." They, like Hobbes, based their system on the selfishness of mankind, and eliminated all other motives; cp. Leviathan chap. xi.

[10] Cited Leslie Stephen, Hobbes 78.

[11] For Hale's criticisms see above 205 and vol. v 482-485, and App. III.

of sovereignty. But his speculations could have no great influence till the divine right of kings, and the natural rights of the people, ceased to form the premises from which all political theories were deduced.

We have seen that belief in the divine right of kings disappeared after the Revolution;[1] and the death-blow to the theory of the natural rights of peoples based upon an original contract was given by Hume,[2] and Burke.[3] It then became possible to base political reasoning frankly upon considerations of expediency and utility. We can see the final conflict between the old methods of political reasoning in their decrepitude, and the new methods in their young and vigorous youth, in Bentham's criticisms on Blackstone's political philosophy in his Fragment on Government. Bentham, in his "Theory of Legislation," gave a pseudo-scientific form to the principle of utility, and mobilized it, so to speak, for the purpose of effecting political and legal reforms. He was able to adopt Locke's principles, and apply them in much greater detail to all branches of the law, because he was no longer hampered by the apparatus of original contract and natural rights, which Locke had been obliged to employ. At the same time he and his school fully accepted Hobbes's doctrine of sovereignty,[4] and advocated the use of the sovereign legislature as the best way of effecting those extensive law reforms which the principle of utility demanded.[5] When the new Whigs finally defeated the Tories in 1832, they proceeded to carry out the principles of Locke, as restated and elaborated and applied to existing abuses by Bentham, using as their weapon that sovereign legislature which Hobbes had been the first Englishman to understand and to analyse. As we have seen, the fact that Burke had been able to strike out for himself a political creed, which combined the strong points of the old methods of political reasoning and the new, was destined in later days to do much to modify the narrow outlook engendered by utilitarianism, and by the *a priori* philosophies of law politics and economics which came in its train.[6]

[1] Above 279.

[2] Cp. Bentham, Fragment on Government (ed. Montague) 153; A. L. Smith, Camb. Mod. Hist. vi 819, 820; Pollock, History of the Science of Politics 85-86.

[3] Ibid 94.

[4] As Maine says, Early History of Institutions 354, Hobbes's analysis of sovereignty was so complete that little was left for Bentham and Austin to add; Austin expressly acknowledges Hobbes's merits, Lectures on Jurisprudence 286; on the other hand, Leslie Stephen says, English Utilitarians i 302, that, though Hobbes was a favourite author of the later utilitarians, "Bentham does not appear to have studied him"; G. H. Lewes, Biographical Hist. of Philosophy 439, says that the "first person who saw his prodigious importance as a political thinker, and had the courage to proclaim it, was James Mill."

[5] Dicey, Law and Opinion (1st ed.) 164-166.

[6] Above 280-281.

The result of the development of English public law during this century had been to create a state which differed from that of every other state in Europe. The English people had refused to identify king and state; they had so developed their mediæval Parliament that it had become the predominant power in the state; and they had maintained the supremacy of the law over officials as well as subjects, and even over the prerogative of the king. Foreign nations did not understand such a constitution. To many Frenchmen in the seventeenth and eighteenth centuries the English seemed to be a barbarous race who killed and deposed their kings.[1] Their government seemed to be ever distracted by faction—more stormy, Voltaire said, than the waves of the sea which surrounds their island; and, like the government of Poland, to be incapable of maintaining authority, or of pursuing any fixed line of policy.[2] But Halifax's penetrating glance saw "the miserable deformity" which existed beneath the "glittering outside of unbounded authority," with which, in the seventeenth century, the brilliant court of Louis XIV. dazzled Europe.[3] In the course of the eighteenth century, many Frenchmen began to echo his praise of that "blessed constitution in which dominion and liberty are so happily reconciled";[4] and, consequently, the English constitution and its theory, as expounded by Locke, began to exercise a profound influence upon the thinkers whose books prepared the way for the French Revolution.[5] Both the prosperity and the achievements of England in the eighteenth century, showed that Halifax had spoken truly when he said that, "those strugglings, which are natural to all mixed governments, while they are kept from growing into convulsions, do by a mutual agitation of the several parts rather support and strengthen, than weaken or maim the constitution; and the whole frame, instead of being torn or disjointed, cometh to be the better and closer knit by being thus exercised."[6]

But, in the seventeenth century, the civil war and the political unrest, which had made England the one great free state in Europe, had not been as favourable to purely legal development as the ordered, and, in many respects, enlightened despotism of Louis XIV. It will be nearly a century and a half before English law can show legislation in any way comparable to those French

[1] See references cited by Buckle, History of Civilization in England ii 173-174 and nn., 231, 232 (ed. 1903); cp. Gooch, English Democratic Ideas 356.

[2] See authorities cited by Sorel, L'Europe et la Révolution Française i 63, 345 nn. 1 and 4.

[3] Character of a Trimmer, Foxcroft ii 297-298.

[4] Ibid 296.

[5] Gooch, English Democratic Ideas 357-358.

[6] Character of a Trimmer, Foxcroft, ii 297.

Ordonnances of the seventeenth and eighteenth centuries, which entitle the French nation to the fame of being the pioneers in the work of codification.[1] But, in spite of this political unrest, English law had begun, during the latter half of the century, to develop in many directions, and, as the result of these developments, to assume its modern form. The history of these developments will form the subject of the two following chapters.

[1] See Esmein, Histoire du droit Français (5th ed.) 780-786; they comprise a code of civil procedure (1667); a code of criminal procedure (1670); a commercial code (1673), supplemented in 1681 by a shipping code and a code of marine commerce; la code noir (1685) which regulated negro slavery in America; an ordonnance as to donations (1731); an ordonnance as to wills (1735); an ordonnance on *substitutions fideicommissaires* (1747); an ordonnance as to forgery (1737).

CHAPTER VII

THE LATTER HALF OF THE SEVENTEENTH CENTURY

The Enacted Law

FROM the purely legal point of view, the most important result of the Great Rebellion had been to reduce to insignificance very many of those courts which had, in the preceding period, been formidable rivals of the common law. The jurisdiction of the Council and its various offshoots had come to an end in England.[1] The jurisdiction of the court of Admiralty was rigorously curtailed.[2] The court of High Commission had disappeared;[3] and, though the other ecclesiastical courts had been restored, they were firmly controlled by the common law courts. On the other hand, the court of Chancery, though often attacked during the Commonwealth period, had never wholly disappeared.[4] At the Restoration equity began again to develop upon the lines upon which it had been developing before the Great Rebellion;[5] and the court of Chancery, like the courts of common law, took over some of the jurisdiction of the courts which had either disappeared or become definitely subordinate.[6] Thus, just as the Restoration introduced many of the modern features of the political life of the state,[7] so it introduced the dominant modern feature of its legal life—the definite superiority of the courts of common law and the court of Chancery. From henceforward it is quite clear that the main sources of the professional development of the law will be found in the activities of these courts. And this characteristic is reproduced in the enacted law of this period. So far as it touches on legal doctrine, it is mainly concerned with the doctrines of common law or equity. It is true that a small place is still left for the activities of the court of Admiralty and the ecclesiastical courts; it is true that the civilians and canonists of Doctors Commons[8] will develop a

[1] Vol. i 515-516.
[2] Ibid 556-558.
[3] Ibid 611.
[4] Ibid 431-434.
[5] Ibid 435; vol. v 217-218, 299-338; below 640-671.
[6] Below 634-636, 650.
[7] Above 203-208, 243-258
[8] Vol. iv 235-237.

body of doctrine upon topics which still fall within their jurisdiction; and it is true that some of the topics with which they deal will increase in importance during the eighteenth century. But, during this period, their activity is not very important; and the enacted law relating to matters falling within their jurisdiction is scanty. I shall therefore deal with the history of the branches of law which they developed in the next Book of this History. In this chapter I shall deal with the enacted law of the latter part of the seventeenth century; and, in the following chapter, with the professional development of law and equity during the same period.

We have seen that, in the preceding period, it was necessary, in dealing with the enacted law, to take some account of the proclamations as well as of the Statutes.[1] During this period the proclamations have not quite the same importance. After the abolition of the Star Chamber, there was no tribunal which would punish a breach of a proclamation, unless the conduct ordered or forbidden by it was illegal.[2] The legislative supremacy of Parliament, and the growing definiteness of the restrictions upon the prerogative during Charles II.'s and James II.'s reigns, were restricting proclamations to the sphere of executive as distinct from legislative acts; and this process was complete after the Revolution.[3] Thus some of them simply contain general warnings and exhortations to obey the law, and to refrain from obviously immoral or illegal courses of conduct, such as drunkenness, debauchery, or profanity;[4] and a very large number simply enforce the provisions of Acts of Parliament, or exercise powers which these Acts of Parliament had conferred upon the crown.[5] But though they are for the most part simply executive acts, definitely subordinate to statutes, they illustrate many of those sides of the

[1] Vol. iv 296-307.

[2] "The general character of Charles II.'s proclamations is modified by the non-existence of any special tribunal to enforce them, and they are in consequence enforced by threats of the king's displeasure and of such penalties as may lawfully be enforced," Tudor and Stuart Proclamations i *cvii*; if the conduct forbidden was not specifically illegal by statute or by the common law, it could only be made punishable if it could be indicted as a nuisance, see ibid no. 3321, which provides that heavy fourwheeled carts which injure the roads are to be treated as nuisances; and no. 3852, which treats the excessive number of hackney coaches as a nuisance, which the king can restrain by prohibiting all which are not licensed.

[3] "The proclamations from this date lose all characteristics of the Ordinance and become in great measure either mediums of announcements to those concerned, or statutory declarations," Tudor and Stuart Proclamations i *cxiii*.

[4] Ibid nos. 3211 (1660); 3242 (1660); 3867 (1688); 4076 (1691-1692); 4246 (1697-1698); 4269 (1699).

[5] See e.g. ibid nos. 3290 (1660-1661); 3293 (1661); 3300 (1661); 3327 (1661); 3335 (1661); 3366 (1662); 4137 (1694); 4223 (1697); 4226 (1697); 4252 (1698); cp. ibid Introd. i *cvii*.

national life, and many of those new developments, which appeared to call for regulation by the state. Thus they still afford a good introduction to the statute law of this period; and therefore, by way of introduction to my account of the statute law, I shall say a few words as to the chief topics with which they deal.

Most of the historical events of the period are reflected in the proclamations. The orders that the thirtieth of January should be observed as a day of humiliation,[1] and the twenty-ninth of May as a day of rejoicing,[2] commemorate the victory of royalty. The great Plague,[3] the fire of London,[4] and the Popish Plot[5] occasioned very many proclamations. The proclamation against tumultuous petitions points to the division of the nation into distinct political parties at the end of Charles II.'s reign, and the growing bitterness between them.[6] Proclamations were issued against Monmouth and his supporters;[7] and it was James II.'s proclamation of the Declaration of Indulgence which set in motion the sequence of events which brought about the Revolution.[8] After the Revolution we get the proclamation of war with France,[9] a series of measures directed against Popish recusants and adherents of James II.,[10] and many orders necessitated by the recoinage.[11]

All through this period the topic of national defence is the occasion for many various proclamations; and the great bulk of them are concerned with the navy. Thus we get proclamations upon the subject of impressment,[12] the encouragement of volunteers,[13] the pay,[14] and other allowances,[15] made to seamen. But, in spite of these proclamations, there is no doubt that seamen were sometimes defrauded of their wages and other allowances, and sometimes paid, not in cash, but by tickets promising

[1] Tudor and Stuart Proclamations i no. 3283 (1660-1661).

[2] Ibid no. 3305 (1661).

[3] Ibid nos. 3426-3442 (1665); no. 3461 (1666) is an interesting collection of sixteen rules for the prevention of infection.

[4] Ibid nos. 3470-3477, 3488 (1666); 3491, 3492 (1667).

[5] Ibid nos. 3656-3667, 3669, 3672-3676 (1678, 1679).

[6] Ibid no. 3702 (1679); this petition was drawn by North, C.J. (below 533); Roger North, Lives of the Norths i 226, says, "It is scarce credible with what saucy impudence divers came to the king with petitions signed with numberless hands and frightful hieroglyphics; but with ten persons only in company, so as not to offend against the statute about tumultuous petitions: all which was fully stopped by a proclamation which his lordship penned."

[7] Ibid nos. 3794-3805 (1685).

[8] Ibid no. 3843 (1687); 3864, 3865 (1688).

[9] Ibid no. 3999 (1689).

[10] Ibid nos. 4037, 4038, 4039 (1690); 4087 (1692); 4177 (1695-1696); 4242 (1697-1698); 4272, 4276 (1699); 4301 (1701-1702).

[11] Ibid nos. 4164 (1695); 4167-4169 (1695-1696); 4198 (1696); 4225 (1697).

[12] Ibid nos. 3405 (1664); 3566 (1672); 4032 (1689-1690); 4058 (1690).

[13] Ibid nos. 4060 (1690-1691); 4075 (1691); 4098 (1692); 4112 (1692-1693); 4144 (1694); 4181 (1695-1696); 4218 (1696-1697); 4284 (1700-1701); 4299 (1701-1702).

[14] Ibid no. 3494 (1667).

[15] Ibid no. 3402 (1664).

payment at a future date;[1] and there was no special provision for sick or disabled sailors. The scandals denounced in the statute book, and graphically described by Pepys,[2] were to a large extent removed after the Revolution.[3] William III. founded Greenwich Hospital for disabled sailors; and both the executive and the legislature made regulations as to its administration.[4] The trade of fishing, which furnished valuable recruits for the navy, was encouraged;[5] and, in 1660-1661 and the two following years, the Political Lent was ordered to be observed.[6] The Navigation Acts were enforced by one proclamation,[7] and, by another, provision was made for the erection of lighthouses on the North and South Forelands.[8] Other proclamations provide for the digging of saltpeter,[9] and prohibit its export.[10] Another prohibits the export of cannon.[11] A proclamation of James II. contains regulations for the behaviour of the soldiers,[12] and a proclamation of William III. deals with false muster rolls by which officers drew pay for non-existent soldiers.[13] The absence of any special provision for maimed soldiers at the beginning of Charles II.'s reign, is illustrated by a proclamation of 1660-1661, which ordered that their parishes should relieve soldiers, who came provided with recommendations signed by certain persons named therein;[14] and the foundation of Chelsea Hospital for their relief is alluded to in a proclamation of 1684-1685.[15]

We shall see that the encouragement of native industry and trade, internal and external, occasioned the most numerous of all the groups of statutes of this period. As we might expect, the proclamations upon this topic are equally numerous. One group

[1] See 18, 19 Charles II. c. 1 §§ 1, 8; and Pepys, Diary (Wheatley's ed.) vii 350-351 for his successful defence before Parliament of the payment of the men by ticket in 1667-1668.

[2] Diary v 98; ibid at p. 107 he writes, "Did business, though not much, at the office; because of the horrible crowd and lamentable moan of the poor seamen that lie starving in the streets for lack of money"; ibid vi 220, "this day a poor seaman, almost starved for want of food, lay in our yard a-dying. I sent him half-a-crown, and we ordered his ticket to be paid."

[3] 9 William III. c. 41 § 6 dealt for the first time with the abuse arising from the giving by seamen of a power of attorney to receive their wages, and coupling it with a will making such attornies their executors.

[4] Tudor and Stuart Proclamations i no. 4227 (1696-1697); 7, 8 William III. c. 21; 8, 9 William III. c. 23.

[5] Tudor and Stuart Proclamations i nos. 3235 (1660); 3325 (1661).

[6] Ibid nos. 3287 (1660-1661); 3330 (1661); 3376 (1662-1663); 3390 (1663-1664); for the Political Lent see vol. iv 300, 328.

[7] Ibid no. 3363 (1662).

[8] Ibid no. 3360 (1662).

[9] Ibid no. 3464 (1666).

[10] Ibid no. 3395 (1663-1664); 4019 (1689).

[11] Ibid no. 3730 (1681).

[12] Ibid no. 3815 (1685).

[13] Ibid no. 4008 (1689).

[14] Ibid no. 3272 (1660); in 1662 two statutes were passed to raise money for soldiers who had fought for the king, 14 Charles II. cc. 8, 9; and provision was made for taking the accounts of its expenditure by 22, 23 Charles II. c. 21.

[15] Ibid no. 3762 (1684-1685).

of these proclamations aimed at suppressing the export of raw material, especially wool,[1] and the import of foreign manufactured articles. At different periods glass,[2] paper,[3] alum,[4] needles,[5] earthenware,[6] buttons,[7] iron-wire,[8] and cordage,[9] got protection. In further pursuance of this policy of encouraging native manufactures, regulations were made for ensuring good quality in the articles produced. Thus powers of supervision over their respective crafts were given to the company of starch-makers,[10] to the company of horners,[11] to the company of water-men,[12] and to a society of frame-work knitters.[13] In addition, the export of the machines used by the frame-work knitters was prohibited.[14] Foreign trade was still, as we shall see, in the hands of trading companies, which had exclusive powers of trading, and large powers of control. There are many proclamations which regulated the admission to these companies,[15] and upheld their privileges, especially their privileges of exclusive trade.[16]

The prices of certain articles consumed in this country were regulated from time to time. Thus there are several proclamations, fixing the prices of wine,[17] and enforcing the statutes as to the measures and prices of coal,[18] and as to the prohibition or permission of the export [19] or import [20] of corn, according to its price. Neither in the proclamations, nor, as we shall see, in the statutes, do we get much information as to the growth of those modern principles of commercial law, which were beginning to emerge during this period; but we get a few hints. We can see the growth of the practice of insurance from a proclamation of 1686 "for the better execution of the office of making and re-

[1] Tudor and Stuart Proclamations i nos. 3256 (1660); 3863, 3870 (1688).
[2] Ibid no. 3400 (1664).
[3] Ibid no. 3844 (1687).
[4] Ibid no. 3490 (1667).
[5] Ibid no. 3526 (1669).
[6] Ibid no. 3636 (1676)—enforcing a statute of 3 Edward IV.
[7] Ibid nos. 3851 (1687); 3856 (1687-1688).
[8] Ibid no. 3651 (1678).
[9] Ibid no. 3611 (1674-1675).
[10] Ibid no. 3317 (1661).
[11] Ibid no. 3521 (1668).
[12] Ibid no. 3547 (1671).
[13] Ibid no. 3452 (1665-1666).
[14] Ibid nos. 3452 (1665-1666); 3837 (1686).
[15] Ibid nos. 3380 (1663), 3742 (1683)—admission to the company of Merchant Adventurers; 3420 (1665)—Canary Company.
[16] Ibid nos. 3731 (1681)—East India Company; 3741 (1683)—Merchant Adventurers; 3604 (1674), 3791 (1685)—African Company; 3862 (1688)—Hudson's Bay Company; no. 3604 explains what was the real justification of this privilege—"As traffic with infidels and barbarous nations cannot be carried on without forts, etc., at great expense, letters patent were granted . . . giving the whole trade with Africa . . . to the Royal African Company. After they have spent much money on the trade other persons have come into it without leave"; see vol. iv 320-321; below 326-327, 334-336; Pt. II. c. 4 I § 4.
[17] Tudor Stuart Proclamations i nos. 3352 (1661-1662); 3391 (1663-1664); 3485 (1666-1667).
[18] Ibid no. 3411 (1664-1665).
[19] Ibid nos. 3503 (1667); 4131 (1693).
[20] Ibid no. 3525 (1669).

gistering Policys of Assurances in London";[1] and the growth of the practice of banking, from an allusion to the Goldsmiths' loans to the king,[2] which is made in a proclamation called forth by a run upon them, consequent upon the presence of the Dutch fleet in the Medway.[3] From proclamations of William III.'s reign as to the issue of Exchequer Bills,[4] we can see the beginnings of those new forms of property which originated in shares in trading companies, and were fostered by the growth of a national debt.[5]

It is principally in connection with commerce that proclamations relating to the over-sea possessions of the crown and the colonies make their appearance. The possession of Tangier led to treaties with other powers on the African coast.[6] The policy of the statutes directed to the securing of the colonial trade for England was strictly enforced.[7] The practice of "spiriting" persons away to the colonies, which had existed during a large part of the seventeenth century,[8] was repressed; and regulations were laid down as to the shipment of persons who had contracted to serve there.[9] The policy of giving a tobacco monopoly to America was maintained.[10] The colonization of Jamaica was encouraged by the promise of grants of land and other privileges to those who settled there;[11] and the colonization of America by the transportation of vagabonds and other undesirable persons.[12]

[1] Tudor and Stuart Proclamations i no. 3831—the proclamation sets out that Charles II. had granted to Sir Allen Broderick and his assigns the office of making and registering all assurances, etc., on ships, merchandise, etc., in London for a certain period; but that private offices had been set up which make assurances not entered in Broderick's office. It goes on to order that all assurances shall be there registered.

[2] Ibid no 3493 (1667)—"Certain Goldsmiths who have advanced money on the revenue have been pressed by creditors, which would endanger public safety. The payments of the Exchequer will be punctually made, and these creditors are to be assured of the solvency of the goldsmiths"; cp. Pepys, Diary vi 383-384 as to the beneficial effects of this declaration.

[3] Pepys, Diary vi 362, "W. Hewer hath been at the bankers, and hath got £500 out of Backewell's hands of his own money; but they are so called upon that they will be all broke, hundreds coming to them for money, and their answer is, 'it is payable at twenty days—when the days are out we will pay you'; and those that are not so, they make tell over their money, and make their bags false, on purpose to give cause to retell it, and so spend time"; however, the bankers weathered the storm, see ibid vii 124.

[4] Tudor and Stuart Proclamations i nos. 4223, 4229 (1697).

[5] Pt. II. c. 4 I § 4.

[6] Tudor and Stuart Proclamations i no. 3377 (1662-1663).

[7] Ibid no. 3619 (1675).

[8] Cunningham, Industry and Commerce ii 348-349.

[9] Tudor and Stuart Proclamations i no. 3737 (1682); cp. North, Examen 591; Luttrell's Diary i 183, 187-188, 233, 247.

[10] Vol. iv 302, 340; Tudor and Stuart Proclamations i no. 3293 (1661).

[11] Ibid no. 3346 (1661)—this in substance repeated a proclamation of Cromwell, ibid no. 3059 (1655).

[12] Ibid no. 3300 (1661); for the statutes providing for the alternative of transportation in the case of certain felonies see below 402 n. 8; for the illegal practices of the merchants of Bristol in shipping off minor offenders, and the manner in which these practices were denounced by Jeffreys, see Lives of the Norths i 284-286.

The settlement of St. Christopher, after its restitution by the French, was regulated by a proclamation of 1671;[1] and the grant of Pennsylvania to Sir W. Penn is recorded in a proclamation of 1681.[2]

The regulation of foreign commerce was intimately related to the management of foreign affairs; and the management of foreign affairs was the peculiar province of the crown.[3] It is therefore to the proclamations, rather than to the statutes, that we must look for illustrations of the way in which these powers were exercised. A declaration of war necessitated the issue of proclamations forbidding all trading with the enemy;[4] and, even if no war was declared, measures taken by the courts of foreign countries, which were injurious to English trade, occasioned proclamations providing for retaliation.[5] But perhaps the most interesting of the proclamations connected with this topic are those which illustrate the working of the still rudimentary rules of international law. It is clear that generally the resident foreigner was protected by the law, owed temporary allegiance to the king, and must take the oaths which Englishmen were obliged to take.[6] There are orders forbidding the carrying of contraband,[7] forbidding English subjects to enlist in the service of foreign princes,[8] forbidding English subjects to assist the rebels of a foreign prince.[9] In 1677[10] the ambassador of the States-General complained that he had been affronted by persons who had cited him to appear before the Council. The culprit was imprisoned till he had submitted and had been forgiven by the ambassador; and the facts were published in the Exchange and at the court gate, that "the reparation might be as public as the injury." It is clear, too, that the sanctity of territorial waters, and the rights and obligations of neutrality, are beginning

[1] Tudor and Stuart Proclamations i no. 3555 (1671).

[2] Ibid no. 3727 (1681).

[3] Above 43-45; below 325-327.

[4] Tudor and Stuart Proclamations i nos. 3408 (1664-1665); 3455 (1665-1666); 4009 (1689).

[5] Ibid no. 3482 (1666)—trade with the Canary Isles.

[6] In 1678-1679 an opinion was given by the judges to the effect that foreigners (not merchants) exercising ordinary trades, foreigners not being menial servants of ambassadors, foreigners being settled residents, and natives being menial servants to ambassadors, must take the oaths, Tudor and Stuart Proclamations i no. 3677; that it was becoming usual to allow even enemy aliens to remain is clear from ibid no 3455 (1665-1666); on this subject see Pt. II. c. 6 § 3.

[7] Tudor and Stuart Proclamations i no. 3408 (1664-1665); ibid no. 3456 (1665-1666) gives us a list of contraband articles.

[8] Ibid nos. 3594 (1674); 3630 (1676); 3860 (1687-1688); 4244 (1697-1698).

[9] Ibid no 3613 (1675)—forbidding assistance to rebels against the king of Spain in Messina.

[10] Ibid no 3644; cp. ibid 3754 (1683)—in consequence of a complaint that squibs, stones and firebrands had been thrown at the coach of the ambassador of the United Provinces and that his wife had been wounded, fireworks or bonfires within the limits of the Bills of Mortality were forbidden.

to emerge. In 1667-1668 the following rules were made to protect English harbours from foreign belligerents and privateers.[1] "1. There shall be no hostilities in English ports, havens, roads, or creeks between foreign belligerents. Offenders are confiscate *ipso facto*, any commission notwithstanding. 2. Foreign men-of-war are not to hover round our ports to surprise merchantmen. Trade and commerce is to be protected. 3. If a merchant ship and an enemy warship be in English ports together, the merchant is to be allowed to go out two tides before the warship. Two opposite men-of-war not to go out together. 4. All ships victualling for sea to be visited and war-like vessels detained. 5. Foreign privateers with prizes not to stay more than twenty-four hours in any port, and not to break bulk or sell any prize goods. They are not to be meddled with except the prizes contain the goods of English subjects. 6. No goods are to be bought from foreign ships except through the customs, on pain of forfeiture as *bona piratum*. 7. No English subject is to engage in any foreign quarrel without licence from the King, the L. High Admiral, etc." These rules were in substance repeated in a proclamation of 1676;[2] and, from a proclamation of 1684,[3] it appears that the rule that enemy ships make enemy goods had been expressly provided for in several treaties.

Of the many new developments that were taking place during this period in manners and social life, the proclamations continue to give valuable illustrations. Duelling was still prevalent on small provocation, and proclamations continued to appear against it.[4] It was still believed that the king's touch would cure the disease that went by the name of the King's Evil; and rules, to be published in every market town, were made as to the times at which the ceremony was to take place.[5] Very many briefs, authorizing charitable collections for deserving objects of very various kinds both at home or abroad, continued to be published all through this period;[6] and the success of one

[1] Tudor and Stuart Proclamations i no. 3512.

[2] Ibid no. 3631. [3] Ibid no. 3758.

[4] Ibid nos. 3245 (1660); 3710 (1679-1680); for earlier measures of repression see vol. iv 304; vol. v 199-201.

[5] Tudor and Stuart Proclamations i no. 3364 (1662); for the history of this belief see Lecky, History of England in the Eighteenth Century i 83-90; the power was never exercised by the Hanoverian kings, though it was supposed still to belong to the Stuarts, ibid 276-278.

[6] Tudor and Stuart Proclamations i nos. 3253 (1660)—a fire at Southwold; 3266 (1660)—a fire at Milton Abbas; 3312 (1661)—for the Protestants of Lithuania; 3509 (1667)—fire at Bicester; 3510 (1667-1668), 3537 (1670)—redemption of captives at Algiers; 3632 (1676)—fire at Southwark; 3739 (1682-1683)—fire at Wapping; 3762 (1684)—Chelsea Hospital; 3826 (1685-1686)—French Protestants; 3993 (1689)—Irish Protestants; 4055 (1690)—Teignmouth and Shaldon which had been plundered by the French; 4214 (1696)—fire at Wolverhampton; 4279 (1700)—fire at Bermondsey; for earlier proclamations of a similar kind see vol. iv 306.

of these collections, made in 1685-1686, for the distressed Protestants of France, was not very pleasing to James II.[1] The Post Office was reorganized, and was proving to be a valuable source of revenue. We find, therefore, many proclamations as to the rates of conveyance, and the arrangements for the supply of post horses.[2] The increased trade and prosperity of the country was beginning to put a severe strain upon the existing machinery for maintaining the highways. The increased size of the waggons cut up the inadequate roads; and both the executive and the legislature still attempted the hopeless task of trying to limit the size and weight of the carriage, instead of re-making the roads.[3] The same causes put an equally severe strain upon the machinery for keeping the peace; and so both the proclamations and the statutes testify to the boldness with which highwaymen carried on their depredations all over the country.[4] The continued need for more stringent regulations as to buildings in London was recognized.[5] Something was done after the great fire by the legislature,[6] and by the orders, made in accordance with statutory powers then given, to widen the streets, to provide for a regular building line, and to ensure substantial building.[7] Some attempt also was made to provide for the cleansing of streets of some parts of London;[8] and regulations were made for the licensing and hiring of hackney coaches.[9]

The licensing of plays and players was regulated by a proclamation of 1661;[10] and the growing popularity of the two London royal theatres is illustrated by the need to provide for the conduct of those who frequented them. No one could enter without payment or without giving up his ticket, nor could he

[1] Macaulay, Hist. (ed. 1864) ch. vi 355-356; Evelyn says, Diary, April 25th, 1686, "this day was read in our church the Briefe for a collection for reliefe of the Protestant French, so cruely, barbarously, and inhumanly oppress'd without anything laid to their charge. It had been long expected, and at last was with difficulty procured to be publish'd, the interest of the French Ambassador obstructing it."

[2] See e.g. Tudor and Stuart Proclamations i no. 3280 (1660-1661) 3382 (1663); 3527 (1669); 3573 (1683); see vol. iv 305 for earlier proclamations.

[3] Vol. iv 307; Tudor and Stuart Proclamations i no. 3321 (1661); a very large number of statutes deal with the repair of particular roads, see e.g. 15 Charles II. c. 1; 16, 17 Charles II. c. 10; 2 William and Mary sess. 2 c. 8; 4 William and Mary c. 9; 7, 8 William III. cc. 9, 26; 8, 9 William III. cc. 15, 37; 9 William III. c. 15.

[4] Ibid nos. 3522, 3523 (1668); 3530 (1669); 3738 (1682-1683); 4054 (1690); for the statutes see below 405-406.

[5] Vol. iv 303.

[6] 18, 19 Charles II. c. 8; 22 Charles II. c. 11.

[7] Tudor and Stuart Proclamations i nos. 3488 (1666-1667); 3491, 3492 (1667).

[8] Ibid no. 3366 (1662).

[9] Ibid nos. 3267 (1660); 3852 (1687); there was statutory authority for these regulations, see 14 Charles II. c. 2; but the latter proclamation does not allude to it, and treats it as a matter within the power of the king to control as part of his prerogative.

[10] Ibid no. 3316.

demand his money back if he left before the end of the play; "and forasmuch as 'tis impossible to command those vast engines (which move the scenes and machines) and to order such a number of persons as must be employed in works of this nature, if any but such as belong thereunto be suffered to press in amongst them," no one was allowed to go on to the stage or behind the scenes.[1]

Since the control of the Press, and the reporting of news concerning the government, were still regarded as being essentially matters which were under the control of the prerogative,[2] problems connected with the Press and the dissemination of news continue to be fully illustrated by these proclamations. The publishing or reporting of any sort of matter concerning the government without licence was considered to be an offence,[3] and in 1668 the sale of news books, gazettes, or pamphlets to hawkers, to cry about the streets, was forbidden.[4] In 1686-1687 it was resolved to license pedlars, to prevent them from dispersing scandalous books;[5] and in 1688 they were forbidden to sell any books.[6] It was upon the Stationers Company that the government chiefly relied to carry out their orders as to the control of the Press;[7] and in 1679 a proclamation was issued, approving their order that no book should be published which did not bear upon it the printer's or publisher's name.[8] Sometimes proclamations were issued to protect copyright[9]—thus in 1671 one was issued to prevent the infringement of a privilege granted to Edward Atkyns for the printing of books concerning the common law.[10] There were other ways, besides the Press, in which news or criticism distasteful to the government was published. During the Commonwealth the coffee-houses had become important centres of social, literary, and political life; and from them news, criticisms, and rumours were quickly disseminated. "People generally believed," says Clarendon,[11] "that those houses had a charter of privilege to speak what they would,

[1] Tudor and Stuart Proclamations i no. 3588 (1673-1674); there is also an earlier proclamation of 1670, no. 3536.

[2] Vol. iv 305-306; below 372-374.

[3] Above 266; Tudor and Stuart Proclamations i nos. 3570 (1672); 3595 (1674); 3715 (1680); 3888 (1688).

[4] Ibid no. 3516; for bills which proposed to put other restrictions on hawkers and pedlars see Hist. MSS. Com. 9th Rep. Pt. ii 110 no. 528, and cp. ibid nos. 557, 586; a similar bill was thrown out by the House of Lords in 1685, Hist. MSS. Com. 11th Rep. App. Pt. ii 319 no. 465; cp. 14th Rep. App. Pt. vi 358, no. 708.

[5] Tudor and Stuart Proclamations i no. 3832.

[6] Ibid no. 3859.

[7] Below 372.

[8] Tudor and Stuart Proclamations i no. 3693.

[9] For the connection between the licensing laws and the law of copyright see below 364-366, 369-370, 373-374, 377-379; Tudor and Stuart Proclamations i nos. 3337 (1661); 3543 (1670-1671).

[10] Ibid no. 3553.

[11] Life (ed. 1843) 1190.

without being in danger to be called in question." In 1666 the licence then assumed by them had attracted the attention of the king. Clarendon recommended, either their suppression, or the employment of spies. The king seemed inclined to take the former course; but, to Clarendon's chagrin, he was dissuaded by Coventry.[1] However, in 1675, they were suppressed.[2] But this raised such an outcry that the proclamation was recalled, on condition that the coffee-house keepers entered into recognizances to prevent scandalous papers or libels from being brought to their houses, or read in them, and gave information within two days of any scandalous reports circulated there.[3]

We shall see that many of the topics covered by these proclamations were dealt with more fully, either by statutes, or by the rules of the common law. With the rules of the common law I shall deal in the following chapter and in the Second Part of this Book. Here we must consider the results achieved by the statutes of this period.

The editions of the statutes during this period are not very numerous. In 1667 the king's printer issued an edition of the statutes at large then in force, from 16 Charles I. to 19 Charles II., together with the titles of those expired or repealed, and an index. In the same year Thomas Manby issued a similar work, based on Pulton's edition of the statutes. He gave an abridgment of the statutes expired and repealed, and the titles of the private Acts. In 1670 this was brought up to date, and issued with Pulton's Statutes; and in 1673 the same author issued a short abridgment of the statutes of Charles I. and II.'s reigns under alphabetical heads. It was preceded by a chronological table of the statutes public and private, and followed by lists of the lords spiritual and temporal and members of the House of Commons.[4] In 1676 we have the first issue of Joseph Keble's[5] edition of the

[1] Life (ed. 1843) 1190. He pointed out that the prohibition of the sale of coffee would be bad for the revenue; and also, "that it had been permitted in Cromwell's time, and that the king's friends had used more liberty of speech in those places than they durst do in any other; and that he thought it would be better to leave them as they were, without running the hazard of ill being continued, notwithstanding his command to the contrary."

[2] Tudor and Stuart Proclamations i no. 3622; the legality of this course was exceedingly dubious; and so recourse was had to the idea that, being nuisances (above 303 n. 2), they could be suppressed; North, Lives of the Norths i 198, says, "His lordship upon the main thought that retailing of coffee might be an innocent trade; but as it was used to nourish sedition, spread lies, scandalize great men and the like, it might also be a common nuisance"; for the discussions on this subject see S.P. Dom. 1675-1676 496-497, 500, 502; cp. North, Examen 138.

[3] Tudor and Stuart Proclamations i no. 3625.

[4] It was probably intended quite as much for the use of members of Parliament as for the legal profession.

[5] For Joseph Keble see below 557-558.

statutes from Magna Carta to the present time. The statutes were printed in paragraphs; the heads of Pulton's and Rastell's Abridgments, and references to the reports and other legal works, were inserted in the margin; and the titles of statutes expired, repealed, altered, or out of use were inserted. Further issues bringing it up to date were made in 1681, 1684, 1695, and 1706.

With the contents of the important statutes relating to public law I have already dealt. Of the rest, the largest group relates to commerce and industry; and with them I shall deal in the first place. The statutes which extend or modify old rules, or create new rules of law, are not, as a whole, of the first importance. The only statutes which effected important permanent modifications of the law are the statute abolishing the military tenures, and the statutes of Distribution with which I have already dealt;[1] the statutes which regulated the Press; and the statute of Frauds, which, as we shall see, was chiefly important for the beneficial changes which it made in the law of evidence. In the second and third place, therefore, I shall deal with the statute law relating to the Press, and the statute of Frauds. Fourthly, I shall briefly summarize the other statutes which modified existing branches of law; and, lastly, I shall say something of the reasons for the striking absence of any great legislative reforms at the Revolution.

Commerce and Industry

Throughout this period the legislation upon these topics is inspired by aims very similar to those which inspired the legislation of the preceding period.[2] The changes which can be observed are due, not to difference of aim, but to differences in the political machinery of the state, and in the economic machinery of commerce and industry. I shall therefore deal with the legislation upon these topics under somewhat the same heads as I dealt with it in the preceding period;[3] and, in conclusion, I shall point out the significance of the effects which the changed political and economic machinery were beginning to have upon political and economic theory. The subject will fall under the following heads: (1) National defence; (2) Colonial trade; (3) Foreign trade and native industry; (4) Agriculture, the prices of food, and wages; (5) the Poor Law.

[1] Vol. iii 45, 51, 61, 67, 559-563.

[2] See Charles II.'s Instructions for the Council of Trade, S.P. Dom. xxi 27, printed by Cunningham, op. cit. iii 913-915.

[3] Vol. iv 326.

(1) *National Defence.*

In Charles II.'s reign the militia was reorganized;[1] and, after the Revolution, we reach the period of standing armies governed by the Mutiny Acts.[2] But, in this period as in the last, it was the navy to which the legislature paid the most attention. Naval discipline,[3] the care of naval stores,[4] the encouragement of volunteers, the organization of Greenwich hospital,[5] the examination of abuses in the management of the navy and of the accounts of money voted for the navy,[6] provision for the repair of harbours,[7] and provision of carriage for ordonnance and naval stores[8]—are all the occasion for lengthy statutes. But we are here concerned, not with the statutes dealing directly with naval organization, but with the manner in which the navy and the other forces of the crown were indirectly encouraged by the regulation of commerce and industry.

It was easier to encourage the navy by such legislation than the army. But there are two sets of measures which operated in favour of both. Firstly, encouragement was given to the manufacturers of munitions of war. In 1660[9] the manufacturers of gunpowder were encouraged by a permission to export if the price did not exceed a certain amount—with the proviso, however, that the king could at any time forbid its export, or the export of arms and ammunition. In 1685[10] the manufacturers of gunpowder and other munitions were still further encouraged by the prohibition of their import without royal licence. Secondly, as in the preceding period,[11] the crown did all it could to encourage the production of saltpetre. In 1694 it was allowed to be freely imported for one year in English ships, and the maximum price at which it could be sold was fixed.[12] Companies which set out to produce it were incorporated. But they had very little success.[13] The most valuable source of supply was found to be the East Indies; and a proviso was inserted in several of the East India Company's charters that it should sell the crown a fixed quantity of saltpetre each year at a fixed price.[14]

The measures passed to encourage the naval strength of the

[1] Above 167.
[2] Above 241.
[3] 13 Charles II. st. 1 c. 9; 5, 6 William and Mary c. 25; above 226.
[4] 16 Charles II. c. 5; 18, 19 Charles II. c. 12; 22, 23 Charles II. c. 23.
[5] 7, 8 William III. c. 21; 8, 9 William III. c. 23.
[6] 19, 20 Charles II. c. 1.
[7] 15 Charles II. c. 5 (a private Act); 1 James II. c. 16; 8, 9 William III. c. 29; 10 William III. c. 5.
[8] 14 Charles II. c. 20.
[9] 12 Charles II. c. 4 § 11.
[10] 1 James II. c. 8.
[11] Vol. iv 299, 331, 352.
[12] 5, 6 William and Mary c. 16.
[13] Scott, Joint Stock Companies ii 471-474.
[14] Ibid 472; Select Charters of Trading Companies (S.S.) liv.

country follow somewhat the same lines as the legislation of the preceding period.[1] Thus, industries which were directly useful to it were encouraged. In 1663 all persons, whether natives or foreigners, were encouraged to set up the trades of dressing hemp and flax for the making (among other things) of thread, twine, fishing nets, and cordage; and foreigners who exercised these trades were, on taking the oaths of allegiance and supremacy, to become naturalized.[2] In 1667-1668, "with a view to the supply of his Majesties Royal Navy and the maintenance of Shipping for the Trade of this nation," an Act was passed for the increase and preservation of timber in the forest of Dean.[3] The fishing industry was a nursery of seamen, and the mercantile marine formed a reserve of ships. Both were encouraged by the legislature and by the crown.

Firstly, the fishing industry. We have seen that the Political Lent was a device to encourage this industry.[4] It ceased to be enforced in the latter part of the seventeenth century;[5] but the fishing trade was encouraged in other ways. In 1662 the pilchard fishery of Devon and Cornwall was regulated;[6] in 1666 the importation of certain kinds of fish taken by foreigners was prohibited;[7] and in 1672[8] the export of fish caught in English ships, manned as required by the Navigation Act,[9] was allowed. Throughout the seventeenth century societies and companies were formed to exploit the fishing industry round the English coast.[10] In 1692 the Greenland Company was created by statute to organize the whaling industry,[11] which had been thrown open in 1672;[12] and in 1696 it was given an exemption from the duties on oil and whalebone.[13] That one of the chief objects of the legislature in creating this Company was to provide a school for seamen can be seen from the preamble to the Act of 1692;[14] and the same object is apparent in some of the regulations for the Newfoundland fishery, which provided for the employment

[1] Vol. iv 327-331.
[2] 15 Charles II. c. 15.
[3] 19, 20 Charles II. c. 8.
[4] Vol. iv 328.
[5] Ibid.
[6] 14 Charles II. c. 28.
[7] 18, 19 Charles II. c. 2. § 2.
[8] 25 Charles II. c. 6 § 3.
[9] Below 317-318.
[10] For a society formed in the early part of the seventeenth century, see Scott, op. cit. ii 361-368; for the Royal Fishery Company founded in 1664, see ibid ii 372-374; and for a company started in 1692, see ibid ii 374-376.
[11] 4 William and Mary c. 17; the encouragement of this industry had been one of the objects of the Russia Company, to which in 1613 James I. had given a monopoly of the trade, Scott, op. cit. ii 53-54.
[12] 25 Charles II. c. 7, § 1.
[13] 7, 8 William III. c. 33; cp. Cunningham, op. cit. ii 484.
[14] "Whereas the trade to Greenland and the Greenland sea in the fishing for whales there hath been heretofore a very beneficial trade to this kingdom, not only in the employing great numbers of seamen and ships, and consuming great quantities of provisions, but also in the bringing into this nation great quantities of oil blubber and fins."

on every voyage of men who had never made a voyage before.[1] It is true that none of these societies or companies were financially successful. But they no doubt gave employment and training to a number of seamen, and so increased the class upon whom the navy was accustomed to draw.

Secondly, the encouragement of the mercantile marine. In 1662[2] and 1670-1671[3] the building of ships of certain dimensions and with a certain armament was encouraged, by giving to their owners a rebate on the customs payable on goods imported in them on their first two voyages; and in 1694 another similar Act was passed which gave even better terms.[4] In 1685[5] foreign built ships employed in the coasting trade were made liable to extra duties. Then, too, the legislation passed for the prevention of the too easy surrender of ships to privateers, either by cowardice or by collusion,[6] and for the better suppression of piracy,[7] was obviously designed to help the mercantile marine against some of the most prevalent dangers which at that period it was called upon to face. But the most famous of all the measures passed to encourage English shipping was the Navigation Act of 1660.[8] Of its provisions and effect I must speak at somewhat greater length.

The encouragement of English shipping, by making its employment necessary for the carriage of goods to England from abroad, is the principle at the back of the provisions of this Act. That principle had been foreshadowed in some of the legislation of the Middle Ages,[9] and in Henry VIII.'s reign.[10] We have seen that, in Elizabeth's reign, Henry VIII.'s legislation had not been strictly enforced, because its enforcement meant a diminution of the customs revenue, and a hindrance to the growth of new manufactures; but that a return to the older policy was foreshadowed in some of the proclamations of James I. and Charles I.[11] Under the Commonwealth, Parliament returned to the earlier policy when it passed the Navigation Act of 1651;[12] and the

[1] 10 William III. c. 14 § 9. "Every master of a by-boat or by-boats shall carry with him at least two fresh men in six, viz. one man that hath made no more than one voyage and one man who hath never been at sea before. . . . And further that all masters of fishing ships shall carry with them in their ships' company at least one such fresh man that never was at sea before in every five men they carry."

[2] 14 Charles II. c. 11 § 34. [3] 22, 23 Charles II. c. 11 § 12.

[4] 5, 6 William and Mary c. 24; for a similar bill which was dropped in the House of Lords in 1691-1692 see Hist. MSS. Com. 14th Rep. App. Pt. vi 63-64 no. 555.

[5] 1 James II. c. 18.

[6] 16 Charles II. c. 6; 22, 23 Charles II. c. 11; below 401.

[7] 11 William III. c. 7; below 401.

[8] 12 Charles II. c. 18. [9] Vol. ii 472.

[10] Vol. iv 327-328. [11] Ibid 329.

[12] Acts and Ordinances of the Interregnum ii 559-562; cp. Cunningham, op. cit. ii 209-210; it is apparently a mistake to connect Cromwell with this measure, ibid

policy of that Act was followed in the more stringent Act of 1660. The Act, in effect, provided that no goods should be imported from countries in Asia, Africa, or America, whether in the possession of the crown or not, except in English ships, the master and three fourths of the mariners of which must be English.[1] No alien could exercise the trade of a merchant or factor in any of the Plantations.[2] Goods of foreign growth, production, or manufacture, must be imported only from the countries where they were grown, produced, or manufactured.[3] Fish imported, which had not been caught by the owners of the vessels importing, must pay double custom.[4] No alien ship could take part in the coasting trade.[5] Exemptions from customs duties given to English ships were only to be enjoyed by ships of which the master and three fourths of the crew were English.[6] Provisions were made for the registration of foreign ships purchased by Englishmen, and the issue of certificates that they were entitled to the privileges of an English ship;[7] but, in 1662, with a view to encourage the shipbuilding industry, the privileges given to English ships manned and owned by Englishmen were confined to ships built in England or the Plantations.[8] Certain enumerated commodities, produced in the English Plantations, were to be shipped only to other English Plantations or to England;[9] and ships sailing from England to the Plantations must give a bond that they would convey goods loaded in the Plantations to England.[10] Conversely, in 1663, it was enacted that no commodity grown, produced, or manufactured in Europe should be imported into the Plantations, unless shipped in England on an English ship manned as provided by the Act of 1660.[11] These rules were further enforced by an Act of 1695-1696, which provided that no goods should be imported into or exported out of

210 n. 3. There were occasional but only occasional dispensations from these Acts, and generally only in time of war in the interest of national defence, L.Q.R. xxxvii 420, 422-423.

[1] 12 Charles II. c. 18 §§ 1 and 3; the word "England" included Ireland, Wales, Berwick-on-Tweed, and the Plantations; and it was made clear by 14 Charles II. c. 11 § 5 that the word "English" had the same meaning.

[2] 12 Charles II. c. 18 § 2. [3] Ibid § 4.

[4] Ibid § 5. [5] Ibid § 6. [6] Ibid § 7.

[7] Ibid § 10. [8] 14 Charles II. c. 11 § 5.

[9] 12 Charles II. c. 18 § 18; amended by 25 Charles II. c. 7 § 5, and 7, 8 William III. c. 22 § 7; the commodities enumerated in § 18 of the Act of 1660 were sugar, tobacco, cotton, wool, indigo, ginger, fustic, or other dyeing wood; as to the economic effects of this clause, and of the later Acts which added to this list of commodities, see Ashley, Surveys Historic and Economic 315-319.

[10] 12 Charles II. c. 18 § 19.

[11] 15 Charles II. c. 7 § 4; amended by 22, 23 Charles II. c. 26 § 6; Tangier was excepted by § 4 of the Act of 1663, and § 5 contained an exception in favour of salt for the fisheries of New England and Newfoundland, and in favour of one or two other commodities; in pursuance of the general policy of the Act of 1660, § 13 of the Act of 1663 prohibited the importation of certain kinds of fish except in English ships manned as directed by the Act of 1660.

any Plantation in Asia, Africa or America, or should be carried from one port in a Plantation to another, or to England, except in English ships manned as provided by the Act of 1660.[1]

The chief object of the Act of 1660 was, "the increase of shipping and the encouragement of navigation of this nation, wherein, under the good providence and protection of God, the wealth, safety and strength of this kingdom is so much concerned."[2] All the evidence goes to show that it succeeded in attaining this object. Contemporary opinion is unanimous that it was the main cause of the rapid increase of our mercantile marine during this period.[3] No doubt the framers of the Act hoped that this increase would take place at the expense of the Dutch, and enable England to capture a share of their carrying trade.[4] There is, however, no evidence that Dutch trade or shipping was seriously damaged by the Act; and there is some evidence that it actually damaged our Baltic and Scandinavian trade, and our colonial sugar trade, owing to the fact that the number of our ships did not suffice for all the branches of our foreign and colonial trade.[5] It might therefore be thought that the Act was injurious to our trade, and was, commercially, a mistake. But so short-sighted a view was not taken by the statesmen of those days. The objects which the Act set out to attain were not only the wealth, but the safety and strength of the kingdom. The increase of English shipping which it caused increased English sea power, and so ensured the safety and strength of the kingdom by diminishing the danger of Holland's naval power.[6] And,

[1] 7, 8 William III. c. 22; amended by 9 William III. c. 42; for the discussions of the former Act see House of Lords MSS. ii 233-234 no. 1047.

[2] 12 Charles II. c. 18 Preamble.

[3] Cunningham, op. cit. ii 213 n. 5, 361 n. 2; Child, Discourse of Trade (1694) 10, says, "I can myself remember since there were not in London used so many wharfs and keys for the landing of Merchants goods, by at least one third part as now there are; and those that were there could scarce have employment for half what they could do; and now notwithstanding one third more used to the same purpose, they are all too little in a time of peace to land the goods at, that come to London"; in the articles of "Standing Instructions to the Governors of His Majesty's Plantations in relation to Trade" (1696-1697), the Navigation Acts are referred to as the "Principal Laws relating to Plantation Trade," and the Governors are directed to make themselves well acquainted with them, House of Lords MSS. ii 483-484.

[4] Cunningham, op. cit. ii 210.

[5] Ibid 212, 213, 360, 361.

[6] This was the opinion of Child, Discourse of Trade 114-115 (1694), who meets and answers the criticisms of some modern economists; he says that some had argued that the Act, though beneficial to shipowners, damaged trade, because, if Dutch shipping were admitted, more native commodities would be exported; "My answer is, that I cannot deny but this may be true, if the present profit of the generality be barely and singly considered; but this kingdom being an island, the defence whereof hath always been our shipping and seamen, it seems to me absolutely necessary that profit and power ought jointly to be considered"; it was also the opinion of Adam Smith; he says, Wealth of Nations, Bk. iv ch. ii, "the defence of Great Britain depends very much upon the number of its sailors and its shipping. The Act of navigation, therefore, very properly endeavours to give the sailors and shipping of Great Britain the monopoly of the trade of their own country, in some cases, by

though the Act may have for some time injured rather than benefited England's wealth, in the long run it probably benefited it; for, it so increased England's mercantile marine that, when, in the eighteenth century, Holland's commercial prosperity declined, England was able to capture the carrying trade which Holland formerly possessed. The Act itself, and the steady adherence to its policy, is almost the only bright spot in the statesmanship of the Restoration period. The statesmen of this period, though often both immoral and corrupt, did fix their eyes firmly on the maintenance of England's sea power. They did not hesitate to sacrifice immediate commercial gain to attain this object; and, having attained it, they ultimately attained all. From this point of view both their patriotism and their foresight compares very favourably with the patriotism and the foresight of some of those party politicians who, in the years before the Great War, had usurped the places formerly occupied by statesmen.[1]

We can see from the provisions of these Acts that their framers endeavoured to accomplish their main object—the increase of English shipping—chiefly by the regulation of the commercial relations of England and the Plantations. It was clearly seen that the Plantations and the Plantation trade could be made to assist in the essential work of increasing England's sea power. We cannot, therefore, appreciate completely the consequences of this legislation, till we have considered it in relation to the other legislation which regulated the commercial relations of England and her Plantations.

(2) *Colonial trade.*

Dr. Cunningham has said that, "the laying the foundations of the commercial and colonial empire of England, widely and

absolute prohibitions, and in others, by heavy burdens upon the shipping of foreign countries. . . . It is not impossible that some of the regulations of this famous Act may have proceeded from national animosity. They are as wise, however, as if they had all been dictated by the most deliberate wisdom. National animosity, at that particular time, aimed at the very same object which the most deliberate wisdom would have recommended, the diminution of the naval power of Holland, the only naval power which could endanger the security of England."

[1] The somewhat short-sighted view of professonial economists is illustrated by the following passage from Cunningham, op. cit. ii 360, 361—the italics are mine. "The evidence as to the malign effects of the Act of Navigation, not only on the Baltic Trade, but on the Sugar Colonies and also on the royal revenue is such, that we can only wonder at the persistence with which the Council of Trade adhered to it. *It may have had incidental advantages of which we can hardly judge*, but we are forced to suppose that in the opinion of experts it was serving its purpose, and did contribute to the rapid increase of the mercantile marine which occurred during the latter half of the seventeenth century"; this passage may usefully be compared with the following passage from Child's Discourse of Trade (1694) 173, which is as true now as when it was written: "Being in a good condition of strength at home, in reference to the navy, and all other kind of military preparations for defence (and

firmly, was the great and lasting achievement of the seventeenth century."[1] This process went forward at an accelerated pace after the Restoration. "Under Charles II. and his brother the work of plantation and trade was organized and pushed on with vigour; there was continued settlement on the Atlantic coast of North America, till the chain was completed by the planting of Pennsylvania and the capture of New York. The bases for the English conquest of India, and the Anglo-Saxon predominance in America, were laid in the time of Charles II."[1] We have seen that the policy of so shaping the course of colonial trade that it should be a source of economic strength to the mother country had been foreshadowed in the preceding period.[3] During this period this policy was vigorously and consistently pursued by Parliament; and its deliberations were guided, and the results of the statutes which it enacted were considered, by the committees for Foreign Trade and for the Plantations which were established in 1660.[4] The best statement of the objects aimed at by these measures is to be found in the preamble to the clause of a statute of 1663, to which I have already referred.[5] As his majesty's Plantations, runs the preamble, are inhabited by the subjects of this kingdom of England, a greater correspondence with them and a firmer dependence upon England should be maintained. They should be rendered more beneficial to England in the further increase of English shipping and seamen, and in the vent of English woollen and other manufactures. Thus England will become a staple, not only for the commodities of the Plantations, but also for the commodities of other countries and places which supply them. As we shall now see, the commercial legislation relating to the colonies, which in bulk and importance is far greater than the legislation upon any other colonial topic, is wholly concerned in carrying out these ideals.

With the first of these ideals—the increase of English shipping and seamen—and with the manner in which it was carried out by the Navigation Acts, I have already dealt.[6] We must now examine the manner in which the second of these ideals—the

offence upon just occasion given) will render us wise and honourable in the esteem of other nations, and consequently oblige them not only to admit us the freedom of trade with them, and countenance in the course of our trade."

[1] Op. cit. ii 202. [2] Ibid 198-199. [3] Vol. iv 339-340.

[4] Cunningham, op. cit. ii 199-200; Charles I. had organized a committee for trade with a similar object, which was successful, ibid 175-176.

[5] 15 Charles II. c. 7 § 4; Child, A Discourse of Trade (1694) 194, expresses the received view when he says, "that all colonies and foreign plantations do endanger their mother kingdoms whereof the trades of such plantations are not confined to their said mother kingdoms, by good laws and severe execution of those laws. The practice of all the governments of Europe witness to the truth of this proposition."

[6] Above 317-318.

making of England a staple for goods exported from and imported into the colonies—was carried out. It is clear that its realization was a task which required delicate handling, because it was necessary to reconcile the somewhat conflicting interests of England and the colonies. The political and economic strength of England was to be increased; but that must be effected without impeding the economic development of what were as yet but infant communities. This delicate task was on the whole performed very successfully. The advantages given to England, and the advantages, either given to the colonies by legislation, or accruing to them by reason of their connection with England, helped forward the political and economic growth of both.

England secured very real and definite advantages. We have seen that certain enumerated products of the colonies could be exported only to England; and that goods of European manufacture could only be imported from England.[1] In addition, in 1698, the English wool manufacture was protected against the competition of any rival manufacture in the colonies, by the prohibition of the export of the woollen manufactures of any American colony to any other colony or any other place whatsoever.[2] "The object," as Sir William Ashley has said, "was to prevent all manufacture for a distant market, while not interfering with manufacture within the family, or for purely local needs."[3] One or two other Acts, dealing in a similar manner with other manufactures, were passed in the eighteenth century.[4] At first sight it might seem that all this legislation imposed, for the benefit of England, a whole series of very serious disadvantages on the colonies. But Sir William Ashley has shown that the disadvantages have been much exaggerated.[5] There were many articles, other than those enumerated, which the colonies could export to whatever place they liked;[6] and the Acts relating to colonial manufactures caused no great hardship, because it is not probable that, even if they had not been passed, there would have been any great development of colonial manufactures.[7] Moreover, as we shall now see, the English legislation and the English connection secured to the colonies very substantial compensating advantages.

In the first place, the policy of the Navigation Acts secured

[1] Above 317-318.
[2] 10 William III. c. 16 § 19.
[3] Surveys Historic and Economic 321.
[4] For these see ibid 321.
[5] Ibid 309-360.
[6] Cunningham, op. cit. ii 472; Ashley, op. cit. 315—"None of the staple articles of the trade of New England were ever enumerated during the century 1660 to 1760—neither fish, nor vessels, nor timber, nor rum; and during the whole of the period before us they could be carried wherever a market might be found"; for the articles enumerated during the period covered by this chapter see above 317 nn. 9 and 11.
[7] Ashley, op. cit. 321-327.

to the colonists and to colonial ships the advantages which were enjoyed by Englishmen and English ships.[1] Consequently, in some of the colonies, particularly in New England, an active shipbuilding industry was created. "American shipbuilding was allowed to develop under the stimulus it received from the opportunity of employment in English trade;"[2] and this policy was adhered to in spite of the protests of the English shipbuilders.[3] Further, by an Act of 1662, some of the colonial products were protected by a prohibition of imports from the Netherlands or Germany;[4] and, in the eighteenth century, the import of colonial pitch, tar, hemp, masts, and spars was encouraged by a bounty, in order that England might be independent of foreign countries for a supply of these essential naval stores.[5] In the second place, the trade of certain of the colonies was directly encouraged by the prohibition of the growth of tobacco in England,[6] and by the imposition upon tobacco grown elsewhere of duties three times as high as those levied on colonial tobaccos.[7] In the third place, the colonists were indirectly benefited by the protection of the English navy, and by the opportunities of gaining an entry into fresh markets which were opened up by the naval victories of the second quarter of the eighteenth century.[8] In the fourth place, English capital helped to develop the natural resources of the American colonies. "The progress," says Adam Smith, "of our North American and West Indian colonies, would have been much less rapid, had no capital but what belonged to themselves been employed in exporting their surplus produce."[9]

There is therefore some ground for contending that a large measure of success attended the efforts of the legislature so to

[1] Above 317.

[2] Cunningham, op. cit. ii 480; Ashley, op. cit. 313, 314—"When we recall Child's lamentation over the inferiority of English ships in point of construction and ease of navigation, and the much lower freight rates which the Dutch were able to offer for this and other reasons, it certainly seems very probable that, but for some such forcible exclusion of foreign ships, the development of New England ship building would have been retarded by half a century or more."

[3] Ibid.

[4] 14 Charles II. c. 11 § 23—enumerating spicery, grocery, tobacco, potash, pitch, tar, salt, rozen, deal boards, fir, timber, and olive oil.

[5] Ashley, op. cit. 328-329; Cunningham, op. cit. ii 485-486, and the preamble to 3 and 4 Anne c. 10, there cited.

[6] 12 Charles II. c. 34; 15 Charles II. c. 7 § 15; 22, 23 Charles II. c. 26; that this prohibition was unpopular appears from Pepys, Diary vii 117-118; he writes, "She tells me how the lifeguard, which we thought a little while since was sent down into the country about some insurrection, was sent to Winchcomb, to spoil the tobacco there, which it seems the people there do plant contrary to law, and have always done;" see vol. iv. 340.

[7] Ashley, op. cit. 318.

[8] Ibid 314, 315.

[9] Wealth of Nations, Bk. iii chap. i; cp. Ashley, op. cit. 331-332, citing Burke's speech on American taxation.

regulate the colonial trade that it benefited both the sea power and the commerce and industry of the mother country and the colonies. But we should observe that this policy was pursued, not by entrusting this trade to one of those companies which had flourished in the preceding period,[1] but by general statutes.[2] Both the objects at which the legislature aimed in its regulation of the colonial trade, and the methods which it adopted to attain them, tell us something of the policy which it pursued in relation to the foreign trade of the country, and in relation to its native industry.

(3) *Foreign trade and native industry.*

We have seen that the commercial legislation of the Tudor and early Stuart period, and the commercial policy pursued by the Tudor and early Stuart kings, had given England the control of her own foreign trade,[3] had made London a financial centre comparable to the commercial cities of the Netherlands,[4] and had encouraged the growth of native manufactures.[5] These had been the broad results of a commercial policy which aimed, not unsuccessfully, at organizing both external and internal trade, and all branches of industry, with a view to the maintenance and increase of national strength. Throughout this period the same policy was pursued.[6] But the constitutional changes, which resulted from the Rebellion and the Revolution, left their marks upon the machinery for enforcing obedience to this commercial legislation, and encouraged the growth of differences of opinion as to the best means of attaining the desired results. The fact that the power wielded by the executive government was diminished by the Rebellion, and still further diminished by the Revolution, left its mark upon the machinery by which this policy was enforced; and the advent of party government encouraged discussions and differences of opinion as to the kind of legislation which would best conduce to the maintenance and increase of national strength. In the first place, therefore, I shall illustrate from the legislation of this period the essential continuity of the commercial policy pursued; and, in the second place, the modifications in the manner in which it was pursued, which resulted from constitutional changes in the state.

[1] Vol. iv 319-320.

[2] "Though several of the trading Companies survived the Revolution, they no longer served as a satisfactory medium for enforcing rules of trade, as they had done in the times of Elizabeth; the plantation trade could be controlled, without being confined to a privileged body of merchants, through the machinery of the Navigation Acts," Cunningham, op. cit. ii 472.

[3] Vol. iv 332-340.

[4] Ibid 49.

[5] Ibid 340-354.

[6] Cunningham, op. cit. ii 202.

(i) The essential continuity of the policy pursued.

In its endeavours to promote commerce and industry, the legislature did not neglect such essential matters as the improvement of means of communication, and the maintenance of the purity of the coinage.

The roads in many parts of England were, during this period and later, a disgrace;[1] but, throughout this period, we find both general[2] and local[3] acts which gave powers to make and repair roads, and sometimes to defray the cost by a toll charged upon those who used them.[4] Throughout this period the Post Office was supplying a very real need for a means of communication,[5] and was proving to be a valuable source of revenue. It was regulated by statute, and the charges which it was authorized to make were fixed.[6] But, for some time, the Post Office only carried letters to distant places in England or abroad. Private companies were formed to convey letters to or from different parts of London. Thus a company was formed in 1680, which instituted a penny letter post for the collection and delivery of letters within the Bills of Mortality. But the Duke of York, in whom the profits of the Post Office were vested, threatened legal proceedings; and the company was dissolved. A second company began operations in 1681 under the management of Dockwra. Legal proceedings were taken against it; and, as a result, the Post Office took over the concern, and retained Dockwra to manage it.[7]

By the end of the century the currency had become very bad. This was the result, not of debasement,[8] but of the permission to export bullion given in 1663,[9] and of the practice of coining gold and silver without charge.[10] A change in the value of gold and silver might make it profitable to export them, or melt them down for sale to the silver and gold smiths. The result was that only the lightest pieces remained in circulation; and they were often made lighter by clipping. Hence great difficulties arose in the conduct of business. "Great contentions do daily arise amongst the

[1] Cunningham, op. cit. ii 535-539.

[2] 14 Charles II. c. 6; 22 Charles II. c. 12; 3 William and Mary c. 12; 7, 8 William III. c. 29.

[3] 14 Charles II. c. 2 (London); 15 Charles II. c. xiv and 16, 17 Charles II. c. xix (Hertford, Cambridge and Huntingdon); 7, 8 William III. c. 26 (Norfolk); 9 William III. c. 18 (Gloucester).

[4] 7, 8 William III. c. 26; 9 William III. c. 18.

[5] Petty says that, during the last forty years, "the postage of letters have increased from one to twenty," Economic Writings (ed. Hull) 305.

[6] 12 Charles II. c. 35.

[7] Scott, Joint Stock Companies iii 43-51.

[8] Cunningham, op. cit. ii 432.

[9] 15 Charles II. c. 7 § 9.

[10] 18, 19 Charles II. c. 5; 25 Charles II. c. 8; 1 James II. c. 7; modified by 7, 8 William III. c. 13, which was repealed by 8, 9 William III. c. 1.

king's subjects in fairs, markets, shops, and other places throughout the kingdom about the passing or refusing of the same, to the disturbance of the public peace; many bargains doings and dealings are totally prevented and laid aside, which lessens trade in general; persons before they conclude in any bargains are necessitated first to settle the price or value of the very money they are to receive for their goods."[1] This state of things was remedied by the recoinage of 1696.[2] The cost, amounting to £2,400,000, was defrayed by a house and window tax.[3]

The measures, more directly aimed at so regulating foreign trade and native industry as to maintain and increase the national strength, comprise the legislation as to the colonial trade, with which I have already dealt;[4] measures taken to regulate trade both foreign and domestic; measures taken to encourage native manufactures; measures taken to ensure the skill of the workman and the quality of the goods; and measures taken to enforce this legislation. With these four sets of measures I must here deal. The first set of measures still rested mainly on the prerogative: the other three were, as in the preceding period, mainly statutory.

(*a*) Measures taken to regulate trade both foreign and domestic.

We have seen that, in the preceding period, foreign trade, being regarded as a branch of foreign affairs, was essentially a topic to be regulated by the prerogative;[5] and that consequently it was held in *Bates's Case* that the crown, by its prerogative, could make alterations in the tariff in order to regulate this trade.[6] But we have seen that statutes of the Long Parliament, and of the Restoration Parliament, made it quite clear that the crown's prerogative to regulate trade did not authorize it to impose any financial burdens on the subject, or to remit any duty already imposed, without the consent of Parliament.[7] Therefore no alteration of the customs duties could be made without Parliamentary sanction; and, if the import or export of particular commodities was prohibited by Act of Parliament, only an Act of Parliament could take off the prohibition. Probably in imposing or remitting duties Parliament was influenced by the duties in force in foreign countries; and in 1698-1699[8] we find a case in which an Act prohibiting the import of foreign lace was repealed, conditionally upon the repeal by the Flemish govern-

[1] Lowndes, Essay for Amendment (1695), in Macculloch, Tracts 233, cited Cunningham, op. cit. ii 435.
[2] 7, 8 William III. c. 1; 8, 9 William III. cc. 2, 7 §§ 20-24, and 8.
[3] Cunningham, op. cit. ii 438.
[4] Above 319-323.
[5] Vol. iv 335-338.
[6] Above 44-45.
[7] Above 112, 173.
[8] 11 William III. c. 11, repealing 9 William III. c. 9.

ment of their prohibition of the import into Flanders of English woollen manufactures. But though the crown had ceased to be able to impose or remit customs duties, or to remove prohibitions on import or export imposed by Act of Parliament, it still possessed large powers to regulate foreign trade. The extent of this prerogative was exhaustively discussed in 1684 in the case of the *East India Company* v. *Sandys*.[1]

The facts of this case were as follows:—The East India Company had been granted by their charter an exclusive right to trade to the East Indies. The defendant infringed this right by trading in the Indies without a licence. The plaintiff Company therefore sued him for damages. The defendant contended that the grant by the crown of this exclusive right to trade was void because it was a monoply. In the course of the arguments, and in the judgment of Jeffreys, C.J., the whole question of the power of the crown to regulate foreign trade was discussed. Naturally the prerogative was asserted in the widest terms; but there were many authorities for so asserting it; and Jeffreys marshals them very ably. All matters connected with foreign trade, he pointed out,[2] were determinable by the universal Law Merchant which was a branch of the Jus Gentium.[3] "Both by the law of nations, and by the common law of England, the regulation, restraint and government of foreign trade and commerce is reckoned *inter jura regalia*, i.e. is in the power of the king: and it is his undoubted prerogative, and is not abridged or controlled by any Act of Parliament now in force."[4] This prerogative to regulate trade is in fact a necessary consequence of the king's absolute power over all matters relating to peace and war and treaties. "Would it not be monstrous, that when the King is entered into league with any sovereign prince, in a matter of trade very advantageous to his people, to have it in the power of any one of his subjects to destroy it?"[5] As a necessary consequence of these powers, the king can, for the better regulation of trade, set up societies with exclusive rights to trade. Societies so privileged are well known both to the laws of this and of foreign countries.[6] They cannot be called monoplies.

[1] 10 S.T. 371. [2] Ibid at pp. 524-530.

[3] "All other nations have governed themselves by this principle; and upon this ground stands the court of Admiralty in this kingdom, viz. that there might be uniform judgments given there to all other nations in the world, in causes relating to commerce, navigation and the like. And in as much as the common and statute laws of this realm are too strait and narrow to govern and decide differences arising about foreign commerce, and can never be thought to bear any sort of proportion to the universal law of all nations, as the interests of all foreign trade do necessitate them to contend for; it will become us that are judges in Westminster Hall . . . to . . . take notice of the law of nations," 10 S.T. at p. 529.

[4] Ibid at p. 530. [5] Ibid at p. 533. [6] Ibid at pp. 538-552.

A monopoly is a grant whereby persons are restricted of some freedom which they formerly possessed, or are hindered in their lawful trade.[1] But it is clear that before the grant of this charter there was no liberty to trade to the Indies.[2] This charter therefore cannot be said to create a monoply. Moreover, the laws of foreign countries, which permit these societies, punish monopolies as severely as our own;[3] and societies with these privileges have been allowed to be good both by Parliament, and by many famous lawyers of this and earlier centuries.[4]

It is clear that for the exercise of the particular prerogative called in question in the *East India Company* v. *Sandys* there was abundant authority. Moreover, as we have seen,[5] and as Jeffreys points out, it could be justified both on grounds of public policy and on grounds of natural equity. On grounds of public policy, because it had been proved that the trade to India needed to be organized in some such way;[6] on grounds of natural equity, because the Company had created forts, settled factories, and made treaties with native princes.[7] We shall see that, for both these reasons, this particular Company retained its exclusive rights to trade, long after similar rights, formerly enjoyed by other companies, had disappeared.[8]

We have seen that the law allowed that the crown had also certain powers over domestic trade.[9] It could grant charters to corporate towns, giving them powers to regulate trade. It could grant the franchise of fair. And many of the franchises and privileges so granted involved an element of exclusion. Thus the right to trade in a particular town might be given to a particular body of persons; and, if a franchise of fair were granted, no rival fair could be set up within a certain distance. It is true that there might be a doubt as to how far the crown could make

[1] "A monopoly is an institution or allowance by the king, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of, or for the sole buying, selling, making, or using anything; whereby any person or persons, body politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade," 10 S.T. at p. 542.

[2] Ibid at pp. 542-543.

[3] Ibid at pp. 538, 542.

[4] "Such companies have been erected in England, and those companies have been in quiet possession of their privileges for such a number of years; they have passed the approbation of many learned men; they have been thought for the public advantage of the nation by so many kings and princes, with the advice of their council both in and out of parliament; all statutes and authorities of law that we can meet with in our books affirm it, and none that I can meet with oppose it," ibid at p. 552.

[5] Above 315-316.

[6] 10 S.T. at pp. 546-547.

[7] Ibid at pp. 538-539—"Such companies and societies ought to be continued and supported upon the natural equity and justice, that no other persons should be permitted either to reap the profit, or to endanger the loss of what hath been begun, and been carried on by them, with great hazard and expense"; cp. Child, A Discourse of Trade (1694) 102-103, 109.

[8] Pt. II. c. 4 I. § 4.

[9] Vol. iv 321-322.

new grants, similar in kind to some of those possessed by the older corporations, and legalized by long continued custom.[1] But certain privileges it could clearly grant; and, as Jeffreys pointed out in the *East India Company* v. *Sandys*, all these rights and privileges really flowed from its power to regulate domestic trade.[2] The fact that "inland traffic is most concerned either in corporations, markets, or fairs, which all proceed from the crown, does plainly evince that the king's prerogative has a more immediate influence over dealings in merchandizes than it has over other mechanic crafts and mysteries; and that, as Mr. Attorney did well observe, to prevent frauds, deceits, and other abuses either in weights, measures, or otherwise, which would certainly interrupt such commerce."[3]

Thus, at the end of the Stuart period, the prerogatives of the crown over the regulation of trade, foreign and domestic, were, in theory, much the same as they were at the beginning of this period. But it should be noted that the object of the exercise of these prerogatives was somewhat different in the case of foreign trade to what it was in the case of domestic trade. In the case of foreign trade the great object was "to keep the balance equal between this and foreign countries."[4] In the case of domestic trade one of the main objects of the crown was to secure skill in the workman and good quality in the articles produced.[5] In neither case could the crown by its prerogative do all that was required. If the export trade was to balance the import, if the skill of the workman and the quality of the article produced were to be maintained, measures must be taken which only Parliament could sanction. With the statutes passed to secure these objects I shall deal in the two following sections:—

(*b*) Measures taken to encourage native manufactures.

The most important of the native industries was still the manufacture of wool; and manufacturers had no difficulty in getting what protection they considered necessary. One group of these statutes prohibited the export of raw materials used in this manufacture. In 1660[6] the export of wool, woolfells, yarn, and fullers earth was prohibited; in 1662[7] the prohibition was repeated, and the penalties for disobedience were made more severe; and other evasions of these Acts were dealt with in

[1] Vol. iv 346 and n. 3. [2] See 10 S.T. at p. 524.

[3] 10 S.T. at p. 524.

[4] "Foreign trade can never be of advantage to this kingdom, except the balance be kept equal between this and other countries; which can never be done, but by keeping up to proportional rules for the regulation thereof with other countries," ibid at p. 539.

[5] Ibid at p. 524. [6] 12 Charles II. c. 32.

[7] 14 Charles II. c. 18; § 7 enacted that, as fullers earth or fullers clay was exported under colour of tobacco pipe clay, no tobacco pipe clay should be exported.

1688,[1] 1695-1696,[2] and 1697-1698.[3] A statute of 1698 [4] protected the woollen industry from Irish, and, as we have seen,[5] from colonial competition, by preventing the export of woollen manufactures from those places. With a view to increase the consumption of these manufactures, statutes of 1666 [6] and 1678 [7] made it necessary that corpses should be buried in woollen shrouds and coverings. The latter statute provided an elaborate machinery to secure obedience to the law. Clergymen were to keep a register of burials, and must get an affidavit that the Act had been complied with from the relatives of the deceased.[8] These affidavits as well as the burials were to be registered.[9]

Other trades also were encouraged by endeavours to facilitate a cheap supply of the raw materials used by them. In 1662,[10] in order to protect those who manufactured articles from leather, the export of ox skins or hides, tanned or untanned, was prohibited. But this protection was found to be disadvantageous to the farmers, and the Act was repealed in 1667-1668.[11] In 1662 [12] the dyeing trade was encouraged by a repeal of the prohibition of the import of logwood.

Throughout this period, statutes were passed to encourage particular manufactures, by prohibiting the import of rival foreign products. We have seen that the wool trade got protection in this way against Irish and colonial products.[13] In 1662 [14] the import of foreign bone lace, cutwork, embroidery, bandstrings, buttons, and needle work was prohibited. In the same year [15] the import of foreign wool cards and iron wire was prohibited. In 1678 the import of a large number of French products was prohibited.[16] This Act was repealed in 1685,[17] and a tariff was imposed on French goods.[18] But the policy of prohibition was revived in 1688;[19] and it was continued till 1695-1696,[20] when

[1] 1 William and Mary c. 32, continued for three years by 4 William and Mary c. 24 § 9.

[2] 7, 8 William III. c. 28; by § 2 of this Act § 1 of 14 Charles II. c. 18, which made such exportation felony, was repealed; for the history of the Act see House of Lords MSS. ii 247 no. 1054.

[3] 9 William III. c. 40.

[4] 10 William III. c. 16; cp. House of Lords MSS. iii *vii-ix* and nos. 1216, 1229.

[5] Above 321. [6] 18, 19 Charles II. c. 4.

[7] 30 Charles II. c. 3. [8] Ibid § 3. [9] Ibid § 6.

[10] 14 Charles II. c. 7; it was specially provided by § 5 that boots could be exported.

[11] 19, 20 Charles II. c. 10, continued 1 James II. c. 13.

[12] 14 Charles II. c. 11 § 26, repealing 23 Elizabeth c. 9, and 39 Elizabeth c. 11, on the ground that, now that the art of fixing colours made of logwood had been discovered, it was a serviceable dye. [13] Above 321.

[14] 14 Charles II. c. 13; the prohibition was enforced by 4 William III. c. 10 and 9 William III. c. 9, but repealed by 11 William III. c. 11 (above 325-326).

[15] 14 Charles II. c. 19. [16] 29, 30 Charles II. c. 1 § 70.

[17] 1 James II. c. 6. [18] Ibid c. 5.

[19] 1 William and Mary c. 34; 4 William and Mary c. 25.

[20] 7, 8 William III. c. 20.

a high tariff was substituted.[1] In 1689[2] the silk trade was protected by a prohibition of the import of silk from Turkey, Persia, India and China; and in 1696-1697[3] penalties were imposed on those who smuggled the varieties of silk known as Lustrings, and alamodes. In 1698-1699[4] restrictions were put upon the wearing or use of silks or calicoes imported from India.

Conversely, English manufactures and industries were encouraged by facilitating their export. In 1660 the export of a large number of manufactured goods was unconditionally allowed;[5] in 1670-1671[6] and 1688[7] the export of beer, ale and mum was permitted; in 1694[8] the export of iron, copper, and mundick metal; in 1695-1696[9] the export of sail cloth; and in 1697-1698[10] the export of watches, sword hilts, plate, and other silver manufactures.

Other methods of encouraging English manufactures also appear on the statute book. In 1663[11] foreigners were encouraged to set up manufactures from hemp and flax. They were not to be liable to aliens' taxes, and, if they carried on the trade for three years, they were to be naturalized. In 1695-1696[12] the linen manufacture of Ireland was encouraged by a remission of the duty on Irish linen; and in 1672[13] it was enacted that aliens should pay no more export duty than natives on native commodities or goods manufactured in this country. The metal industry was encouraged by a repeal of the statute of Henry IV.'s reign which made alchemy a felony;[14] and by the definition of what was to be accounted a mine royal,[15] and of the extent of the king's rights therein.[16] In 1695-1696[17] an attempt was made to preserve for England the new process of frame knitting, by prohibiting the export of knitting frames or any parts of them.

We have seen that, in the preceding period, the growth of new industries had been encouraged by grants of monopoly patents;[18] but that the conditions under which the crown could

[1] For the detailed history of this legislation see Ashley, Surveys Historic and Economic 272-284; below 340.

[2] 2 William and Mary c. 9; modified by 5 William and Mary c. 3.

[3] 8, 9 William III. c. 36; House of Lords MSS. ii 542 no. 1153.

[4] 11 William III. c. 10.

[5] 12 Charles II. c. 4 § 10.

[6] 22, 23 Charles II. c. 13.

[7] 1 William and Mary c. 22.

[8] 5, 6 William and Mary c. 17.

[9] 7, 8 William III. c. 39 § 2.

[10] 9 William III. c. 28; by § 2 it was provided that no parts of clocks or watches were to be exported, and the maker's name must be engraved on each.

[11] 15 Charles II. c. 15.

[12] 7, 8 William III. c. 39.

[13] 25 Charles II. c. 6.

[14] 1 William and Mary c. 30, repealing 5 Henry IV. c. 4; for the latter Act see vol. ii 451.

[15] 1 William and Mary c. 30 § 3.

[16] 5 William and Mary c. 6.

[17] 7, 8 William III. c. 20 § 3.

[18] Vol. iv 345-351.

make such grants had been prescribed by the Act of 1624.[1] We have seen, too, that that Act had saved the rights of the crown to make monopoly grants to corporations or companies "for the maintenance, enlargement or ordering of any trade or merchandyze."[2] This saving had been abused by the earlier Stuarts;[3] but it was conclusive in favour of the crown's power to make such grants as those in issue in the case of the *East India Company* v. *Sandy's*.[4] The conditions laid down by the statute for making such grants to individuals are, as we have seen,[5] the foundation of our modern patent law. But as yet the ordinary courts had little chance to develop it. All through this period, cases which involved the making, the regulation, and the revocation of these patents, generally came before the Council.[6] The Council decided such questions as, Who of two claimants was the first inventor,[7] Whether a patentee was working his patent,[8] Whether the invention was really new,[9] Whether it was in the public interest to grant a patent.[10] Very few cases of this sort came before the courts of common law[11] or the court of Chancery.[12] It was not till the following period that the Council abandoned this jurisdiction to these courts.[13] It was not till quite the end of that century that applications to decide these questions ceased to be made to it.[14]

(*c*) Measures taken to secure the skill of the workmen and the quality of the goods.

Of these measures there is but little to be said. We have seen that in the preceding period the mediæval gilds had ceased to be effective disciplinary bodies.[15] The new régime, established in the preceding period, was maintained in this period with very little alteration. The Elizabethan statutes as to apprenticeship[16] operated to secure skill in the workmen; and it was only very occasionally that they required to be modified or supplemented.[17]

[1] 21 James I. c. 3.
[2] Ibid § 9; vol. iv 353.
[3] Above 81 and n. 2.
[4] (1683) 10 S.T. at pp. 549, 550.
[5] Vol. iv 353-354.
[6] L.Q.R. xxxiii 63.
[7] Treswall's Patent (1660), ibid 63-64; Howard and Watson's Patent (1667), ibid 68; Crouch and Whiston's Application (1680), ibid 72-73; Barlow's Application (1687-1688), ibid 182.
[8] Hutchinson's Patent, and Grandison's Patent (1676), ibid 71.
[9] Thomas's Patent (1675), ibid 70.
[10] Garill's Application (1663-1664), ibid 65-67; Howard and Watson's Patent (1667), ibid 68.
[11] Edgeberry v. Stephens, Holt 475; S.C. *sub-nom.* Edgborough v. Stephenson Comb. 84; L.Q R. xxxiii 71-72.
[12] Dwight's Patent (1684), L.Q.R. xxxiii 74.
[13] L.Q.R. xxxiii 193-194.
[14] The last application to the Council for the revocation of a patent was in 1794.
[15] Vol. iv 321-324, 340-343.
[16] Ibid 341-342.
[17] 14 Charles II. c. 15 § 8 (silk trade); 14 Charles II. c. 32 § 9 (Yorkshire broad cloth); 22, 23 Charles II. c. 8 § 13 (Kidderminster weavers); 5, 6 William and Mary c. 9, repealing 5 Elizabeth c. 4 § 32 (apprentices to weavers).

In order to secure good quality in the article produced, the device of giving powers to a company entrusted with the supervision of a particular trade, was still employed in many cases.[1] In one or two cases statutes were passed requiring all engaged in a particular trade to observe the rules for the conduct of that trade laid down in the statute;[2] and, as the older machinery decays,[3] statutes of this kind will become more common.[4]

(*d*) Measures taken to enforce this legislation.

As in the preceding period, there was not much certainty that this legislation would be enforced, unless some company was given powers to regulate the particular trade.[5] This was not always done; and the legislature adopted various devices to secure compliance with the law. In one case all transactions which infringed the Act were declared void, and merchants guilty of such disobedience was disabled from recovering any debts due by their factors.[6] In another case powers were given to special commissioners appointed by the Act.[7] In other cases powers were given to the justices of Assize and to justices of the peace,[8] and in others the practices prohibited were declared to be common nuisances.[9] Sometimes provision was made for bringing the Act to the attention of the public by a direction that it was to be given in charge by the judge at the Assizes, and the justices of the peace at Quarter Sessions.[10] But in a very large number of cases general rules were laid down, and it was left to the person interested, or to the common informer, to take action.[11] The growing number of cases, in which this course was pursued, tells us something of the modifications which were being produced in the modes of regulating commerce and industry, by the constitutional changes which were taking place in the state.

[1] 12 Charles II. c. 22 (Dutch Bays); 14 Charles II. c. 5 (Norwich stuffs); 14 Charles II. c. 15 (silk); 14 Charles II. c. 32 (broad cloth); 22, 23 Charles II. c. 8 (Kidderminster weavers); 8, 9 William III. c. 9 (cloth factors—governors of Blackwell Hall).

[2] 12 Charles II. c. 25 § 11 (wine trade); 14 Charles II. c. 26; 4 William and Mary c. 7, and Hist. MSS. Com. 14th Rep. App. Pt. vi 75 no. 563, 105, no. 594 (trade in butter); 9 William III. c. 39 (gold and silver wire drawing trade).

[3] Below 341.

[4] Cunningham, op. cit. ii 321.

[5] Vol. iv 319-322, 355-361.

[6] 12 Charles II. c. 32 § 4—"If any merchant or other person . . . transport . . . any wool . . . he shall be disabled to require any debt or accompt of any factor or others for or concerning any debt or estate properly belonging to such offender."

[7] 1 William and Mary c. 32; cp. 12 Charles II. c. 25 § 2 which appointed commissioners to grant wine licences.

[8] E.g. 14 Charles II. c. 18 § 11; 18, 19 Charles II. c. 2; 10 William III. c. 3.

[9] E.g. 29, 30 Charles II. c. 1 § 70 (import of French goods); 9 William III. c. 9 § 2 (import of foreign lace).

[10] 30 Charles II. c. 3 § 9.

[11] E.g. 14 Charles II. c. 26 § 5; 4 William and Mary c. 7 § 6; 10 William III. c. 2.

(ii) Modifications resulting from constitutional changes in the state.

The law regulating foreign trade and native industry was modified by the constitutional changes in the state in three main directions. In the first place, the power of the central government to regulate commerce and industry was very much diminished after the Great Rebellion. The abolition of the Star Chamber, and the other branches of the Council which exercised a similar jurisdiction in different parts of England, meant that the Council had lost almost all its coercive power. Thus, just as it had ceased to be able to exercise effective control over the officials of the local government,[1] so it ceased to be able to exercise effective control over commerce and industry.[2] It could no longer attempt, as in the preceding period, to enforce the commercial policy of the state. That policy was, as we have seen, much the same as it had been in the preceding period; but we have also seen that the Acts of Parliament on which it rested were often left to be enforced by some person interested or by a common informer.[3] The result, as Dr. Cunningham has said, was a great development of economic freedom;[4] and this increase in economic freedom was both rendered permanent and accentuated by the Revolution. In the second place, the importance of the commercial element in English life and politics had greatly increased after the Great Rebellion. Naturally, commercial men took advantage of their increased economic freedom; and, as the Revolution owed its success mainly to their support, they were able to exercise a greatly increased influence upon the course of legislation. We can see the results in the growing increase of the influence of capital,[5] and the growth of the influence of purely economic points of view.[6] "The success of Puritanism meant the triumph of the new commercial morality, which held good among moneyed men. No room was left for authoritative insistence on moral as distinguished from legal obligations."[7] In the third place, this tendency to adopt purely economic points of view was accentuated by the system of party government which prevailed after the Revolution. Upholders of different lines of economic policy tended to identify themselves with one or other of the political parties in the state.[8] Their discussion tended to give rise to the growth of bodies of economic doctrine, which naturally tended to react upon the policy pursued by the state in relation to commerce and industry. We can see that,

[1] Above 215-216.
[2] Cunningham, op. cit. ii 310, 311.
[3] Above 332.
[4] See Cunningham, op. cit. ii 206.
[5] Below 341, 345-346.
[6] Below 355-360.
[7] Cunningham, op. cit. ii 256.
[8] Below 339-340.

in the future, doctrines of the economists will have as much influence on the policy of the statesmen, as the policy of statesmen upon the doctrines of the economists.[1]

The effect of these changes is apparent both in legal doctrine and in the course of legislation. Firstly, the increase in economic freedom is reflected in the diminution of the powers of the crown to regulate foreign and domestic trade. Secondly, the growth of the political importance of the commercial men, and the increased importance of capital, are reflected in the rapid development of our modern commercial law. Thirdly, the same influence leads to a development of the policy of the legislative protection and encouragement of native industries, which has affected the whole of the subsequent history of commerce and industry in this country. I shall consider these changes under these three heads:—

(*a*) We have seen that the powers of the crown to regulate foreign and domestic trade had been asserted by Jeffreys, C.J., in the case of *The East India Company* v. *Sandys*.[2] He asserted them in large terms, but in substantial accordance with the older authorities; and there does not seem to have been any disposition to question the correctness of his decision.[3] These prerogatives of the crown were not complained of as abuses in the Bill of Rights; nor do they seem to have been questioned by the courts after the Revolution;[4] but they tended to be more restrictively construed. In 1691 the law officers of the crown were of opinion that, if a trade was in substance a new trade in a region "not before traded in by any English subjects," an exclusive right to trade could be granted, but under no other circumstances.[5] In 1693 Parliament resolved that, "It is the right of all Englishmen to trade to the East Indies, or any part of the world, unless prohibited by Act of Parliament."[6] And, as a matter of fact, after the Revolution, exclusive rights to trade ceased to be granted without Parliamentary sanction. Indeed, both before and after the Revolution, Parliament intervened to secure greater freedom of trade, by making it easy for any one who wished to become a member of some of the regulated companies, which controlled certain branches of trade;[7] and this course was advocated by Child.[8] On the other hand, it

[1] Below 355-356. [2] Above 326-327.
[3] Merchant Adventurers v. Rebow (1688) 3 Mod. 126.
[4] Nightingale v. Bridges (1690) 1 Shower K.B. 135.
[5] S.P. Dom. 1690-1691 463-464.
[6] Scott, Joint Stock Companies 159-160.
[7] 24 Charles II. c. 5 § 9 (Eastland Company); 10 William III. c. 6 § 2 (Russia Company).
[8] "No company whatsoever whether they trade in a joint stock or under regulation can be for the public good, except it may be easy for all, or any of his

was admitted that certain branches of foreign trade could not be carried on without this or other special privileges, and that it was not fair to deprive companies of their privileges when they had spent money in organizing and establishing their trade. For these reasons the privileges secured to the East India Company,[1] and the Hudson's Bay Company,[2] were allowed to continue either in their original or in a modified form.

This does not mean that the idea that the crown had large and vague prerogatives to regulate foreign trade in the interests of the nation wholly disappeared. In 1718 Mr. West, the counsel of the Board of Trade, summed up, in a very instructive opinion, the views then generally held as to the extent of the prerogative.[3] "That particular subjects should have an uncontrollable liberty of all manner of trading, is not only against the policy of our nation, but of all other Governments whatsoever. I do, therefore, take it to be law, that the Crown may, upon special occasion, and for reasons of state restrain the same; and that not only in cases of war, plague, or scarcity of any commodity, of more necessary use at home, for the provision of the subject, or the defence of the kingdom, etc. . . . but even for the preservation of the balance of trade; as suppose a foreign prince, though in other respects preserving a fair correspondence and in amity with us, yet will not punctually observe such treaties of commerce as may have been made between the two nations; or, in case there are no such treaties existing, refuses to enter into such a regulation of trade as may be for the mutual advantage and benefit of both dominions. On such occasion, I am of opinion that the King, by his prerogative, may prohibit and restrain all his subjects, in general, from exporting particular commodities, etc., or else, generally from trading to such a particular country or place. . . . Without such a power it is obvious that the Government of England could not be upon equal terms with the rest of its neighbours, and since trade depends principally upon such treaties and alliances as are entered into by the Crown with foreign princes; and, since the power of entering into such treaties is vested absolutely in the Crown, it necessarily follows that the management and direction of trade must, in a great measure, belong to the King. Things of this nature

Majesty's subjects to be admitted into all, or any of the said companies, at any time for a very inconsiderable fine, and that if the fine exceed £20, including all charges of admission, it is too much," A Discourse of Trade (1694) 103.

[1] Cunningham, op. cit. ii 269.

[2] Ibid 282; in the case of the African company its exclusive privileges were got rid of, but independent merchants were required to pay certain percentages on goods carried from or to African ports to help the company keep up its forts, 9 William III. c. 26 § 7; Scott, Joint Stock Companies ii 23.

[3] Forsyth, Cases and Opinions on Constitutional Law 423-427.

are not to be considered strictly according to those municipal laws, and those ordinary rules, by which the private property of subjects resident within the kingdom is determined; but a regard must also be had to the laws of nations, to the policy and safety of the kingdom; the particular interest and advantages of private men must, in such cases, give way to the general good; and acting against that, though in a way of commerce, is an offence punishable at the common law. Foreign trades carried on by particular subjects for their private advantage, which are really destructive unto, or else tending to the general disadvantage of the kingdom, are under the power of the Crown to be restrained or totally prohibited. . . . Carrying on such trades is, in truth (what some Acts of Parliament have declared some trades to be [1]), being guilty of common nuisances: and if the Crown, which in its administration of government is to regard the advantage of the whole realm, should not be invested with sufficient power to repress and restrain such common mischiefs, it has not a power to do right to all its subjects."

Thus, the crown's prerogative to regulate foreign trade, being still regarded as a branch of its wide prerogative to control foreign affairs, was necessarily large and vague. In fact this view of the law came very naturally to an age which believed in the theory that foreign trade should be so regulated as to increase the strength of the nation. But it was equally natural that this large and vague prerogative should gradually be lost sight of, as the belief grew up that the only way in which the strength of the nation could be increased, was the encouragement of manufacturers who carried on native industries; [2] and that, still later, it should wholly decay, as the new and false theory gained ground, that in all trade, domestic and foreign, the particular interest of the trader (which he could be trusted to look after) was identical with the interest of the nation at large.

The opinion which I have cited attributes to the crown, on similar grounds, a large prerogative to regulate internal trade for the good of the nation. But this prerogative had never been so wide or so ill defined. It was not connected with the crown's undisputed power over foreign affairs; and the limitations imposed upon the king's power to legislate, and to interfere with the

[1] Above 332.

[2] "The promotion of industry of every kind had become the primary object which Parliament pursued in its efforts to build up the wealth and power of England. . . . During the period of Whig ascendancy attention was concentrated on this aspect of economic life," Cunningham, op. cit. ii 494; "from the Revolution till the revolt of the colonies the regulation of commerce was considered, not so much with reference to other elements of natural power, or even in its bearing on revenue, but chiefly with a view to the promotion of industry," ibid 459.

subject's property, prevented the exercise of any very large control. We have seen that it had been admitted in the preceding period that the powers over trade granted to corporations, though valid by prescription or custom, could not be justified by a recent royal grant.[1] After the Revolution these grants were sometimes jealously scrutinized if they seemed to run counter to the new ideas of economic freedom. In the case of the *Mayor of Winton* v. *Wilks*[2] Holt, C.J., refused to uphold an alleged privilege of the city of Winchester that no one, not free of the gild merchant and apprenticed for seven years, could exercise any trade in the city. "All people," he said,[3] "are at liberty to live in this place, and their skill and industry are the means they have to get their bread; and consequently it is unreasonable to restrain them from exercising their trades within this place, within which, having a liberty to live, they ought also of consequence to have all lawful means of supporting themselves." But these exclusive rights could not be got rid of so easily. There are many cases in the eighteenth century in which their validity was upheld.[4] And, though the same causes, which were making for the decay of the large prerogatives of the crown to regulate foreign trade, were making these franchises seem more and more anomalous, they were not finally abolished till the passing of the Municipal Corporation Act of 1835.[5]

(*b*) Of the rapid development of the doctrines of our modern commercial law I shall speak in the second Part of this Book.[6] As in the preceding period, it was mainly the work of the courts, and it therefore leaves few marks on the statute book. But during this period it was so marked that it occasioned one or two statutes; and it is implied in many more.

The earliest of the statutes occasioned by the development of commerce is a statute of 1660 which reduced the legal rate of interest to 6 per cent.[7] It recites that "the abatement of interest from ten in the hundred in former times hath been found by notable experience beneficial to the advancement of trade, and improvement of land by good husbandry," and that it was advantageous to reduce it "to a nearer proportion with foreign states with whom we traffic." In 1662[8] the constitution of the court, created to try insurance cases by Elizabeth's statute of

[1] Vol. iv 346 n. 3.

[2] (1705) 2 Ld. Raym. 1129; cp. two contrary opinions of Levinz and Agar upon a similar case given in the Modern Conveyancer (3rd ed. 1725) iii 98.

[3] At p. 1133.

[4] Bodic v. Fennell (1748) 1 Wils. 233; in Wooley v. Idle (1766) 4 Burr. 1951 Lord Mansfield said, at p. 1952, that such a custom was "warranted by a vast number of cases."

[5] 5, 6 William IV. c. 76 § 14.

[6] Pt. II. c. 4.

[7] 12 Charles II. c. 13.

[8] 14 Charles II. c. 23.

1601,[1] was improved, and its powers were enlarged. In 1696-1697[2] an Act was passed to "restrain the number and ill practice of brokers and stock jobbers." It is clear from § 10 of the Act that speculation in options to buy stock and shares was well known.[3] In 1697-1698 a statute was passed to allow a protest on the non-payment of an inland bill of exchange, and to settle the form of the protest.[4] It is quite clear from an Act passed in 1667-1668[5] to settle "freedom and intercourse of trade between England and Scotland," that it had already begun to be seen that, in the interest of trade, a closer union between England and Scotland was desirable. But it is the assumptions implicit in the provisions of many of the statutes of this period which are the best evidence of the growth of the doctrines of our modern commercial law. In the statutes, even more than in the proclamations,[6] there are many indications of their existence. It is clear from a statute of 1670-1671 that banks and banking were established institutions in the reign of Charles II.;[7] and in the loans of the bankers to that king,[8] and in the provisions of statutes of his reign for borrowing money on the security of an Act of Parliament,[9] we can see the beginnings of a national debt. The Bank of England and our present national debt owe their origin to a statute of 1694.[10] Orders on the Exchequer were made freely transferable in 1667-1668;[11] and, in the statutes establishing joint stock companies of various kinds, similar provision was made for the transferability of their shares.[12] It is clear from the statutes establishing the Bank of England that bills of exchange were part of the ordinary machinery of commerce;[13] and that statute established our modern Bank of England notes.[14] In the statutes establishing joint stock companies we see, not only transferable shares, but also provisions regulating calls on shares, the election and powers of directors,

[1] Vol. i 571; vol. v 150.

[2] 8, 9 William III. c. 32.

[3] "Every policy contract bargain or agreement . . . upon which any premium . . . shall be given or paid for liberty to put upon or to deliver receive accept or refuse any share or interest in any joint stock talleys orders exchequer bills exchequer tickets or bank bills whatsoever other than and except such policies contracts bargains or agreements . . . as are to be performed within the space of three days . . . from the time of making the same . . . shall be utterly null and void."

[4] 9 William III. c. 17; for inland bills see Pt. II. c. 4 I. § 2.

[5] 19, 20 Charles II. c. 4.

[6] Above 306 307.

[7] 22, 23 Charles II. c. 3 § 3—a tax imposed on money lent to the king at over 6 per cent; Pt. II. c. 4 I. § 3.

[8] 22, 23 Charles II. c. 3 § 3.

[9] Ibid § 6; this becomes a usual clause in the finance Acts of Charles II.'s reign, see e.g. 29 Charles II. c. 2 §§ 5-14.

[10] 5, 6 William and Mary c. 20 §§ 18-32; Pt. II. c. 4 I. §§ 3 and 4.

[11] 19, 20 Charles II. c. 4.

[12] See e.g. 4 William and Mary c. 17 § 19 (the Greenland Company).

[13] 5, 6 William and Mary c. 20 § 27.

[14] Ibid § 28.

general meetings, voting at such meetings, and the powers of these companies.[1] It is clear that, by the end of this period, the modern mechanism of a commerce organized upon a capitalistic basis has been reached; and naturally, as we shall see later, this mechanism necessitated corresponding developments of legal doctrine.

(*c*) The same influence of the commercial men led to a development of the policy of protecting native industries, which has affected the whole subsequent history of commerce and industry in this country. But to explain why this was so it is necessary to say something of the two somewhat divergent lines of economic policy which emerged during this period.

We have seen that, in the preceding period, divergencies of opinion upon economic policy existed. Burghley was inclined to abandon the policy of requiring English merchants to use English ships, because it impeded the increase of English trade and the growth of native industries.[2] On the other hand, a return to the older policy was begun by the earlier Stuarts,[3] and was, in this period, carried out very thoroughly by the Navigation Acts.[4] In this period we see other differences of opinion upon economic policy; but they have left a deeper mark upon our economic history than the differences of the earlier period, because, having identified themselves with the two great political parties which now divided the state, they were both hardened and perpetuated.

It is essential to the success of any system of party government that the two parties should be agreed on certain fundamental matters. And so we find that on economic questions all parties agreed on such matters as the policy of the Navigation Acts, and the expediency of giving some protection to English trade. But the two parties which divided the state took different views as to the form which that protection should take, which were coloured very largely by their political views. It was to the interest both of the crown and of the landowners that the customs revenue should be large. The crown drew a large part of its revenue from this source; and the greater the amount of this revenue the lighter the taxes upon land. It was therefore to the interest of the crown and the Tory party to keep up the volume of exports and imports upon which customs duties were payable.[5] On the other hand, it was to the interest of the commercial men and manufacturers to encourage native industries.

[1] See 4 William and Mary c. 17.
[2] Vol. iv 329, 332.
[3] Ibid 329.
[4] Above 317-318.
[5] Ashley, The Tory Origin of Free Trade Policy, Surveys Historic and Economic 268 seqq.; Cunningham, op. cit. 456-457, 598, 600.

They had no interest in the maintenance of the customs revenue at a high figure; and they approved of measures which would totally prohibit those branches of foreign trade which seemed to be able to compete successfully with the industrial development of this country.[1] National power, they considered, could best be increased by the encouragement of native industry.[2] But, as we have seen, these commercial men were generally Whigs; and so these two different lines of economic policy became identified with the two political parties in the state. Naturally they have left their mark upon the statute book; and the discussions which they called forth tended to the growth of divergent bodies of economic doctrine.

The views of the court and Tory party can be seen in the statutes of 1663,[3] which allowed the free export of foreign coin or bullion in order to promote trade; in the statute of 1685, which repealed the Act of 1678[4] prohibiting a large number of French manufactured goods;[5] and in the encouragement given by James II. to the East India Company,[6] in spite of the objections that its trade involved the export of bullion, and the import of goods which competed with English wool and silk manufactures. The views of the Whig party can be seen in the statute of 1678 which prohibited a large number of French manufactured goods;[7] in their hostility to the East India Company;[8] and in the large number of statutes passed after the Revolution to protect native industries. Throughout the century statesmen had derived many hints from the economic policy of the Dutch;[9] but the Whig ideas were, if not borrowed from, at least justified by the example of, Colbert's policy in France. In framing his tariff he had considered mainly the interest of the native producer; and his success in fostering industry by this means seemed conclusive to those who were interested mainly in the promotion of native manufactures.[10]

[1] Ashley, op. cit. 273-284; this point of view is illustrated by a paper written by Alderman Patience Ward, printed S.P. Dom. 1675-1676 276-277; and in the reasons for prohibiting the export of wool given to the House of Commons, ibid 373-375; the other point of view to some extent comes out in reasons for allowing a limited exportation, ibid 375-376.

[2] Above 329-330.

[3] 15 Charles II. c. 7 § 9.

[4] 29, 30 Charles II. c. 1 § 70.

[5] 1 James II. c. 6.

[6] Scott, Joint Stock Companies ii 145-149.

[7] 29, 30 Charles II. c. 1 § 70; this prohibition was revived by 1 William and Mary c. 34, and 4 William and Mary c. 25; above 329 n. 19.

[8] Scott, Joint Stock Companies 150 seqq.

[9] Cunningham, op. cit. ii 208-209; see Child, A Discourse of Trade (1694) pp. 1-8 where he gives fifteen reasons for the commercial success of the Dutch, and advocates the adoption of similar methods in England; Petty, on the other hand, Economic Writings (Ed. Hull) 255, deprecates excessive admiration of them, "as if they were more, and all other nations less, than men."

[10] Cunningham, op. cit. ii 405, 456.

The Revolution meant the triumph of the line of policy advocated by the Whigs.[1] And their steady adherence to this line of policy achieved much. "That the Whigs made grievous mistakes is true, but it is also true that the main object they had at heart was achieved to an extraordinary extent during the period when they were in power. At the time of the Civil War, English industry was but little developed, and English agriculture was very backward. When the *Wealth of Nations* was published, both had advanced enormously."[2] Obviously it was this progress which made it possible, during the latter part of the eighteenth century, to take full advantage of those mechanical inventions which produced the Industrial Revolution. And the economic policy pursued by the Whigs accentuated the political effects of the Revolution. We have seen that the Revolution, by diminishing the power of the crown, gave a larger measure of economic freedom.[3] The industrial development, consequent on the Whig policy, increased it. Both before and after the Revolution it was the individual capitalist or the joint stock company which had done most to develop native industry; and, as it developed, it tended more and more to be organized upon a capitalistic basis. From this three important results flowed, which will in future cause large modifications of legal doctrines and rules. In the first place, the older regulations, designed to secure skill in the workman and quality in the article produced, gradually became obsolete. They could not be applied easily to industries thus organized; and the capitalist could be trusted to supervise these matters, as the success of his business depended upon the adequacy of his supervision.[4] In the second place, those engaged in industry tended to become less and less independent workmen, and more and more wage earners.[5] In the third place, the rapid development of our modern commercial law,[6] which originated in and was adapted to a system of commerce and industry organized on this basis, was assured.

We shall now see that these new developments are to some extent reflected in the legislation affecting some of the more domestic branches of commerce and industry.

[1] "During the period of Whig ascendency, the economic policy of the country became a thorough-going imitation of the principles of Louis XIV.'s great minister Colbert, though they were put into effect, not by royal mandates as in France, but by Parliamentary legislation," Cunningham, op. cit. ii 406.

[2] Ibid 601.

[3] Above 333.

[4] Child, A Discourse of Trade (1694) 148, 149; Cunningham, op. cit. ii 511-512 514-515.

[5] Ibid ii 496-498.

[6] Pt. II. c. 4.

(4) *Agriculture, the prices of food, and wages.*

That the prosperity of agriculture was a condition precedent to the prosperity of all other branches of commerce and industry was as firmly and as universally held in this period as in the last.[1] "The encouragement of tillage," it was said in the preamble to a statute of 1663,[2] "ought to be in an especial manner regarded and endeavoured, and the surest and effectualest means of promoting and advancing any trade occupation or mystery being by rendering it profitable to the users thereof." All through this period, therefore, agriculture had a large measure of protection and encouragement from the legislature; agricultural methods were improved, with the result that the area of land under cultivation was enlarged; and, as a result, we see that the tendency, which had begun in the preceding period,[3] to put capital into the land, and to treat farming as a business to be run for profit, made considerable progress. I shall examine the course and effects of the legislation upon agriculture under these three heads.

(i) The legislature aimed at so stimulating the agricultural industry that it could produce a sufficient food supply for the nation. With that object in view it, in the first place, protected it from foreign competition. Thus it imposed an import duty on corn in 1660,[4] in 1663[5] it imposed duties upon fatted cattle and sheep imported, in 1666[6] it prohibited the import of such cattle and declared such import to be a common nuisance, and in 1667-1668[7] it increased the penalties for the infringement of the Act of 1666. By a statute of 1680[8] the statute of 1666 was made perpetual; and it was provided that no butter or cheese should be imported from Ireland. But it was necessary to do more than this. The farmers who grew corn must be protected from being obliged to sell at unprofitable prices if the harvest was too abundant for the needs of the nation, because, if they were thus ruined and let land go out of cultivation, the effects of a year of scarcity would be aggravated. To obviate this danger the legislature had, in 1660,[9] allowed the export of certain food-stuffs when the price did not exceed a certain amount. In 1663 more elaborate provisions were made as to the conditions under which the export of grain was to be permitted. If its price did not exceed certain

[1] Vol. iv 362 seqq.

[2] 15 Charles II. c. 7—the grammar is a little odd, though the meaning is unmistakable.

[3] Vol. iv 371.

[4] 12 Charles II. c. 4.

[5] 15 Charles II. c. 7 §§ 10, 11.

[6] 18, 19 Charles II. c. 2 § 1.

[7] 19, 20 Charles II. c. 12; § 9 of the Act made those who conspired to evade it liable to the penalties of the statute of Præmunire.

[8] 32 Charles II. c. 2.

[9] 12 Charles II. c. 4 § 11—the enumerated commodities were wheat, rye, peas, beans, barley, malt, oats, pork, bacon, butter, cheese, and candles.

rates, specified in the Act, it could be exported, paying customs duties; and if it were imported, when the price was at these specified rates, it must pay an import duty. Further, when these specified rates prevailed, grain could be bought and stored in granaries, notwithstanding the law as to forestalling and regrating, provided that there was no attempt to forestall the market, or to sell the grain so bought in the same market within three months from its purchase.[1] In 1670,[2] the prices, on the attainment of which export was allowed, were raised, and the duties payable on import were rearranged on a sliding scale which fell as the price increased. The same Act provided also for the raising of the prices, on the attainment of which the other commodities mentioned in the Act of 1660[3] could be exported. In 1690,[4] partly in consequence of the prohibition of all French imports, the distillation of spirits from corn was encouraged, and its export was allowed—a liberty considerably restricted in 1698,[5] in order that the price of corn might not be unduly raised.

It is clear that the object of all this legislation was so to regulate the various branches of the agricultural industry, that it should be able to produce abundant food supply at reasonable prices. In furtherance of this policy a new step was taken in 1689.[6] The export of corn was encouraged by a bounty when the price fell to a certain level. The adherence to this policy, in Dr. Cunningham's opinion, had the results which its authors expected. "By promoting the growth of corn to serve as a commodity for export in favourable seasons, a motive was brought into play for growing as much as would meet the home consumption in unfavourable years."[7] This policy had of course its political aspect. We have seen that the Whig policy of encouraging the growth of native industries by protection, tended to diminish the customs revenue, and so to throw a greater fiscal burden on the land.[8] The results of this bounty system, by ensuring the prosperity of agriculture, helped the landed proprietors to bear this burden.[9] Further, it enabled the country to support the increase in population to which the progress of native industries gave rise. From this point of view it had an effect similar to

[1] 15 Charles II. c. 7 §§ 1-3.

[2] 22 Charles II. c. 13; 1 James II. c. 19 provided a machinery for ascertaining the prices on the basis of which the import duty was payable. In 1698, owing to its being a time of scarcity, the export of corn and certain other food-stuffs was prohibited for a year; but the king was given power to permit the export of corn by proclamation if the price decreased.

[3] Above 342 n. 9.

[4] 2 William and Mary sess. 2 c. 9.

[5] 10 William III. c. 4.

[6] 1 William and Mary c. 12.

[7] Op. cit. ii 541; he points out, ibid, that the bounty "was continued with suspensions in the four famine years of 1698, 1709, 1740, and 1757."

[8] Above 339-340.

[9] Cunningham, op. cit. ii 541-542.

the effect produced by the repeal of the Corn Laws in 1846. But, unlike that measure, it attained this result by ensuring the prosperity both of agriculture and of industrial development. The belief in the necessarily beneficent action of the free play of economic forces, had not yet relieved statesmen from the labour of considering the probable effects upon national strength of their commercial and industrial legislation.

(ii) We have seen that, towards the close of the preceding period, the agitation against that species of inclosure which converted arable into pasture had died down.[1] We have seen that it had died down mainly because the increased gain to be made from arable farming had caused the large inclosures, which at the beginning of the sixteenth century threatened to depopulate the country, to be no longer profitable.[2] On the other hand, that species of enclosure which tended to improve the productiveness of the land either (*a*) by getting rid of the common field system of cultivation, or (*b*) by draining and developing parts of the country which had never been cultivated, continued to progress.[3]

(*a*) It is probable that the inclosures which were made to get rid of the common field system of cultivation did not proceed at so rapid a rate as in the eighteenth century. We have seen that between 1607 and 1692 no inclosure Act was passed, and that such Acts do not become common till George II.'s reign.[4] In 1664 an attempt was made to pass a bill "to inclose and improve commons and waste lands"; but it failed.[5] On the other hand, it is probable that this species of inclosure proceeded continuously by agreement among the shareholders in the common fields. Suits to enforce or to confirm such agreements were in this period often brought before the court of Chancery;[6] and, if the agreement were proved, the court would decree its specific performance, even though all the parties to the agreement were not parties to the suit.[7] Apparently in some cases the court was prepared to make a decree, even though all the shareholders

[1] Vol. iv 368. [2] Ibid.

[3] Gonner, Common Land and Inclosure 154—"Inclosure continued steadily throughout the seventeenth century, and the inclosures of the eighteenth and nineteenth centuries were no new phenomena but the natural completion of a great continuous movement."

[4] Vol. iv 368 n. 10. [5] Gonner, op. cit. 56.

[6] "A large body of evidence as to inclosures and their distribution, mainly affecting the latter part of the century, lies in the Chancery Enrolled Decrees, where cases of inclosure suits and agreements occur in large numbers," Gonner, op. cit. 167-168.

[7] Thirveton v. Collier (1664) 3 Ch. Rep. 13, 14—It appeared that there were to be eighteen allotments and that there were only fifteen parties to the suit, "Decreed nevertheless, that the agreement for the inclosure should be performed; and a commission then was awarded to set out each person's lot; and the Court said, that if there were any that had interest, and were not parties to the agreement, they could not be bound by the decree, and so at no prejudice: and however that it should not be in the power of one or two wilful persons to oppose a publick good."

concerned had not agreed.[1] A bill was introduced into the House of Lords in 1666 to confirm these decrees, but it failed;[2] and in 1689[3] and 1706[4] the court laid it down that it had no power to coerce any but the parties to an agreement. It was probably the difficulty of arriving at, or of proving, an agreement that made it clear that a private Act of Parliament was the only effectual method of procedure.[5]

(*b*) All through this period the process of reclaiming waste land proceeded. Elaborate Acts of Parliament provided for the draining of Bedford level,[6] Deeping Fenn in Lincolnshire,[7] and Sedgmore.[8] It is fairly clear, therefore, that the progress of the kinds of inclosure which improved the fertility of the soil was by no means stopped during this period.[9] It is true that we hear less about inclosure than in the sixteenth, or in the eighteenth and nineteenth centuries. But this is probably due to the fact that, on the whole, it caused less hardship than it did in the earlier or the later period. It did not, as in the earlier period, depopulate the country, and it was more possible in this period, than in the eighteenth and nineteenth centuries, for a small holder to live from his holding.[10] But this introduces us to our third head—the tendency to treat farming as a business run for profit.

(iii) We have seen that in the preceding period capital had been applied to agriculture, and that in many cases farming was

[1] This seems to be hinted at in the case cited in the last note; and considering the nature of the distribution of strips in the common fields it is difficult to see how any sort of inclosure could be made without prejudicing those not parties to the agreement; see Gonner, op. cit. 168; he says that these decrees were used, not only to bind a minority, but also third persons who might be ignorant of the proceedings—"that this was illegal is clearly stated by the author of the legal text book on the *Law of Commons and Commoners* (1698), but his language leaves no doubt as to its occurrence."

[2] Gonner, op. cit. 56.

[3] Delabeere v. Beddingfield (1689) 2 Vern. 103—where a distinction, as to the power of the court to override a minority, was drawn between an agreement to stint a common and an agreement to inclose.

[4] Bruges v. Curwin (1706) 2 Vern. 575—where the court denied that it could override a minority in the case of an agreement to stint a common.

[5] Gonner, op. cit. 168.

[6] 15 Charles II. c. 17; for the earlier history of this undertaking see Scott, Joint Stock Companies ii 352-356.

[7] 16, 17 Charles II. c. 11.

[8] 10 William III c. 15.

[9] Child, A Discourse of Trade (1694) 192 can speak of, "great improvements made this last sixty years upon breaking up and enclosing of wastes forrests and parks, and draining of the fens, and all those places inhabited and furnished with husbandry."

[10] "The conditions determining the effect of eighteenth century inclosure on small farms were largely wanting (in earlier centuries). Capital was not so great a necessity. Facilities in transport were lacking. The inclosure was less exacting in its demands for improvement or expensive hedging by those concerned, and also less costly in itself. While lastly, the small holder was less likely to be tempted to sell," Gonner, op. cit. 375.

pursued, not for subsistence, but as a business.[1] The legislative encouragement given to agriculture, and especially the system of bounties on the export of corn,[2] strengthened this tendency. But the effects upon the position of the small landowners were ultimately serious. The large farmer could hold his stock for a longer period, and he could afford new and expensive machinery.[3] Thus it happened that in the farming, as in the manufacturing industries,[4] the new capitalistic organization tended to crowd out the small man.[5] But, at the end of the seventeenth century, the progress of inclosure, and of this new organization of the farming industry, had not gone far enough to produce these results. We can see, it is true, the beginnings of the causes which will produce these results; but the results themselves are as yet in the future.

These developments, both in the manufacturing and in the farming industries, help us to understand analogous developments which were taking place in the laws as to the regulation of prices and wages.

It is clear that the legislature still took the view that a fair price, having regard to all the circumstances, must be charged for food and other necessaries.[6] The best illustration of the maintenance of this attitude is the series of statutes which regulated the export of grain.[7] Moreover, other statutes directly fixed, or empowered certain persons to fix, the prices of wine[8] and coal.[9] It is clear, too, that the law as to forestalling and regrating,[10] though modified in special cases,[11] was still relied upon to prevent an artificial rise in prices by means of speculation.[12] Certain statutes passed to prevent butchers speculating in cattle are illustrations of this.[13] But, as with the legislation as to the skill of workmen and the quality of the article produced,[14] so with this statutory regulation of food prices—it is clear that the growth of the capitalistic organization of all branches of industry will strengthen the tendency to allow prices to be determined simply by the relation of supply to demand. And, just as in its regulation of industry, the legislature tended to rely more on general

[1] Vol. iv 371.
[2] Cunningham, op. cit. ii 541.
[3] Ibid 544.
[4] Above 341.
[5] Gonner, op. cit. 378-379.
[6] Vol. iv 375-379.
[7] Above 342-343.
[8] 12 Charles II. c. 25 § 12; § 13 gave certain officials the power to fix these prices from time to time.
[9] 16, 17 Charles II. c. 2 § 1—giving powers to the Lord Mayor and Aldermen in London, and elsewhere the justices of the peace; the Act expired and was revived by 2 William and Mary sess. 2 c. 7 § 1.
[10] Vol. iv 375-377.
[11] 15 Charles II. c. 7 § 3, above 343; 10 William III. c. 13 § 3.
[12] See e.g. 10 William III. c. 13 §§ 6, 7.
[13] 15 Charles II. c. 8; 22, 23 Charles II. c. 19, modified by 25 Charles II. c. 4.
[14] Above 341.

statutes and less on the supervision of special gilds or companies ;[1] so, in its regulation of these prices, it will tend to rely less on measures directly prescribing their amount, and more upon legislation, such as that designed to encourage agriculture, which will ensure a low price by providing an adequate supply. Public opinion was inclining to the view expressed by Child, that it was vain to hope by laws to oppose the "force subtlety and violence" of "the general course of trade."[2]

The laws as to the rates of wages payable to workmen follow a somewhat similar course. We have seen that, under the Tudors and early Stuart kings, the legislation both as to prices and wages were part of a coherent scheme for the regulation of the relation of employer and workman. The main incidents of that relation were regulated by law ; and, in so far as they were regulated by law, they could not be affected by the agreement of the parties. Thus a combination of workmen to raise wages so fixed was as definitely illegal as a combination of employers to raise prices above their statutory level, if they were fixed by statute ; or, if they were not fixed by statute, above their natural level by acts which amounted to forestalling or regrating. Similarly, an individual workman was not free to refuse work offered to him ; and, though there was no statutory duty imposed on a master to employ, the Council interfered if he dismissed his workman merely because work was slack.[3] During this period the statutes which created these legal relations between employers and workmen were still in force. And that the ideas which underlay them were still approved is clear from the statute of 1666,[4] which provided for the rebuilding of London after the great fire. It was obvious that large numbers of workmen connected with the building industries, and large quantities of building materials, would be needed. Special rules, it was thought, ought to be made to meet these extraordinary circumstances ; and these special rules naturally reflected the prevailing legal and economic ideas. In order that builders might get their materials at reasonable prices,[5] the Act provided that the judges of the King's Bench, on the complaint of the mayor and aldermen, should summon a number of brick makers, tile makers, and lime burners

[1] Above 323.

[2] A New Discourse of Trade (1694) 147—he is arguing that, if foreigners can afford to give a better price for our wool, they will get it ; "they that can give the best price for a commodity shall never fail to have it, by one means or other, notwithstanding the opposition of any laws, or interposition of any power by sea or land ; of such force subtlety and violence is the general course of trade" ; cp. Economic Writings of Petty (Ed. Hull) i 51-52 for a discussion as to the natural causes which determine food prices ; for the influence of commercial men like Child, and scientific writers like Petty, in discrediting legislation to fix prices, see below 356-359.

[3] Vol. iv 380-383, 385-386. [4] 18, 19 Charles II. c. 8. [5] § 14.

carrying on business within five miles of the Thames, and settle such a price "as may equally respect the honest profit of the said brick makers, tile makers, lime burners, and carriers, and the necessity and convenience of the builder." In order that no artificer, workman, or labourer might "make the common calamity a pretence to extort unreasonable or excessive wages," it was provided that the judges should, upon the like complaint, fix the rates of wages.[1] A refusal to sell at the prices, or to work at the wages so fixed, a departure from work without excuse, or an agreement to give higher prices or wages, was made punishable by a month's imprisonment or a fine not exceeding £10.

It is clear from these clauses of this statute, that the prevalent legal and economic ideas as to the proper mode of regulating the relation of employer and workman, were much the same as they had been in the preceding period; and in fact, there is some evidence that the justices of the peace still continued to assess the rates of wages in accordance with the Elizabethan statutes.[2] But it is evident that in practice the Tudor scheme was not being consistently applied. In fact this scheme suffered, more than any other part of the industrial and commercial system of the Tudors, from the abolition of the control of the Council. Though by statute workmen could not refuse work,[3] there was no correlative obligation upon employers to employ, now that the coercive authority of the Council had disappeared;[4] and the machinery for the assessment of fair wages does not seem to have been used much beyond the end of the century.[5] The capitalist had in sub-

[1] § 15—the Act enumerates brick makers, tile makers, lime burners, carpenters, bricklayers, masons, plasterers, joiners, plumbers; cp. Tudor and Stuart Proclamations i no. 3844 (1687) for a proclamation forbidding foreigners to entice away work-people; see vol. iv 383-385 for the law on this topic, which the proclamation was evidently intended to enforce.

[2] This is assumed by 14 Charles II. c. 32 § 15; the Act was passed for the better regulation of the broad cloth manufacture in Yorkshire; this § provides that the company entrusted with its regulation shall not "set or impose any other or lesser rates or wages upon any inferior workmen servants or labourers to be employed by them . . . in the said manufacture than such as shall be from time to time allowed and approved of by the justices of the peace in their quarter sessions according to the laws and statutes touching labourers in that case made and provided"; cp. Cunningham, op. cit. iii 896-897 for references to such assessments during this period and later; it is fairly obvious, however, that they were not regularly made; Petty says, "the non-observance of which Laws (i.e. those regulating wages), and the not adapting them to the change of times is by the way very dangerous, and confusive to all endeavours of bettering the trade of the nation," Economic Writings (Ed. Hull.) i 52; it is significant that in the printing trade, in which the control of the Council was continued, the older rules both as to employment and wages survived; vol. iv 381; below 369, 372.

[3] Vol. iv 380.

[4] Ibid 380-381.

[5] Cunningham, op. cit. ii 43 n. 6, where it is pointed out that Hale, in his tract upon Provision for the Poor at p. 18, "seems unaware of any legal provision against the starvation rates of pay of which he complains"; the fact that it had fallen into disuse is implied by a bill "for the more easy recovery of servants' wages and for determining differences between masters and servants," which failed to pass the House of Lords in 1695-1696, House of Lords MSS. ii 227 no. 1044.

stance freed himself from the obligations which the Tudor scheme imposed upon him; but the workmen still remained liable to them. It is not suprising to find that, early in the following century, both the executive[1] and the legislature[2] found it necessary to interfere to suppress strikes, and to fix wages in many of those trades which had become organized upon a capitalistic basis.

We shall now see that these changes in the economic machinery, and in the laws which guided its working, had serious effects upon the poor law and its administration.

(5) *The Poor Law.*

We have seen that the Elizabethan poor law aimed at relieving the impotent, educating the children of those who could not maintain themselves, coercing the idle and vagrant, and providing work for the able-bodied; that the parish, acting under the supervision of the justices of the peace, was the unit for performing these duties; and that the parish was responsible for the relief of the impotent who were settled there.[3] We have seen that the success of the system largely depended on the measures taken to coerce the vagabond, and provide work for the deserving poor;[4] and that, throughout the earlier years of the seventeenth century, the justices were compelled to take adequate measures to perform these and the other duties imposed upon them by the strict supervision of the Council.[5] During this period the administration of the poor law failed to effect the same results as it had effected in the preceding period. This failure was due, partly to the breakdown of the whole system during the Great Rebellion, and to the absence of any adequate supervision after the Restoration by the central government; partly to the unwise policy of applying the idea of settlement to the able-bodied and industrious poor; and partly to the fact that, under the changed economic and constitutional conditions of this period, the poor law was ceasing to be an integral part of the general commercial and industrial policy of the state.

(i) It is clear that, during the Great Rebellion, the administration of the poor law in London and elsewhere had broken

[1] See the Proclamation of 1718 against unlawful clubs of woolcombers and weavers, cited by Cunningham, op. cit. ii 508-509; as early as 1671 the mayor of Newcastle-upon-Tyne had been obliged to suppress a tumult caused by the tumultuous assembling of the keelmen, on pretext of being ill dealt with by the masters of the colleries as to hire and wages, S.P. Dom. 1671 297.

[2] Stephen, H.C.L. iii 206—these Acts of the earlier part of the eighteenth century were, "for the most part Acts relating to particular trades, and prohibiting combinations in respect of the wages payable in those trades."

[3] Vol. iv 392-401; for a bill, which was lost in the House of Lords, to provide for places which were not in any parish see Hist. MSS. Com. 7th Rep. 173-174.

[4] Vol. iv 395-396. [5] Ibid 400.

down. Charitable institutions suffered either from want of funds or from actual malversation.[1] Nor were efforts of the government to restore some sort of system of poor relief in London very successful;[2] and, as Miss Leonard says, "in the rest of the country there was probably the same disorganization and less attempt to remedy matters."[3] The justices were either unable or unwilling to provide stock to set the poor to work; and, during the war, there was not the same need for it, as employment was abundant.[4] Thus the whole system of providing work for the poor disappeared. Something, it is true, was done for the impotent. As Miss Leonard says,[5] "the privation of the helpless old and young appealed far more to the sympathy of overseers and ratepayers than the needs of the able-bodied poor. Besides it was far easier to grant pensions than to superintend work and supply materials." The Restoration brought no improvement. The parishes and the justices were left to take very much their own line.[6] It is true that the legislature in 1662[7] provided that one or more workhouses should be set up within the parishes comprised in the Bills of Mortality,[8] the governors of which should be able to arrest and set to work idle and disorderly persons. It is true that in 1666 an effort was made to provide work for poor prisoners awaiting their trial for criminal offences.[9] But it is clear from the literature of the last half of the seventeenth century that there was no general system in force throughout the country for setting the poor to work.[10] The Act of 1662 assumes that this will be done;[11] but, for the most part, both it and other Acts passed during this period are far more concerned with punishing the vagrant and the vagabond,[12] with providing that rogues shall be punished by transportation to the Plantations or otherwise,[13] with compelling parents to support their bastard

[1] Leonard, Early History of English Poor Relief 269-270, 271-272.

[2] Ibid 272-274; Acts and Ordinances of the Interregnum (Ed. Firth and Rait) i 1042 (1647), ii 104 (1649).

[3] Leonard, op. cit. 273.

[4] Ibid 274-275; see a tract published by Stanley in 1646 in Eden, State of the Poor i 169-170.

[5] Leonard, op. cit. 274.

[6] Eden, op. cit. i 144 n. 4, citing a pamphlet of 1698.

[7] 14 Charles II. c. 12 §§ 4-14; 22, 23 Charles II. c. 18; 1 James II. c. 17 § 2.

[8] For a full account of the history of these Bills, and the book of John Graunt upon them, which was published in 1662, see Hull, Economic Writings of Petty i *xxxiv-liv*, *lxxv-xci*; Graunt's book is printed in vol. ii of Hull's Ed. of Petty's economic writings; cp. Hist. MSS. Com. 7th Rep. 148 for a bill of 1661 providing for the relief and employment of the poor in the cities of London and Westminster.

[9] 18, 19 Charles II. c. 9; a common gaol and workhouse had been already provided for this purpose at Exeter, and §§ 4 and 5 of that Act make some regulations for its management.

[10] Eden, op. cit. i 184-225.

[11] 14 Charles II. c. 12 § 21.

[12] Ibid §§ 6, 16-18, 23; 11 William III. c. 18.

[13] 14 Charles II. c. 12 §§ 16, 23.

children,[1] and with the regulations for the apprenticing of pauper children.[2] Moreover, as we shall now see, this Act of 1662 considerably complicated an already difficult problem by its provisions as to the settlement of the able-bodied and industrious poor. This new departure gave rise to a branch of the law which, as Eden justly remarks, "has been more profitable to the profession of the law than any other point in English jurisprudence."[3]

(ii) The parish was the unit for the administration of the poor law; and the provision which different parishes made for dealing with the poor, and the natural advantages which they possessed, were very various. The preamble to the Act of 1662[4] tells us that some parishes made better provision than others for providing work for the able-bodied poor, and that some parishes were better able to relieve them than others because they had larger commons and wastes. The paupers had found this out; and "endeavoured to settle themselves in those parishes where there is the best stock, the largest commons or waste to build cottages, and the most woods for them to burn and destroy, and when they have consumed it, then to another parish, and at last become rogues and vagabonds, to the great discouragement of parishes to provide stock, when it is liable to be devoured by strangers." To remedy this evil the Act proceeded to apply the idea of settlement to the able-bodied and industrious poor.

We have seen that the parish was liable to relieve the impotent or the vagabonds, who had acquired a settlement there, either by birth or residence, for periods fixed by statute.[5] But the parish was under no liability to relieve the able-bodied and industrious poor, unless the pauper was in fact resident there when he applied for relief.[6] The principle of founding liability to relieve upon settlement applied only to the impotent or the vagrant. The Act of 1662[7] now extended the principle to the able-bodied and industrious poor by a clause which in substance runs as follows: On a complaint of the churchwardens or overseers of a parish, made to a justice of the peace, within forty days after any person had come to reside in any tenement in the parish under the value of £10 a year, any two justices could remove such person to the parish where he was last "legally settled either as a native householder, sojourner, apprentice, or servant for the space of forty days at the least," unless he gave

[1] 14 Charles II. c. 12 § 19.

[2] 8, 9 William III. c. 30 § 5; for this Act see also House of Lords MSS. ii 548 no. 1161; for projects to establish a corporation for the whole kingdom to set up workhouses to set the poor to work see S.P. Dom. 1690-1691, 369, 422.

[3] Op. cit. i 176-177.

[4] 14 Charles II. c. 12.

[5] Vol. iv 393-394, 397-398.

[6] Eden, op. cit. i 174.

[7] 14 Charles II. c. 12 § 1.

such security to discharge the parish of its prospective liability as the justices thought sufficient.[1] It was provided in 1685 that the forty days continuance in the parish should run from the delivery of a notice in writing of his place of residence and the number of his family to the overseers.[2] In 1691[3] it was provided that this notice should be read publicly in the church of the parish after Divine Service, and registered; and that service as a parish officer, payment of rates, service by an unmarried person for a year, apprenticeship, and residence—should give a settlement without notice.

It is obvious that the stringency of the law as to settlement seriously interfered with the mobility of labour, at the very time when the growth of the capitalistic organization of industry was making it more requisite than at any former time that labour should be mobile. This was pointed out by Child,[4] and was partially remedied by the legislature in 1696-1697.[5] This Act recites that persons chargeable to the parish where they live might be able to find work and maintain themselves in other parishes, that they are not allowed to do so because they cannot give the security required upon coming to those other parishes, and that if this were allowed "manufactures would employ more hands." It then enacts in substance that, if a person coming to dwell in a parish brings a certificate from the churchwardens or overseers of the parish where he is settled, admitting that he is there legally settled, he cannot be removed to his parish of settlement until he becomes chargeable to the parish; and that, when he becomes so chargeable, the parish giving the certificate is liable to maintain him and his family. In order to clear up some doubts which had arisen as to the construction of this statute, it was enacted in 1697-1698[6] that a person coming to live in a parish with such a certificate, could never acquire a legal settlement unless he leased a tenement there of the yearly value of £10, or executed some parish office. This Act did

[1] § 3 of the Act contained a proviso for persons going to work in other parishes in time of harvest, who got a certificate from the minister, or churchwardens, or overseers of the parish; the confirmation of an order for removal was ruled to be conclusive as against all the world that the pauper was settled in the parish to which he was ordered to be removed, Rex v. Inhabitants of Rislip (1699) 1 Ld. Raym. 394.

[2] 1 James II. c. 17 § 3.

[3] 3 William and Mary c. 11; § 11 of the Act provided for the keeping of a parish register of those entitled to relief, and for its annual revision.

[4] A Discourse of Trade (1694) 85-88; at p. 88 he says, "For the laws against inmates, and empowering the parishioners to take security before they suffer any poor person to inhabit amongst them: it may be they were prudent constitutions at the times they were made (and before England was a place of trade) and may be so still in some countries, but I am sure in cities and great towns of trade they are altogether improper, and contrary to the practice of other cities and trading towns abroad."

[5] 8, 9 William III. c. 30.

[6] 9 William III. c. 11; House of Lords MSS. iii *xviii* and p. 138 no. 1234.

something to remedy the defects of the law, but not very much; as the granting or refusal to grant a certificate was entirely at the discretion of the churchwardens and overseers of the parish of settlement.[1]

It is clear that the evil effects of these restrictions will be more and more severely felt as the number of wage earners, and the fluctuations of trade, increase with the growth of the capitalistic organization of industry, and the greater freedom of trade which resulted therefrom.[2] Moreover, the fact that the poorer classes were put under these disabilities tended to give them a peculiar status; and, as we shall now see, this strengthened existing tendencies to regard those in receipt of parish relief, not as a class which was receiving a benefit to which it had a legal right,[3] but as a class to which the stigma of disability was attached.

(iii) We have seen that the Elizabethan poor law was the logical consequence of the economic policy pursued by the state. If the measures taken to carry out this economic policy did not avail to prevent distress or unemployment or vagrancy, the machinery of the poor law intervened as a necessary consequence. It followed that the persons relieved by its agency did not have the peculiar status which is the lot of the modern pauper.[4] There was no "stigma of pauperism" attaching to such persons. But, with the changes which, at the end of this period, were beginning to take place in economic and constitutional conditions, we can see the beginnings of this new idea. In the first place, the new organization of industry tended to introduce the idea that the prosperity or failure of any given business was dependent upon the skill of those who managed it, and called for no interference by the state.[5] No doubt a course of business which led to constant failures in many undertakings, which ruined many persons, and thus endangered the commercial prosperity of the nation, would produce some legislative interference. The Bubble Act, passed in 1720,[6] in consequence of the rash speculation which accompanied the rise of the South Sea Company, is an instance of legislation of this kind. But, otherwise, the idea was growing that success or failure in any given business was due to individual merit or demerit, and that the active supervision and regulation, which was characteristic of the preceding period, was a mistake. And this idea reacted upon the position of the workman. Though he was not, owing to the law of settlement, left free to choose his place of abode, yet it was beginning to be

[1] See Adam Smith's remarks in the Wealth of Nations, Bk. i c. x; and Eden, op. cit. i 177-184.

[2] Cunningham, op. cit. ii 571.

[3] Vol. iv 400.

[4] Ibid.

[5] Above 341.

[6] 6 George I. c. 18; Pt. II. c. 4 I. § 4.

thought that, if he was driven to apply to the parish for assistance, it was more often than not his own fault. In the second place, this idea was fostered by the break down of the machinery for providing work for the able-bodied and deserving poor,[1] which had been caused by the absence of any adequate supervision by the central government.[2] The recipients of poor relief were for the most part the impotent or the vagrants. Hence the receipt of such relief came to be associated with some form of incapacity. As we have seen,[3] the disabilities imposed by the new law of settlement upon the able-bodied and industrious poor tended to foster this idea. But it is perhaps most strikingly illustrated by a section of the Act of 1696-1697.[4] In order that the money raised for the relief of the poor and impotent "might not be misapplied and squandered by the idle sturdy and disorderly beggars," it was enacted that the recipients of relief and their wives and children should wear, as a distinctive badge, "a large Roman P" embroidered on their right sleeve;[5] and that no one not wearing this badge was to be entitled to relief. It is clear, therefore, that, at the end of the seventeenth century, the administration of the poor law was giving rise to serious problems which required very careful handling; but the history of the handling which they received belongs to the following period.

Changes in economic and constitutional conditions were, as we have seen, intimately related. The constitutional changes made for the increased influence of the commercial men upon the government of the state, and a greater freedom from governmental control. All branches of the local government, the administration of the poor law, and all branches of commerce and industry, were left very much more free than ever before to follow their own course. This increased freedom naturally reacted upon the prevailing economic ideas, and thus caused a

[1] See Hist. MSS. Com. 12th Rep. App. Pt. vi 448 no. 222 for an attempt in 1689-1690 to give life to the earlier legislation on this subject, and to compel the overseers to account.

[2] Above 349-350; the growth of the system of out relief, which necessarily followed, is illustrated by the case of Waltham v. Sparks (1696) 1 Ld. Raym. at p. 42, where it was said that the justices strictly had no authority to order maintenance of this kind, but that they all did it, and "communis error facit jus"; we begin to get cases on the question as to when such maintenance could be ordered, see the curious case of Inhabitants of St. Andrews v. Jacob Mendez (1702) 1 Ld. Raym. 699—a Jew father, who had turned his daughter out of doors because she had become a Christian, could not be ordered to maintain her unless it was shown that she was poor.

[3] Above 351-353.

[4] 8, 9 William III. c. 30 § 2.

[5] "Shall upon the shoulder of the right sleeve of the uppermost garment . . . in an open and visible manner wear such badge or mark as is hereinafter mentioned . . . that is to say a large Roman P, together with the first letter of the name of the parish or place whereof such poor person is an inhabitant cut either in red or blue cloth as by the churchwardens and overseers of the poor it shall be directed."

modification of the attitude of the state to commerce and industry. Of this modification I must, in conclusion, say a few words, because it helps us to understand the nature of the changes which had taken place in this century, and the nature of the still larger changes which will take place in the next.

We have seen that there had been a great change in economic ideas in the sixteenth century. The moral aim, which comes out clearly in the economic legislation of the Middle Ages, had given place to the material aim of increasing the strength and power of the state. To accomplish this end it was obviously desirable to allow individuals more freedom in conducting their business. If they were allowed more freedom to make profits as they could, they increased the trade and riches of the nation. And thus the mediæval ideal of securing honest manufacture, a just price, reasonable profit, and a fair wage, tends to sink into the background. But, if the strength and power of the state were to be maintained and increased by an expanding trade, it was still necessary to secure some of these objects. They must be secured if new customers were to be got and kept, and if industrial peace was to be maintained. And so many of the mediæval rules, and much of the mediæval machinery, was retained in order to secure, not so much the mediæval ideal of fairness and justice, as the new ideal of increasing the strength and power of the state. But necessarily the new system was a national system controlled at all points by general statutes. And, because it was a national system, and not a system controlled and applied by towns and trade gilds, it was less exacting in its requirements, and left a freer scope to the individual.[1]

During this period the economic freedom of the individual advanced a stage further. The commercial men conquered for themselves more political power than they had ever possessed before. Consequently there is a great deal more reasoned discussion upon economic subjects than at any preceding period; and the economic point of view exercises a great deal more influence upon the course of legislation. But these economic discussions were, for the most part, the discussions of practical business men; and their economic point of view was limited to the advocacy of the measures which their experience had suggested were necessary to the maintenance of the strength and power of the state, and the prosperity of its commerce.[2] The

[1] Vol. iv 315-326.

[2] A good illustration will be found in Hist. MSS. Com. 8th Rep. App. 133-136 no. 215 which records the proceedings of the committee appointed in 1669 to consider the causes and grounds of the fall of rents and decay of trade within these kingdoms.

economic literature of the time is therefore eminently practical. "By far the larger number of contemporary tracts were written by men who were advocating some particular proposal, and who adduced general reasons in favour of the special scheme they had in view."[1] But "general reasons" naturally tend to the formation of theories; and so we can see in a good deal of the literature the growth of particular theories on economic subjects.[2] Thus we get the beginnings of a distinctively economic point of view which, as it gathers strength and cohesion, will have a progressively increasing influence on the course of legislation. It is true that, during the whole of this period, all economic theory accepts as an axiom the view that the increase and maintenance of the power of the state is the ultimate test by which all legislation upon industry and commerce must be judged. But the views of writers as to the measures which will best secure this object are naturally coloured by their education and calling. As commerce and the political power of commercial men increased, naturally their views began to prevail; and the prevalence of their views meant the growth of the theory that the wealth and power of the state would be best maintained and increased by legislation favourable to the development of commerce on the new capitalistic lines.

Obviously this involved the abolition of many of those legislative restrictions on the freedom of industry, which the sixteenth century had taken over from the Middle Ages in a modified form. Thus Child criticizes the laws limiting the price of beer,[3] the laws against engrossing,[4] the law forbidding a man to use any manual occupation unless he had been first apprenticed,[5] "all bylaws used among the society and other artificers limiting masters to keep but one apprentice at a time,"[6] the laws "that oblige our people to the making of strong substantial (and as we call it loyal) cloth of a certain length breadth and weight,"[7] the laws "limiting the numbers of looms or kind of servants or times of working,"[8] the laws prohibiting "a weaver from being a fuller tucker or dyer, or a fuller or tucker from keeping a loom."[9] He contends that exporters should have a discretion, as each individual "best knows what will please his customers beyond the seas."[10] But, it might be asked, if these regulations are to disappear in order to secure an increased trade, what is to take their

[1] Cunningham, op. cit. ii 381. [2] Ibid 401.

[3] A New Discourse on Trade (1694) 71-72; cp. North, Discourse on Trade, Pref., "that no law can set prices in trade, the rates of which must and will make themselves."

[4] A New Discourse on Trade 72.

[5] Ibid 73. [6] Ibid. [7] Ibid 148.

[8] Ibid 149. [9] Ibid. [10] Ibid.

place? The answer given in some cases was that more general laws would serve. Thus, in order to secure the good quality of the cloth manufactured in England, Child suggests that the quality and measure of certain standard varieties should be guaranteed by a public seal;[1] and that all other varieties should be sealed with the maker's mark, the counterfeiting of which should be a serious offence.[2] In other cases, it was said that no laws at all were necessary because, if made, they would not be efficacious. They would not, it was said, be efficacious either (i) because they were opposed to the general course and custom of the trade, or, (ii) because they attempted to effect what was naturally impossible. Let us glance at these two reasons for abandoning legislative control.

(i) Mun[3] demonstrated that laws prohibiting the export of bullion were futile; and we have seen that Child, speaking of the legislation prohibiting the export of wool, expressed his opinion that such prohibition was futile because, whatever the law might say, those who could give the best price for a commodity would be certain to get it.[4] Again, it had been argued that, unless foreign trade was controlled by companies, shop-keepers and other inexperienced people might turn merchants; and that "they will, through ignorance, neglect buying and sending out our native manufactures, and will send out our money or bills of exchange to buy foreign commodities, which is an apparent national loss." To this Child replied that shop-keepers are, like everyone else, "led by their profit," and "if it be for their advantage to send out manufactures they will do it without forcing; and if it be for their profit to send over money or bills of exchange they will do that, and so will merchants, as soon and as much as they."[5] Obviously the moral is in both these cases that the course of trade should be left to regulate such matters. As North put it, "no people ever yet grew great by politics, but it is peace, industry, and freedom that bring trade and wealth and nothing else."[6] And that it was beginning to be recognized on all hands that the course of trade might, in many cases, be too strong for the legislature, is clear from a conversation which Pepys tells us[7] he had with an official of the mint. "To another question

[1] A New Discourse on Trade (1694) 150. [2] Ibid 151.

[3] England's Treasure by Foreign Trade (Ashley's Ed.) 118-119—whatever the laws may say, "so much treasure only will be brought in or carried out of a commonwealth as the foraign trade doth over or under ballance in value. And this must come to pass by a Necessity beyond all resistance"; cp. Barbon, Discourse concerning coining new money lighter 57.

[4] Above 347 n. 2.

[5] A New Discourse on Trade (1694) 107-108.

[6] Discourse upon Trade, Select Tracts on Commerce (1856) 540.

[7] Pepys, Diary (Ed. Wheatley) iv 342.

of mine he made me fully understand that the old law of prohibiting bullion to be exported, is, and ever was, a folly and an injury, rather than good. Arguing thus, that if the exportations exceed importations, then the balance must be brought home in money, which, when our merchants know cannot be carried out again, they will forbear to bring home in money, but let it lie abroad for trade, or keep in foreign banks: or, if our importations exceed our exportations, then, to keep credit, the merchants will and must find ways of carrying out money by stealth, which is a most easy thing to do, and is everywhere done; and therefore the law against it signifies nothing in the world." The men who knew the world of commerce had a very practical knowledge of what laws were efficacious and what not; and they could not help seeing that, to use Petty's words, "too many matters have been regulated by laws which nature, long custom, and general consent, ought only to have governed."[1]

(ii) The view that certain kinds of legislation were inefficacious, somewhat easily slides into the view that they were inefficacious because they were "naturally" impossible. And this view was materially assisted by Petty's economic writings. As Hull has pointed out, the influence of Bacon on Petty was marked. He was "an eager member of that group of experimental investigators, working in the spirit of the 'Novum Organum,' who began the systematic pursuit of scientific knowledge in England."[2] And he was one of the first to try to give some sort of scientific reasons for economic phenomena, and to explain these phenomena by "natural" causes.[3] Thus he explained how the phenomenon of rent arises—it is, he says, the surplus after the husbandman has provided seed for the next harvest, and provided for his maintenance.[4] Similarly he endeavoured to discover "the natural standards of usury or exchange"; and he condemned laws which limit the rate of interest, because it is vain to legislate against giving a rate of interest

[1] Political Arithmetick, Pref., Economic Writings (Ed. Hull) i 243.

[2] Economic Writings i *lxiii*; see Evelyn's laudatory account of Petty, Diary, 22nd March, 1675; among other things he says, "There is not a better Latin poet living when he gives himself that diversion; nor is his excellence less in Council and prudent matters of state; but he is so exceeding nice in sifting and examining all possible contingencies, that he adventures at nothing which is not demonstration. There were not in the whole world his equal for a superintendent of manufacture and improvement of trade, or to govern a Plantation. If I were a Prince I would make him my second counsellor at least. There is nothing difficult to him."

[3] "He anticipated the modern conclusion that statistical investigation, applied to wisely selected circumstances, affords perhaps the best substitute for experimentation that is open to an economist. . . . The application of an appropriate method 'not yet very usual' to a field of knowledge in which it was altogether new, justifies him in associating himself with the most eminent followers of the new philosophy, and even distinguishes him among his colleagues," Hull, op. cit. i *lxv-lxvi*.

[4] A Treatise of Taxes, Economic Writings (Ed. Hull) 43.

which the hazardous character of the security makes it necessary for the lender to demand.[1] So with regard to food prices—they must be determined by the natural law of demand and supply.[2] Thus the new scientific methods applied to economic phenomena often led to the adoption of a point of view, and to conclusions, similar to those arrived at by commercial men anxious for greater freedom to push their trades. The scientific inquirer naturally tended to isolate the phenomena which he was investigating. The commercial man naturally tended to consider that the strength and power of the state would be best secured by measures which ensured the expansion of commerce. The scientific man demonstrated the futility of attempting to legislate against the natural laws which he had discovered. The commercial man found in these demonstrations an additional argument in favour of the policy which he advocated.[3]

Now it is obvious that, as these ideas prevail with the legislature, the character and course of the legislation on commerce and industry will alter. The old mediæval restrictions and machinery, if not actually abolished, will gradually become obsolete. No doubt some such development was advantageous, and in fact necessary, to the continued expansion of the trade of the country. But it had its dangers. The chief of these dangers will be that the legislature will regard the expansion of trade, and the resulting increase of wealth, as an end in itself, and not merely as an aid to securing and increasing the strength and prosperity of the nation as a whole. Already we can see some signs that this point of view was beginning to emerge. The Tudor scheme for the regulation of wages was obsolete.[4] Child maintained that the laws against engrossing were a mistake.[5] Petty advocated the repeal of the laws which forbade foreigners to purchase land, and imposed upon foreign traders extra duties,

[1] "As for usury, the least that can be, is the rent of so much land as the money lent will buy, when the security is undoubted; but when the security is casual, then a kind of insurance must be interwoven with the simple natural interest, which may advance the usury very conscionably unto any height below the principal itself. . . . But of the vanity and fruitlessness of making civil positive laws against the laws of nature, I have spoken elsewhere, and instanced in several particulars," ibid 48; cp. North, Discourse upon Trade, Select Tracts 521.

[2] A Treatise of Taxes, Works (Ed. Hull) 51-52.

[3] The beginnings of this combination may perhaps be illustrated by what is truly said in the Preface to North's Discourse upon Trade as to the characteristics of that tract—"I find trade here treated at another rate than usually has been; I mean philosophically; for the ordinary and vulgar conceits, being meer husk and rubbish are waived; and so proceeding with like care comes to a judgment of the nicest disputes and questions concerning trade"; it also comes out in the Merchants' criticism of the Bullion Exportation Bill of 1690, Hist. MSS. Com. 13th Rep. App. Pt. v no. 330 pp. 181-182, no. 353 pp. 205-207.

[4] Above 348.

[5] Above 356.

because these laws interfered with the increase of trade.[1] He did not consider that it might be to the interest of the nation to sacrifice some immediate gain, to prevent foreigners from acquiring an influence over English trade, which might, in the event of war, be used to our disadvantage. As yet, however, this danger is in the future. The commercial men had gained a position of great influence in the House of Commons; but they did not as yet dominate it; and they were not as yet governed wholly by the commercial point of view. They still distinguished, as Mun[2] put it, "between the gain of the kingdom and the profit of the merchant"; and this is perhaps most strikingly illustrated by the fact that the policy of the Navigation Acts was maintained, although it was hurtful to the development of some branches of commerce and industry.[3] As yet, too, the scientific study of economic phenomena is in its infancy. But the commercial and industrial legislation of the latter part of the eighteenth and the nineteenth centuries will show us that this danger will increase as the commercial point of view gains greater political weight, and as the study of economic questions becomes more "scientific."

We must now turn to the other branches of law in which the legislature of the latter half of the seventeenth century showed its activity.

The Press

"I deny not," wrote Milton in his Areopagitica, "but that it is of greatest concernment in the Church and Commonwealth to have a vigilant eye how books demean themselves as well as men; and thereafter to confine, imprison and do sharpest justice on them as malefactors: for books are not absolutely dead things, but do contain a potency of life in them, to be as active as that

[1] "Note that selling of lands to foreignors for gold and silver, would inlarge the stock of the kingdom: whereas doing the same between one another, doth effect nothing. For he that turneth all his land into money disposes himself for trade; and he that parteth with his money for land, doth the contrary; but to sell land to foreignors, increaseth both money and people, and consequently trade. Wherefore it is to be thought, that when the laws denying strangers to purchase, and not permitting them to trade, without paying extraordinary duties, were made; that then, the publick state of things, and interest of the nation, were far different from what they are now," Political Arithmetick, Economic Writings (Ed. Hull) i 313; cp. Child, A New Discourse on Trade (1694) 140 seqq., who recommends an Act for the naturalisation of strangers for somewhat similar reasons.

[2] England's Treasure by Foreign Trade (Ed. Ashley) 14; and cp. Barbon's remarks on the wine trade, Discourse concerning coining new money lighter 46—"Tho' the importing of wines be certainly cried out against, yet it is one of the best trades to England; for being a very bulky commodity it pays a great freight; and being for the use of the richer people it pays a greater duty to the king, and that without complaint. For England being an island, and the riches and strength of it being from trade and shipping, those commodities that are bulky ought to be valued as most profitable."

[3] Above 318-319.

soul was whose progeny they are; nay, they do preserve as in a vial, the purest efficacy and extraction of that living intellect that bred them. I know they are as lively and as vigorously productive as those fabulous dragon's teeth; and being sown up and down, may chance to spring up armed men. And yet on the other hand, unless wariness be used, as good almost kill a man as kill a good book; who kills a man kills a reasonable creature, God's image; but he who destroys a good book kills reason itself. . . . We should be wary, therefore, what persecution we raise against the living labours of public men, how we spill that seasoned life of man preserved and stored up in books." Milton in this eloquent passage states some of the problems which introduction of printing set to the state. How to punish the writers of actually harmful books, how to prevent the publication of books likely to do harm, and yet leave a liberty of writing and publishing sufficient to maintain and increase the learning of the nation.

To solve this problem the Tudors and early Stuarts employed three kinds of expedients. Firstly, they punished as criminal offences the publication of treasonable, seditious, heretical, or blasphemous books. Secondly, they gave large powers of control over printing and publishing to the Stationers' company, which they had incorporated mainly in order that it might supervise this new industry; and these powers they supplemented when necessary by direct governmental action. Thirdly, they issued comprehensive ordinances, based partly on the needs of the state, but chiefly upon the rules which the Stationers' company had devised for the organization and control of printing. The body of law, thus formed, was the foundation of the press law of the latter part of the seventeenth century, and to some extent of our modern law.

With the first of these expedients I shall not deal at this point. Treasonable, seditious, heretical, or blasphemous publications were dealt with, partly by special statutes or proclamations, partly by the growth of the criminal and civil law of libel. I have already mentioned some of the statutes,[1] and proclamations[2] directed against various publications of this kind; and I have already said something of the way in which the Star Chamber dealt with libels.[3] With the beginnings of the modern law of libel, criminal and civil, which was based to a large extent on the law created by the Star Chamber, I shall deal in the second Part of this Book.[4] Here I shall describe the two other forms

[1] Vol. iv 496, 511-512.
[2] Ibid 305-306; above 311; cp. Arber, A Transcript of the Stationers' Registers (1554-1640) i 10b, 30b, 210b, 211a, 215a, 216b, 221b, 235b.
[3] Vol. v 205-212.
[4] Pt. II. c. 5 § 2.

of control which emerged during the sixteenth and seventeenth centuries. We shall see that, as the result of their working, unlicensed printing was suppressed, and the conception of copyright was originated. We shall see, too, that the differences between the control exercised indirectly through the Stationers' company, and that exercised directly by the crown, are at the root of two very different theories as to the origin and nature of copyright.

(1) For the beginnings of the associations, which in 1556 were incorporated as the Stationers' company, we must go back to the fourteenth century.[1] In 1357 there is evidence of the existence of a society of writers of court hand and text letters.[2] In 1403, these writers of text letters, and those "commonly called limners (i.e. illuminators), and other good folks, citizens of London, who were wont to bind and sell books," were formed into a craft presided over by two wardens, the one a limner and the other a text writer, whose duty it was to provide for the "good rules and governance" of these allied crafts.[3] It would seem that about the same period the word "Stationer" was beginning to be applied to the men who thus made or dealt in books.[4] Certainly, in 1480, it was applied to persons whose craft consisted in binding, dressing, and gilding MSS.;[5] and it is probable, from the account given by Christopher Barker in 1582, that the word "Stationer" was applied to all the various members of this joint craft.[6]

With the rise of printing, changes necessarily took place. The craft of the printers was obviously closely allied to the craft of the Stationers; and Barker tells us that the Stationers "have, and partly to this daye do use to buy their bookes in grosse of the saide printers, to bynde them up, and sell them in their shops, whereby they well mayntayned their families."[7] The Stationers thus appear as the persons who bought from the printers the books which they bound and sold. They were the

[1] For this subject generally see the Introductions to vols. i, ii and iv of Arber's Transcript of the Stationers' Registers.

[2] Arber, op. cit. i *xxii*.

[3] Ibid *xxiii*—"that the names of the Wardens so elected may be presented each year before the Mayor, for the time being, and they be there sworn well and diligently to oversee, that good rule and governance is had and exercised by all folks of the same trades in all works unto the said trades pertaining."

[4] Ibid ii 5-6.

[5] Ibid iv 24, cites from the accounts of the Keeper of the king's Great Wardrobe in the City of London several disbursements to "Piers Bandwyn stacioner for binding gilding and dressing books."

[6] Ibid i *xx*—"In the time of king Henry the eighte, there were but fewe Printers, and those of good credit and of competent wealth, at whiche tyme and before, there was an other sort of men, that were writers, Lymners of books and dyverse things for the Church and other uses, called Stacioners.

[7] Ibid.

capitalists upon whom the printers depended.[1] And this view is confirmed by the provisions of the statute of 1533-1534, passed to regulate the prices of books, and to prohibit both the importation of foreign-bound books, and the retail sale by aliens of any printed books. The preamble to the statute makes it clear that the craft of printing was already allied with the crafts of book binding and book selling; but the statute itself protects, not the printers, but the book binders, the book sellers, and the book-buying public.[2] Thus it is not surprising to find that, when the new craft of printing allied itself with the older association of crafts connected with the production of books, the association was called by the name of its richer and more important members, and became first the craft, and then the company of Stationers.[3] From an early date the Stationers and text writers had settled round St. Paul's Churchyard; and the name Paternoster Row had been given to the street which they chiefly inhabited, because there they sold "all sorts of bookes, then in use, namely, A.B.C. or Absies, with the Pater noster, Ave, Creede, Graces, etc."[4]

To this company the Tudors entrusted the general supervision of the trades of printing, binding, publishing, and dealing in books.[5] Only those free of the company, or specially licensed by the crown, could print or publish;[6] and there were many complaints when the company's monopoly was infringed by a royal grant permitting the university of Cambridge to set up a printing press.[7] As with many other trades,[8] so with this, the Tudors gave the company large powers to make orders, to charge fees, to settle industrial disputes, to supervise the education of apprentices, to search for and destroy books printed in

[1] Barker says, Arber, op. cit. i *xx*, "In King Edward the sixt his Dayes, Printers and printing began greatly to increase, but the provision of letter, and many other thinges belonging to printing, was so exceeding chargeable, that most of those printers were Dryven Throughe necessitie, to compound before hand with the booksellers at so lowe value, as the printers themselves were most tymes small gayners, and often loosers."

[2] 25 Henry VIII. c. 15; a proviso in 1 Richard III. c. 9, which allowed the importation of foreign books, vol. ii 472 n. 1, was repealed.

[3] They were incorporated on 4th May, 1556; and on February 1st, 1560, they were made one of the liveried Companies of the City, Arber, op. cit. i *xxiv*; for Phillip and Mary's Charter, and Elizabeth's Confirmation see ibid i *xxviii-xxxii*.

[4] Ibid *xxv*, citing Stowe's Survey. [5] See the Charter, ibid *xxxi*.

[6] Ibid *xxx*, *xxxi*—"No person . . . shall practise or exercise by himself or by his ministers his servants or by any other person the art or mistery of printing any book or any thing for sale or traffic within this our realm of England or the dominions of the same unless the same person at the time of his foresaid printing is or shall be one of the community of the foresaid mistery or art of Stationery of the foresaid City or has therefore licence of us . . . by the letters patent of us. . . ."

[7] Arber, op. cit. i 108; ii 782, 813, 819; iv 527; cp. a remonstrance by the Company addressed to Burghley in 1576, against a proposed monopoly to print all ballads, and all books of under 24 pages.

[8] Vol. iv 321-322, 351-352.

contravention of any statute, Act, or proclamation.[1] In return, they expected the company to assist the government in preventing the publication of treasonable, seditious, or heretical books, in discovering the authors or printers of any obnoxious works that appeared, and in carrying out the regulations which they made from time to time.[2] In the performance of this task the system of registration of published books adopted by the company was an invaluable aid. Unless a printer or publisher had a special patent of privilege from the crown, authorizing him to print a certain book, or certain books of a defined class, he was expected to register with the company all books which he printed or published.[3] On each registration the company was entitled to a small fee.[4] This system no doubt helped to control the press. Moreover, it was not without its advantages to the printer or publisher; and it is this advantage which is interesting to the legal historian.

By registration the printer or publisher got an incontestable title to the book registered in his name. It therefore tended to give clearness and precision to the idea of literary property or copyright. The registers show us the growth of this idea. Copyright is protected by the imposition of penalties upon those who infringed it.[5] It is assigned,[6] sold,[7] settled,[8] given in trust;[9]

[1] See the clauses of the Charter, above 363 n. 6, and various proclamations cited above 311; cp. Arber, op. cit. i 159b; and for some good illustrations of the way in which they exercised their powers see the entries 1st February, 1594, 23rd October, 1597, ibid ii 393a-396a; for an order of 1635, made to settle certain industrial disputes, and to regulate the rights of masters and journeymen, see ibid iv 21-24.

[2] See the Star Chamber Decree of 1566, printed Arber, op. cit. i 145b; cp. Documents relating to the Bishop of London's search for and list of printing presses in 1583, ibid 107b-108b; the orders as to searches and inquiries (1576) ii 5a, 5b; and orders as to printing, ibid 6a, 6b.

[3] Arber, op. cit. ii 24, 25; for the licences granted by the crown see below 365-366; occasionally these patents were brought in to be confirmed by the Company, ibid i 32a.

[4] Ibid.

[5] See e.g. Arber, op. cit. i 121b—"Receved of Alexandre lacye for his fyne for that he printed *ballettes* which was other mens copyes. xiid."; such entries are frequent; see e.g. i 34b-35a for a list.

[6] Ibid iii 11a (1596)—"Assigned over unto him (William Leeke) for his copie from master harrison the elder, in full court holden this day by the said master harrison's consent A booke called Venus and Adonis"; ibid 78a (1602)—an assignment of Stowe's Chronicle; ibid 406-407 (1638)—an assignment of "all the estate right title and interest" in 68 works—"Salvo jure cujuscunque"; for an entry saving the rights of a particular person see ibid ii 283a (1591).

[7] Ibid i 114; this entry of 22nd July, 1564, is the earliest entry of such a sale; it runs as follows: "Receavyd of Thomas Marshe for his lycence for pryntinge of Dygges *Pronostication* and his *tectonicon* which he boughte of lucas haryson."

[8] Ibid iii 175a (1608)—"John Tapp and Thomas Mann *Junior* Entered for their copy parte and partelike betweene them duringe their lives only a booke called *the art of Navigacion*. As eyther of them shall dye his moyty shall fall to the disposicion of the Company.

[9] Ibid iii 123a (1605)—"Memorandum it is agreed that these copies thus entred

and limited grants are made.[1] Its duration is nowhere stated, unless it is expressly created for a limited period.[2] It is therefore most probable that it was perpetual; and if we regard it, as it was then clearly regarded, as a form of property, it would naturally be considered to be perpetual, unless a general enactment or order could be pointed to which expressly limited it. Nowhere can such general enactment or order be found. The only limitation on the right of the owner of the copy was an order of 1588 that, if a book was out of print, and, after warning, the owner did not reprint within six months, any member of the company could do so, provided that the author did not refuse, and the owner of the copyright was given such part of the profit as the Master and Wardens of the company might order.[3]

From the point of view of legal history, the invention of this new form of property is the most important result of the control over the press exercised by the Stationers' company in the sixteenth and early seventeenth centuries. But we have seen that the Tudors, though they gave large powers to companies of this kind, sometimes intervened to control directly the industries subject to their supervision.[4] This occurred in the case of the press as in the case of other industries. And, just as in the case of other industries this control gave rise to the conception of a patent right,[5] so, in the case of the press, it gave rise to further developments in the conception of copyright.

We have seen that the crown controlled other industries by granting patents of monopoly to certain favoured persons. It adopted the same plan with regard to the printing and publishing industry. Patents were issued to certain persons, giving them the monopoly of printing certain books, or certain kinds of books, for a certain period.[6] Thus, to take a few out of many instances, in 1559 R. Tottell had a licence to print during his life "all manner of books concerning the common laws of this realm";[7] and W. Seres had a licence for his life to print primers and books of private prayers.[8] In 1589 T. Bright, M.D., had a licence for fifteen years to print all works in shorthand, and any other works

for Edmund weaver may and shall be at the Disposition of master Thomas Wight to dispose of them to any freeman of this Companye."

[1] Arber, op. cit. iii 120b (1605)—"Grannted unto him the printing of one impression onely . . . paying to the use of the poore vid. in the li. for paper and printing. And agreying with master norton for suche numbers thereof as he hath unsold of the former impression"; ibid 176b (1608)—two licences to print one impression only.

[2] Above 364 n. 8.

[3] Arber, op. cit. ii 6a.

[4] Vol. iv 323-324.

[5] Ibid 345-354.

[6] See Arber, op. cit. i 115, 116, 144 for the part of Barker's report of 1582 describing the patents then in force; ii 15, 16 for a list between the years 1559 and 1599.

[7] Ibid ii 15.

[8] Ibid.

he might compile.[1] In 1623 George Wither, the poet, was given a monopoly for fifty-one years in his 'Hymns and Songs of the Church,' and certain other privileges.[2] In the majority of cases these privileges were given to the printers; and in many cases to the company of Stationers.[3] In fact the company sometimes protested against grants to other persons.[4] It would appear, from Barker's report to Burghley in 1582, that these grants were made in many cases to printers who were impoverished, owing to the fact that the most profitable copyrights had become the property of the booksellers;[5] and that these grants were not considered by Parliament to be contrary to public policy, can be seen from the fact that the Act of James I., which regulated monopoly patents, provided that it should not extend to "any letters patent or grants of privilege heretofore made or hereafter to be made of, for, or concerning printing."[6] The great legal interest of this device consists in the fact that it introduced two new ideas into the conception of copyright. In the first place, copyright no longer depended solely upon the registration by a member of the company of the particular book. It might originate in a grant from the crown, and therefore might belong, not only to a member of the company, but to anyone else. This device, therefore, helped to introduce the idea of author's copyright side by side with the copyright of the publisher or printer. In the second place, these patents introduced the idea of a copyright limited as to duration. Many of these grants were so limited;[7] and this, as we have seen, was a conception that did not appear with respect to copyright acquired by registration with the company.

But this method of controlling the press through the company of Stationers, and by means of monopoly patents granted to

[1] Arber, op. cit. ii 16. [2] Ibid iv 13.

[3] Ibid iii 42—a grant by James I. on 29th Oct., 1603, of the right to print Primers, Psalters, Almanacks, and Prognostications for ever; ibid 317, 317b—a second and larger grant to the same effect in 1616.

[4] See ibid iv 12-20 for an account of the controversy, literary and otherwise, between Wither and the Stationers' company; on Wither's petition, the Council had ordered the Stationers to respect his rights—apparently without much effect, S.P. Dom. 1633-1634 533, cclxiii 80.

[5] Arber, op. cit. i 114, 115—"The Booksellers being growen the greater and wealthier nomber have nowe many of the best Copies and keepe no printing howse, neither beare any charge of letter or other furniture but onlie pay for the workmanship . . . so that the artificer printer growing every daye more and more unable to provide letter and other furniture, requisite for the execution of any good work . . . will in tyme be . . . prejudiciall to the commonwealth. These considerations have enforced printers to procure granntes from her Majestie of some certayne Copies for the better mayntenance of furniture, Correctours, and other workmen, who cannot suddaynely be provided, nor suddenlye put away: and if they shoulde, must of necessitie either wantt necessarie lyving, or print bookes, pamphletts, and other trifles, more daungerous than profitable."

[6] 21 James I. c. 3 § 10. [7] Arber, op. cit. ii. 15, 16.

printers, publishers and others, was satisfactory neither to the state nor to the industry itself. The state, in its warfare against nonconformists, political and religious, found that it needed more stringent rules, and a better machinery for their enforcement. The industry itself suffered from these monopoly patents, because, the right to print a large number of the most profitable books having become vested in a favoured few, there was no chance for the journeymen to rise in their trade and become master printers. At the same time, as there was no adequate limitation upon the number of apprentices which a printer could take, the number of these discontented journeymen was constantly increasing. They formed an organization which systematically pirated the books belonging to the patentees.[1] Concessions were made, and a peace was patched up.[2] But the result of this controversy, which was being carried on between the years 1578 and 1586, was the assumption by the government of a direct control of the press. The Stationers' company still retained its powers and privileges. But, for the future, it was more closely supervised by the government, and its regulations became merely supplementary to the comprehensive ordinances issued by the government.

(2) The two detailed ordinances which controlled the press were issued by the Star Chamber in 1586 and 1637. It is to these two ordinances that we must look for the origin of the licensing laws. At the same time they recognize the new legal conception of copyright, to which the regulations of the company and the patents of the crown had given birth.

That the somewhat general orders hitherto issued by the Council,[3] and the control exercised by the company of Stationers, were insufficient means of restraint, had been for some time apparent. In 1577 William Lambard had drawn an Act, "to restraine the licentious printing, selling, and uttering of unprofitable and hurtful Inglishe books," and had further corrected it in 1580.[4] According to this Act, the press was to be subjected to the control of certain governors, without whose licence nothing was to be printed or published. The disorders in the company had emphasised the need for a general regulation of this kind; and therefore in 1586[5] an ordinance, much more comprehensive than Lambard's Act, was issued by the Star Chamber.

All presses were to be notified to the company. No printing was to take place in any place except London, Oxford, and

[1] For an account of this controversy see Arber, op. cit. ii 17-21; for some cases in the Star Chamber bearing upon it see ibid 753-769, 790-793, 794-800, 800-804.

[2] Ibid 784-785; see ibid 786-789 for the list of copyrights presented by the patentees for the use of the poor of the Stationers' company.

[3] For an order of 1566 see Tanner, Constitutional Documents 245-247.

[4] Arber, op. cit. ii 751-753.

[5] Ibid ii 807-812.

Cambridge. The archbishop of Canterbury and the bishop of London were to decide as to the number of presses needed; and no new press was to be set up till the number of presses had fallen below this limit. The company, the archbishop, and the bishop, were to act together in choosing a new master printer when a new appointment became necessary. All books must be licensed by the archbishop and bishop, except books issued by the queen's printer for the queen's service, and except books of the common law, which were to be licensed by the two chief justices and the chief baron. No books contrary to any statute or royal injunction were to be printed; and no books contrary to "any letters patentes commissions or prohibicions under the great seale of England, or contrary to any allowed ordynannce sett downe for the good governaunce of the Cumpany of Staconers." This last provision, it will be observed, prevented printing in breach of copyright. The number of apprentices which master printers could take was limited; and power was given to the company to search for and deface offending books, presses, and type. Printers, publishers, booksellers, or binders who took part in the issue of books contrary to this ordinance were liable to be prosecuted before the court of High Commission.[1]

The ordinance of 1637[2] is far more elaborate. It was caused, partly by the recrudescence of trouble between the journeymen and the master printers, but chiefly by the fact that the growing intensity of the political and religious controversies of the day seemed to require a more stringent control of the press. Thus, while the main part of the ordinance is concerned with licensing regulations, we get provisions designed to remedy the grievances of the journeymen, and to protect the copyrights of the printers and publishers. The provisions of the ordinance were to be enforced either by the court of High Commission or in the Star Chamber.

In the first place, it prohibited the publication or importation of all unlicensed books, and provided an elaborate scheme of licensing, together with subsidiary provisions designed to make it impossible that any unlicensed books should appear. Books of law were to be licensed by the two chief justices and the chief baron; books of history and politics by the secretaries of state; books of heraldry by the earl marshall; and "all other books, whether of Divinitie, Phisicke, Philosophie, Poetry or whatsoever" by the archbishop of Canterbury and the bishop of London. All books were to bear the names of the printer and the author.

[1] For an instance of such a prosecution see S.P. Dom. 1631-1633, clxxxviii 13.
[2] Arber, op. cit. iv 529-536.

No one who had not served a seven years' apprenticeship to the trade of bookseller, printer, or book-binder, was to trade in books. No more than twenty master printers were to be allowed; and no one of them was to have more than two presses, except one who had been master or upper warden of the Stationers' company, in which case he might keep three. No one was to erect or manufacture a press, or cast type, without notice to the company. Only four type founders were to be allowed. The number of apprentices which a master printer might have was limited. Large powers of search were given to the Stationers' company to discover breaches of the ordinance. Books imported were to be landed only at the port of London.

In the second place, the ordinance directly assisted the journeymen by provisions that only apprentices or free men of the company were to be employed to print, and that the company must take measures to provide employment for all journeymen who were out of work. A master printer was to be obliged to give work to at least one such journeyman if required to do so; and, conversely, a master printer could require any journeyman out of work to enter his employment.[1] Indirectly it assisted the journeymen by a provision that no English book should be printed beyond the sea and imported.

In the third place, copyright was protected by a clause which prohibited the forgery of the mark of the company upon any book, or of the mark of any person who had a privilege to print the book. Such books were not to be printed without the consent of the company, or the persons having the privilege to print.

This ordinance thus sums up and codifies the policy pursued during this period with regard to the press. The provisions as to licensing outline the policy which was pursued almost continuously till 1694. The industrial provisions in favour of the journeymen, and the powers of supervision given to the company of Stationers, simply apply to this industry the same policy as was pursued with reference to many other industries.[2] The provisions protecting the privileges of authors, printers, or publishers to the sole right of printing certain books, contain the germs of the law of copyright. But we should do well to note that, under these provisions, copyright is closely bound up, both with the privileges of the Stationers' company, and with the patents issued by the crown giving a sole right to print; and we shall see that this double origin of copyright has been the source of very

[1] Cp. the rules that an edition should consist only of a limited number of copies, that work might be provided for the journeymen, Arber, op. cit. ii 6a; ibid 883—a similar order of 1587.

[2] Vol. iv 321-322, 340-342, 380-383.

different theories as to its nature. Here, as in many other cases, the manner in which a right first gained adequate protection and recognition, has had a large influence upon its future development.[1]

The victory of the Parliament destroyed all this machinery for the control of the press, because it depended directly for its existence and motive power upon the prerogative of the crown, and upon the courts of Star Chamber and High Commission. What policy would the Parliament pursue? The matter did not long remain doubtful. A revolutionary government is peculiarly open to attack and peculiarly sensitive to criticism. At the same time the company of Stationers, and all the industries which they represented, feared that unlicensed printing would mean the loss of the valuable copyrights belonging to the company itself, and to its members.

In a petition, which they addressed to Parliament,[2] they pointed out that an unlicensed press was a danger to religion and to the state;[3] that the company was best fitted to be entrusted with the control of this industry;[4] and, further, that unless the industry was regulated, there was no security for copyright, without which the industries they represented would perish.[5] The destruction of copyright, they said, was the destruction of a species of property, the existence of which could be justified upon the same grounds as any other species of property.[6] Community of copies would make the trade in books hazardous, and be hurtful to the state, the trade, and the public. It would discourage authors from writing, and ruin orphans and widows whose estate consisted in the income derived from their copyrights. It would impoverish the company itself, because its chief wealth consisted in copyrights, and it would be therefore the less able to regulate the industries it represented, and to give

[1] Below 378-379. [2] Arber, op. cit. i 584-588.

[3] "It is not meere Printing, but well ordered Printing that merits so much favour and respect, since in things precious and excellent, the abuse . . . is commonly as dangerous, as the use is advantagious. . . . We must in this give the Papists their due; for as well where the Inquisition predominates, as not, regulation is more strict by far, than it is amongst Protestants; we are not so wise in our Generation, nor take so much care to preserve the true Religion, as they do the false from alteration."

[4] "The Stationers humbly desire to represent three things to the Parliament: (1) that the Life of all Law consists in prosecution. (2) That in matters of the Presse, no man can so effectually prosecute, as Stationers themselves. (3) That if Stationers at this present do not so zealously prosecute as is desired . . . that it is partly for want of full authority, and partly for want of true encouragement."

[5] "It [property in copies] is not so much a free privilege as a necessary right to Stationers; without which they cannot at all subsist."

[6] "There is no reason apparent why the production of the Brain should not be as assignable, and their interest and possession . . . held as tender in Law, as the right of any Goods and Chattells whatsoever."

pecuniary assistance to the state. Finally, unless some sort of regulation was made, there was no security against the importation of objectionable books from abroad, and no protection for the native industry. Milton pointed out in vain that it was perfectly possible to suppress mischievous and libellous books, and to protect copyright, without a system of licensing.[1] In vain he asked the Parliament "to consider what nation it is whereof ye are and whereof ye are the governors: a nation not slow and dull, but of a quick ingenious and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to." In vain he reminded them that "errors in a good government and in a bad are equally almost incident." His advice to Parliament to treat its detractors with contempt fell on deaf ears; and his vision of the nation, "as an eagle renewing her mighty youth, and kindling her undazzled eyes at the full mid-day beam, purging and unscaling her long abused sight at the fountain itself of heavenly radiance, while the whole noise of timorous and flocking birds, with those that love the twilight, flutter about, amazed at what she means," remained merely a vision. Milton's Areopagitica was, to use his own words, "a strain of too high a mood" to be appreciated by a mere representative assembly.

The ordinances of the Commonwealth all proceeded upon the lines indicated by the petition of the Stationers' company, and show a gradual approximation to the provisions of the Star Chamber ordinance of 1637. The ordinance of 1643[2] prohibited any publication of the orders of either House except by order of the House; and no other book was to be "printed, bound, stitched, or put to sale" unless both licensed and entered in the register of the Stationers' company.[3] The copyrights of the company and private persons were not to be infringed, either by printing or importing printed copies. Extensive powers of search and arrest were given to the company, in order that these

[1] "And as for regulating the Press, let no man think to have the honour of advising ye better than yourselves have done in that order published next before this: that no book be printed, unless the printer's, and the author's name, or at least the printer's be registered. Those which otherwise come forth, if they be found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectual remedy that man's prevention can use; . . . And, how it (the present order) got the upper hand of your precedent order . . . it may be doubted there was in it the fraud of some old patentees and monopolizers in the trade of bookselling, who, under pretence of the poor in their company not to be defrauded, and the first retaining of each man his several copy, which God forbid should be gainsaid, brought divers glorying colours to the House."

[2] Acts and Ordinances of the Interregnum (Ed. Firth and Rait) i 184-187.

[3] A list of licensers is appended to the Act; the categories are, law books, physic and surgery, civil and canon law, heraldry, small pamphlets, portraitures, pictures and the like, mathematics, almanacks and prognostications; only matter printed by order of either House or of the committee for printing escaped, ibid.

provisions might be duly carried out. The ordinance of 1647[1] provided again for the licensing of all printed matter, and ordered that the author's, printer's, and licenser's name should be on every book. The members of the committees for the militia in London, Middlesex, and Surrey, justices of the peace, and head officers of corporations, were to see to its enforcement. In 1649[2] a more elaborate ordinance was issued, even more closely modelled on the Star Chamber ordinance of 1637. In addition to provisions as to licensing, printing presses were restricted to London, the two Universities, York, and one press in Finsbury used to print the Bible and the Psalms; printers must enter into a bond of £300 to observe the ordinance; and no house could be let to a printer, nor implements for printing manufactured, without notice being given to the Stationers' company. Imported books must be landed in London only, and viewed by the master and wardens of the company before they were sold; and no books formerly printed in this country were to be imported. Copyright was not to be infringed. Hawkers of pamphlets and ballad singers were suppressed. In 1652-1653,[3] the whole business of printing was put directly under the control of the Council of State, which was to limit the number of presses, master printers, and apprentices. The Stationers' company was to carry out the rules laid down for it by the Council.

After the Restoration the provisions of the ordinance of 1637 were in substance enacted by the statute passed in 1662, "for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphets, and for regulating of printing and printing presses."[4] The Act was, in the first instance, passed for two years; but it was continued from time to time till 1679, when it expired.[5] It was revived again for seven years in 1685.[6] Its effect was to give statutory force to the measures which the crown had taken to control the press in the earlier part of the century, and, as we might expect, the crown did not suffer it to be a dead letter. The press was controlled both indirectly through the Stationers' company, and directly by the licensers appointed by the crown.[7] In 1662 L'Estrange was appointed

[1] Acts and Ordinances of the Interregnum i 1021-1023.
[2] Ibid ii 245-254.
[3] Ibid ii 696-699.
[4] 14 Charles II. c. 33.
[5] 16 Charles II. c. 8; 17 Charles II. c. 4.
[6] 1 James II. c. 17 § 15; one famous book—Marvell's Advice to a Painter—appeared in this short interval, Foxcroft, Life of Halifax i 172.
[7] See e.g. S.P. Dom. 1671 447 for an order of the king to the City of London to see that all printers belong to the Stationers' company and so are subject to their rules, a course recommended by L'Estrange in the preceding year, ibid 1670 436-437; in 1669 the company had been ordered to co-operate with L'Estrange, S.P. Dom. 1668-1669 446; and in 1670 the king promised to give him if necessary larger powers, ibid 1670 451-452; in 1690 an order was issued to the company to search for all unlicensed scandalous books and pamphlets, S.P. Dom. 1690-1691 74.

licenser; and he, as Arber truly says,[1] "gagged the London Press then, as it has never been gagged before or since."

Copyright cases were still heard by the Council;[2] and the crown availed itself of the exemption of the printing trade from the provisions of James I.'s statute of monopolies[3] to grant, both to individuals and to the company of Stationers, patents giving the sole right of printing books.[4] Occasionally a monopoly of this kind was pronounced to be void, when it gave a sole right to print such things as blank writs, which, by no stretch of the imagination, could be classed as books or pamphlets.[5] But generally they were upheld; and the prerogative of the crown to make these grants was asserted in the widest terms. Thus, in one case, a sole right of printing almanacs was defended on the grounds, either that the almanac was part of the book of common prayer, and therefore based upon "a public constitution," so that the king had the sole right to print it; or that it had no certain author and therefore the copyright, being a sort of res nullius, vested in the king.[6] In another case, the sole right of the king to print psalters and primers was said to rest upon the fact that he was head of the church; and it was said that he could restrain and license prognostications of all kinds, because otherwise it would be of dangerous consequence to the government.[7] Similarly

[1] The Term Catalogues i Pref. xiii; for an interesting report sent by L'Estrange to Williamson see S.P. Dom. 1667-1668 357-358—"it is not easy," he says, "to govern the license of the press, and those who serve therein should be rewarded. If you cannot make sure of destroying the offenders utterly, it will be better to let them alone till an opportunity offers of making them sure"; for a dispute between him and the Stationers' company, in the course of which a quo warranto was issued against their charter, see ibid 1673 413.

[2] Pepys, Diary viii 64, "Up and to attend the Council, but all in vain, the Council spending all the morning upon a business about the printing of the Criticks, a dispute between the first Printer, one Bee that is dead, and the abstractor, who would now print his abstract, one Poole."

[3] Above 366.

[4] "Prohibition to any person to print for five years any portions of the history of the Worthies of England, compiled by Dr. Thos. Fuller, excepting his son John Fuller, to whom the copyright belongs," S.P. Dom. 1663-1664 67; in 1664 Clarendon asked the secretary, Benet, to give Samuel Butler a licence for the sole printing of the first, second, and third parts of Hudibras, ibid 1664-1665, 139; in 1675-1676 Robert Scott, the publisher of Selden's MSS., wanted a licence of sole printing for twenty years, ibid 1675-1676 542.

[5] Mounson v. Lyster (1632) W. Jones 231-232—the grant was of, "le sole fesans de touts bills et informations destre preferre ou exhibite devant le Councell de Yorke in partibus borealibus et de touts letters missive"; the same point was decided in the earl of Yarmouth v. Darrel (1686) 3 Mod. 75; cp. 2 Rolle Ab. 214 pl. 4.

[6] The Company of Stationers v. Seymour (1677) 1 Mod. 257—"There is no difference in any material part betwixt this almanack and that which is put in the rubrick of the Common Prayer. Now the almanack that is before the Common Prayer proceeds from a public constitution . . . so that almanacks may be accounted prerogative copies. . . . There is no particular author of an almanack; and then, by the rule of our law, the King has the prerogative in the copy"; cp. the Company of Stationers v. Partridge (1711) 10 Mod. 105.

[7] The Company of Stationers v. Lee and others (1682) 2 Shower at pp. 259, 260.

the king was said to have the sole right to print books dealing with matters of state or with law; and, that being so, he could grant this right to others. No one, it was said, could discuss matters of state without his sanction;[1] while the copyright of all law books must belong to him because the laws were the king's laws.[2] Even the legend about the official reporters of Year Books was pressed into the service of those who argued for the king's patentee—the king had paid for their production, and therefore he alone had a right to print them.[3] So far were these rights pushed that, when the king's patentee had got hold of the MS. of the third part of Croke's reports and printed it without the consent of the owner, the House of Lords refused to give the owner any redress.[4] We shall see that the result of the law laid down in these cases was to perpetuate the confusion introduced by the Star Chamber ordinances as to the principles upon which the law of copyright was based.[5]

No immediate change was made in the licensing laws at the Revolution. As Macaulay has said, the restrictions imposed by them "were in perfect harmony with the theory of government held by the Tories," while "they were not in practice galling to the Whigs," because the new licenser—one Fraser—was a zealous Whig. But the existing Act expired in 1692; and at that time the injudicious conduct of Bohun, Fraser's successor, had, by arousing the party feelings of the Whigs, called pointed attention to the shortcomings of the law, and raised the whole question of the control of the press. Tracts, consisting largely of garbled extracts from the Areopagitica, brought Milton's arguments before the public.[6] And these arguments, coupled with the change which the Revolution was producing in men's political ideas, and in the economic and industrial policy of the state,[7] worked together to produce a body of opinion hostile to the licensing

[1] "Matters of State and things that concern the Government were never left to any man's liberty to print that would," Company of Stationers v. Seymour (1677) 1 Mod. at p. 258.

[2] "The king hath a particular prerogative over law books, and so he would have had, if the art of printing had never been known. The reasons are, 1. All the laws of England are called the King's laws," the Stationers v. the Patentees about the printing of Roll's Abridgment, Carter's Rep. 89 at p. 91; cp. S.P. Dom. 1667-1668 481-482.

[3] Carter's Rep. at p. 91—"the salaries of the Judges are paid by the King; and reporters in all Courts at Westminster were paid by the King formerly"; cp. Millar v. Taylor (1769) 4 Burr. at p. 2327 *per* Willes, J., citing a note of Lord Hardwicke's judgment.

[4] Roper v. Streater (1672), cited in Company of Stationers v. Parker (1686) Skin. at p. 234; see Hist. MSS. Com. 9th Rep. App. Pt. ii 38 no. 145.

[5] Above 369-370; below 378-379.

[6] See Macaulay, History of England (ed. 1864) iii 398-405.

[7] Above 333 seqq.

system which had so long prevailed. The licensing laws obviously gave large powers to the crown, and authorized many interferences with individual liberty. On these grounds the Whigs were naturally opposed to them. They also interfered with the liberty, not only of the printing trade, but also with the industries of book binding, book selling, type founding, and printing press making; and, as we have seen, exclusive licences given to print certain kinds of books, prevented authors from freely disposing of their works, and might easily prevent a book from being printed at all. These results naturally attracted a political and a literary opposition, and also an opposition from all the trades affected by the Act. The fact that these trades desired some change can be seen from a petition to the House of Lords, from the representatives of these trades in 1692, that the House would hear them before they renewed the Act.[1] In that year a minority in the House of Lords wished to refuse to renew the Act of Charles II.; and, following Milton's suggestion, to allow any book to be printed, provided that the name of the author and printer appeared on it. Their protest illustrates very well the nature of the various kinds of objections—philosophical, political, and economic—which were beginning to accumulate against this legislation. The present law, it was said, "subjects all learning and true information to the arbitrary will and pleasure of a mercenary and perhaps ignorant licenser;[2] destroys the property of authors in their copies; and sets up many monopolies."[3]

These objections did not then prevail, and the Act was renewed for two years. But the question of the policy of the law had been brought into prominence; and during the ensuing two years the objections to it were gradually realized by an increasing number of persons. They prevailed with the House of Commons, who, in 1694, declined to renew the Act. The House of Lords wished to renew it. But, at a conference, the House of Commons produced eighteen reasons against its renewal, which are said to have been drawn up by Locke; and these reasons appear to have convinced the House of Lords.[4] Some of them are based on logical absurdities which were discovered in the provisions of the Act. The Act, it was said, did not accomplish the end for which it was designed. It was designed to suppress treasonable and

[1] Journals of the House of Lords, March 4, 1693.

[2] As Selden, Table Talk, speaking of books and authors, says—"Who must be judge? The customer or the waiter? If he disallows a book, it must not be brought into the kingdom; then lord have mercy upon all scholars."

[3] Journals of the House of Lords, March 8, 1693; cp. Foxcroft, Life of Halifax ii 167.

[4] Journals of the House of Lords, April 18, 1695; Journals of the House of Commons, April 17, 1695; Macaulay, History of England iv 78.

seditious books; but no particular penalty was imposed for the publication of these books, which were left to be dealt with by the common law. On the other hand, it penalized conduct which in no way concerned the safety of church or state. Neither House of Parliament could authorize the printing of documents which they might think it desirable to publish. Custom House officers must open packets of imported books in the presence of one of the company of Stationers; but how can it be known that the packet contains books till it is opened? Smiths must not make iron work for presses without notice to the company; but how can a smith know whether any particular piece of iron work is to be used for a press? Other reasons were based upon the powers of oppression which the Act gave to the licenser and the company, and the arbitrary penalties which might be imposed under it. Others were based upon the new ideas, which were beginning to prevail, as to the injustice of fettering unduly the freedom of the individual. Why should the trade in books be confined to the port of London? Why, when imported, should they wait an indefinite time till they had passed the licenser? Why should restrictions be placed on the industries of type founding and bookselling? Why should the number of workmen be restricted? Why should there be an obligation to employ workmen when there was no work for them to do? Other reasons were based upon the hardships to authors. They were fettered by the rights of patentees, whose privileges were based upon crown grants of doubtful validity, and by the privileges of the company of Stationers, who could hinder, perhaps from corrupt motives, the publication of useful books. Other reasons were based on the harm done to learning. The most useful and essential books were monopolized by the patentees. These were often badly printed; and, as foreign editions of such books could not be imported, scholars could not get the best editions.

These arguments are on a different plane from those which Milton had used without success. But, because they were suited to the temper of the times, and to the comprehension, both of the assembly which used them, and of the assembly to which they were addressed, they succeeded where Milton had failed. The Licensing Act disappeared for ever; and, with it, disappeared the whole of the machinery for the regulation of the printing and other cognate trades, which had been laboriously built up by the Tudor and early Stuart kings, in substance continued under the Commonwealth, and given Parliamentary sanction after the Restoration.

There is reason to think that Parliament did not mean to abandon completely the older policy. Two petitions, similar to

those addressed to Parliament in 1643,[1] had been presented to the House of Commons. One, from the company of Stationers, represented the danger that would ensue to the owners of copyrights if nothing was substituted for the Act.[2] The other, from members of the printing trade, pointed out the dangers of leaving the trade open, and the advantages of restricting the number of workmen and apprentices.[3] The House of Commons appointed a committee to prepare a bill to establish a new set of regulations for the printing trade;[4] and it may well be that the knowledge that such a bill was contemplated, caused the refusal to renew the Licensing Act to pass without remark. But this bill never matured, and so the whole of the older law disappeared.

The legal results were important, and not unlike those which flowed from the destruction of other prerogative powers. On the one hand, the importance of common law principles was increased. The press, having been freed from the control of a licenser, remained subject only to the restrictions imposed by the law of libel. Hence, in the following period, the law of libel attained a greatly increased importance in public law, which contributed materially to its elucidation and development. On the other hand, much was swept away that it was soon found necessary to replace in an altered form. Copyright had so long depended upon the privileges granted by the crown, and had been so long protected by the penalties provided in the Licensing Act, that the withdrawal of these privileges, and the abolition of these penalties, left its legal position very obscure. Did it really exist? And, if so, how was it to be protected? The necessity for dealing with this problem caused the passing of the Copyright Act of 1709,[5] which is the starting point of the development of the modern law on this subject.[6] With the ascertainment of

[1] Above 370. [2] Journals of the House of Commons, March 30, 1694.

[3] Ibid, April 1, 1694.

[4] Ibid, Feb. 11, 1694; Feb. 27, other members were added; March 2, bill presented; March 7, read a first time; March 11, order for second reading; April 1, read a second time; April 3, additional powers given to the committee; for another bill introduced into the House of Lords in 1698-1699, which attempted to regulate the press much in the old way, which failed to pass that House, see House of Lords MSS. iii 271 no. 1339; ibid iv 420 no. 1706.

[5] 8 Anne c. 19.

[6] The owners of copyright had petitioned Parliament for a bill to protect their copyrights in 1703, 1706, and 1709; they pointed out that an action for damages was a wholly inadequate remedy, "for by the common law, a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay perhaps the hundreth part of the damage he suffers; because a thousand counterfeit copies may be dispersed into as many different hands, and he not be able to prove the sale of ten. Besides, the defendant is always a pauper; and so the plaintiff must lose his costs of suit . . . therefore the only remedy by the common law is to confine a beggar to the rules of the King's Bench or Fleet; and there he will continue the evil practice with impunity," cited by Willes, J., Millar v. Taylor (1769) 4 Burr. at p. 2318.

these results we have reached the conditions under which the development of the various branches of our modern law relating to the press will take place in the following period.

It is in the development, during this period, of the law relating to the control of the press that we must look for the origins of copyright, antecedent to the Act of 1709. Those origins must, as we have seen, be sought, partly in the action of the Stationers' company, and partly in the action of the crown. The Stationers' company had so protected copyright that it had come to be in substance a right of property;[1] and, their powers to give protection having been recognized by the common and statute law,[2] there was good ground for holding that a right of copyright existed at common law. But we have seen that the right was also based upon royal patents giving an exclusive right to print;[3] and that both the rights gained by registration with the company, and the rights granted by these patents, were protected, in the earlier part of the seventeenth century, by the courts of High Commission and Star Chamber; and, in the latter part of the century, by the remedies provided by the Licensing Act. Plaintiffs naturally had recourse to these remedies, and not to unsatisfactory actions for damages at common law;[4] and this gave rise to the view that copyright was not so much a right of property recognized by the common law, as a right dependent upon royal grant, exercised directly in favour of a patentee, or indirectly through the powers conferred by the crown on the company. As all the cases of copyright reported during this period turned on the rights of these royal patentees, the right was naturally treated by the courts as dependent upon royal grant.

In the eighteenth century the question whether or not copyright existed at common law, independently of royal grant, was elaborately argued in the case of *Millar* v. *Taylor* in 1769.[5] The majority of the court of King's Bench decided that it was a right of property which existed at common law. But, shortly afterwards, the decision of the House of Lords in *Donaldson* v. *Beckett*[6] that copyright depended solely on the Act of 1709, made the question one of merely academic interest. It was a question, however, upon which the most divergent opinions continued to

[1] Above 364-365.

[2] 14 Charles II. c. 33 § 5 distinctly recognizes that copyright is gained either by virtue of royal letters patent, or by registration with the Stationers' company; for an interesting case turning upon such registration see Genealogical History of the Croke Family ii App. xxx 855-857.

[3] Above 365-366, 373-374.

[4] Above 377 n. 6.

[5] 4 Burr. 2303.

[6] (1774) 4 Burr. 2408.

exist. In 1854 this divergence clearly appears in the opinions of the judges, and in the judgments of the House of Lords, in the case of *Jeffreys* v. *Boosey*.[1] But it can hardly be doubted that the view taken by the majority of the judges, both in this case and in the cases of the eighteenth century, that it existed at common law, is historically correct.[2] Many of these judgments, and notably the judgment of Erle, J., in *Jeffreys* v. *Boosey*, display a remarkable historical insight into the origins and mode of development of this branch of the law. As Erle, J., points out, and as the history which I have just related shows, the fact that there are hardly any common law actions for infringment of copyright before the Act of 1709, is not conclusive against the existence of copyright at common law. Their absence is fully accounted for by the fact that more convenient remedies then existed which plaintiffs naturally employed.[3] To suppose that copyright depended solely on royal patents or on these special remedies, is to ignore the manner in which the Stationers' company had, without any reference to these patents or these remedies, built it up on the basis described by Erle, J., as "the most elementary principles of securing to industry its fruits, and to capital its profits."[4]

The Statute of Frauds[5]

The Statute of Frauds is the most important of the few statutes of the seventeenth century which are concerned solely with the technical doctrines of English private law. The reasons for its importance are mainly four. Firstly, it affects many different branches of the law. Secondly, the large mass of judicial decisions, to which many of its clauses have given rise,

[1] 4 H.L.C. 815.

[2] The state of judicial opinion is thus summed up by Erle, J., 4 H.L.C. at p. 875, "In the learned conflict ending with *Donaldson* v. *Beckett* the numbers for copyright at common law are in a great majority; Lord Mansfield, Aston, and Willes, JJ., against Yates in *Millar* v. *Taylor;* and ten judges against one for copyright at common law, and either eight judges against three, or seven against four, for an action for infringment in *Donaldson* v. *Beckett*"; later, Lords Kenyon and Ellenborough were of the same opinion as Yates, J.; in Jeffreys v. Boosey, Erle, Wightman, Maule, JJ., and Colridge, C.J., were in favour of the view that copyright existed at common law; Jervis, C.J., Pollock, C.B., Parke, B., and Lords Brougham and St. Leonards were against it; Crompton, J., Alderson, B., and Lord Cranworth, L.C., did not express an opinion.

[3] 4 H.L.C. at p. 876; Erle, J., said that, "no record of an action on the case for infringment of copyright prior to the statute of Anne, has been found"; but there appears to be a reference to such an action in The Company of Stationers v. Parker (1685) Skin. 234-235, where it is said that, in The Company of Stationers v. Wright (1683) the company brought an action on the case on their patents; and cp. Ponder v. Bradyl, Lily's Entries 67, in which an action on the case was brought for printing the Pilgrim's Progress, but was not proceeded with, *per* Willes, J., Millar v. Taylor 4 Burr. at p. 2317.

[4] 4 H.L.C. at p. 870.

[5] 29 Charles II. c. 3.

have made important additions to many departments both of law and equity. Thirdly, though some of its clauses have been modified or replaced by later legislation, the principles which it has introduced, and many of the detailed applications of those principles which have been worked out by the courts, are part of our law to-day. Fourthly, the most divergent views as to the effects of the statute have been expressed, both by the judges who have interpreted and applied it, and by writers who have explained and systematized the branches of law affected by it.

It is clear that in a history of English law a detailed consideration of the clauses of this statute, and their interpretation, would be out of place. It is equally clear that in such a history some account must be given of its origins, its contents, the causes for its enactment, and its subsequent history. I shall therefore deal with it under the following heads: (1) its enactment and authorship; (2) its contents; (3) the statute in relation to the law of the seventeenth century; and (4) its later history.

(1) *The enactment and authorship of the statute.*[1]

The present statute of Frauds is the last of four attempts to pass a law for the prevention of frauds and perjuries. We can see the manner in which the statute actually enacted assumed its present shape, and form some conclusions as to the persons responsible for it, if we examine these four attempts in chronological order.

(i) On February 16, 1673, "An Act for preventing many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury," was read a first time in the House of Lords; and on February 20, 1673, it was committed under the title, "An Act for the prevention of Frauds and Perjuries."[2] The committee met and adjourned, but took no further proceedings.[3] This was a comparatively short bill, which was possibly drafted by the future Lord Nottingham, and certainly contains an amendment in his handwriting.[4] The text

[1] On this matter the authorities are the Ninth Report of the Royal Commission on Historical MSS. Pt. ii; the Journals of the House of Lords and House of Commons; and a paper by Crawford D. Hening on "The Original Drafts of the Statute of Frauds and their Authors" in Pennsylvania Law Rev. lxi 283-316, in which the information contained in the above cited authorities, and from other sources, is collected, and facsimiles of parts of the original drafts of the statute, and amendments to them, are given.

[2] Journals of the House of Lords xii 638, 645; it will be observed that the bill on its first reading is referred to by its preamble and is not called by its title, Ninth Rep. etc. Pt. ii App. 45.

[3] Ibid.

[4] E. Fairfax Taylor, and Felix Skene, who calendared the House of Lords MSS. say, Ninth Rep. p. 45, "this draft is apparently in the careful handwriting of Lord Keeper Finch; the corrections upon it are undoubtedly in his hand"; Mr. Hening, Penns. Law Rev. lxi 288-289, has printed in facsimile a part of the draft amended, together with a letter of Finch, which makes this quite clear.

of the bill will be found in the Appendix,[1] and it may be summarized as follows: Firstly, interests in land created by parol, and not put into writing by direction of the parties, were to have the effect of estates at will merely. An addition to this clause, in Lord Nottingham's handwriting, made a deed or note in writing necessary for the assignment, transfer, or surrender of these interests. It will be observed that this clause differed from the corresponding clause in the statute ultimately passed, in that there is no provision for signature by the parties or their agents. Secondly, in actions for debt and other personal actions on parol contracts, of which no memorandum in writing was taken by the direction of the parties, no more than a fixed amount of damages (the amount is left blank in the draft) was to be recovered; but the clause was not to apply to contracts for goods sold or money lent, or to obligations to pay upon a quantum meruit, or upon a contract created by construction of law. Here again there is no provision as to signature by the parties. Thirdly, wills of lands made in time of sickness were to be void, unless the testator was, after the making thereof, seen abroad in some public place. No will of lands was to be revocable by parol, but only by some other will, codicil, or instrument in writing. Nothing was said about wills of chattels personal. Fourthly, declarations, creations or assignments of trust, other than trusts arising or resulting by operation of law, must be made in writing. Fifthly, trust estates were made liable to execution for the debts of the cestuique trust. Sixthly, trust estates in fee simple descending to the heir were to be liable to the debts of the deceased in the same way as legal estates.

(ii) On April 14, 1675, the House of Lords read a first time another "Act for prevention of Frauds and Perjuries."[2] It passed its second reading on the following day, and was committed.[3] Lord Nottingham was not on the committee.[4] On the 19th, North, C.J., and Windham, J., were ordered to attend the committee.[5] On May 10 it was reported with amendments, and ordered to be engrossed.[6] On May 12 it was read a third time, and sent to the Commons.[7] On May 26 it was read a first time by the Commons;[8] but it was not committed, and, owing to a prorogation of Parliament, it dropped.[9] This bill, when it was

[1] App. I.; it is printed Penns. Law Rev. lxi 285-287; and the points in which it differed from the statute ultimately passed are summarized, ibid 289-290.
[2] Journals of the House of Lords xii 656.
[3] Ibid 659.
[4] Ibid; Penns. Law Rev. lxi 291.
[5] Journals of the House of Lords xii 662.
[6] Ibid 686.
[7] Ibid 689; Journals of the House of Commons ix 335.
[8] Ibid 345.
[9] Penns. Law Rev. lxi 309.

introduced, was the bill of 1673 as amended by Lord Nottingham.[1] It was the amendments and additions made to it in committee that caused this bill to assume substantially the shape of our present statute of Frauds.[2] The amendments were made in the committee to which, as we have seen, North, C.J., and Windham, J., had been added; and many were suggested by North.[3] The additions were chiefly due to North, C.J., and Sir Leoline Jenkins. To North was due the clauses as to the estate pur autre vie;[4] as to the time from which a judgment bound the lands of the person against whom it was given, and as to the binding effect of judgments upon lands in the hands of bona fide purchasers for value;[5] as to the time from which writs of execution bound the goods of the person against whom the writs were sued forth;[6] as to contracts for the sale of goods;[7] as to the enrolment of recognizances;[8] and the proviso to the clause making trust estates assets by descent.[9] To Sir Leoline Jenkins was due the raw material for the clauses as to nuncupative wills of personalty, and as to the probate of such wills.[10] The clause declaring that the statute of Distribution was not to apply to the husband who took administration to his wife's estate, seems to have been added by the committee. A copy of the draft of the bill thus amended will be found in the Appendix.[11]

(iii) On October 14, 1675, the House of Lords read for the first time a bill substantially similar to the last-mentioned bill, as amended by the committee.[12] It was read a second time on November 12 and committed.[13] Edward Turner, the Chief Baron, and Littleton, B., were directed to assist the committee.[14] The committee met twice; and the Chief Baron and Littleton, B.,

[1] Penns. Law Rev. lxi 290.

[2] "It was in the deliberations and meetings of this committee, which extended from April 17 to May 6, 1675, that the draft of the bill was wholly altered in structure and detail; and the bill as finally reported by this committee has in general the scope, and, with only some minor differences, the exact language of the statute," ibid 291.

[3] See the minutes of the committee printed in Penns. Law Rev. lxi 291-296.

[4] 29 Charles II. c. 3 § 12. [5] §§ 13, 14, 15.

[6] 29 Charles II. c. 3 § 16. [7] § 17. [8] § 18.

[9] § 11; Mr. Hening has printed the clauses proposed by North with his amendments, which were incorporated by the committee in the bill, Penns. Law Rev. lxi 297-300; and he has printed in facsimile the proviso to the clause making trust estates assets by descent, which was added to the drafts of 1675 and 1676, ibid 296 and n. 10, and 312-313.

[10] §§ 19-24; Mr. Hening prints the clauses as drawn by Jenkins, Penns. Law Rev. lxi 300-301, and the same clauses as they emerged from the committee, ibid 301-303; for Jenkins see vol. i 555, 557, 566; some further account of him will be given in a succeeding volume; Jenkins' clauses are also printed in Ninth Rep. Hist. MSS. Com. App. 49.

[11] App. I.

[12] Journals of the House of Lords xiii 7; Penns. Law Rev. lxi 309, 310.

[13] Journals of the House of Lords xiii 20; Penns. Law Rev. lxi 310.

[14] Ibid.

told it that they had "perused the bill and finde not a worde to be altered in it."[1] The further progress of the bill was stopped by a prorogation.

(iv) On February 17, 1676-1677, the same bill was again introduced into the House of Lords and read a first time.[2] It was read a second time on February 19; and North, C.J., Windham, Jones, and Scroggs, JJ., were ordered to assist the committee.[3] On March 6 it was reported with amendments, and ordered to be engrossed.[4] On March 7 it was read a third time and sent to the Commons.[5] On the 13th it was read a first time by the Commons, and ordered to be read a second time in a full House.[6] It was read a second time on April 2 and was sent to a large committee, to which all the lawyers in the House were added.[7] On April 12 it was reported with amendments.[8] On the same day all the amendments, except one to make the bill temporary, were agreed to, and it was read a third time, and sent to the Lords,[9] The Lords agreed to the Commons' amendments on the same day,[10] and it received the royal assent on April 16.[11]

The amendments made by the committee of the House of Lords were not important,[12] and those made by the committee of the House of Commons were even less important.[13] It may be noted that the proviso to the clause making trust estates assets by descent was again drawn and put forward by North, C.J., and inserted in the bill.[14]

The conclusions as to the authorship of the statute to be

[1] See extracts from the committee book of the House of Lords, Penns. Law Rev. lxi 310, 311; Hist. MSS. Com. 9th Rep. App. no. 291, p. 66.

[2] Journals of the House of Lords xiii 43.

[3] Ibid 45.

[4] Ibid 62.

[5] Ibid 63; Journals of the House of Commons ix 394.

[6] Ibid 398.

[7] Ibid 410.

[8] Ibid 419.

[9] Ibid.

[10] Journals of the House of Lords xiii 111.

[11] Ibid 120.

[12] They are summarized by the 9th Rep. of the Hist. MSS. Commission Pt. ii App. no 336 p. 69 as follows :—"These are to introduce the words 'not being copyhold or customary interest' in § 3, and the words 'in or,' before 'concerning' in § 4, to change 'and no other person' into 'or by some other person' in § 5, to introduce the words 'which lands and tenements rectories tythes rents and other hereditaments by force and virtue of such execution shall accordingly be held and enjoyed free and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for ye person against whome such execution shall be sued' in § 10, and the words 'till fourteen days at the least' in § 20."

[13] The committee records of the House of Commons perished in the fire which destroyed the Houses of Parliament, see Penns. Law Rev. lxi 313; but the 9th Rep. of the Hist MSS. Commission Pt. ii App. no. 336 p. 69 says, "As amended in the Lords' Committee it is identical with the Act 29 Car. II c. 3, except that the words, 'where the estate thereby bequeathed shall exceed the value of twenty pounds,' and 'or where he or she shall have been resident for the space of ten days or more next before the making of such will' in § 18 are wanting in the Draft, which moreover has 'three days' instead of 'six days' in § 19."

[14] Penns. Law Rev. lxi 312; it appears as § 11 of the statute.

drawn from this discussion substantiate the claims made by Lord Nottingham in *Ash* v. *Abdy*,[1] and for North, C.J., by his brother.[2] Lord Nottingham is responsible for the original draft of §§ 1, 3, 6, 7, 8, 9, 10, though many of these clauses were subsequently altered in committee.[3] North helped to draft §§ 2, 4, and 25, and he drafted §§ 5 and 11-18.[4] But, though Nottingham and North are mainly responsible for the statute, they were helped by Jenkins, who supplied the raw material for §§ 19-24,[5] and by the other judges and members of the committees of April 17 to May 6, 1675, and February 20 to March 6, 1676, who put into their present form §§ 2, 4, 6, 9, 10 and 25.[6] Thus Nottingham's statement that the Act had had its first rise from him, but that it had afterwards received some additions and improvements from the judges and civilians,[7] is substantially accurate; though it neither lays sufficient stress on the importance of these additions and improvements, nor gives us any hint of the facts that North's share in the authorship of the statute is at least equal to Nottingham's, and that many of the amendments, which gave the statute its present form, are due to him.

We must now turn to the contents of the statute.

(2) *The contents of the statute.*[8]

The statute is stated to be passed, "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury"; and most of its clauses are concerned with carrying out this object, by making written or other adequate evidence necessary for certain transactions. The transactions thus required to be evidenced in a prescribed way are: (i) Certain conveyances of interests in land. Leases, estates, and interests in freehold, or terms of years, or any uncertain interests in land (other than leases not exceeding three years at a rent of two-thirds the full value) must be in writing,

[1] (1678) 3 Swanst. 664, "And I said that I had some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received some additions and improvements from the Judges and Civilians."

[2] Lives of the Norths i 141, "He had a great hand in the Statute of Frauds and Perjuries, of which the Lord Nottingham said that every line was worth a subsidy. . . . For I find in some notes of his and hints of amendments in the law, every one of those points which were there taken care of"; but there seems to be no evidence for his statements that Hale had something to do with the preparation of the statute, and that it originated with North.

[3] Penns. Law Rev. lxi 314, 315. [4] Ibid 314-316.

[5] Ibid 316. [6] Ibid 314-316. [7] Above 382 nn. 9 and 10.

[8] In the Record Commission edition of the statutes § 13 includes §§ 13 and 14 of the ordinary editions; for convenience I have adopted the numbering of the §§ in the ordinary editions, though the numbering of the Record Commission edition is clearly more correct; in the preceding section I have followed the correct numbering of the Record Commission of the statutes.

signed by the parties. If they are not, they will have the force only of estates at will. Assignments and surrenders of such interests must also be in writing.[1] (ii) Wills of real estate must be in writing signed by the testator, or by some other person in his presence and by his direction, and attested in his presence by three or four credible witnesses; and such wills were only to be revocable, either by another will or codicil executed in like manner; or by a writing signed by the testator in the presence of three or four witnesses declaring the will revoked; or by the destruction or obliteration of the document by the testator, or by some one else in his presence and by his directions and consent.[2] The statute did not apply to the execution of wills of personal property if the estate was of the value of £30 or less,[3] or if it was a will of a soldier on actual military service or of a mariner or seaman at sea.[4] But, in other cases, a nuncupative will of personal property was not to be valid unless (*a*) it was proved by the oath of three witnesses who were present at its making, and were requested by the testator to bear witness to it; and (*b*) it was made during the last sickness of the deceased, and in the house in which he had been resident ten days before its making.[5] Further, after a period of six months from the making of a nuncupative will, no testimony was to be received to prove it, unless such testimony had been committed to writing within six days of its making.[6] No written will of personal estate was to be revoked or altered by words, or by a nuncupative will, unless the words were, in the lifetime of the testator, committed to writing, and proved by three witnesses to have been read to and allowed by the testator.[7] (iii) Declarations or assignments of trust. Declarations or creations of trusts of lands or tenements must be "manifested and proved" by a writing signed by the party creating the trust, or by his will in writing.[8] The same

[1] 29 Charles II. c. 3 §§ 1-3.

[2] §§ 5, 6; for some of the reasons for the enactment of this clause see below 389-390, 394-395.

[3] § 19.

[4] § 23.

[5] § 19; there was an exception as to the last requirement, "where such person was surprised or taken sick being from his own home and died before he returned to the place of his or her dwelling"; for the reasons for the enactment of this clause, and its earlier interpretation see Real Property Commission, 4th Rep. App. 27.

[6] § 20; in order that the hasty grant of probate or letters of administration might not render nugatory the provisions of §§ 19 and 20, it was provided by § 20 that no such grant should be made till after fourteen days from the death; and that probate of a nuncupative will should never be granted till the widow or next of kin had been cited to see if they wished to contest the will.

[7] § 22; ex abundanti cautela it was provided by § 24 that, subject to the foregoing provisions, nothing in the Act was to affect the jurisdiction of the ecclesiastical courts over the probate of wills.

[8] § 7; the § applies to land of copyhold tenure, Acherley v. Acherley (1732) 1 Bro. P.C. 273; Withers v. Withers (1752) 1 Amb. 151; and to leases for years, Riddle v. Emerson (1682) 1 Vern. 108.

form was required for the grant or assignment of any trust;[1] but the statute was not to apply to trusts which arose or were transferred or extinguished by operation of law.[2] (iv) Contracts. Five classes of contracts were declared to be unenforceable by action unless evidenced by a note or memorandum in writing signed by the party to be charged therewith;[3] and contracts for the sale of goods for the price of £10 or upwards were not to be "allowed to be good," unless evidenced by either acceptance and actual receipt, or by a gift of something as earnest, or by part payment, or by a note or memorandum in writing signed by the parties to be charged.[4]

Besides these clauses, which were directed to securing written or other adequate evidence for certain transactions, the statute made some amendments in the land law, the law of procedure and in the law of succession to chattels. The main object of the amendments in the land law was to give creditors wider and better remedies against their debtors' land. Equitable interests in land were growing in importance, now that the use upon a use was enforced as a trust;[5] and so the statute provided that these equitable interests should be liable to be taken in execution on a judgment, and should be assets by descent binding the heir, as if they were legal interests.[6] The estate pur autre vie[7] was made devisable by a will executed in the form provided for a will of real property.[8] If such an estate was not devised, and

[1] § 9. [2] § 8.

[3] § 4; they are (1) a special promise by an executor or administrator to answer damages out of his own estate; (2) a promise to answer for the debt, default, or miscarriage of another person; (3) an agreement made in consideration of marriage; (4) contracts or sales of any lands, tenements, or hereditaments or any interest in or concerning them; and (5) an agreement which is not to be performed within a year from the making thereof.

[4] § 17; it was never finally decided whether non-compliance with this section had the same effect as non-compliance with § 4, and rendered the contract only unenforceable by action, or whether it rendered it void; Lord Blackburn in Maddison v. Alderson (1883) 8 A.C. at p. 488, and Brett, L.J., in Britain v. Rossiter (1879) 11 Q.B.D. at p. 127, took the view that non-compliance with § 17 rendered the contract unenforceable, and this conclusion seems to follow from the decision of the court in Bailey v. Sweeting (1861) 9 C.B. N.S. 843; and cp. Morris v. Baron and Co. [1918] A.C. at pp. 15-16, 24-25, 30-31; on the other hand, Bosanquet, J., in Laythoarp v. Bryant (1836) 2 Bing. N.C. at p. 747, Jervis, C.J., in Leroux v. Brown (1852) 12 C.B. at p. 824, and Erle, C.J., in Williams v. Wheeler (1860) 8 C.B. N.S. at p. 312, took the view that such non-compliance rendered the contract void; the doubt is now academic in this country by reason of the provisions of § 4 of the Sale of Goods Act, 1893, which adopts the phraseology of § 4 of the Statute of Frauds; but, having regard to the words "allowed to be good," and the requirement that the *parties* to be charged, must sign (cp. § 1), there is a good deal to be said for the view that non-compliance with this § entailed the avoidance of the contract; and this seems to have been the view which commended itself to S. M. Leake, see Papers of the Juridical Society i 281.

[5] Vol. iv 472-473; vol. v 307-309; below 641-642.

[6] §§ 10, 11; for the provisions of the statute of Fraudulent Devises, which had a somewhat similar object, see below 397-398.

[7] Vol. iii 123-125. [8] § 12.

descended to the heir as special occupant, it was made liable to debts while in his hands, as if it were real property; and if there was no special occupant, it was to go to the personal representative, and to be assets in his hands, as if it were personal property.[1] The amendments in the law of procedure provided that judgments charging the land should, as against bona fide purchasers for value, be operative only from the date on which they were signed;[2] that recognizances should, as against such purchasers, be operative only from the date of enrolment;[3] and that writs of execution should bind the property in the goods of the person, against whom they were issued, only from the time when the writ was delivered to the sheriff to be executed.[4] The amendment in the law of succession was the provision that the husband, taking administration to his wife, was not to be bound to distribute the estate in accordance with the statute of Distribution.[5]

All these clauses made useful changes in and additions to the law. But they are not very intimately related to the clauses which carried out the main purpose of the statute. It is the latter clauses which have added important chapters to the branches of law and equity affected by them, by reason of the large number of judicial decisions to which they have given rise. It is these clauses, and especially the clauses relating to contracts, which have roused the greatest number of divergent criticisms. It is therefore with them that I shall deal in considering the causes for the enactment of the statute in this century, and its later history.

(3) *The statute in relation to the law of the seventeenth century.*

We shall see, when we come to deal with the later history of the statute, that both its draftsmanship and its policy have been most diversely criticized.[6] But, as a general rule, these criticisms have been made from the point of view of the state of the law existing at the period at which authors of these criticisms wrote, and not from the point of view of the state of the law existing at the time when the statute was passed. It is clear that we cannot do justice to its framers unless we adopt the latter standpoint; nor, as we shall see when we come to describe the later history of the statute, can we rightly understand the variegated history of the interpretations put at different periods

[1] § 12.
[2] § 15; § 14 set out the old practice, and § 15 provided that the precise date of signing judgment should be entered on the record.
[3] § 18.
[4] § 16.
[5] § 25; vol. iii 559-561.
[6] Below 394-396.

upon some of its clauses, unless we bear in mind the state of the law at the time when these interpretations were arrived at, the intellectual bias of different judges both in courts of law and in courts of equity, and the gradual modifications of the law in the succeeding centuries.

To understand the statute in relation to the law of the seventeenth century, we must, in the first place, look at certain of the rules of procedure and evidence then in force. In the second place, we must inquire whether, at this period, the requirement of written evidence of the transactions affected by the statute was so expedient that such evidence was, either generally used, or might fairly, as a matter of public policy, be rendered necessary. In the third place, we must inquire on what principle, if any, the contracts named in the fourth and seventeenth sections were selected, and why they were so loosely described that they have given rise to the enormous mass of case law that has accumulated round them.

(i) At the period when the statute of Frauds was passed the institution of trial by jury was in a transition state. In the first place, the mediæval method of controlling the jury by writ of attaint was obsolete,[1] the sixteenth and early seventeenth century method of controlling it by fine or imprisonment had been decided by *Bushell's Case* to be illegal,[2] and the modern device of getting an order for a new trial, when the verdict was clearly against the weight of evidence, was in its infancy.[3] In the second place, the jury, though generally guided by the evidence, might still decide a case from its own knowledge of the facts—the fact that it had this power was assigned by Vaughan, C.J., in *Bushell's Case*, as one of the main reasons why it could not be punished for finding a verdict contrary to the directions of the court.[4] It was therefore a wise precaution to make certain kinds of evidence necessary for the proof of certain transactions, because it placed a limitation upon the uncontrolled discretion of the jury. There was also another reason for the adoption of this precaution. We shall see that the courts were beginning at this period to construct a law of parol evidence.[5] But as yet there were few settled rules; and some of the rules, which were settled, precluded the courts from getting information upon the facts at issue from those who were most likely to know them. Neither the parties to an action, nor their husbands or wives, nor any persons who had any interest in the result of the litigation, were competent witnesses.[6] The effect of some of these rules, which lasted until they

[1] Vol. i 342. [2] (1670) Vaughan's Rep. 435; vol. i 344-347.
[3] Ibid 225-226; Thayer, Evidence 180, 430.
[4] Vol. i 346. [5] Pt. II. c. 7 § 1. [6] Ibid.

were removed by a series of statutes passed between 1844 and 1854,[1] has been pointedly illustrated by Lord Bowen.[2] "The merchant whose name was forged to a bill of exchange had to sit by, silent and unheard, while his acquaintances were called to offer conjectures and beliefs as to the authenticity of the disputed signature from what they knew of his other writings. If a farmer in his gig ran over a foot-passenger in the road, the two persons whom the law singled out to prohibit from becoming witnesses were the farmer and the foot-passenger." And we can see from a tale told by Roger North that, in this period, these rules were capable of working grave injustice.[3]

Though the plan adopted by the statute, of requiring that certain transactions should only be capable of proof by certain specified evidence, does not preclude the risk of forgery or perjury,[4] it does ensure that some evidence of these transactions is submitted to the court; and it thereby renders the prosecution of wholly baseless claims more difficult. Therefore, by reason both of the defects then existing in the system of trial by jury, and of the defects in the law of evidence, the requirement that certain transactions must be proved by certain specified evidence probably effected a considerable improvement in the law of that period.

(ii) The rules of procedure and evidence, which I have just described, go some way to answering the second question. It is clear that they rendered written evidence expedient in cases in which it would be unnecessary or even inexpedient to require it to-day. That being so, it is probable, both that such evidence was then more generally used, and that it was good policy to encourage its use. Indeed, the expediency of making written evidence necessary for conveying land, for the creation or assignment of trusts of interests in lands, and for wills, was obvious

[1] 6, 7 Victoria c. 85; 14, 15 Victoria c. 99 § 2; 16, 17 Victoria c. 83 §§ 1, 2.

[2] Administration of Justice during the Victorian period, Essays A.A.L.H. i at p. 521.

[3] North, C.J., was trying an action brought by a cook for goods sold. The defendants produced a receipt which showed that he had been paid up to 1677. "The cook started forth from the crowd; and, 'My Lord,' said he very quick and earnest, 'I was paid but to 1676.' At that moment his lordship concluded the cook said true; for liars do not use to burst out in that unpremeditated manner. . . . He asked the cook again and again, if he was sure; to see if he would stammer or hesitate, as liars will often do; but his answer was blunt and positive as before. Then his lordship, in the *nisi prius* court in London, sitting under a window, turned round, and looked through the paper against the light; and so discovered plainly the last figure in the date of the year was 6, in rasure; but was wrote 7 with ink"—clearly this would not have been discovered if the judge had not been impressed by the demeanour of one who could not have been called as a witness.

[4] "Its success is confined to this, that it prevents the perpetration of fraud through the instrumentality of a contract established by mere perjury: but the safeguard of its formalities is only effectual when the fraudulent neglect, or do not venture to supply them," Leake, Papers of the Juridical Society i 288.

before the statute was passed;[1] and it has never been seriously questioned. If the clauses of the statute relating to these matters are not law at the present day, it is because the legislature has been so convinced of the soundness of the principle which underlies them, that it has replaced them by other enactments, which require even more elaborate forms. It is the clauses which make written or other specified evidence necessary for certain kinds of contracts that have aroused the most serious criticism. It has been said that they are not only not expedient, but even actively harmful, because they are contrary to ordinary business habits;[2] and that they tend, both to encourage the dishonest evasion of obligations,[3] and to defeat just claims.[4] No doubt this criticism is well founded if we look at these clauses in relation to the law of the present day; and it has some weight if we look at them in relation to the law of the seventeenth century. But, from the latter point of view, any inconvenience resulting from their operation is, I think, outweighed by the fact that they did go some way to meet the evil consequences of the defective condition, both of the system of trial by jury, and of the law of evidence.

(iii) These considerations do not, however, answer two other criticisms which have been urged against these clauses. In the first place, it has been said that there is no discoverable principle

[1] See Lord Ellesmere's statement in 1603, Cary 27-28, cited vol. v 333-334; below 394-395.

[2] "The chief objection to the statute, and the cause to which most of its difficulties may be traced, seems to lie in this, that the prescribed mode of transacting business is so far at variance with the natural mode, that there is always in practice a conflict between them. . . . The statute, in prescribing a general use of writing, is at variance with a natural law of social action. Hence it is very commonly disregarded and so operates as a positive danger instead of a safeguard. . . . If it comes to pass that men may act, almost habitually, in a manner which will bring on them the penalties of the law, or at least deprive them of its protection, and yet without any imputation of moral blame on the score of dishonesty or even of negligence, it surely affords a strong argument to show, that in such case the law is in fault, and has attempted to guide the conduct of men in a wrong direction: and such seems to be the case with the Statute of Frauds," Papers of the Juridical Society i 289; cf. Stephen, L.Q.R. i 6.

[3] "The special peculiarity of the 17th section of the Statute of Frauds is that it is in the nature of things impossible that it ever should have any operation, except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud by breaking his word. In some cases no doubt this may protect an honest man against perjury . . . but in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality," L.Q.R. i 3, 4; cp. Papers of the Juridical Society i 288-289.

[4] In Sievewright v. Archibald (1851) 17 Q.B. at p. 119 (cited L.Q.R. i 3) Campbell, C.J., said, "I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; although, believing that he had broken his contract, he could only have defended the action in the hope of mitigating the damages; and although he was not aware of the objection on which he now relies, till within a few days before the trial."

upon which the contracts named in the statute were selected;[1] and, in the second place, that the draftsmanship of these clauses is so bad that they have given rise at different periods to an infinite number of hardly reconcilable decisions.[2] It can hardly be denied that there is some truth in these criticisms. But here again I think that their force can be somewhat mitigated by looking at them from the point of view of the law of the seventeenth century.

(*a*) At first sight the contracts specified in the statute do seem to be selected in a very arbitrary fashion. But I think that the inclusion of each of them may be explained, either by a reference to the state of the law at this period, or by a reference to the idea underlying the clauses of the statute relating to the transfer of property.

The contracts, the inclusion of which can be explained by reference to the state of the law at this period, are the special promise of the executor or administrator to answer damages out of his own estate, the contract of suretyship, and the contract not to be performed within the year. Special promises by executors or administrators to answer damages out of their own estates, were probably far more common in the seventeenth century than at later periods in the history of the law. In the first place, the executor took at law beneficially if there was no residuary gift;[3] and the equitable modifications upon his right so to take, though recognized, were not so definitely ascertained as in later law;[4] while, up to the time when the statute of Distribution[5] was passed, there was no adequate procedure to compel the administrator to distribute.[6] In the second place, there were as yet hardly any exceptions to the rule that the estate of the deceased was not liable for wrongful acts;[7] and it may well be that the old idea, that some part of the estate should be spent in making restitution,[8] helped to exert a moral pressure, which led to the

[1] "The statute describes the contracts which it would affect, not specifically, but generically, according to various characteristics, which are neither very philosophical nor very definite. In the class of agreements not to be performed within a year the duration of the contract is taken as the test; and therein contracts relating to every possible subject may be included. In the agreements relating to interests in land and the sale of goods the statute seems to have regard to the importance and value of the subject of the contract. The agreements relating to marriage seem to have been included on account of the uncertainty of such transactions; and in the case of executors and sureties, the object appears to be to afford protection to those classes of persons. Arbitrary descriptions, not based on any sound scientific distinctions, are necessarily very vague and uncertain in application, because they have no counterpart in reality," Papers of the Juridical Society i 280-281.

[2] Stephen, L.Q.R. i 7, 8.

[3] Vol. iii 583-584, 592.

[4] "There hath been a variety of resolutions, both in Chancery and the House of Lords, on this head; notwithstanding which, this matter seems as undetermined as any in equity," Eq. Cas. Ab. i 243; vol. v 317; below 654.

[5] 22, 23 Charles II. c. 10.

[6] Vol. iii 556-559.

[7] Ibid 576-583.

[8] Ibid 582-583.

making of such contracts. Contracts of suretyship and contracts not to be performed within the year are, by the nature of the case, continuing contracts. Having regard to the rules of evidence then in force,[1] it might be very difficult, when they came to be enforced, to give any evidence of their formation. Therefore it was good policy to provide that they must be evidenced by writing.

The other contracts—agreements made in consideration of marriage, agreements for the sale of interests in lands, and sales of goods—can be explained by reference to the idea underlying the clauses of the statute relating to the transfer of property.[2] They were all contracts which were intended to lead up to some transfer of property; and, therefore, they fell within the principle of the clauses of the statute which required certain conveyances to be in writing.[3] The sale of goods, in fact, operated as a conveyance. But, in this case, the framers of the statute recognized that it would be absurd to require all such sales to be evidenced in one way. They only required specified evidence if the price was over £10—a larger sum in the seventeenth than in the twentieth century; and they allowed such a contract to be proved, either by writing, or by certain other acts which evidenced the conclusion of the contract. For these reasons, therefore, I think that the list of contracts specified in the statute was not selected in a wholly arbitrary fashion.

(*b*) To undertake a defence of the draftsmanship of these clauses of the statute would be a rash adventure. The long line of cases needed to explain them would seem to afford conclusive proof of its utter want of skill. But to be fair to its framers we should, I think, remember three things. Firstly, the law of contract was as yet young; it had been developed wholly by decided cases; and it had very few rules as to the characteristics and incidents of particular contracts. It follows that the framers of the statute were legislating on a branch of the law which was not fully developed, and on a topic which had not before been the subject of legislation. We know from our own experience that statutes framed under these conditions always do, and always must, give rise to many difficulties of construction, when their provisions come to be applied to the infinitely various combinations of facts. From this point of view we may compare these

[1] Above 388-389. [2] Above 384-385.

[3] It was no doubt because it was realized that this was the intent of the framers of the statute that it was held, after a little conflict of opinion, that the statute did not apply to the contract to marry, but only to a promise to settle property in consideration of marriage, Philpott v. Wallet (1682) 3 Lev. 65, Freeman, K.B. 541; Harrison v. Cage (1697) 1 Ld. Raym. at p 386; Cork v. Baker (1717) 1 Stra. 34; cp. Wigmore, Celebration Essays 486-488.

clauses of the statute of Frauds to our early Company Acts and to our Workmen's Compensation Acts. Secondly, the want of uniformity in the interpretation applied to these clauses has been partly due to differences between courts of common law and the court of Chancery. We shall see[1] that these courts differed in their methods of interpretation, and sometimes in their views as to the expediency and value of these clauses. Obviously difficulties arising from this cause cannot be ascribed to faulty draftsmanship. Thirdly, these clauses of the statute have been long-lived. They have remained amid changes, not only in legal, but also in social and commercial ideas. But case law is naturally influenced by these changes—that it is so influenced is not the least of the advantages which it possesses. It follows that changes in the mental attitude of succeeding generations of judges have influenced their manner of interpreting the statute; and that it is to these changes that the conflicting character of the decisions on the statute is partly due. But with these two last points I must deal more fully in the following section.

(4) *The later history of the statute.*

From a very early period the manner in which the statute was treated by the court of Chancery was somewhat different from the manner in which it was treated by the courts of common law. The court of Chancery was inclined to construe its clauses in a somewhat restrictive fashion, and even to modify them materially. Thus, though the statute required that trusts of interests in land should be evidenced by writing, it was laid down that they could be proved by parol, if insistence on the letter of the statute would facilitate a fraud.[2] Similarly, though contracts for the sale of interests in land were required to be similarly evidenced, the court would, as we shall see,[3] decree specific performance, if there was a parol contract sufficiently evidenced by acts of part performance. No doubt this restrictive method of interpreting the statute was due to the fact that the causes which made the provisions of the statute useful in the courts of common law did not operate in the court of Chancery. The court of Chancery did not depend upon a jury to ascertain the facts, nor were the parties debarred from giving evidence.[4]

Thus the bias of the court of Chancery was against a too literal construction of the statute; and naturally that bias was also found

[1] Below 394-395.
[2] Thynn v. Thynn (1684) 1 Vern. 296; cp. Hutchins v. Lee (1737) 1 Atk. 447.
[3] Below 659.
[4] Thayer, Evidence 431; Wigmore, Evidence iv 3421 (§ 3426), and cases cited in n. 47.

in the decisions of judges like Lord Mansfield, who aimed at improving the law by the recognition of equitable principles. Thus, in the case of *Simon* v. *Metivier*,[1] Lord Mansfield decided that sales by auction were not within the statute, if the buyer gave his name. He said,[2] in giving judgment, "the key to the construction of the Act is the intent of the Legislature; and therefore many cases, though seemingly within the letter, have been let out of it; more instances have indeed occurred in courts of Equity than of Law, but the rule is in both the same. For instance, when a man admits the contract to have been made, it is out of the statute, for here there can be no perjury. Again, no advantage shall be taken of this statute to protect the fraud of another. Therefore, if the contract is executed, it is never set aside. And there are many other general rules by way of exception to the statute." Wilmot, J., in the same case, said,[3] "Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing, frauds. I, therefore, incline to think sales by auction openly transacted before 500 people are not within the statute." On the other hand, the bias of courts of law and of most of the common law judges was in favour of giving full effect to the provisions of the statute. Lord Ellenborough, in the case of *Hinde* v. *Whitehouse*,[4] after referring to these opinions of Lord Mansfield and Wilmot, J., said,[5] "With all deference to these opinions I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing in a statute applying to all sales of goods above the value of £10, without exception, merely because the quantum of parol evidence in the case of an auction is likely to render the danger of perjury less considerable." He considered that such a view would give rise to an "indefiniteness of construction" which "would be destructive of all certainty of practice."

We can see the same difference of view between Lord Mansfield and other judges in their remarks on the clauses of the statute which impose formalities upon wills. In *Windham* v. *Chetwynd*[6] Lord Mansfield said, "I am persuaded many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it. I have had a good deal of experience at the delegates; and hardly recollect a case of a forged or

[1] (1766) 1 W. Bl. 599. [2] At p. 600. [3] At p. 601.
[4] (1806) 7 East 558. [5] At p. 568.
[6] (1757) 1 Burr. at pp. 420, 421; cp. Whitchurch v. Whitchurch (1721) Gilb. Rep. at p. 171 where Jekyll, M.R., Raymond, C.J., and Gilbert, C.B., say, "All such laws as have been appointed to restrain the natural dominion have been very restrictively construed, because solemnities that are appointed are to hinder frauds and perjuries, in the proof of improper instruments, and hindering the party himself from surprise."

fraudulent will, where it has not been solemnly attested. It is clear that judges should lean against objections to the formality. They have always done so, in every construction upon the words of the statute. . . . And still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled." On the other hand, Blackstone considered the statute to be, "a great and necessary security to private property";[1] and, as we might expect, Lord Kenyon expressed views upon the proper mode of construing the statute diametrically opposed to the views of Lord Mansfield. In *Chater* v. *Beckett*[2] he said,[3] "I lament extremely that exceptions were ever introduced in construing the statute of Frauds; it is a very beneficial statute, and if the courts had at first abided by the strict letter of the Act it would have prevented a multitude of suits that have since been brought." And in *Chaplin* v. *Rogers*[4] he said,[5] "It is of great consequence to preserve unimpaired the several provisions of the Statute of Frauds, which is one of the wisest laws in our Statute Book."

It is inevitable that the decisions of judges, who approached the statute from these very different points of view, should be conflicting. These conflicting decisions occur upon the construction of all its clauses, but more especially upon the construction of the fourth and seventeenth clauses. To take one or two illustrations:— Holt was inclined to give a wide meaning to the phrase "contract not to be performed within the year";[6] but the tendency of the decisions has been to give it a very restricted meaning, and to confine it to contracts which cannot be performed on either side within the year.[7] But, notwithstanding these decisions, the views of those who favoured a wider construction have so far prevailed, that the insertion in such a contract of an option to determine it within the year does not take the contract out of the statute. In 1911 the House of Lords adhered to this view,[8] though Lord Alverstone admitted that, "if there were an absolutely clean slate it might be possible to construe the statute somewhat differently."[9] The meaning of a contract for the sale of an interest in lands has given rise to an enormous number of decisions. Leake says,[10] "Every distinct species of English vegetable produce has in turn given rise to a distinct series of decisions. The early decisions on the subject by Lord Mansfield and others have for the most part been overruled; and, in later times, Lord Denman and Lord

[1] Comm. iv 432. [2] (1797) 7 T.R. 201. [3] Ibid at p. 204.
[4] (1800) 1 East 192. [5] Ibid at p. 194.
[6] Smith v. Westall (1698) 1 Ld. Raym. 316.
[7] Papers of the Juridical Society i. 279.
[8] Hanau v. Ehrlich [1912] A.C. 39. [9] At p. 42.
[10] Papers of the Juridical Society i 278-279.

Abinger have found occasion to lament over the difficulty in attempting to reconcile the cases." It was long a doubtful point whether a contract under seal, which was not signed, was rendered unenforceable by the statute;[1] and it was not till 1910[2] that it was decided that, if a contract fell within the terms of both the fourth and the seventeenth[3] sections, the provisions of both must be complied with.

No doubt some of these difficulties have arisen from obscurities in draftsmanship which might have been avoided; but it can hardly be denied that many have arisen from obscurities, which are inevitable when a statute attempts to legislate for matters upon which there is no previous statutory authority, and very little authority in the decided cases. And it is clear that the very different views held by different judges, as to the purpose and wisdom of the statute, have largely contributed to these difficulties.

At the present day most questions arising upon the construction of these sections are covered by authority; and the courts follow the rules which have been authoritatively fixed because they are fixed.[4] We no longer find them bestowing upon the statute the hearty praise bestowed by Kenyon and Ellenborough. On the contrary, the prevailing feeling both in the legal[5] and the commercial[6] world is, and has for a long time been, that these clauses have outlived their usefulness, and are quite out of place amid the changed legal and commercial conditions of to-day. This is clearly the last phase. But, when these clauses are at length repealed, let us remember that, though their longevity has troubled litigants, they once had their use; and that the long lines of cases, to which they have given rise, have occasionally contributed something of permanent value to the development of our law. The true character and the essential features of the contract of suretyship, the difference between the contracts of sale and hire, the difference between a void and an unenforceable contract—have been elucidated principally by the cases which have arisen upon their construction. And let us, who are historians, remember that

[1] Bl. Comm. ii 306; cp. Cooch v. Goodman (1842) 2 Q.B. at p. 597; it was decided in Cherry v. Heming (1849) 4 Exch. at p. 636 that the statute did not apply to contracts under seal—"The statute," said Parke, B., "was never meant to apply to the most solemn instrument which the law recognises." It may be noted that in Lemayne v. Stanley (1681) 3 Lev. 1, and in Warneford v. Warneford (1727) 1 Stra. 764, it was said that sealing a will was equivalent to signing it; but in Smith v. Evans (1751) 1 Wils. K.B. 313 this was said to be "very strange doctrine."

[2] Prested Miners Ltd. v. Garner Ltd. [1910] 2 K.B. 776, [1911] 1 K.B. 425 C.A.

[3] § 17 is now represented by § 4 of the Sale of Goods Act 1893 which repealed and substantially re-enacted it, above 386 n. 4.

[4] Above 395.

[5] Leake, Papers of the Juridical Society i 271; Stephen, L.Q.R. i 1; Pollock, L.Q.R. xxix 247.

[6] See Second Report of the Mercantile Law Commissioners p. 6, cited Leake, Papers of the Juridical Society i 290 n.

it was one of these cases which reasserted the true historical doctrine, that consideration is not merely one of several possible pieces of evidence for the conclusion of a simple contract, but the necessary condition precedent for the existence of such a contract.[1] We shall see that it is probable that the assertion of this principle was not unconnected with the fact that the courts had considered the effect of putting a contract into writing chiefly in connection with the statute of Frauds, and that that statute had provided that such contracts, if not reduced to writing, should be, not void, but only unenforceable by action. It followed that even a contract in writing must satisfy the test of validity imposed upon all contracts not under seal—the test of consideration.[2]

Various Branches of the Law

Under this head I shall record briefly the less important changes and developments made by the legislature in various branches of the law. I shall divide these branches of the law into the following groups: (1) the Land Law; (2) Crime and Tort; (3) Evidence; (4) Civil Procedure; and (5) the Ecclesiastical Law and Jurisdiction.

(1) *The Land Law.*

Apart from the Act abolishing the military tenures,[3] there are only small changes of detail to record. In 1664-1665 an attempt was made to improve the procedure by which a creditor, who was secured by a Statute Merchant or Staple, could assert his rights.[4] In 1666 it was enacted that, if an estate was granted pur autre vie, and the cestuique vie remained beyond the sea or did not appear for seven years, he should be accounted dead; but that, if he afterwards appeared, his estate should revest in him, and he should recover the mesne profits with interest.[5] In 1689[6] permission was given to sell goods distrained for rent if they were not replevied within five days; corn, hay, or straw were allowed to be distrained; and new remedies were given both for pound breach and for wrongful distress. In 1691 the statute of Fraudulent Devises provided that, if a man died leaving his heir liable to pay specialty creditors, and devised away his lands, such devise should be deemed to be fraudulent as against these creditors; and it empowered them to sue the heir and devisee jointly.[7] It further provided that, if the

[1] Rann v. Hughes (1778) 7 T.R. 350 n.; for the history of the doctrine of consideration see Pt. II. c. 3 § 1.

[2] Pt. II. c. 3 § 1.

[3] 12 Charles II. c. 24.

[4] 16, 17 Charles II. c. 5; made perpetual by 22, 23 Charles II. c. 2; see vol. iii 131-132 for Statutes Merchant and Staple.

[5] 18, 19 Charles II. c. 11.

[6] 2 William and Mary c. 5.

[7] 3 William and Mary c. 14 §§ 1 and 2.

heir or devisee aliened the land descended or devised before action brought, the heir or devisee should become personally liable to pay the debt to the extent of the value of the land.[1] The fact that the equity of redemption was now an estate in the land fully protected by the court of Chancery,[2] had made several mortgages of the same piece of property possible, and had given opportunities to fraudulent mortgagors, of which they had not been slow to take advantage. It was therefore enacted in 1692 that a mortgagor who borrowed money upon mortgage, without disclosing the existence of judgments, statutes, or recognizances to which he was liable, should, unless he paid up the judgments, statutes, or recognizances within six months after demand by the mortgagee, lose his equity of redemption;[3] and that, if a mortgagor mortgaged his land a second time without disclosing the existence of the first mortgage, he should cease to have any equity of redemption as against the second mortgagee.[4] It was specially provided that the second mortgagee should be able to redeem.[5] The fact that mesne tenure, in the case of estates in fee simple, was now of little importance, is illustrated by an Act of 1695-1696, which provided that a licence in mortmain granted by the crown should be sufficient, whether or not the land was held in chief.[6] In 1696-1697 some small improvements were made in the procedure upon a writ of partition.[7] In 1698 it was provided (in effect) that a posthumous child should be able to succeed its father under the limitations of a strict settlement, although no trustees to preserve contingent remainders had been appointed.[8] In 1700 natural born subjects were permitted to take by inheritance, in spite of the fact that one of their ancestors, through whom they traced their descent, was an alien.[9]

[1] §§ 4-6; as to the interpretation of these sections of the Act see British Mutual Investment Company v. Smart (1875) L.R. 10 Ch. Ap. at pp. 577-578; for the provisions of the Statute of Frauds as to the liability of land to debts see above 386-387.

[2] Vol. v 330-332; below 663-665.

[3] 4 William and Mary c. 16 § 1; for the history of the bill see Hist. MSS. Com. 14th Rep. App. Pt. vi 64-65, 83, nos. 557, 578.

[4] § 2. [5] § 3.

[6] 7, 8 William III. c. 37; for the provisions of the original mortmain Act which required the licence both of the mesne lords and the crown see vol. ii 348-349; vol. iii 86-87; for the history of this Act see House of Lords MSS. ii 221-222, 245, nos. 1036, 1052.

[7] 8, 9 William III. c. 31; for this writ see vol. iii 19; in 1673 "An Act for the more easy partition between joint tenants" had been rejected in the House of Lords on a first reading, Journals of the House of Lords xii 628; Hist. MSS. Com. 9th Rep. App. Pt. ii 41 no. 158; for a similar bill which failed to pass the House of Lords in 1696-1697 see House of Lords MSS. ii 250 no. 1061.

[8] 10 William III. c. 22; for the history of the law on this matter see Pt. II. c. 1 § 3.

[9] 12 William III. c. 7, wrongly printed in Rec. Com. Ed. of the statutes as 11 William III. c. 6, see House of Lords MSS. iii 356 n.; for an earlier bill of 1698-1699 on this subject see ibid no. 1382.

(2) *Crime and Tort.*

Under this head there are a large number of statutes which either create new offences or sharpen the penalties for offences already recognized. They are extremely miscellaneous in character: but they can be divided into fairly well defined groups.

(i) In the first place, there is a group of crimes which directly affect the government of the state.

Of these high treason and offences connected therewith are of course the most important. We shall see that the growth and extension of the doctrine of constructive treason went far to fill up the many gaps in Edward III.'s statute.[1] But it was sometimes thought advisable to supplement these doctrines by direct legislation. Thus a statute of 1661 made it treason, during the life of Charles II., to intend any bodily harm tending to the death of the king, his deposition, a levying of war in the realm, or a stirring of any foreigners to invade the realm; provided that such intention was declared by printing, writing, preaching, or malicious and advised speaking.[2] Again, as in the preceding period,[3] the special circumstances in which the kingdom was placed, or particular dangers to the king, caused special varieties of treason to be created. Thus in 1665 all those who, during the continuance of the war with the United Provinces, did not return to England when ordered to do so by proclamation, or who continued to serve in the army or navy of the United Provinces, were declared guilty of high treason.[4] In 1691 the export of arms to France, or setting out for or returning from France without licence, was made treason.[5] In 1697-1698 those who had gone to France since December, 1688, or who had borne arms in the service of James II., were declared to be guilty of treason if they returned without licence;[6] and those who corresponded with James II., or remitted money to him, or received a pardon or a title of honour from him, were declared guilty of the same offence.[7] The recognition by Louis XIV. of the title of James II.'s son, was the occasion in 1701 of two Acts, one of which made it treason to correspond with the Pretender,[8] and the other to compass the death of the Princess Anne or the hindrance of her succession to the throne.[9] There is also a group of offences which can be

[1] Pt. II. c. 5 § 1.
[2] 13 Charles II. st. 1 c. 1 § 1.
[3] Vol. iv 493-496.
[4] 17 Charles II. c. 5 §§ 2 and 4.
[5] 3 William and Mary c. 13; it was declared by 9 William III. c. 1 § 4 that § 3 of the former Act, which made it treason to set out for France, expired with the making of peace with France; see 7, 8 William III. c. 27 §§ 16, 17 for similar temporary provisions.
[6] 9 William III. c. 1 § 1.
[7] §§ 2 and 7: there was a proviso in the latter section for those who delivered up their pardons or grants by a fixed date.
[8] 13, 14 William III. c. 3.
[9] Ibid c. 6 § 14.

regarded as subsidiary to these statutory extensions of the scope of treason. In 1661 it was declared an offence to say that the king was a papist, to assert that the Long Parliament was not dissolved, that there was a duty to endeavour a change of government, or that Parliament could legislate without the king;[1] and in 1695-1696 it was declared an offence to refuse the oath of allegiance when tendered, to publish that the king was not rightfully king, or that James II. or any other person had any right to the crown.[2]

The maintenance of the purity of the coinage is a matter which nearly concerns the government; and we have seen that both Edward III.'s statute of treason and later statutes treated certain coinage offences as treason.[3] An addition was made to these statutes in 1696-1697.[4] Making, mending, concealing, or having in one's possession tools for coining, taking such tools from the Mint, and colouring or gilding coin resembling current coin, were declared to be treason;[5] and blanching copper for sale, or taking or paying counterfeit money, was declared to be felony.[6] Besides punishing the coiner, the legislature endeavoured to make his trade difficult. An Act passed in 1694[7] with this object created a number of new offences, such as selling or paying silver money for more than its face value, or buying, selling, or knowingly having in one's possession clippings of current coin. In 1696-1697 the forgery of the sealed bills or any of the signed notes of the Bank of England, and altering or erasing any indorsement on these bills or notes, were made felony.[8]

The importance of all matters connected with shipping, which, as we have seen, is reflected in the commercial legislation of the period,[9] is also reflected in the criminal law. In 1670 benefit of clergy was taken from those who stole or embezzled the king's naval stores;[10] and in 1697-1698 it was made an offence to manufacture without authority naval or ordnance stores bearing the king's marks, or to have such stores in one's possession without licence.[11] The same Act also provided a penalty for those who got money from the Pay Office by personating seamen, or forging letters of attorney, bills of sale, or wills.[12] The growth of the British dominions beyond the seas, and the increase of English shipping in all parts of the world, had disclosed various defects, both in the machinery and the substance of the law as to piracy and cognate offences. In 1698-1699[13] an attempt was made to

[1] 13 Charles II. st. 1 c. 1 §§ 2, 3.
[2] 7, 8 William III. c. 27 §§ 1, 2.
[3] Vol. iii 289; vol. iv 498.
[4] 8, 9 William III. c. 26.
[5] §§ 1-4.
[6] § 6.
[7] 6, 7 William and Mary c. 17.
[8] 8, 9 William III. c. 20 § 36.
[9] Above 316-319.
[10] 22 Charles II. c. 5.
[11] 9 William III. c. 41 §§ 1, 2, 4.
[12] § 3.
[13] 11 William III. c. 7; see House of Lords MSS. iv 136 no. 1546.

remedy these defects. After making provision for the trial, in any place at sea or upon land in any of the Plantations, of "piracies, felonies and robberies committed in or upon the sea," or in any place subject to Admiralty jurisdiction,[1] the Act provided that the following offences should be punished as piracy: if piracy, robbery, or an act of hostility was committed by a British subject on a British subject under colour of a commission from any foreign prince; or if a commander or seaman turned pirate, or voluntarily yielded the ship to a pirate; or if he brought messages from a pirate enemy or rebel; or if he attempted to persuade any commander or seaman to yield up or run away with ship or cargo, or to turn pirate; or if he laid violent hands on the commander to hinder him from fighting, or imprisoned the commander, or attempted to raise a mutiny.[2] Persons aiding and abetting pirates, either before or after the fact, were to be considered as accessories, and were to be liable to the same punishment as the principals.[3]

This statute introduced the distinction between piracy by statute, and piracy at common law or ex jure gentium. The latter species of this offence fell under the criminal jurisdiction of the Admiralty, which, as the result of Henry VIII.'s legislation, eventually came to be exercised in accordance with the rules and the procedure of the common law, and by the judges of the common law courts.[4] In the fourteenth century it had not become an offence distinct from robbery or murder on land;[5] and, though it had become distinct in the seventeenth century,[6] no attempt to define it seems to have been made till 1696. In that year it was defined by Sir Charles Hedges, the judge of the court of Admiralty, as follows: "Piracy is only a sea term for robbery; piracy being a robbery within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention, in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy."[7] This definition was approved by Holt, C.J., and the other common law judges composing the court, and by the Privy Council in 1873;[8] but, as Stephen has pointed out,[9] it is not altogether satisfactory. The infrequency of the offence in modern times[10] is no doubt the reason why its nature has not been more precisely settled.

[1] §§ 1-6. [2] §§ 7 and 8. [3] §§ 9 and 10. [4] Vol. i 550-552.
[5] Marsden, Law and Custom of the Sea (Navy Records Soc.) i 99 *note*.
[6] See Coke, Third Instit. cap. xlix. [7] R. v. Dawson, 13 S.T. at p. 454.
[8] Attorney-General for Hongkong v. Kwok-a-Sing, L.R. 5 P.C. at pp. 199, 200.
[9] H.C.L. ii 28; in his opinion, "it may be safely stated that in modern times at least, no case has been treated as piracy unless the ship itself has been taken from the control of its lawful master and either plundered or carried off or scuttled by the criminals, or unless the criminals have been cruising as robbers and thieves."
[10] Kenny, Outlines of Criminal law 317.

The same causes which had led to legislation for the repression of piracy and cognate offences, led to the enactment, in the same year, of a statute for the punishment of governors of colonies, who were proved to be guilty of oppressing their subjects, or of breaking the laws of England or their own colonies.[1] It is clear that the legal position of such a governor was as yet very uncertain. The statute recites that they did not consider themselves "punishable here nor accountable for such crimes and offences to any person within their respective governments;" and so it provided that their crimes should be punishable by the King's Bench, or by such commissioners in England as the king might assign. It was not till the nineteenth century that it has been definitely decided that a governor, who breaks the law, is also amenable to the jurisdiction of the courts of his own colony.[2]

(ii) In the second place several statutes were passed to punish more severely offences against property.

Firstly, there are statutes relating to theft and cognate offences. In 1691 thieves and their accomplices were deprived of clergy, if they robbed any person; if they stole from or robbed any dwelling-house, the owner thereof or an occupant being therein and being put in fear; or if they broke into any dwelling-house or shop or warehouse annexed thereto in the daytime, and took goods to the value of 5s.[3] The same Act also made the buying and receiving of stolen goods, knowing them to be stolen,[4] and the stealing by lodgers of furniture and other chattels let to them, felonious.[5] In 1698 thieves and their accomplices, if they stole goods to the value of 5s. in any shop, warehouse, coach-house, or stable, were deprived of clergy, even though the premises were not broken open, or the owners or occupants not put in fear.[6]

Secondly, there are statutes against damage to property. An Act of 1663 increased the penalties for stealing and spoiling timber and underwood, and gave enlarged powers to constables and justices to arrest those suspected;[7] an Act of 1670 made the wilful burning of ricks and barns, and killing horses or cattle at night, felony;[8] and the maiming of horses and cattle, and the

[1] 11 William III. c. 12.

[2] In Mostyn v. Fabrigas (1774) 1 Cowp. at pp. 172-173 Lord Mansfield said, "It is truly said that a governor is in the nature of a viceroy; and therefore locally during his government, no civil or criminal action will lie against him: the reason is because upon process he would be subject to imprisonment"; but this dictum has, as to civil actions, been overruled; see Hill v. Bigge (1841) 3 Moo. P.C. 465, and see pp. 481-482; Musgrave v. Pulido (1879) 5 A.C. at p. 107.

[3] 3 William and Mary c. 9 § 1. [4] § 4. [5] § 5.

[6] 10 William III. c. 12 § 1. [7] 15 Charles II. c. 2.

[8] 22, 23 Charles II. c. 7 § 1; § 3 provided that a person convicted could elect, instead of being hung, to be transported for seven years; for a bill introduced into

destruction of plantations and inclosures, a tort for which treble the damage was recoverable;[1] an Act of 1697-1698 provided penalties for the making or selling of fire-works, and the throwing or permitting them to be thrown from houses.[2]

Thirdly, there is a miscellaneous group of statutes against the infringement of various rights connected with sport. Statutes of 1661 and 1691[3] were passed to suppress the offences of unlawfully coursing, hunting, and killing of deer; and statutes of 1670-1671 and 1692 provided penalties for poaching, and machinery for arresting poachers, and defined the persons who were to be allowed to keep guns, dogs, and other apparatus of sport.[4] It is clear from these statutes that the main principles of the Game Laws[5] have emerged.

(iii) In this, as in the preceding period,[6] the law punished very inadequately injuries to the person which did not result in death. Only one Act[7] was passed to amend the law in this respect; and probably that would not have been passed if Sir John Coventry, a distinguished member of the House of Commons, had not been savagely assaulted by some courtiers, on account of a reference which he had made in the course of a debate to the king's relations with actresses.[8] The Act[9] relates in the preamble the history of the assault, and makes provision for the apprehension of the culprits in its first five sections. Then, "for the prevention of like mischiefs for the time to come," it provides that certain forms of disablement, inflicted with intent to maim or disfigure,[10] shall be felony without benefit of clergy. Although this was the only Act dealing with aggravated assaults, it was "so narrowly construed that in the well-known case of *R.* v. *Woodburne and Coke*[11] the prisoner took the point that his intent was to murder and not to disfigure. He

the House of Lords in 1663-1664 providing for the transportation of persons convicted of felony within clergy, or petty larceny, or of felons who had taken the benefit of clergy, see Hist. MSS. Com. 7th Rep. 175.

[1] 22, 23 Charles II. c. 7 § 4. [2] 9 William III. c. 7.

[3] 13 Charles II. st. 1 c. 10; 3 William and Mary c. 10.

[4] 22, 23 Charles II. c. 25; 4 William and Mary c. 23.

[5] See vol. i 107-108; vol. iv 505-506.

[6] Vol. iv 514.

[7] Another Bill against child stealing failed to pass, Hist. MSS. Com. 8th Rep. App. 143 no. 289, and see the note which corrects Marvel's account of this Bill.

[8] See Marvel's account of the incident, Works (Ed. Grosart) ii 388-390.

[9] 22, 23 Charles II. c. 1; for some amendments proposed in the Lords, one of which originated with Vaughan, C.J., and became § 7 of the Act, see Hist. MSS. Com. 8th Rep. App. 160 no. 355.

[10] "On purpose and of malice forethought and by lyeing in waite shall unlawfully cutt out, or disable the tongue, put out an eye, slitt the nose, cut off a nose or lipp, or cutt off, or disable any limbe or member of any subject of his majestie with intention in soe doeing to maime or disfigure in any the manners before mentioned," § 6.

[11] (1722) 16 S.T. 53, see pp. 80, 81.

was convicted because the chief justice told the jury that he must be convicted if they thought he meant to disfigure in order to kill."[1]

(iv) There are one or two Acts which publish offences against morality or religion, or practices which seemed to be contrary to public policy. An Act of 1694[2] was designed to render more effectual the Act of 1624[3] against profane cursing and swearing; and, to make certain that the penalties should be widely known, it was ordered that the Act should be publicly read four times a year in all parish churches.[4] In 1677 an Act was passed "for the better observation of the Lord's day commonly called Sunday," which imposed various penalties on tradesmen or others who followed their ordinary callings on that day.[5] In 1697-1698[6] penalties were imposed upon persons who, having been educated in or having made profession of the Christian religion, denied "any one of the persons in the Holy Trinity to be God," or asserted that there are more Gods than one, or denied the truth of the Christian religion, or the Holy Scriptures to be of divine authority. In 1664 the struggle of the legislature with the gambler began. An Act passed in that year imposed a penalty on any person who acquired money or property by fraud in playing at games, or in bearing a share in the stakes, or in betting on the players. It further provided that, if any person betted on the players of such games, and lost any sum exceeding £100, the loser could not be compelled to pay; that the contract to pay, and all securities given for the same, should be void; and that the winner should forfeit treble the value of any winnings above the sum of £100 which he had made.[7] In 1698 lotteries were declared to be public nuisances, and a penalty was imposed on those who held them, or took part in them.[8]

(v) Throughout the seventeenth century, the border country between England and Scotland continued, in spite of the union of the crowns, to be in a very unsettled state. In 1631 a petition to the king alleged that "the want of education on the borders of Cumberland was so great, that the poor inhabitants

[1] Stephen, H.C.L. iii 112.

[2] 6, 7 William and Mary c. 11; legislation on this subject had been attempted in 1666-1667, and 1667, Hist. MSS. Com. 8th Rep. 111 no. 80; ibid 112 no. 92; and in 1675, ibid 9th Rep. Pt. ii 67-68 no. 311.

[3] 21 James I. c. 20; vol. iv 514. [4] § 6.

[5] 29 Charles II. c. 7; cp. Hist. MSS. Com. 9th Rep. Pt. ii 83 no. 350; bills on this subject were before the House of Commons in February and March, 1670-1677, Marvel's Letters, Works ii 368, 379; Hist. MSS. Com. 9th Rep. App. Pt. ii 17 no. 46; a bill with a similar title had been dropped in the Lords in 1660, Hist. MSS. Com. 7th Rep. 136.

[6] 9 William III. c. 35; somewhat similar provisions had been contained in the bills of 1666-1667 and 1667 against profane swearing, above n. 2.

[7] 16 Charles II. c. 7. [8] 10 William III. c. 23.

cannot say the Lord's Prayer, and their ignorance of God draws them to robbing, stealing, and all other manner of lewd vices."[1] There was very little improvement in the latter part of the century. Roger North, who had gone on circuit with his brother in these districts, says,[2] "the county of Northumberland hath been exceedingly infested with thieving of cattle, which is the remains of the Border trade, since the union with Scotland, after the way used in time of peace before. For, as in Italy, the murderer, running into the next territory was safe: so here they stole on either side, and the other under a different jurisdiction was an asylum. . . . After the union, to prevent this thieving trade, the crown sent commissioners of oyer and terminer directed to an equal number of English and Scotch, extending to certain limits on each side of the border; and being continued it is therefore called the border commission. And these meet in their sessions, and hang up at another rate than the assizes; for we are told that at one sessions, they hanged eighteen for not reading *sicut clerici*. This hath made a considerable reform; but yet there is need of an officer they call a country keeper, who hath a salary from the country, and is bound to make good all the stolen cattle unless found out and restored." A continuous series of statutes[3] throughout this period illustrates the need for establishing a special machinery for dealing with the crimes there committed.

(vi) Lastly, several statutes were passed in order to effect improvements in the machinery of the criminal law. Of the most important improvement in this branch of the law—the new provisions made in 1695-1696 for the trial of persons accused of treason[4]—I have already spoken. Here I must enumerate some of the other less important changes.

The fact that it was difficult to enforce the law in the absence of any efficient police system, is illustrated by two statutes which attempted to bribe members of the public to give information and active assistance by offering them rewards. An Act of 1692 recognizes the increase in the numbers and boldness of highwaymen.[5] For the apprehension and conviction of a highwayman a

[1] S.P. Dom. 1629-1631 473, clxxxii 1.

[2] Lives of the Norths i 178-179.

[3] 14 Charles II. c. 22; 18, 19 Charles II. c. 3; 29, 30 Charles II. c. 2; 1 James II. c. 14; 7, 8 William III. c. 17; 12, 13 William III. c. 6.

[4] 7, 8 William III. c. 3; vol. i 390; vol. iv 499; above 232-234.

[5] 4 William and Mary c. 8, the preamble runs, "Whereas the highways and roads . . . have been of late time more infested with thieves and robbers than formerly for want of due and sufficient encouragement given and means used for the discovery and apprehension of such offenders, whereby so many murders and robberies have been committed that it is become dangerous in many parts of the nation for travellers to pass on their lawful occasions to the great dishonour of the laws of this realm and the government thereof;" see Macaulay, History of England (ed. 1864) i chap. iii

reward of £40 was promised;[1] and, in addition, the horse, arms, and property taken with the highwayman, provided that they belonged to him.[2] The Act of 1698,[3] which increased the punishment for certain forms of theft,[4] provided that any one who arrested and prosecuted such a thief to conviction, should be entitled to a certificate, which was to be assignable once but not more than once, releasing the holder from all parish and ward offices in the parish or ward where the felony was committed; and further that any such thief who, being out of prison, gave information which led to the conviction of two other such offenders, should be entitled to a pardon, which was also to be a bar to an appeal for the same crime.[5] The same Act also provided that persons convicted and entitled to benefit of clergy should be burnt in the cheek and not in the hand;[6] that no fees should be payable by witnesses bound over to give evidence against a prisoner accused of treason or felony; that no more than 2s. should be exacted for drawing an indictment against any felon;[7] and that clerks and others who drew defective indictments were to be liable to a penalty of £5.[8] The exclusion of offences from the benefit of clergy continued;[9] and in 1691 it was provided that if a prisoner charged with any of these offences stood mute, the effect was to be the same as if he had pleaded and been convicted.[10] On the other hand, the same Act extended the benefit of clergy to women;[11] but it was enacted in the following year that the extension was to be for a first offence only.[12] In 1692 some small improvements were made in the procedure of the Crown Office;[13] and, in the same year, another statute attempted to prevent malicious informations for misdemeanour exhibited in the King's Bench by the Master of the Crown Office; and made some improvements in the process for the reversal of outlawries, other than outlawries on charges of treason or felony.[14] In 1694 it was provided that felons who pleaded a pardon might be compelled to give security for good behaviour for seven years.[15] In the same year an attempt was

181-182; iv chap. xxiii 256-257; and cp. S.P. Dom. 1667-1668, 598-600; ibid 1689-1690, 85; in 1677 Reresby notes in his memoirs, at p. 106, that he went to London well guarded for fear of highwaymen—"having caused one of the chief of them to be taken not long before."

[1] § 1. [2] § 4. [3] 10 William III. c. 12 § 2.
[4] Above 402. [5] § 5. [6] § 6. [7] § 7. [8] § 8.
[9] E.g. 3 William and Mary c. 9 § 1; 10 William III. c. 12 § 1.
[10] 3 William and Mary c. 9 § 2. [11] Ibid § 6.
[12] 4 William and Mary c. 24 § 13. [13] Ibid c. 22.
[14] Ibid c. 18; for the history of the bill see Hist. MSS. Com. 14th Rep. App. Pt. vi 48 no. 537.
[15] 5, 6 William and Mary c. 13; the Act repealed 10 Edward III. c. 3 on the same subject; the preamble tells us that the latter Act had long been found so difficult to put in force that it had generally been dispensed with; but that it was now necessary to repeal it, as the Bill of Rights had made such dispensations no longer possible; for a similar bill rejected in the House of Commons in 1692-1693 see Hist. MSS. Com. 14th Rep. App. Pt. vi 366 no. 712.

made to stop the hindering of proceedings at quarter sessions by obtaining (for no sufficient cause) writs of certiorari to remove them before trial.[1] In 1698-1699 powers were given to the justices of the peace to levy rates for building or repairing the country gaols.[2]

(3) *Evidence.*

As yet the statute law on this topic is scanty. The most considerable addition was made by the statute of Frauds, the chief object of which was, as we have seen,[3] to secure written evidence of certain transactions. We have seen, too, that one of the clauses of the Act of 1698 was designed to encourage witnesses for the crown in cases of felony.[4] The only other Act upon this topic was passed in 1677. It empowered the judges of assize to take affidavits as to matters depending in any of the three common law courts, and the chiefs of these courts to appoint commissioners to take such affidavits in the country.[5]

(4) *Civil Procedure.*

A number of statutes were passed to effect small changes in the law of civil procedure. It will be sufficient to enumerate them briefly, as none of them attempted to make any fundamental changes.

Acts of 1660[6] and 1688[7] were passed to provide for the continuance of process and other difficulties consequent upon the Restoration and Revolution. Of the rest, some of these statutes were designed to remedy defects in the process of the courts, and in the law of pleading. Others were concerned with the officials and their fees, and the discouragement of frivolous or trifling suits.

Of the statutes relating to process the largest group relates to the arrest of defendants on mesne process. An Act of 1661, in order to stop the practice of maliciously arresting defendants, provided that, unless the true cause of action was set out in the writ, no one could be kept in prison; and that a defendant could only be compelled to give a bond for his appearance to an amount not exceeding

[1] 5, 6 William and Mary c. 11; made perpetual by 8, 9 William III. c. 33; a bill had been passed by the House of Commons upon similar lines in 1667, but the judges had opposed it, and it was lost in the House of Lords, Hist. MSS. Com. 8th Rep. 113 no. 99; ibid 116 no. 129.

[2] 11 William III. c. 19.

[3] Above 384-386.

[4] Above 406.

[5] 29 Charles II. c. 5.

[6] 12 Charles II. c. 3; 12 Charles II. c. 12 was passed to determine which of the judicial proceedings of the Commonwealth should stand good, and which were to be void; § 8 of the Act provided that the judges, barons of the Exchequer, commissioners of sewers, bankrupts, and charitable uses should cease to hold office on May 8, 1660.

[7] 1 William and Mary c. 4.

£40.[1] In order to relieve creditors, whose debtors, with intent to delay their creditors' actions, remained in prison, it provided a means by which creditors could proceed to judgment against such prisoners.[2] Further provisions for the benefit both of creditors and debtors were made by an Act of 1696-1697.[3] That Act made provision for punishing gaolers who allowed persons imprisoned for debt to escape, and for permitting creditors to take further proceedings against such escaped prisoners; for compelling sheriffs to arrest debtors though they fled to pretended privileged places such as Whitefriars;[4] and for settling the chamber rent that such prisoners could be compelled to pay. The inconvenient rule, that, upon the death of the parties or some of them before final judgment, an action abated, was partially remedied. In 1665 it was provided that the death of either party between verdict and judgment in real, personal, or mixed actions was not to render the judgment liable to be reversed;[5] and in 1696-1697, that if there were two or more plaintiffs or defendants and one died, and the right to sue or the liability to be sued survived to the others, there should be no abatement of the action.[6] Attempts were made to prevent the delays which could be interposed by bringing writs of error. An act of 1661[7] extended to certain other actions the rule made by an Act of 1606,[8] that execution was not to be stayed by writ of error, unless security for double the amount of the sum adjudged to be due and costs were given; and, if the judgment was affirmed, the plaintiff in error was to pay double costs.[9] In 1698 it was provided that no fine recovery or judgment in a real or personal action should be reversed for error after twenty years.[10] Several statutes endeavoured to amend defects in

[1] 13 Charles II. st. 2 c. 2 § 1; for the effect of this Act on the King's Bench process of latitat see vol. i 200, 221.

[2] 13 Charles II. st. 2 c. 2 § 4; see also 4 William and Mary c. 21.

[3] 8, 9 William III. c. 27; a bill to abolish the process of Capias for all debts under 40s. had been lost in 1690, Hist. MSS. Com. 13th Rep. App. Pt. v 44, no. 266; cp. House of Lords MSS. ii 396 no. 1114.

[4] The places enumerated in § 15 of the Act are Whitefriars, Savoy, Salisbury Court, Ram-Alley, Mitre Court, Fuller's Rents, Baldwyn's Gardens, Montague Close or the Minories, Mint Clink or Deadman's Place; see Macaulay, History of England (ed. 1864) i chap. iii 173, iv chap. xxii 189-190, for a picturesque account of these quasi-sanctuaries; the Mint in Southwark was not got rid of till 1723, Lecky, History of England ii 109-110; for the mediæval sanctuaries see vol. iii 303-307.

[5] 17 Charles II. c. 8; 8, 9 William III. c. 11 § 6 provided that actions were not to abate if either party died after interlocutory judgment, if it was such an action as the executors or administrators might bring or defend.

[6] 8, 9 William III. c. 11 § 7.

[7] 13 Charles II. st. 2 c. 2 § 7—the actions were debt for tithes, assumpsit, trover, covenant, detinue, trespass; further extended by 16, 17 Charles II. c. 8 § 3 to dower and ejectment.

[8] Vol. v 535; 3 James I. c. 8, made perpetual by 3 Charles I. c. 4 § 4.

[9] 13 Charles II. st. 2 c. 2 § 8.

[10] 10 William III. c. 20 § 1; § 2 provided that in case of infancy, coverture, lunacy, imprisonment, or absence beyond the seas a period of five years should be allowed from the termination of the disability.

the jury system. In 1664-1665 a property qualification was required for jurors; changes were made in the mode of summons; and penalties were imposed on sheriffs who took bribes to excuse the appearance of particular persons.[1] In 1695-1696 an attempt was made to remedy some of the delays in proceeding to trial at assizes, and in summoning jurors.[2] In 1665 "the intricate and dilatory proceedings" upon the action of replevin were in some points amended.[3] In 1692[4] provision was made for the more easy discovery of judgments given in the courts of common law.

Very few statutes relate to the law of pleading. An Act of 1664-1665 enumerated certain defects of form which, in civil cases, were not to stay judgments or be a ground for their reversal;[5] and an Act of 1696-1697 allowed a plaintiff in an action on a penal bond to assign as many breaches as he pleased.[6]

One or two Acts deal with the officials of the Courts and their fees. In 1692 power was given to the chief justices to appoint commissioners to take special bails in the country;[7] and in 1665[8] and 1694[9] certain old fees or exactions by officials of the courts of common law were taken away. As in the preceding period,[10] attempts were made to discourage the bringing of frivolous or trifling suits in the courts of common law. It was provided in 1670-1671,[11] that, if the damages recovered by a plaintiff in a personal action (other than an action for assault or an action in which the title to land was in question) were under 40s., he should receive only the same sum for costs as he had recovered for damages; and in 1696-1697 successful plaintiffs and defendants in certain actions were given a statutory right to costs.[12]

(5) *The Ecclesiastical Law and Jurisdiction.*

The statutes on this topic fall into two clearly marked divisions—(i) statutes dealing with purely ecclesiastical topics;

[1] 16, 17 Charles II. c. 3; modified by 4 William and Mary c. 24 § 16; for another bill on this subject in 1678 see Hist. MSS. Com. 9th Rep. App. Pt. ii 122 no. 614.

[2] 7, 8 William III. c. 32; supplemented by 8, 9 William III. c. 10.

[3] 17 Charles II. c. 7.

[4] 4 William and Mary c. 20.

[5] 16, 17 Charles II. c. 8 § 1—it did not apply to appeals of felony or pleas of the crown other than revenue cases; for earlier statutes on this subject see vol. iv 535-536.

[6] 8, 9 William III. c. 11 § 8.

[7] 4 William and Mary c. 4.

[8] 17 Charles II. c. 6—a payment called damages cleer exacted by the prothonotaries of the King's Bench and Common Pleas; for this see vol. i 255-256.

[9] 5, 6 William and Mary c. 12—capias pro fine—a fine for breach of the peace payable to the king by unsuccessful defendants in actions for trespass, but compounded for by the payment of a small sum to an official, and never estreated into the Exchequer; the officials abused the process, outlawing defendants unless they compounded to their satisfaction, see Runnington, Ejectment 405.

[10] Vol. iv 539.

[11] 22, 23 Charles II. c. 9 § 9, extended to Wales by 11 William III. c. 9.

[12] 8, 9 William III. c. 11 §§ 1-4; for the history of the law as to costs see vol. iv 536-538.

and (ii) statutes dealing with the ecclesiastical jurisdiction over the administration of the estates of deceased persons.

(i) Several statutes relate to marriages, births, and burials. In 1660 all marriages solemnized since 1642, according to the law then in force, were confirmed.[1] In 1694 two Acts had imposed a duty on marriage licences; and it had been provided that no person should marry without having got such a licence, unless banns had first been published.[2] An Act of 1695-1696[3] imposed penalties on persons marrying, and on priests who performed the marriage ceremony, or who permitted others to perform it, without licence or banns. It further provided for the notification of all births to the parson, and the keeping by him of a register of births;[4] and for the notification by him to the collectors of the tax on burials of all cases in which he had buried a person resident in another parish.[5] In 1677 regulations were made as to gifts for the augmentation of livings;[6] and in 1691 as to the amount of tithes on flax and hemp,[7] and in 1695-1696 as to the recovery of small tithes.[8] The writ *de haeretico comburendo* was abolished in 1677—with a proviso that its abolition was not to take away the ecclesiastical jurisdiction in cases of blasphemy, heresy, and schism.[9] On its repeal, a news letter tells us, "the chancellor observed, and was hummed for it, that the Parliament had taken away Smithfield Purgatory."[10] In 1688 it was provided that the simoniacal promotion of a clerk should not, after the death of such person, prejudice an innocent patron, or the *bona fide* lessee of such person.[11]

(ii) With the Statutes of Distribution—the most important of the statutes affecting the ecclesiastical jurisdiction over the administration of the estates of deceased persons—I have already dealt.[12] I have dealt also with the statutes of 1692 and 1695-

[1] 12 Charles II. c. 33.

[2] 5, 6 William and Mary c. 2 § 1; 6, 7 William and Mary c. 6 § 47.

[3] 7, 8 William III. c. 35 §§ 1-3; for bills of 1677 and 1685 to prevent clandestine marriages of minors, see Hist. MSS. Com. 9th Rep. App. Pt. ii 90 no. 395; ibid 11th Rep. App. Pt. ii 276 no. 420; ibid 12th Rep. App. Pt. vi 243 no. 130; ibid 13th Rep. App. Pt. v 253 no. 395.

[4] § 4. [5] § 6. [6] 29 Charles II. c. 8.

[7] 3 William and Mary c. 3; 11 William III. c. 16.

[8] 7, 8 William III. c. 6; for the amendments to and the history of this bill see Hist. MSS. Com. 14th Rep. App. Pt. vi no. 511, and House of Lords MSS. ii 153 no. 093; it was by no means the first attempt at legislation on this topic; a bill on this subject from the House of Commons was dropped in the House of Lords in 1677, Hist. MSS. Com. 9th Rep. App. Pt. ii 95 no. 418; for another bill see ibid 12th Rep. App. Pt. vi 225 no. 126; for a bill similar to that which was passed in 1695-1696 see ibid no. 234.

[9] 29 Charles II. c. 9; for this writ see vol. i 617, 618; for notes of the passage of the bill through the House of Commons see Marvel's Works ii 522, 533, 536, 546; Hist. MSS. Com. 9th Rep. App. Pt. ii 64 no. 276; for William III.'s Act on the subject of blasphemy, and for blasphemy generally see Pt. II. c. 5 § 4.

[10] S.P. Dom. 1677-1678 95. [11] 1 William and Mary c. 16.

[12] Vol. iii 559-563.

1696 which abolished the restrictions on testation which still existed in the province of York and in Wales.[1] The only other statute on this topic is an Act of 1678, which provided that the personal representatives of executors de son tort, who had wasted or converted to their own use the goods of the deceased, should be liable to make good the damage caused by their testator or intestate.[2]

In this series of statutes there are hardly any indications of the great Revolution which had taken place in 1688. It is clear that that Revolution was not accompanied by any great reforms in private law; and, as we have seen,[3] the changes which it made directly in our public law were comparatively small. It is true, as we shall see,[4] that bills were from time to time introduced which, if carried, would have introduced more extensive reforms. But, as the statute book shows, they never become law. The reason for this we must now consider.

The reasons for the Absence of any Great Legislative Reforms at the Revolution

The cause of this phenomenon is to be found in the political character of the Revolution. We have seen that its character was shaped by the fact that is was the work of a coalition of all parties in the state for a particular object; that all parties were agreed in the necessity of getting rid of a Roman Catholic king, who had deliberately broken the law in order to favour his religion and enlarge his prerogative; but that it was only a very inconsiderable minority who wished for any further changes. We have seen, too, that the political experiments of the Commonwealth period had instilled a healthy fear of any departure from the established constitutional order which was not absolutely necessary.[5] As it was with public, so it was with private law. The extensive law reforms projected by the Commonwealth statesmen had succeeded in convincing the great majority both of lawyers and laymen, that such reforms were likely to prove a remedy worse than any disease from which the law was suffering. But, to understand both the strength of and the justification for this feeling, it is necessary at this point to make a short digression, and to give a brief account of the reforms which were proposed during the period of the Commonwealth, and of the legislative measures which were actually passed. We shall then be in a

[1] 4 William and Mary c. 2; 7, 8 William III. c. 38; vol. iii 552.

[2] 30 Charles II. c. 7, made perpetual 4 William and Mary c. 24 § 11; cp. Hist. MSS. Com. 9th Rep. App. Pt. ii 103 no. 502, and cp. ibid nos. 518, 580.

[3] Above 241-242. [4] Below 428. [5] Above 161-162.

position to understand why the Revolution was not accompanied by any large legislative changes, and to come to some conclusions upon the question whether this phenomenon was beneficial or otherwise to the development of English law. The subject therefore falls under three heads: (1) the law reforms proposed during the Commonwealth period; (2) the legislation of the Commonwealth; (3) the question whether, at the end of the seventeenth century, large measures of legislative reform would have been beneficial to the English legal system.

(1) *The law reforms proposed during the Commonwealth period.*

The English legal system, as it existed at the period when the Commonwealth was established, was the product of a gradual and a continuous growth, which had corresponded with the growth of the nation. It had been adapted to the new needs created by this national growth by many different methods. We have seen that the failure of the mediæval common law to cope with the problems set by the growth of the modern state, had led, during the sixteenth and seventeenth centuries, to the growth of new courts and councils, which had both supplemented the deficiencies of the mediæval common law, and had originated new bodies of law.[1] But the rivalry which naturally sprung up between the common law and these new bodies of law had made for the expansion of the common law.[2] That expansion had taken place, partly by means of judicial decisions, partly by legal fictions, partly by the adaptation of mediæval machinery to new uses, and partly by changes in, or additions to, the law made by the legislature.[3] But, though the law had thus been adapted to the needs of the modern state, the methods by which it had been thus adapted had led to conflicts of jurisdiction between rival courts,[4] to a cumbersome, a dilatory, and an expensive procedure,[5] and to other abuses, in which many of the officials of the courts,[6] and many members of the legal profession,[7] had a vested interest. Naturally, at a period when all existing institutions were put upon their trial, these obvious abuses attracted attention. Men began to ask why they they should be suffered to continue in a new made state. And, as the men who asked these questions were the rulers of the state, it was certain that a determined attempt to reform these anomalies would be made.

We have seen that the policy of tolerance, pursued by the army, had allowed many fanatical sects to develop.[8] To their

[1] Vol. v chaps. iii and iv. [2] Ibid chap. v. [3] Vol. iv chap. ii.
[4] Vol. i 459-465, 508-516, 553-558, 610-611; vol. v 428-433, 438-440, 492-493.
[5] Pt. II. c. 7 § 2. [6] Vol. i 256-259, 424-428.
[7] Ibid 257-262, 422-425, 425. [8] Above 152-154, 158-159.

religious programme these sects generally added a political programme:[1] and, as part of their political programme, they advocated some very radical plans of law reform. There were those who wished to "clear the law of everything, 'either properly and directly, or collaterally and obliquely repugnant to the law of God,' a method . . . which had been pursued in the Judaized code of New England."[2] Others considered that all the defects of the law were, if not actually invented, certainly maintained and defended, by the legal profession, from motives of corrupt self-interest.[3] They raked up the old complaints of the author of the Mirror of Justices.[4] They would have liked to dispense with law reports,[5] to get rid of all the central courts of law, and to entrust its administration to what would have been, in effect, local tribunals of arbitration.[6] Others contended for something very much like a communal ownership of land, and possibly of other kinds of property.[7] The advocates of such plans as these were never anything more than a noisy but small minority. The majority of those who pressed for law reforms were considerably more sane. They aimed at a reformation of private law which should make it harmonize with the new modelled constitution. Abuses in the law itself and in its administration — some

[1] Above 153, 158-159.

[2] Robinson, Anticipations under the Commonwealth of Changes in the Law, Essays A.A.L.H. i 481, citing John Coke, Vindication of the Profession and Professors of the Law 25-26; this tendency in New England was noted and criticized by T. H. Leckford, Plain Dealing on News from New England (1642), Mass. Hist. Soc. 3rd series iii at pp. 85-86—"I feare it is not a little degree of pride and dangerous improvidence to slight all former laws of the Church and State, cases of experience, and precedents, to go hammer out new according to several exigencies; upon pretence that the Word of God is sufficient to rule us all. It is true it is sufficient, if well understood. But take heed my brethren, despise not learning, nor the worthy lawyers of either gown, lest you repent too late;" Cromwell alluded to these ideas in Speech II (1654), Carlyle, Letters, etc. iv. 29-30—"But when they come to such practices as telling us, for instance, that Liberty and Property are not badges of the kingdom of Christ; when they tell us, not that we are to regulate Law, but that Law is to be abrogated, indeed, subverted; and perhaps wish to bring in Judaical Law; instead of our known laws settled among us; this is worthy of every Magistrate's consideration."

[3] W. Cole, A Rod for Lawyers (1659), Harl. Miscell. iv 319-326; see especially p. 322; at p. 319 he says, "It is thy duty, and every honest Englishman's in the land, to take care hereafter never to choose any of that generation to make laws for us;" J. Jones, The New Returna Brevium (1650) 7, 15, 16; Warr, Corruption and Deficiency of the Laws of England (1649) Harl. Miscell. iii 256, 258-259.

[4] J. Jones, op. cit. 9; for The Mirror see vol. ii 327-333.

[5] J. Jones, op. cit. 22.

[6] Ibid 29-33; Cole, op. cit. 321-322; at p. 323 he says, "Can the people of London or Masters in Chancery judge the equity of things acted in Cornwall or Wales, better than the chief able men of the neighbourhood?"

[7] G. Winstanley, "An appeal to the House of Commons desiring their answer whether the common people shall have quiet enjoyment of the Commons and waste land, or whether they shall be under the will of Lords of Manors still" (1649); at p. 5 he says, "All of us by the righteous law of our Creation ought to have food and raiment freely by our righteous labouring of the earth, without working for hire or paying rent one to another."

connected with the prerogatives of the monarchy now abolished, others with the privileges of lawyers and officials, others with the old ecclesiastical order, others with the intricacy of legal rules—were to be abolished. Thus reformed, the law was to cease to be an expensive burden to the people, and become the means of distributing justice and protection cheaply and quickly. The aims of these more moderate reformers are illustrated by a tract written by John Warr in 1649, upon "The Corruption and Deficiency of the Laws of England."[1]

"The proper fountain of good and righteous laws," is, he says, "a spirit of understanding with freedom, and having a simple respect to people's rights."[2] "So far as the laws advance the people's freedoms, so far they are just;" but so far as they advance the prince's prerogative they are unrighteous.[3] The laws of England are unrighteous because, since the Norman Conquest,[4] the prerogative "hath the greatest influence and is the chiefest ingredient in the mixture of law."[5] It is true that, since the Conquest, the king's power has been abridged; but, in spite of this, his interest is "the great bias and rule of law," and the interests of the people are very little respected.[6] "Good patriots should study the people as favourites do the prince."[7] They should therefore aim at seeing that the laws secure to all "an equal and a speedy distribution of right."[8] English law does not secure this. To those who are inclined to deny this proposition the author addresses the following list of pertinent questions, which sum up the current objections to the law, and indicate the main objects of the reformers:—[9]

"Why are there so many delays, turnings and windings, in the laws of England?

"Why is the law a meander of intricacies, where a man must have contrary winds before he can arrive at his desired port?

"Why are so many men destroyed for want of a formality and punctilio in law? And who would not blush to behold seemingly grave and learned sages prefer a letter, syllable, or word before the weight and merit of a cause?

"Why do the issue of most law suits depend upon precedents rather than the rule, especially the rule of reason?

"Why are men's lives forfeited by the law upon light and trivial grounds?

"Why do some laws exceed the offence? And, on the con-

[1] Harl. Miscell. iii 250-260. [2] At p. 251. [3] At p. 253.

[4] The idea that the burdensome character of the law was introduced by the Conqueror, because it was made in his interest, was an idea generally held by the reformers, see this tract at pp. 253-256; Winstanley, op. cit. 6; Cole, op. cit. Harl. Miscell. iii 320.

[5] At p. 253. [6] At p. 255. [7] At p. 257. [8] Ibid. [9] Ibid.

trary, other offences are of greater demerit than the penalty of the law?

"Why is the law still kept in an unknown tongue, and the necessity of it rather countenanced than corrected?

"Why are not courts rejourned into every county, that people may have right at their own doors, and such tedious journeys may be prevented?

"Why under pretence of equity and a court of conscience are wrongs doubled and trebled upon us, the court of Chancery being as extortionous or more than any other court?"

All these undoubted evils should be redressed. Nor should people be apprehensive that such a reformation would sweep away the state, and the fundamental laws upon which it rests. "The notion of a fundamental law is no such idol as men make it. For, what I pray you, is fundamental law, but such customs as are of eldest date, and longest continuance? . . . The more fundamental a law is, the more difficult, not the less necessary to be reformed."[1] As these ideas were held by many of the Commonwealth statesmen, the introduction of large proposals of law reform was inevitable.

We can distinguish two chief sets of these proposals. The first set is contained in the bills which were considered by the Little Parliament in 1653,[2] and the second, in a little book written by William Shepherd, entitled *England's Balme*.[3] Cromwell intended to introduce measures of law reform both in the Parliament of 1654[4] and in that of 1656;[5] and this book represents the opinion of one who had been summoned to discuss the measures to be introduced in 1656.[6] I have already given

[1] At pp. 253-254.

[2] Somers' Tracts vi 177-245.

[3] For Shepherd, see vol. v 377, 391-392, 397; below 606; for the full title of the book see vol. i 430 n. 13; in the Clarke Papers (C.S.) iii 61, it is stated that "A new modell is lately drawne by Mr. Shepard, an able lawyer, for settling provinciall courts throughout the whole nation, and a register in every county; it is presented to his Highnesse and Councill, and soe well approved that its thought generally . . . it will be put into practice before Easter-term next. This much startles the lawyers and the Citty."

[4] Speech II. Carlyle, Letters, etc. iv 33—"the Government hath desired to reform the Laws. I say to reform them;—and for that end it hath called together Persons . . . of as great ability and as great interest as are in these Nations to consider how the Laws might be made plain and short, and less chargeable to the People; how to lessen expense, for the good of the Nation. And those things are in preparation, and Bills prepared."

[5] Speech V. Carlyle, Letters, etc. iv 209-210—"there is one general grievance in the Nation. It is the Law. Not that the Laws are a grievance; but there are Laws that are. . . . The truth of it is, there are wicked and abominable Laws, which it will be in your power to alter. To hang a man for Six-and-eight pence, and I know not what; to hang for a trifle, and acquit murder. . . . I have known in my experience abominable murders acquitted. And to see men lose their lives for petty matters: this is a thing God will reckon for."

[6] England's Balme, Prefatory Address to the Lords and Gentlemen assembled in Parliament; this claim is borne out by the Clarke Papers (C.S.) iii 64.

some account of the changes proposed, and the changes actually made in the judicial system during this period.[1] Here I shall describe shortly the chief changes which were proposed to be made in the various branches of the substantive law.

The changes proposed in 1653 are contained in several draft bills, "prepared by persons appointed to consider of the inconvenience, delay, charge, and irregularity in the proceedings of the law."[2] These bills travel over the whole field of law; and I shall briefly describe their contents under the following heads:—the land law; criminal law; equity; mercantile law; matters formerly dealt with by ecclesiastical law; procedure; the legal profession.

The land law.—The reforms proposed in this branch of the law were very extensive. Fines and recoveries were to be abolished. An ordinary conveyance by a tenant in tail was to be sufficient to bar the entail, and a conveyance by deed acknowledged was to be sufficient to pass the interest of a married woman.[3] An heir liable to pay his ancestors' debts was no longer to escape liability by selling the land before action brought.[4] Fines on the descent and alienation of copyholds were to be limited to one year's value of the land.[5] Grantees of rents were to have a better remedy for their recovery,[6] and notice of the grant to the tenant was substituted for attornment.[7] Lands voluntarily conveyed were to be liable to all debts contracted before the conveyance.[8] Provision was made for a system of county registries of conveyances and descents of land, and of incumbrances created upon it.[9]

Survivorship between joint tenants was to be abolished in the absence of a declaration to the contrary.[10] Dower was to be capable of being barred by a declaration in the conveyance by which the husband acquired the land.[11] Merger was to be prevented by a declaration to that effect.[12] Collateral warranties were to have the same effect as lineal warranties.[13] General occupancy was abolished,

[1] Vol. i 429-434.
[2] Somers' Tracts vi 177.
[3] Ibid 182-183; see 3, 4 William IV. c. 74.
[4] Somers' Tracts vi 183; cp. 3 William and Mary c. 14 §§ 4-6; above 397-398.
[5] Somers' Tracts vi 183.
[6] Ibid 183-184.
[7] Ibid; cp. 4 Anne c. 16 §§ 9 and 10.
[8] Somers' Tracts vi 186; there were also clauses dealing with the case where a man voluntarily made his wife or children joint purchasers, or where a man, being indebted, took a bond or bought goods in the name of himself and his wife, or of his wife and children.
[9] Ibid 191-196; the question of registration of conveyances attracted a good deal of attention all through the latter part of the seventeenth century, below 532 n. 9, 594.
[10] Ibid vi 229, Sect. lxxv.
[11] Ibid Sect. lxxvi; cp. 3, 4 William IV. c. 105.
[12] Somers' Tracts vi 229, Sect. lxxvii.
[13] Ibid Sect. lxxix; for the difference between the effect of collateral and lineal warranties see vol. iii 117-118.

and the estate was to go to the heir, and be assets as if it were an estate in fee simple.[1] The half blood was to be admitted to succeed in default of heirs of the whole blood.[2] Younger children were to have a third of their parent's real property, if they were neither advanced by the parent nor married with his consent, and if they had not acquired land by descent from the parent by local custom, nor been barred by the parents' declaration made before two witnesses or in writing.[3]

Criminal Law.—In the criminal law there had been, throughout English legal history, no extensive statutory reforms. Statutes had added new offences; but they had interfered very little with existing rules. Hence there was a large scope for the reformer's activity. The plea of "not guilty" was abolished, and for it was substituted the plea "I abide my lawful trial."[4] Peine forte et dure was abolished, and standing mute was made equivalent to a conviction.[5] Prisoners were allowed to have counsel, and their witnesses were to be sworn.[6] Pardons as of course were abolished, and, where they were formerly issued, the prisoner was to be acquitted.[7] The benefit of clergy was taken away, and, in certain cases in which clergy might have been pleaded, the punishment was mitigated.[8] Women sentenced to death were no longer to be burnt, but to be hung.[9] Provision was made for rewards to prosecutors and others by whose assistance criminals had been brought to justice.[10] Forfeiture of goods in consequence of suicide was abolished.[11] No civil action was to lie for goods feloniously taken till the offender had been prosecuted.[12] Special provision was made for duelling and challenges to duels,[13] for drunkenness, cursing, swearing, and Sabbath breaking.[14]

Equity.—We have seen that the delays and expense of the court of Chancery had caused such an outcry against the court

[1] Somers' Tracts vi 229, Sect. lxxx; cp. 29 Charles II. c. 3 § 12; above 386-387.
[2] Somers' Tracts vi 229, Sect. lxxxi; cp. 3, 4 William IV. c. 106 § 9.
[3] Somers' Tracts vi 230, Sect. lxxxiii.
[4] Ibid 234-235, Sect. i.
[5] Ibid Sect. ii; cp. 12 George III. c. 20.
[6] Somers' Tracts vi 235, Sect. iii; cp. 7 William III. c. 3 § 1 (treason—witnesses sworn and defence by counsel); 1 Anne St. 2 c. 9 § 3 (felony, prisoners' witnesses to be sworn); 6, 7 William IV. c. 114 (felony, defence by counsel).
[7] Somers' Tracts vi 235, Sect. v; cp. 9 George IV. c. 31 § 10; 24, 25 Victoria c. 100 § 7; for pardons as of course see vol. iii 312-313.
[8] Somers' Tracts vi 235-236, Sects. vi-x; cp. 7, 8 George IV. c. 28 § 6; 4, 5 Victoria c. 22; for benefit of clergy see vol. iii 294-302.
[9] Somers' Tracts vi 236, Sect. xi; cp. 30 George III. c. 48.
[10] Somers' Tracts vi 237-238, Sects. xviii, xix; cp. 4 William and Mary c. 8; 10 William III. c. 12 § 2; above 406.
[11] Somers' Tracts vi 238, Sect. xxi; cp. 33, 34 Victoria c. 23.
[12] Somers' Tracts vi 239, Sect. xxv; as to this rule see vol. iii 331-333.
[13] Somers' Tracts vi 188-189.
[14] Ibid Sect. xxvi; for the Commonwealth legislation on these topics see below 427.

that, all through this period, attempts had been made to reform both the court itself and the system of equity procedure.[1] Some proposals were also made for reforms in the doctrines of equity. But these were neither so numerous nor so detailed as the suggested reforms in equity procedure or in common law doctrine, because the doctrines of equity had not as yet attained to any great degree of fixity.[2] Some of these proposed changes favoured the common law at the expense of the Chancery. Thus it was provided that no injunction was to be issued against proceedings at common law upon a bill of exchange;[3] and in other cases the power to issue such injunctions was limited.[4] It was also provided that, if a trustee was liable to account, he should be made to account by the common law action, and not in any other way.[5] The period for redeeming existing mortgages was limited to two years, and thereafter to one year from the mortgagee's entry after condition broken;[6] and in other respects the mortgagor's position was made more onerous than it was under the existing equitable rules.[7] It was further provided that, if equity relieved against a penalty or a forfeiture, double damages should as a general rule be payable by the party relieved.[8]

Mercantile Law.—One or two proposals illustrate the fact that mercantile needs were beginning to influence legal development. It was proposed to make debts due by matter of record, by specialty, or by bill of exchange, assignable, provided that the assignment was in writing signed by the assignor, and that notice was given to the debtor. After notice the assignor was to be able to sue in his own name.[9] The rule that there was no survivorship between partners, in the absence of a declaration to the contrary, was expressly stated.[10]

Matters formerly dealt with by Ecclesiastical Law.—Provision was made for a civil marriage before a justice of the peace,[11] as to the age of consent to marriage,[12] as to consent of parents or guardians,[13] and for the registration of marriages, births, and burials.[14] Questions of alimony, and other "controversies con-

[1] Vol. i 431-434.
[2] Vol. v 299-338.
[3] Somers' Tracts vi 207, Sect. xxv.
[4] Ibid Sects. xxv, xxvi.
[5] Ibid 221, Sect. xlii.
[6] Ibid 209, Sect. xxxvi.
[7] Ibid 210; six months was to be the longest period allowed for redemption, Sect. xxxvii; the mortgagee in possession was only to be responsible for the profits "he hath clearly made," deducting charges, and the amount was to be ascertained by his oath alone, Sect. xxxviii.
[8] Ibid Sect. xl—excepted cases were when the party liable was an infant, or could prove that the fault was not caused by his carelessness.
[9] Ibid 189; cp. 36, 37 Victoria c. 66 § 25, 6; for a similar proposal in 1673-1674 see Journals of the House of Lords xii 538, 623.
[10] Somers' Tracts vi 229, Sect. lxxv.
[11] Ibid 179-180.
[12] Ibid 181—the ages were 17 for a male and 15 for a female.
[13] Ibid 180-181.
[14] Ibid 180; cp. 7, 8 William III. c. 35 §§ 4 and 6; above 410.

cerning marriages" were to be determined by the court of Common Pleas or by the county judicatures.[1] The same courts were also given jurisdiction over the probate of wills and grants of administration.[2] The conditions under which such grants were to be made were defined.[3] The duties of the executor or administrator to get in and make an inventory of the estate,[4] to pay debts,[5] to pay legacies,[6] and to account,[7] were also defined; and rules were made as to the persons entitled to the chattels of a deceased intestate.[8] We shall see that special provision had already been made for such offences as incest and adultery, which were formerly dealt with by the ecclesiastical courts.[9]

Procedure.—In this branch of the law very far-reaching reforms were proposed. The delays of the Chancery procedure were remedied by a set of rigid rules, which specified the number, and defined the duties of the officials of the court.[10] These rules also regulated the stages of the procedure[11]—the times at which the pleadings must be delivered,[12] the conditions under which references to masters must be made,[13] the hearing of motions and causes in their proper order,[14] the powers of the judges at the hearing of the case,[15] the execution of decrees,[16] payment of money into court,[17] and costs.[18] A table of fees was provided;[19] and the taking of any further fee was to render the taker liable to be punished as an extortioner.[20] The reforms suggested in the common law system of procedure aimed at securing a uniformity of process, and simplified rules of pleading, such as have to a large extent been secured by the Uniformity of Process Act,[21] the Common Law Procedure Acts, the Judicature Acts, and the modern Rules of the Supreme Court.[22] A uniform process for beginning an action,[23] and model pleadings were provided.[24] A straightforward action for the

[1] Somers' Tracts vi 214, Sect. viii; for the proposed county judicatures see vol. i 430. [2] Somers' Tracts vi 196, 199.
[3] Ibid 196-198, 199, 201. [4] Ibid 198.
[5] Ibid 198, 200, 201; it was provided (at p. 201) that an heir who had paid a debt for which the executor was liable could sue the executor by action on the case—a unique attempt to enforce the doctrine of marshalling assets by a common law action.
[6] Ibid 200. [7] Ibid 200, 201.
[8] Ibid 199, 200; cp. the statutes of Distribution, 22, 23 Charles II. c. 10, 1 James II. c. 17; vol. iii 559-561.
[9] Below 424.
[10] Somers' Tracts vi 202-203, Sects. ii and iii.
[11] Ibid 203-209, Sects. iii-xxxv. [12] Ibid 204, Sect. ix; 205, Sects. xii, xiv.
[13] Ibid 205-206, Sect. xv. [14] Ibid 206, Sects. xvi, xvii.
[15] Ibid 207-208, Sect. xxvii. [16] Ibid 209, Sects. xxxii, xxxiii.
[17] Ibid 209, Sect. xxxiv. [18] Ibid 208, Sect. xxx. [19] Ibid 210, 211.
[20] Ibid 210, Sect. xl; cp. 15, 16 Victoria c. 87 §§ 1, 3, 4; vol. i 445.
[21] Vol. i 222, 240. [22] Ibid 645-647; Pt. II. c. 7 § 2.
[23] Somers' Tracts vi 215, Sect. xii.
[24] Ibid 243-245; Sect. xiii provided that, "the length of declarations shall be forborne, and nothing immaterial inserted, but briefly the substance of the complaint, according to the forms set down at the end of this Act, which shall be precedents for brevity and sufficient certainty in all cases."

recovery of land was substituted for the "chargeable and uncertain" action of ejectment;[1] and some changes were made in the action of replevin, and some additions to the chattels which were distrainable.[2] Many reforms were made in particular rules of procedure and pleading. Of the reforms in the rules of procedure the following are instances: Fines upon bills, declarations, and original writs were abolished.[3] The time within which certain pleadings must be delivered, and the trial must take place, was specified;[4] and rules were made as to the qualification of jurors, and as to the modes of summoning them.[5] Very detailed rules were made as to the execution of judgments against the person and property of debtors.[6] Debtors who could not pay must work, and give half their earnings to the creditor.[7] Even if released from prison on account of poverty, they were to be detained in the workhouse.[8] Of the reforms in the rules of pleading the following are instances: Colour in pleading, and new assignments were prohibited;[9] and there was to be no demurrer of the parol in actions against infants.[10] If a defendant pleaded the general issue, he must set down also the substance of the matters he proposed to rely upon at the trial.[11] Tables of the fees chargeable both in civil and criminal proceedings were provided.[12] Finally, it was specially stated that, "all persons should be alike liable to the proceedings of justice without any benefit of privilege."[13]

The Legal Profession.—Some of the proposed regulations as to the legal profession were unobjectionable. For instance, the court of Common Pleas was thrown open;[14] and no attorney was to be admitted unless approved by the grand jury of his county.[15] But many of them were evidently inspired by the idea that the legal profession was acquiring too much wealth by questionable means, and a position of too great influence in the state. Thus it was provided that no counsel was to make more than £5 out of any one cause,[16] and that no member of Parliament was to practise as a counsel, except on behalf of the Commonwealth.[17]

[1] Somers' Tracts vi 228-229, Sect. lxxiv; cp. 15, 16 Victoria c. 76 §§ 186-221; for the history of this action see Pt. II. c. 1 § 1.

[2] Somers' Tracts vi 227-228, Sects. lxix-lxxiii; cp. 17 Charles II. c. 7; 2 William and Mary c. 5; above 397.

[3] Somers' Tracts vi 179.

[4] Ibid 216, 217, 218, Sects. xxii, xxiv, xxviii, xxix.

[5] Ibid 218, 219, Sects. xxx-xxxiii; cp. 16, 17 Charles II. c. 3; above 409.

[6] Somers' Tracts vi 221, 222, Sects. xliv-xlvii; see below 427 for the actual legislation of the Commonwealth of this topic.

[7] Ibid Sect. xliv.

[8] Ibid.

[9] Ibid 217, Sect. xxii; for the doctrine of colour see vol. iii 639 n. 1; for both rules see Pt. II. c. 7 § 2.

[10] Somers' Tracts vi 223, Sect. xlviii; for demurrer of the parol see vol. iii 513-516.

[11] Somers' Tracts vi 217, Sect. xxv; for the general issue see Pt. II. c. 7 § 2.

[12] Somers' Tracts vi 233-234, 239-240.

[13] Ibid 225, Sect. lvii.

[14] Ibid 211-212, Sect. i.

[15] Ibid 230, Sect. lxxxiv.

[16] Ibid 184.

[17] Ibid.

Similarly, the idea that the law was perverted by the ingenuity of the lawyers is illustrated by the exclusion of practising lawyers, judges, and officers of the courts from the final court of appeal,[1] and by the rule that "no argument by counsel shall be admitted upon special verdicts or demurrers touching the exposition of any Act of Parliament."[2]

The proposals made by William Shepherd in *England's Balme* are similar in character; but they deal in greater detail with legal machinery and doctrines, and they contain some suggestions as to the restatement of these doctrines. We have seen that he advocated something in the nature of a fusion of law and equity, and a uniform code of procedure.[3] He is somewhat critical as to the advantages of the jury;[4] and recommends that it should be dispensed with in the smaller local courts,[5] that there should be a property qualification for jurors,[6] and that the court of appeal should have power to fine a jury for a perverse verdict.[7] Among the many suggestions which he makes as to the reforms of legal doctrine, we may note the proposal to abolish the maxim *actio personalis moritur cum persona*,[8] the enactment of a law on the lines of Lord Campbell's Act,[9] a reform of the bankruptcy law with a view to the more severe punishment of fraudulent bankrupts,[10] and a measure making land liable to all the debts of a deceased person.[11] We can see Puritan influences in the suggestion that the law should be purged of all relics of heathenism, idolatry, superstition, and profaneness;[12] and we can see the prevalent suspicion of the legal profession in the suggestion that the judges should be made accountable to the law for any miscarriage of justice,[13] that they should never sit alone,[14] and that, "some honest godly man, though no lawyer, have an allowance to sit with them

[1] Somers' Tracts vi 240; vol. i 429.
[2] Somers' Tracts vi 219, Sect. xxxvi.
[3] Vol. i 432-433.
[4] England's Balme at p. 49.
[5] "To take away the trial by juries in county and hundred courts, and court barons, altogether; and where no witnesses are, to do it by wager of law there: and that the judges may, if they will, examine the parties themselves upon oath; and in trivial causes send for the parties and witnesses into the court, and end them," ibid.
[6] At p. 50; cp. 16, 17 Charles II. c. 34; above 409.
[7] "That if the judges dislike the verdict, they may cause short notes of the evidence to be taken, give it them, and cause them to enquire again upon it; and if yet they persist, the judges may certify the case to the judges of appeal, who without a jury shall hear the witnesses and fine the juries, and order damages to the party grieved, according to discretion," at pp. 50, 51; for the growth of the practice of granting a new trial, by which the difficulty of controlling the jury was solved, see vol. i 225-226, 346.
[8] At pp. 144, 193-194.
[9] At p. 148.
[10] At pp. 147-148.
[11] At pp. 214, 215.
[12] At pp. 6, 7; cp. pp. 128-129.
[13] At p. 45—"that all judges be beneath justice, and accountable to some above them, by whom their judgment may be examined, and miscarriage punished.
[14] Ibid.

when he will, to see and report the manner and justice of their proceedings to the Lord Protector."[1] At the same time he was a lawyer who had written many books upon the law.[2] He was quite conscious of the need, which had already been forcibly stated by Bacon,[3] for a restatement of the law. He would have liked, "To make one plain, complete, and methodical treatise or Abridgment of the whole common and statute law . . . to which all cases may be referred: and therein to make those things that are now obscure and uncertain, clear and certain. And to have all the judges subscribe it for the settled law, and to have it confirmed by the Parliament."[4]

Some few of the proposals in these long lists of projected law reforms were accepted, and became law, either during the Commonwealth period, or during the latter years of the seventeenth century. But, for the acceptance of the majority of them, it has been necessary to wait till the nineteenth and twentieth centuries;[5] and some are still unrealized. There were two closely connected reasons why so few were accepted during the seventeenth century. Firstly, during the Commonwealth period, no really stable government existed. There was, as we have seen,[6] no common consent as to the form of constitution to be adopted, and, in default of such consent, it was necessary to govern the country by means of the army. But, under these circumstances, it was impossible to legislate on the scale which the enactment of these suggested reforms would have necessitated. The enactment of the measures needed to safeguard the state against enemies, domestic and foreign, came first, and taxed all the resources of the government. Secondly, the establishment of the Commonwealth was very distasteful to the majority of the lawyers. They had held a very important position in the early days of the Long Parliament. But, from the time that the Long Parliament had been first purged and then dissolved by the army, their importance in the state had diminished. Moreover, the execution of the king, and the overthrow of the old constitution, seemed to the majority of them to be the end of all law; and it was certainly fatal to the realization of that supremacy of the law, which many had hoped would come with the final defeat of the king.[7]

[1] At pp. 45, 46.
[2] Vol. v 377, 391-392, 397.
[3] Ibid 485-489.
[4] England's Balme at p. 6.
[5] Above 417-420 and notes.
[6] Above 158-159.
[7] Whitelocke was told in 1656 that many objected to his being on the Council because he was a lawyer, and would trouble their proceedings "by telling them what was law upon every occasion, and their affairs would not permit to tie up themselves to those rules of law. . . ." "I said, I accounted my profession my greatest honour, and that it did not make me less capable of serving my country, as the late long parliament thought . . .; and former ages had the like good opinion of my profession; but if the present age were wiser than our ancestors, it was because they had

It would of course have been possible to remove certain abuses in the law—e.g. the peine forte et dure, and the benefit of clergy, without the help of the lawyers. But it was not possible, without their help, to pursue with any success a policy of constructive law reform. It was not possible, for instance, to make a successful code, or to carry a workable measure for the registration of conveyances. But the reformers of this period had not learnt the lesson that it is only those who understand a technical system who can restate it or reform it effectually. It is true that Hale, Whitelocke, and Lane, C.B., were on the committee responsible for the law reforms proposed in the Parliament of 1653. But the majority of the committee were laymen;[1] and it is clear that their proposals were bitterly opposed by the lawyers.[2] Some of these proposals were, it is true, absurd—for instance the proposal that the court of final appeal should be staffed by lawyers who had never practised.[3] Others—for instance the scheme for the registration of conveyances—were so drawn that they needed the active assistance of the lawyers to put them into workable shape. Others, on the other hand, contained valuable suggestions for the removal of obvious abuses, which could easily have been carried. But the lawyers, partly out of dislike to the domination of the army, partly from resentment at the charges of corruption freely made against them, offered, both in 1653 and all through the Commonwealth period, an indiscriminate opposition to all these proposed reforms. We shall now see that their opposition had a very large measure of success.

(2) *The legislation of the Commonwealth.*

Until the publication by the Statute Law Committee of the Acts and Ordinances of the Interregnum, there was no complete edition of the actual legislation of this period. This collection enables us to estimate the nature of the actual legislation of the period, and to distinguish what was enacted from what was merely proposed. With the legislation upon public law,[4] and upon the judicial system[5] I have already dealt. Here I must deal with the legislation upon private law.

two hundred thousand men in arms to prove them so; and if they disliked the profession of the law, it was because the law is the only opposer of unlimited will and arbitrariness which did not love to be curbed," Memorials iv 255, 256-257; cp. ibid 379-380.

[1] The names of the committee are given in Somers' Tracts vi 177.

[2] Ludlow, i 430, citing Somers' Tracts vi 177, says, "Upon the debate of registering deeds in each county, for want of which, within a certain time fixed after the sale, such sales should be void, and being so registered, that land should not be subject to any incumbrance: this word *incumbrance* was so managed by the lawyers, that it took up three months' time before it could be ascertained by the committee."

[3] Vol. i 429. [4] Above 152-157. [5] Vol. i 429-434.

Upon matters of private law the changes made were far less extensive than the changes made in public law, or in the judicial machinery of the state. These Acts and Ordinances show a very considerable measure of continuity, sometimes with the legislation of the earlier half of the century, but more often with the legislation of the latter half. Of course there are enactments which are quite peculiar to this period. Some were the necessary consequences of the changes made in the public law of the state. Thus the abolition of the court of Wards made it necessary to provide for the guardianship of idiots and lunatics;[1] the abolition of the corrective jurisdiction of the ecclesiastical courts made it necessary to provide for the punishment of incest, adultery, and fornication;[2] and it was the suppression of the Constable and Marshal's court which made it necessary to provide a special commission to punish offences connected with the unwarrantable assumption of coats of arms or crests.[3] Others were due to the fact that the Commonwealth was a Puritan government. Thus there is an Act abolishing stage plays, and imposing penalties on both actors and spectators;[4] and another prohibiting cock matches.[5] But it is only very occasionally that we meet with a reform in the law which was not carried out wholly or partially in the latter half of the seventeenth century. Almost the only instance is the Act providing that all legal proceedings should be in English, and written in ordinary hand and not in court hand; and that "all the report books of the resolutions of judges and other books of the law of England," should be translated into English; and that for the future they should be written in English.[6]

This continuity between the Acts and Ordinances of the Interregnum, and the legislation of the latter half of the seventeenth century, can best be illustrated by a brief enumeration of some of these Acts and Ordinances, under headings similar to those under which the statute law has been grouped. Those headings are: Commerce and Industry; the Press; and statutes relating to various branches of the law.

Commerce and Industry.—The Commonwealth legislation encouraged manufactures useful or essential to national defence in

[1] Acts and Ordinances of the Interregnum ii 767 (1653).

[2] Ibid ii 387 (1650).

[3] Ibid i 838 (1645-1646); for the jurisdiction of the Constable and Marshal's court over these matters see vol. i 578-580.

[4] Acts and Ordinances of the Interregnum i 1070 (1647-1648).

[5] Ibid ii 861 (1654).

[6] Ibid ii 455 (1650); it was provided in 1651, ibid ii 510, that certain persons should be commissioners to superintend these translations; that mistranslation or variation in form by reason of translation should not be error; and that no translation was necessary of certificates of cases or proceedings in the Admiralty which were to be sent beyond the sea.

much the same manner as the Restoration legislation. Thus the provision and manufacture of gunpowder was encouraged,[1] and likewise timber cultivation in the Forest of Dean.[2] Some attention was given to the fishing trade;[3] and the most famous of all the measures of the Restoration—the Navigation Act[4]—was, as we have seen, a more stringent edition of the Navigation Act of 1651. The main lines of the policy pursued with regard to colonial and foreign trade were also foreshadowed. An Act "for advancing and regulating the trade of this Commonwealth" was designed to effect the same objects as those aimed at by Charles II.s committee for trade and for the Plantations.[5] The Colonial shipping trade was encouraged by the Commonwealth's Navigation Act;[6] and the tobacco growing industry of some of the colonies was encouraged by the prohibition of English grown tobacco.[7] Attempts were made to improve the means of communication by legislation as to the highways,[8] and as to the Post Office,[9] very similar to the legislation of Charles II.'s reign; and, as in his reign, a greater liberty was allowed to export bullion.[10] The abolition of the monarchy meant the abolition of the large and somewhat indefinite powers which the king possessed over trade domestic and foreign.[11] But what was formerly done by the prerogative could be done by ordinance. Patent rights could be granted,[12] and privileges could be given to trading companies.[13] As after the Restoration, woollen manufactures were encouraged by a prohibition of the export of raw wool;[14] and other manufactures were protected against foreign competition.[15] There are also regulations for the manufacture of particular commodities, similar to those made by the legislation of the latter

[1] Acts and Ordinances i 320 (1643), 418 (1644), 578 (1644), 828 (1645-1646), ii 699 (1652)—provision of saltpetre; ii 1046 (1656)—power to export; cp. above 314; 12 Charles II. c. 4 § 11 (export), 5, 6 William and Mary c. 16 (saltpetre).

[2] Acts and Ordinances i 1125 (1648), ii 1114 (1657); cp. 19, 20 Charles II. c. 8.

[3] Acts and Ordinances ii 1276 (1659), 1421 (1659-1660); above 315-316.

[4] Acts and Ordinances ii 559; 12 Charles II. c. 18; above 316.

[5] Acts and Ordinances ii 403 (1650); above 320.

[6] Acts and Ordinances ii 559; above 316.

[7] Acts and Ordinances ii 580 (1652), 718 (1653); cp. 12 Charles II. c. 34; 15 Charles II. c. 7 § 15; 22, 23 Charles II. c. 26; above 322.

[8] Acts and Ordinances ii 861 (1654), 871 (1654), 897 (1654); cp. 14 Charles II. c. 6; 22 Charles II. c. 12; 3 William and Mary c. 12; 7, 8 William III. c. 29; above 324.

[9] Acts and Ordinances ii 1110 (1657); cp. 12 Charles II. c. 35; above 324.

[10] Acts and Ordinances ii 495 (1650-1651); cp. 15 Charles II. c. 7 § 9; above 340.

[11] Above 325-328, 334-337.

[12] Acts and Ordinances i 263 (1643), ii 490 (1650), 509 (1651).

[13] Ibid i 395 (1643-1644)—Levant Merchants; 1224 (1648)—Merchants trading to France.

[14] Ibid i 1059, 1061 (1647-1648); cp. 12 Charles II. c. 32; 14 Charles II. c. 18; above 328.

[15] Acts and Ordinances ii 242 (1649); cp. above 329-330.

part of the seventeenth century.[1] The reduction of the rate of interest to 6 p.c., made in 1660,[2] was in substance a reinactment of an Act of 1651;[3] and the practice of borrowing money on the security of taxing Acts was well established under the Commonwealth.[4] The reclamation of the flooded areas of the eastern counties was provided for by two elaborate Acts which were the precursors of a similar Act passed in 1663.[5] Some attention was paid to the poor law. The Commonwealth legislators attempted, not very successfully, to enforce for London a scheme in accordance with the principles of the Elizabethan Poor Law;[6] and in 1657 a law, applicable to the whole country, provided for the punishment of vagrants.[7] As we have seen, the whole system of poor relief practically collapsed during this period.[8]

The Press.—With this topic I have already dealt. We have seen that the Commonwealth legislation, in spite of Milton's protest, proceeded on the lines of the Star Chamber ordinance of 1637, and the later licensing Acts of Charles II.'s reign.[9]

Various branches of the law.—A very large number of the Acts, passed during the Commonwealth period to reform or add to various branches of the law, foreshadow statutes of the latter part of the seventeenth century. In the land law there is the Act for abolishing the military tenures, purveyance, and the court of Wards.[10] In the criminal law, the legislation as to treason[11] reproduces some of the features of the Act of 1661;[12] as in 1698-1699, it was found necessary to make special provision for the trial of crimes committed on or beyond the sea;[13] some of the provisions of the Test Act were foreshadowed by an Act of 1657 against Popish recusants;[14] and the Act of 1661 against tumultuous petitions was foreshadowed by an Act of 1648.[15] Acts against

[1] Acts and Ordinances ii 451 (1650)—making of stuff in Norfolk; cp. 14 Charles II. c. 5; above 332; ii 362 (1649-1650)—packing of butter; cp. 14 Charles II. c. 26.

[2] 12 Charles II. c. 13. [3] Acts and Ordinances ii 548.

[4] Ibid i 143 (1643), ii 159 (1649); above 338 n. 9.

[5] Acts and Ordinances ii 130 (1649), 899 (1654); cp. 15 Charles II. c. 17; above 345.

[6] Acts and Ordinances i 1042 (1647), ii 104 (1649); cp. 14 Charles II. c. 12 §§ 4-14; 22, 23 Charles II. c. 18; above 350.

[7] Acts and Ordinances ii 1098 (1657); cp. 14 Charles II. c. 12 §§ 6, 16-18, 23; above 350.

[8] Above 350. [9] Above 371-372.

[10] Acts and Ordinances i 833 (1645-1646), ii 1043 (1656), 1057 (1657); cp. 12 Charles II. c. 24.

[11] Acts and Ordinances ii 120, 193 (1649), 831, 844 (1653-1654), 1038 (1656).

[12] 13 Charles II. St. 1 c. 1.

[13] Acts and Ordinances ii 254 (1649); the Act of 1698-1699, 11 William III. c. 7, above 400-401, is more elaborate and provides for trials in the Plantations.

[14] Acts and Ordinances ii 1170 (1657); cp. 30 Charles II. St. 2, c. 1; above 199.

[15] Acts and Ordinances i 1139 (1648); cp. 13 Charles II. c. 5; above 167.

thieves and highwaymen,[1] poaching and killing deer,[2] and thefts on the borders;[3] and Acts against cursing and swearing,[4] the profanation of the Lord's Day,[5] blasphemy,[6] atheism,[7] and gaming,[8] were similarly foreshadowed. The Act of 1694,[9] to prevent delays in criminal proceedings by the issue of writs of certiorari, was anticipated in 1650.[10] In the law of civil procedure, there are Acts which reproduce some of the features of the statutes of Charles II.'s and William III.'s reigns as to those imprisoned for debt,[11] as to delays caused by the bringing of writs of error,[12] and as to the exaction called damages cleere.[13] The policy of registering marriages, births, and burials, which had been adopted in 1653, was partially carried out in 1695-1696.[14] An Act of 1657,[15] which attempted to prevent the building of new houses in or near London, is reminiscent of the policy pursued in the earlier rather than in the latter half of the seventeenth century.

Upon matters of private law, therefore, the legislation of the Commonwealth was not of a revolutionary character. In fact, some legislative proposals which, during the Commonwealth, never got beyond the stage of proposals, were enacted after the Restoration.[16] Obviously this phenomenon affords an adequate explanation of the absence of any great legislative reforms at the Revolution. During the Commonwealth period abuses in the law were attracting much public attention, the party which ruled the state was not very favourably disposed to the lawyers, and it lent a sympathetic ear to proposals for the reform of the law. If so little was done under these favourable conditions, we can hardly expect that much would be attempted at a time when no one of

[1] Acts and Ordinances ii 577 (1651-1652), 772 (1653); cp. 4 William and Mary c. 8; above 405-406.

[2] Acts and Ordinances i 915 (1646-1647), ii 548 (1651); cp. 13 Charles II. St. 1, c. 10; 3 William and Mary c. 10.

[3] Acts and Ordinances ii 1262 (1657); above 405 n. 3.

[4] Acts and Ordinances ii 393 (1650) 940 (1654); cp. 21 James I. c. 20; 6, 7 William and Mary c. 11.

[5] Acts and Ordinances i 420 (1644), ii 383 (1650), 1162 (1657); cp. 29 Charles II. c. 7.

[6] Acts and Ordinances i 1133 (1648); cp. 9 William III. c. 35.

[7] Acts and Ordinances ii 409 (1650); cp. 9 William III. c. 35.

[8] Acts and Ordinances ii 1250 (1657); cp. 16 Charles II. c. 7; above 404.

[9] 5, 6 William and Mary c. 11; above 406-407. [10] Acts and Ordinances ii 443.

[11] Ibid ii 240, 321 (1649), 378 (1650), 753 (1653); the last Act was suspended in 1654, ibid ii 860, 888, 897; a new Act was made later in the same year, ibid ii 911, 943; cp. the Acts cited above 407-408.

[12] Acts and Ordinances ii 357 (1649-1650); cp. Acts cited above 408.

[13] Acts and Ordinances ii 497 (1650-1651); cp. 17 Charles II. c. 6; vol. i 255-256.

[14] Acts and Ordinances ii 715; cp. 7, 8 William III. c. 35 § 4; above 410.

[15] Acts and Ordinances ii 1223; see vol. iv 303 for the earlier proclamations on this subject; these proclamations were ordered to be obeyed in 1661, Tudor and Stuart Proclamations i no. 3322, and in 1671, ibid no 3549; but after that we hear no more of them.

[16] Above 416-422.

these conditions was in existence. At the time of the Revolution abuses in the law were not attracting much attention; and the coalition of parties which accomplished it worked with the lawyers, and justified its action by arguments which the lawyers supplied.[1] Naturally there was no movement to undertake reforms in the law not supported by the lawyers. The fact that the Revolution was the work of a coalition reduced the changes which it effected in public law to the smallest possible dimensions: the fact that it was a legal Revolution reduced the changes which it effected in private law to dimensions even smaller.

It is true that attempts were made to effect some reforms in the machinery both of the common law courts[2] and the court of Chancery;[3] but, as we have seen, all these attempts failed. Similarly, abortive attempts were made to redress other abuses. A bill, introduced into the House of Lords in 1690,[4] proposed to limit the fees payable to counsel and attornies;[5] to impose penalties on counsel who took fees and then neglected to attend and plead;[6] to limit the number of counsel who could be employed in any case;[7] to revive and improve the writ of attaint by making a conviction involve only the payment of treble damages, and incapacity to serve on a jury or to give evidence;[8] to exercise a stricter supervision over the courts by the appointment of a committee to execute the powers of 14 Edward III. St. 1 c. 5, under which five members of the House of Lords could be appointed to hear complaints of the delays of courts of justice.[9] We have seen, too, that the common lawyers fortunately failed in their attempt to limit the jurisdiction of the court of Chancery.[10] The question naturally arises, Was this absence of reform beneficial or otherwise to the future development of the English legal system?

(3) *Would large measures of legislative reform at this period have been beneficial to the English legal system?*

When we look at the list of anomalous and absurd rules and practices which were marked for destruction during the Commonwealth period, it is impossible not to regret that the Revolution statesmen did not complete the destruction of some of them. It

[1] Above 194-195, 241-242. [2] Vol. i 250-251, 262. [3] Ibid 435-436.
[4] Hist. MSS. Com. 13th Rep. App. Pt. v 17 no. 244.
[5] Ibid 24; a suggestion that the fees of attornies, solicitors, and proctors should be fixed and enrolled had been made in 1670, S.P. Dom. 1670 60.
[6] Hist. MSS. Com. 13th Rep. App. Pt. vi no. 244 at p. 18 § iv.
[7] Ibid 23-24. [8] Ibid 21 § xvii.
[9] Ibid 21 § xix; for the statute of Edward III. see vol. i 369-370.
[10] Vol. i 464; Hist. MSS. Com. 13th Rep. App. Pt. v 128, no. 304; this bill also proposed to allow a mortgagor out of possession only two years from the time that the mortgagee got possession to assert his equity of redemption; and to prohibit the court of Chancery from taking cognisance of any trust of lands, unless the trust was in writing, or the cestuique trust was in possession, ibid 130, 131.

would certainly have been beneficial to the English legal system if such anomalies as the peine forte et dure, the benefit of clergy, the exclusion of the half blood from the right to inherit real property, and the rules summed up in the maxim *actio personalis moritur cum persona*, had been removed; and if the cumbersome forms of such proceedings as fines and recoveries, and the action of ejectment, had been replaced by a simpler procedure. But we should remember that a government, which was sufficiently in earnest in the cause of law reform to make a serious effort to abolish these and other similar anomalies, would not have been inclined to limit its activities to this work. It would probably have wished to recast and restate many branches of English law; and there are good reasons for thinking that such an attempt, if it had been made at this time, would have been the reverse of beneficial to the English legal system.

The history of the Commonwealth period shows that the legislature would not have been able to command the legal ability necessary to ensure the success of such a scheme, because the lawyers would have bitterly opposed it; and a scheme carried through, in the face of their opposition, would probably have been fatal to the continuous and orderly development of English law. At any time the retention of a few anomalies would be a small price to pay for securing the advantage of such a development, and more especially at this particular time. At the end of the seventeenth century the development of the modern rules of English law from their mediæval basis had been begun; but it had only just been begun. Obviously a body of law, which in all its branches was being thus transformed by the slow process of judicial decision, was wholly unfit to be recast and restated. In continental countries, like France, where many branches of the law were based upon the civil and canon law, and upon the works of many generations of writers who had been adapting these codes to modern needs, the development of modern law had been more rapid; and, as the Ordonances of Louis XIV. show,[1] a measure of codification was possible. But even Louis XIV. could not have done for English law what he did for French law. If the development of English law had been arrested at the point which it had reached at the end of the seventeenth century, its doctrines would have been rudimentary and its rules would have been scanty. Time was needed to elaborate its doctrines, and to work them out into detailed rules for the guidance of the activities of men in a modern state. Time was needed to educate the lawyers out of their insular pride in the excellencies of their own system, out of their insular ignorance

[1] Above 301 n. 1.

of its defects, and out of their insular contempt for any system but their own. Not till these results had been achieved would it be possible to lop off anomalies, and reform intelligently.

The internal peace of the eighteenth century was needed to enable the country to settle down and accustom itself to constitutional government; and it was needed no less to enable the development of the rules of our modern law to proceed smoothly and continuously. The continued existence of the many anomalous survivals which disfigured the law must be suffered, that its stability and orderly development might be secured. When the modern constitution, resting ultimately upon the supremacy of the law, had been evolved; when the modern rules of private law had been more fully developed; then it would be time, with greater knowledge and deliberation, to take in hand those reforms which, amid the passion and turmoil of the seventeenth century, it had been possible to foreshadow, but impossible to effect.

CHAPTER VIII

THE LATTER HALF OF THE SEVENTEENTH CENTURY (*Continued*)

The Professional Development of the Law

THE statute book gives us little direct information as to changes and developments in legal doctrine; but, in fact, large changes and developments were taking place as a result of the changed political, social, and commercial conditions which prevailed after the Restoration. We can, it is true, catch occasional glimpses in the statute book of the effects of these changed conditions upon legal doctrine—but, from it, we can get no complete picture of their extent and character. It is to the professional development of the law that we must look, if we would estimate their extensive effects upon the organization of the legal profession, upon the character of the lawyers, upon legal literature, and upon legal doctrine. Under these four heads I shall group the history of the professional development of the law during this period.

I

The Legal Profession

During the latter part of the sixteenth, and throughout the seventeenth centuries, important changes were taking place, both in ordering of the ranks of the legal profession, and in the educational system of the Inns of Court. I shall discuss these changes under these two heads.

The Ranks of the Legal Profession

In the Middle Ages the serjeants-at-law, from whom the judges were exclusively chosen, were the heads of the legal profession. Of the lawyers outside the ranks of the serjeants—the apprentices of the law—the highest place was occupied by the benchers and readers of the Inns of Court. Then came the outer barristers, and lastly the inner barristers or students.[1] Besides

[1] Vol. ii 484-485.

these grades of persons qualified or qualifying to represent litigants before the courts, the class of attorneys, appointed for the purpose of legal business, was rapidly becoming a distinct professional body.[1] They were admitted and supervised by the judges; they were often members of the Inns of Court or Chancery; and they shared the benefits of the thorough system of legal education there provided.[2] During the latter part of the sixteenth and throughout the seventeenth centuries, this grouping of the profession was modified, chiefly by changes which took place at its lower and upper ends. At the lower end, we see a growing distinctness in the profession of the attorney, a growing separation between the attornies and the barristers, and the rise of three new classes in the legal profession—pleaders, conveyancers, and solicitors—the first two of which approximate to the profession of the barrister, and the third to that of the attorney. At the upper end, the commanding position of the serjeants was modified by the growth of the pre-eminence of the law officers of the crown, and the rise of the new class of king's counsel. As the result of these changes the grouping of the legal profession begins to assume almost its modern form.

The changes in the lower branches of the legal profession.

(i) The growth of the professional attorney, and the separation between the attornies and barristers.

We have seen that the distinction between the attorney who represents a person for the purposes of litigation, and the pleader who speaks for a litigant in court, is fundamental in early law. The idea that one man can represent another is foreign to early law. When first it is introduced it is regarded as an exceptional privilege, and the representative must be solemnly appointed. On the other hand, the idea that a litigant may get assistance from his friends or others to conduct his case in court is known to and recognized by early law.[3] Thus the appointment by a litigant of an attorney, and the obtaining by the litigant of the assistance of a pleader, are two very different things; and so the class of attorneys and the class of pleaders naturally tended, from a very early period, to become quite distinct. English law has retained this distinction throughout its history. But the nature of the distinction and the reasons for its maintenance have altered. In the fourteenth century, the idea that it was something unusual or exceptional that a litigant should be represented by an attorney, was beginning to break down before the statutes which gave this privilege with a free hand.[4] At the same time legislation was

[1] Vol. ii 504-505.
[2] Ibid 505.
[3] Ibid 311-312.
[4] Ibid 316-317.

separating the attorney for purposes of litigation from other attorneys.[1] The former was becoming subject to the control of the courts, and was beginning to be regarded as an officer of the courts.[2] He was beginning to be a person of some legal education; and there is good reason to think that he often shared with the other apprentices of the law the benefits of the system of legal education provided by the Inns of Court and Chancery.[3] It was only gradually that he ceased to be able to plead in court for his clients.[4] At a much later date attorneys were heard at the side bar in the courts of Common Pleas and King's Bench;[5] and it is certain that, both in the Middle Ages and later, pleaders dealt directly with their lay clients.[6] It was decided in the sixteenth century that both could refuse to testify as to matters which they had learned in the course of their professional duties.[7] It might seem therefore not improbable that these two branches of the legal profession would ultimately amalgamate.

This was not to be. During this period the differences between the two branches of the profession were deepened and perpetuated. But, though the line of cleavage was the old line, the reasons for adhering to it were not the old reasons. We have seen that the old reasons turned upon a set of very primitive ideas as to the differences between the representation of a person for purposes of litigation, and assistance in court while the litigation was proceeding.[8] The new reasons turned upon differences in the mode of appointment, the discipline, the personnel, the education, and the work of these two classes of legal practitioners. We can see the beginnings of some of these differences in the mediæval period; but they were very greatly accentuated in this period, and they gave rise to distinct regulations emanating from the judges, the Inns of Court, and the legislature. As

[1] Vol. ii 317, 505.

[2] Ibid 505.

[3] Ibid 505-506; that students who intended to become attorneys, and even practising attorneys, were members of the Inns of Court in the sixteenth century and later, is proved by the terms of the orders which attempted to exclude them, below 441-443.

[4] Vol. ii 505-506.

[5] Lives of the Norths i 132.

[6] Vol. ii 490 and n. 3, 491; Lives of the Norths i 45—"Soon after his being called to the bar, he (Francis North) began to feel himself in business and . . . had the favour of divers persons that out of a good will went to him, and some near relations. He was once asked if he took fees of such. 'Yes,' said he; 'they come to do me a kindness; and what kindness have I if I refuse their money?' The attornies also were very civil to him;" cp. ibid 77 for an account of the way in which in later years he was bothered by a relation; Roger North also tells us, Discourse on the Study of the Law 39-40, how Serjeant Maynard on circuit interviewed the parties and witnesses before going into court, and contrasts this with the more distant relations that prevailed in his day.

[7] Creed v. Trapp (1578-1579), Choyce Cases 121 (counsel and solicitor); Havers v. Randoll (1581), ibid 148 (attorney); see also Cary, 63, 100.

[8] Above 432.

the result of these regulations, the main features of the modern differences between the two branches of the profession began to take their modern shape.

The mode of the appointment of the barristers and attorneys was quite different. In the case of the barrister the judges had delegated to the Inns of Court the power of admitting their members to practise in the courts.[1] They accepted those whom the benchers called to the bar of the Inn. On the other hand, the attorney was admitted directly by the judges of the court in which he sought to practise.[2]

This difference in the method of appointment is reflected in the different measures taken to discipline and regulate these two branches of the profession. The mediæval statutes, which regulated professional attorneys, had given the judges power to control as well as to admit them.[3] This control increased in stringency all through this period. Orders of the courts provided for their examination before admission,[4] and for their conduct after admission.[5] The cases show that the courts were ready to act with severity, even to the throwing an attorney over the bar, in a case of grave misconduct.[6] A statute of 1605[7] regulated the method of rendering accounts to clients, provided penalties for certain forms of fraudulent or negligent conduct, laid down conditions for admission,[8] and attempted to suppress unqualified practitioners. The attorney was never allowed to forget that he was an officer of the court and subject to its discipline. The barrister, on the other hand, was in no sense an officer of the court, and was much less directly under its control. It is true that he could be disbarred either by the benchers of his Inn,[9] or by the Court[10] for unprofessional conduct, and in this period for professional in-

[1] Vol. ii 496-497, 506.

[2] Ibid 317, 505; and see the evidence given by Vaughan, C.J., to a Committee of the House of Lords, Hist. MSS. Com. 9th Rep. App. Pt. ii 20 no. 84.

[3] Vol. ii 317, 505.

[4] Praxis Utriusque Banci 15; the Practick Part of the Law (3rd ed.) 247; Christian, A Short History of Solicitors 80, 81.

[5] Praxis Utriusque Banci 19 (K.B.); ibid 24-26—the orders of Trin. 35 Hy. VI.; ibid 34-38, 40—orders of 15 Eliza.; ibid 113-119—orders of 8 Car. I. (C.B.).

[6] Byrchley's Case (1585) Jenkins 262; Jerome's Case (1628) Cro. Car. 74, citing Osbaston's Case (1588), and Y.B. 20 Hy. VI. Trin. pl. 6; see also Casen's Case (1632), Cases in the Star Chamber and High Commission (C.S.) 117, 137.

[7] 3 James I. c. 7.

[8] "That none shall from henceforth be admitted attornies in any of the king's courts of record, but such as have been brought up in the same courts, or otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition," § 2; a bill to render this Act more stringent failed to pass the House of Lords in 1700, House of Lords MSS. iv 62 no. 1482.

[9] Vol. ii 497 and n. 5; cp. Boorman's Case (1642) March N.R. 177.

[10] The case of Prynne sentenced by the Star Chamber in Charles I.'s reign is a well-known illustration; and cp. Redding's Case (1680) Sir T. Raym. 376-377—where the court acted at the request of the bar.

capacity.[1] But he was not so strictly controlled by the orders of the judges; and no statute of this period attempted any regulation. He was much more directly under the control of his Inn of Court who called him to the bar, who made him Reader and finally bencher, and thus qualified him for promotion to the ranks of the serjeants and the judges.

It is not surprising, therefore, to find that the personnel of the attorney's profession differed from the personnel of the bar. The attorneys, being officers of the court, were closely connected by their method of appointment, by their privileges, and by their business, with the other members of clerical staff of the courts. The courts of King's Bench and Common Pleas had, from the first, each admitted its own staff of attorneys;[2] and the Exchequer seems to have had a staff of clerks who acted as attorneys.[3] No doubt the same persons often acted as attorneys both in the Common Pleas and in the King's Bench—this is shown by an order of 1564 which attempted in vain to suppress this practice.[4] But it is obvious that the necessity for separate admission in each court emphasized the fact that the attorneys were the officers of that court; and the same fact was still further emphasized by orders for their constant attendance in their respective courts,[5] and by their possession of the same privileges of exemption from

[1] Thus in the Chancery barristers were punished for prolix or scandalous pleadings, Hill's Case (1603) Cary 27.

[2] Christian, op. cit. 38, 39; for a description of the form of admission see the Compleat Solicitor 63; occasionally professional differences arose between the attorneys of the different courts; thus, in an undated paper of James I.'s reign, there is a reference to complaints made by the attorneys of the King's Bench against the attorneys of the Common Pleas, for irregular proceedings in the conduct of actions to their prejudice, S.P. Dom. 1623-1625 513, no. 10; for a list of 544 attorneys of the court of King's Bench in 1697 see House of Lords MSS. iii 82-87; the number in the Common Pleas in 1667 was 1421, and in 1697 1096, ibid 82.

[3] The Practick Part of the Law (3rd ed.) 434 tells us that, in the office of Pleas in the Exchequer, "there are several clerks that are retained between party and party in all suits commenced or depending there, who are to follow their clients' causes, and to make their pleas, answers, replications, and rejoinders upon the same for councel, learned in the law to consider"; this was necessary as the number of attorneys was only four, House of Lords MSS. iii 81.

[4] Cited by Christian, op. cit. 38-39; it is clear that in the latter part of the seventeenth century this attempt had been abandoned; the rules and orders issued by the King's Bench and Common Pleas were practically the same, and we see no repetition of the prohibition of 1564, see the Practick Part of the Law 246-248, 301-303; in fact, the rule that an attorney dismissed from one court is not to practise in the other, assumes that a large number were attorneys in both courts, ibid 247, 303; the fact that the admission of an attorney meant fees to the officers of the courts, Compleat Solicitor 63, and below 436 n. 2, no doubt insured easy admission; possibly most London attorneys belonged to both courts; North tells us, Lives of the Norths i 128, that the country attorneys "were most of the Common Pleas"; and we may perhaps gather from the context that the country attorneys contented themselves with admission in one court; in fact, as they would be obliged to employ a London agent, admission in one court would generally be sufficient.

[5] Praxis Utriusque Banci 25; The Practick Part of the Law 246, 301.

public service, and immunity from suit, except in their own court, as the other officials of the various courts enjoyed.[1]

Their business, too, connected them closely with these officials. We shall see that their close connection with procedure and practice brought them into daily conduct with the prothonotaries, the cursitors, and the other clerks of the court.[2] Indeed, it would seem that the connection was so close that it sometimes resulted in a combination to enrich the attorney at the expense of the client.[3] The orders of the judges, which required that a candidate for admission as attorney should have served five years as a common solicitor, or as clerk to a judge, serjeant, barrister, attorney, or to a clerk of one of the courts of common law,[4] show us that the attorney belonged essentially to the clerical side of the law. On the other hand, the barrister had no permanent connection with clerkship, or the clerical staff of the courts. He must know the forms of the court; but he was interested, not in the mechanical copying or working of these forms, but in the legal principles applied through them; and he was drawn from a social stratum different from that from which the attorney was drawn. No doubt in this period men who had begun as clerks made their way to the bar, and even to the bench.[5] But generally in this period, as in the period of Fortescue,[6] the expense of a career at the Inns of Court caused the barristers to be drawn from the sons of men of independent means, or of the more prosperous and successful men in various walks of life.

The education of the attorney and the barrister was necessarily different, and tended to become more different. Both branches of the profession needed and got an education in the theory and the practice of the law. But the main part of the education of the attorney consisted in his apprenticeship to a practitioner, during which he learned the construction and the use of the common forms and processes of the legal machine. On the

[1] Christian, op. cit. 58, 59.

[2] Vol. iii 645-646, 650-653; and see Lives of the Norths i 132—"the attorneys are always favourites of the officers, because they bring grist"—this is explained by the fact that each attorney, on his admission, was obliged to settle himself and his business with some one prothonotary, and not change without reason, Praxis Utriusque Banci 19.

[3] Lives of the Norths i 131-132—apparently by connivance the attorneys were allowed to charge in their bills the fees payable to the offices which in fact they had never paid.

[4] The Practick Part of the Law 247, 302-303.

[5] One famous instance is Saunders, C.J., below 564; but generally a prosperous career as an attorney led to posts like the clerk of the peace or clerk of assize; Reresby, Memoirs 90-91, tells of one Benson, "The most notable and formidable man of business of his time, and that had raised himself from being clerk to a country attorney to be clerk of the peace at the Old Bailey, to clerk of assize of the northern circuit, and to an estate of £2500 per annum, but not without suspicion of great frauds and oppressions."

[6] Vol. ii 494.

other hand, the main part of the education of the barrister consisted in mooting and discussion, in reading and reporting, from which he learned the principles of the law both substantive and adjective.[1] The attorneys read books; and, as members of the Inns of Court and Chancery, took the benefit of the legal education there given: similarly, the barristers sometimes learned draftsmanship by acting as clerks in the offices of the courts,[2] and the rules of practice and the forensic art by conversing with, and the assistance of older practitioners.[3] But in the legal education of these two branches of the legal profession the stress laid upon the practical and the theoretical side was quite different. "Although," says Roger North, "I was not a regular student to proceed in order and take in all the Year Books, but read the more modern reports, I digested them well by commonplace, which was a good foundation and preparative for me to build upon, which I afterwards learnt in practice. And I must own to that, more of my skill in the law than from hard reading; but without a competency of the latter, the others would not have done, no more than bare reading without practice which pedantiseth a student, but never makes him a clever lawyer."[4]

The reason for these differences in their mode of education we must seek in the difference of the work which fell to their lot. This difference of work is brought out clearly in the literature which some of the attorneys composed for their fellow practitioners. If we look at books like the Attorney's Academy,[5] the Compleat Solicitor,[6] the Practick Part of the Law,[7] or the Practising Attorney,[8] we are at once struck by their intensely practical character. They are concerned with the process of the different courts, with instructions as to the manner and time of taking the various steps in an action, with the forms of pleading, with the modes of executing judgment, with the fees payable at the different offices of the courts, with the forms of conveyances and other documents which clients would be likely to need. A good deal of law is sometimes interspersed; but it is treated and regarded wholly

[1] Vol. ii 506-508; below 481 seqq.

[2] Dyer, C.J., in 1567 told a jury of attorneys and clerks of the Common Pleas that he himself had acted as a clerk, Praxis Utriusque Banci 46; as Roger North says, Lives of the Norths i 28, "Forms are better understood and learned by writing than by reading; for that exercise allows time; which consideration hath made clerkship so recommendable to beginners that most enter the profession of the law that way."

[3] Below 498; cp. vol. ii 508 and n. 1.

[4] Lives of the Norths iii 89.

[5] Vol. v 381-382.

[6] The Compleat Solicitor, Entering Clerk, and Attorney, first published 1668, 2nd ed. 1683.

[7] The Practick Part of the Law, Shewing the office of an Attorney, and a guide for Solicitors in all the courts of Westminster, first published 1678, 3rd ed. 1702.

[8] The Practising Attorney; or Lawyer's Office: containing the business of an Attorney in all its branches, by William Bohun, 2nd ed. 1726.

from a severely practical standpoint. It is set out in bare rules, with no attempt to state the underlying principles, because it was knowledge in this form that the attorneys required.[1] On the other hand, the successful barrister must know something of legal principles underlying the rules of the common law. He must know something of the Year Books and the older cases if he was to argue points of law successfully, or give advice on cases stated to him.[2] The art of examining witnesses, and of presenting the facts in a manner favourable to his client, was more important than a minute knowledge of how to put and keep in motion the formal machinery of process.

This division of work did not come all at once. In the Middle Ages the management of process was a very much more complicated and serious matter than it was at the end of the seventeenth century.[3] It was often pre-eminently a question for counsel, as the whole case might depend upon a single skilful move. And in this period, as at the present day, the younger members of the bar were brought more closely into touch with this part of the attorney's work than the leaders. The future judge, Sir James Whitelocke,[4] the future lord keeper Guildford, and his biographer and brother Roger North, all occupied themselves with court keeping while they were waiting for a practice. As Roger North explained,[5] they found that it taught them much both of the theory and the practice of the law; and, as he said, "the knowledge how to conduct such a court fits a man to be a practiser even at the Common Pleas Bar."

But, towards the end of this period, the division of work between the two branches of the profession was becoming more clearly defined. For instance, in the business of court keeping, the ordinary business of the manorial courts was falling to the attorneys,[6] while the barristers continued to be judges of the

[1] Thus C. G. Cock, English Law (1651) 43, says, "I know the labours and pains of a faithful and honest attorney is great and very painful and laborious, in running from office to office, from clerk to clerk, counsel to counsel, judge to judge, court to court."

[2] "It was not moroseness, but reason, that inclined his lordship to deal as much as he did with the Year Books; and however at present that sort of reading is obsolete and despised, I guess there will not be found a truly learned judicious common lawyer without it," Lives of the Norths i 28.

[3] Vol. ii 520-521; vol. iii 597-607, 623-627.

[4] Whitelocke was called in 1600; at Michaelmas, 1601, he tells us, "The colledge of St. John in Oxon [of which he had been a fellow], bestowed on me the stewardship of thear lands," Liber. Fam. (C.S.) 15.

[5] Lives of the Norths iii 107-108; see the passage cited vol. i 186-187.

[6] Lives of the Norths iii 139; the fourth Part of the Practising Lawyer, the second edition of which was published in 1726, deals with the rules as to the keeping of manorial courts. The stewardship of St. John's College, Oxford, which Sir James Whitelocke held, above n. 4, is now held by the college solicitor.

larger franchise courts.[1] Roger North laments[2] that the attorneys had encroached upon the practice of the younger members of the bar, because the latter "have left the mechanic part of their practice, that is to speak with the client at the first instance, to state his business, and to advise the action." He pointed out that it would not do for the younger barrister to ignore entirely such learning. "If young gentlemen will ever think to secure a practice to themselves, they must set pen to paper, and be mechanics and operators in the law as well as students and pleaders. Mere speculative law will help very few into the world . . . the other can scarcely fail." But, obviously, it was becoming evident that the barrister must give more attention and time to the speculative part of the law; that they must therefore curtail somewhat their training in the work of the attorney's branch of the profession; and acquire it, as lord keeper Guildford acquired it,[3] and as students now acquire it, in their student days. The "mechanic side" of their own profession could be learnt in the chambers of their seniors.[4]

Two consequences followed from this division of work.

In the first place, as Roger North pointed out, the class of work which the attorney did tended to bring him much more closely into touch with the lay client than the barrister.[5] The barrister must be consulted when difficulties occurred; but it was the attorney, and not the lay client, who knew when such a difficulty occurred, and how to state it clearly. Therefore he, rather than the lay client, tended to be the client of the barrister. We shall see that this tendency to remove the lay client from direct contact with the barrister was increased by the introduction of written pleadings. The attorney, with the help sometimes of counsel and sometimes of the officials of the court, prepared these pleadings from his client's instructions. The barrister argued the

[1] Francis North was judge of the franchise of Ely, Lives of the Norths i 55; Roger North was temporal Steward to the See of Canterbury, ibid iii 109; the judge of the court of Pleas in Durham and Lancaster was in later days always one of the judges of the courts of common law, vol. i 112 n. 3; and the chancellorship of Durham was frequently held by judges or eminent equity practitioners, such as Romilly, Eldon, and Redesdale, Romilly, Memoirs i 429, 431.

[2] Lives of the Norths iii 139—"Anciently, as I have been informed, all conveyancing, court keeping, and even the making of breviats at the assizes was done by the lawyers. Now the attorneys have the greatest share;" and this tendency was evident as early as 1651—C. G. Cock, English Law 44, says that the attorneys often kept "those pestilencies of England, Lords' Courts, they take all the work, which was heretofore the way of educating and bringing into practice the young lawyer."

[3] Below 447.

[4] Below 498.

[5] "The first undertaker in business doth all, and he must go through in the cause; he is instructed and can instruct others; he is resorted to on all occasions; he (perhaps) disburseth money, and is easy to let himself into the business," Lives of the Norths iii 139.

case on the basis of the pleadings so settled; and thus he tended to become much further removed from the actual litigant, than was possible in the days when he orally pleaded at the bar the tale which he had himself elicited from the lay client, and for the truth of which he took some responsibility.[1] It is clear from Harrison[2] that the change was beginning in Elizabeth's reign; it is clear from Roger North that, though it had not hardened into a fixed rule of professional etiquette,[3] it was almost complete by the end of this period.

In the second place, the difference between the class of work done by the barrister and that done by the attorney, led to the modern difference between the legal relations between them and their clients. We do not find any difference in the Middle Ages. Both alike could sue for their fees.[4] But it was laid down in 1629-1630[5] that a barrister, unlike an attorney,[6] could not sue for his fees. This rule made its first appearance in the court of Chancery; and it almost certainly originated in reminiscences of the rules of Roman law as to legal position of members of the learned professions in relation to their clients. However that may be, it clearly emphasized the truth that the work of the barrister was more "liberal" in character than that of the attorney.

These differences had been becoming apparent all through the sixteenth century; and in the seventeenth century they had become quite obvious. So obvious had they become that, in 1614, it could be stated quite generally by the benchers of the four Inns that "there ought always to be preserved a difference between a counsellor at law, which is the principal person next unto the serjeants and judges in administration of justice, and attorneys and solicitors which are but ministerial persons and of an inferior nature."[7] Therefore, as we might expect, both before and after

[1] Below 445-446; cp. vol. iii 638, 646-647.

[2] "The time hath been that our lawyers did sit in Paul's upon stools against the pillars and walls to get clients, but now some of them will not come from their Chambers to the Guildhall in London under ten pounds, or twenty nobles at the least. And one, being demanded why he made so much of his travel, answered that it was but folly for him to go so far when he was assured to get more money by sitting still at home," cited Christian, op. cit. 45.

[3] Below 444. [4] Vol. ii 491.

[5] Moor v. Row 1 Ch. Rep. 38; that this decision was in accordance with the current of feeling in the profession appears from the preface to Davis's Reports; Sir J. Davis says, at p. 23, "the fees of professors of the law are not duties certain growing due by contract for labour or service, but gifts; not merces, but honorarium"; see Kennedy v. Broun (1863) 13 C.B. N.S. 677, where all the authorities from the days of the Y.BB. are elaborately discussed.

[6] Bradford v. Woodhouse (1619) Cro. Jac. 520; Sands v. Trevilian (1628) Cro. Car. 107.

[7] Dugdale, Orig. Jurid. 317—orders of the king and the judges § 4; cp. orders of 1631 § 6 ibid 320, "For that there ought alwaies to be observed a difference between *utter-barristers, Readers in Court*, and *Apprentices at law*, which are the principal

1614, efforts had been made, both by the Inns of Court and the judges, to adjust the relations between the two branches of the profession; and these efforts have contributed materially to fix these relations in their modern form.[1]

From the middle of the sixteenth century, the Inns of Court began the policy of excluding from their membership the practising attorney.[2] They did not desire to exclude students who intended to become attorneys; and it was of course possible that a student might become a member, and begin his studies, without having definitely decided whether he wished ultimately to be called to the bar. Apparently, according to the Lincoln's Inn order of 1556,[3] even practising attorneys could be admitted to the Inns of Court and have chambers there, if they conformed to the educational curriculum. And, from an entry of 1570, it would seem that they might be called to the bar, if they ceased to practise, and were otherwise qualified.[4] It is clear, however, that both the judges and the Privy Council approved of this exclusion of the practising attorney.[5] Substantially similar orders were issued by the Inns of Court and the Privy Council in the first half of the seventeenth century.[6] This policy was continued during the Commonwealth period; and at Lincoln's Inn it was specifically ordered in 1653 that attorneys, clerks, and solicitors were not to be called to the bar.[7]

persons next unto the Serjeants and Judges in administration of justice: and *Attorneys* and *Solicitors* which are but ministerial persons of an inferiour nature": an order of the judges in 1666 was still more uncomplimentary to the attorneys and solicitors, as it called them "immaterial persons of an inferior nature," Dugdale, Orig. Jurid. 322.

[1] On this subject see Bellot, the exclusion of attorneys from the Inns of Court L.Q.R. xxvi 137-145.

[2] The first order cited by Bellot is of the year 1555 from the Middle Temple Records i 104 and runs as follows: "that no common attorney should be admitted into the Company and in all admissions it should be implied that every gentleman when he refuseth study, to practice attorneyship, shall be dismissed from this Company, and to have liberty to go and resort to the house of Chancery from whence he came"; a similar order was made by Lincoln's Inn in 1556, Black Books i 315, but six of the bench could admit a practising attorney; and the Inner Temple issued an order in 1557 that attorneys and common solicitors were not to be admitted without the consent of the parliament, Inner Temple Records i 190.

[3] Black Books i 315, "Yt is ordered that from henceforth no man that shall exercise th'office of Attorneyship shall be admitted into the Feloship of this House wt'out the concent of VI of the Benche . . . wherof ther must be two Duble Redders. Item, if any man shalbe admitted as a studient, and after shall only exercise th' office of Attorney, and shall not kepe the lernynges in the vacacions, that then he shall losse the Felloship and his chambers. . . . Item, that everi attorney that kepeth not the lerninges in the vacacions shall leve his study, and his fellowe, being a studient in the same chamber, to occupye him. Item, in everi chamber wher ii Attornies be, that wt them shalbe admitted ii studientes, and where one is, one studyent."

[4] L.Q.R. xxvi 139, citing the Black Books i 372, and see the case of West, the author of the Symboleography, there cited.

[5] Ibid 138, citing orders of the judges and the Privy Council of 1557 and 1574; for these orders see below 449.

[6] L.Q.R. xxvi 139, 140.

[7] Ibid 141.

After the Restoration the orders of the earlier part of the century were repeated;[1] but it is clear that, in spite of them, attorneys, and even practising attorneys, were members, and, with the leave of the benchers, could continue to be admitted as members of the Inns.[2] And apparently there was nothing to prevent students from doing the work of attorneys or solicitors. Roger North tells us that the future lord keeper Guildford, when a student, "and during his incapacity to practise above board, was contented to underpull, as they call it, and managed divers suits for his country friends and relations, which, he said, was useful to him in letting him into a knowledge of the offices and methods used there";[3] and it appears that this was so common a practice that there was a current rate of commission paid by the attorneys and solicitors in whose names the business was done.[4] The practice of the Inns was still very uncertain. But, at the end of the century, it is possible to discern a tendency to exclude practising attorneys from call to the bar;[5] and only to call them if they had ceased to practise, and had complied with the other conditions imposed upon students who wished to be called.[6] Apparently the result of this policy was that attorneys did not become members of the Inns of Court, unless they intended to abandon their practice, and pass to the other branch of the profession. But this result was not definitely attained till the following century.[7]

This exclusion of practising attorneys from the Inns of Court was not beneficial either to the attorneys or to their clients. It was not beneficial to the attorneys, because it deprived them of the benefit of a professional organization which could safeguard their interests. It was not beneficial to their clients, because the clients were deprived of the safeguard which the discipline of a professional organization gives. The attorneys were no doubt individually amenable to the discipline of the

[1] L.Q.R. xxvi 143.

[2] See an order of the benchers of Lincoln's Inn of 1668 (cited ibid 143) from Black Books iii 59: "that the names of all Atterneys, Solicitors and Clarks who have bin lately admitted into this House be delivered in at the next Councill; and that for the future noe such be admitted without first acquainting the Councill therewith, and leave obtained from them for their reception and admittance into this Society."

[3] Lives of the Norths i 31.

[4] "He (Francis North) made use of Mr. Baker, a solicitor in Chancery, who for his singular integrity was famous. . . . When his Lordship (Francis North's father) paid his bill, the virtuous solicitor laid by a sum (according to an usual rate) for him, saying that it was their way, and they were allowed at the office somewhat for encouragement to them that brought business," ibid 31, 32.

[5] Black Books iii 126, cited Bellot, L.Q.R. xxvi 143 contains an order of 1679 that, "from henceforth noe practising attorney or solicitor of this House be called to the Barre."

[6] Black Books iii 134, 158, cited Bellot, ibid, contain orders of 1681 and 1686 for the call of attorneys who had ceased to practise, had studied the law, and performed the exercises; and there is a similar order in the Inner Temple Records iii 251.

[7] L.Q.R. xxvi 143-144.

courts to which they were attached;[1] but this was a much less effective form of discipline than that which an organized profession can apply. It was found to be difficult to apply the discipline of the courts to scattered individuals with no registered address. Hence we find that, in 1633,[2] 1654, 1667, 1684, and 1704,[3] the judges ordered that all attorneys must, as a condition of admission, be admitted as members of an Inn of Court or Chancery. From the order of 1704 we can gather that the reasons for taking this step were to secure "better management of the business of law"; to prevent "the detriment and decay of the societies of the law"; and that the attorneys might have either chambers or an address in the Inn, so that they might be found when they were wanted.[4]

These orders certainly seem inconsistent with the orders of the Inns and of the Council excluding practising attorneys. Probably Dr. Bellot is right when he says that the judges probably expected that the benchers would keep them out of the Inns of Court, and that therefore the result of the orders would be to force them into the Inns of Chancery.[5] But, even though they continued to be members of the Inns of Court,[6] the evil was not remedied, since they could only occupy the inferior position of students. They could never become barristers, readers, or benchers. Membership of the Inns of Chancery was equally useless, as these Inns were small and scattered bodies, controlled by the Inns of Court,[7] and already in a decadent condition.[8] Thus, neither the Inns of Court nor the Inns of Chancery could provide the attorneys with a professional organization, capable of safeguarding their own interests or those of their clients.[9] It was for these reasons that, early in the following century, a new "Society of Gentlemen Practisers in the Courts of Law and Equity" was formed with the object of safeguarding these interests,[10] which was a precursor of the Law Society of the present day.[11]

[1] Above 434.
[2] Praxis Utriusque Banci 115-116.
[3] L.Q.R. xxvi 141-142.
[4] Ibid 142.
[5] Ibid 142. This is rendered the more probable by the fact that in the judges, orders of 1631, Dugdale Orig. Jurid. 320, and 1666, ibid 322, it is assumed that attorneys, clerks, and officers of the courts of justice belong to the Inns of Chancery.
[6] Black Books of Lincoln's Inn iii xxxiv.
[7] Vol. ii 494, 498-499.
[8] Below 488-489.
[9] "The Inns of Court . . . supplied the place of a trade guild for the regulation of the bar. But the judges, possessing powers of regulation and punishment more drastic, proved, as regards attorneys, an inefficient substitute for the corporations which regulated trades," Christian, A Short History of Solicitors 60.
[10] Ibid 120-122—the earliest record of its existence is in 1739, but this record shows that it had existed previously; the last trace of its existence comes from the year 1818, ibid 176.
[11] Ibid 176-178.

The fact that the two branches of the legal profession thus came ultimately to be organized in wholly distinct bodies, was the cause which finally fixed upon its modern lines, and perpetuated, the separation between them. No doubt this separation had an old root in the ancient distinction between the pleader and the attorney; and this old root helped to form the lines upon which the separation proceeded. But, the modern lines upon which this separation has taken place, owes far more to the new grouping of the duties of the legal profession in this period, and to the separate organization, in the following period, of those branches of the profession which were not called to the bar, or not members of the Inns of Court.

The evolution of the practical effects of this separation slowly proceeded in the two following centuries; and professional customs grew up, which gradually hardened into rules of law. Thus, in 1846, the court of Common of Pleas ruled that there was no binding rule of law preventing a barrister from accepting a brief from a lay client;[1] but it was a rule which had been insisted upon by the Society of Gentlemen Practisers, and recognized by the bar in the eighteenth century.[2] This would seem to show that, though the foundations of the modern separation were laid in the sixteenth and seventeenth centuries, the relations between the two branches of the profession were only gradually adjusted in the eighteenth and nineteenth centuries, by the help of the two organized professional bodies in which the lawyers had come to be grouped.

(ii) The rise of new classes in the legal profession.

(*a*) *The Pleaders and the Conveyancers.*

The division of duties between the attorneys and the barristers left several branches of professional practice not quite clearly assigned to either. The two most important of these branches were pleading and conveyancing. It is probably to this cause that we must assign the growth of the two classes of practitioners under the bar, who were neither attorneys nor barristers.

Of the changes in the law of pleading, which came with the rise of written pleadings in the sixteenth century, I shall speak later in this chapter and in the second Part of this Book.[3] We have seen that, during this period, pleadings written on paper, and exchanged by the attorneys of the parties, superseded the older oral pleadings at the bar.[4] Though, even at the end of the period, oral pleadings were still used in the real actions,

[1] Doe d. Bennett v. Hale 15 Q.B. 171.
[2] Christian, op. cit. 136, 137.
[3] Below 570-571; Pt. II. c. 7 § 2.
[4] Vol. iii 640-653.

Roger North tells us that it was "done for form and unintelligibly"; and that "whatever the serjeant mumbles it is the paper book that is the text."[1] From an early date these written pleadings were exchanged by the attorneys of the parties, and drawn up either by the attorneys, or by the clerks in the prothonotaries office.[2] As I have said, the attorneys and the clerks belonged essentially to the same class of persons;[3] and the clerks often became attorneys. Service as a clerk in a prothonotary's office, as well as service as clerk to an attorney, were accepted by the judges as qualifying for admission to the roll of attorneys;[4] and it is quite clear from the orders of the court of Common Pleas in 1573, that these clerks sometimes acted as attorneys.[5] It is true that in 1633 the court of Common Pleas attempted to separate the office of the clerk who drew and entered the pleadings, from the office of attorney;[6] but we do not find any similar order issued by the King's Bench; and it cannot have had any very permanent result, as it is assumed in all the books of practice[7] that it is part of the attorney's duty to draw pleadings.[8] At the same time these pleadings must be entered in the prothonotary's office, and copies must be taken.[9] It would therefore be natural that an attorney should sometimes employ the clerks of that office to draw the pleadings if he felt doubtful about his ability to do so.[10]

The pleadings drawn by these attorneys or clerks were probably for the most part common form pleadings. The King's Bench in 1666 ordered that special pleas and demurrers should have a counsel's hand to them;[11] in the Common Pleas a serjeant's

[1] Lives of the Norths i 27, 28.

[2] Vol. iii 645-646, 651-653.

[3] Above 435-436.

[4] Above 436.

[5] "No prothonotary's clerk, being attorney, shall draw up any paper book of the office where he is a clerk wherein shall be any special pleading. And in which matter the same clerk shall be attorney with plaintiff or defendant without the assent of the other party or his attorney," Praxis Utriusque Banci 40.

[6] Ibid 113-115.

[7] For these books see above 437; below 598-599.

[8] See especially, the Practice of the Courts of King's Bench and Common Pleas (1696) Pref.—"the office of *entering clerk or attorney* in either of these courts is an employment that requires great skill and industry in its management . . . for the greatest qualifications are requisite to constitute a perfect entering clerk who designs to be a master of the science of good pleading, the most nice and curious part of our law, which is in itself founded upon the solid basis of right reason."

[9] Praxis Utriusque Banci 34—orders of the Common Pleas 1565.

[10] "And for the drawing of these declarations it requires the skill, study and experience of an able clerk of the Prothonotary's office," the Practick Part of the Law 34; the fees in the Common Pleas for copies were 4d. a sheet: for drawing special declarations and pleas 8d., the Compleat Solicitor 291.

[11] Praxis Utriusque Banci 56; these rules as to the signature of common law pleadings by counsel survived till 1852, when they were abolished by the Common Law Procedure Act, 15, 16 Victoria c. 76 § 85; but long before, Stephen tells us, Pleading (7th ed.) 30-31, they had become merely formal, as the pleadings were always drawn by the attorneys or special pleaders.

hand was required;[1] and it was necessary that bills in Chancery should be settled or drawn by counsel.[2] It followed that the work of pleading at common law was shared between the attorneys, the clerks in the prothonotaries' offices, and counsel; and in equity between the solicitors and counsel.

But, as the seventeenth century advanced, pleading, both at common law and in equity, tended to become more complex. It is true that at common law the disuse of the real actions, and the growth of actions on the case, had tended to simplify procedure.[3] But, with the growth of case law in the common law courts and in Chancery upon various points of pleading, the rules become more detailed, the science grew more exact, and the subject became more special. The books of entries show that the rules of common law pleading were studied with special minuteness in the prothonotaries' offices.[4] A student of the common law, who was attracted to this topic, would be well advised to learn the rudiments there. Similarly the rudiments of equity pleading might be learned in a solicitor's office. In both cases further instruction could be got in a barrister's chambers. At the end of this period the prothonotaries themselves were generally called to the bar by virtue of their office,[5] and sometimes became benchers;[6] and it would seem that there was nothing in the regulations of the Inns of Court to prevent their clerks from becoming members of the Inns, or from continuing to be members, if they did not practise as attorneys or solicitors.[7] And, if they decided to specialize in this art, there was no reason why they should be called to the bar. Thus we see the cause for the rise of a class of pleaders and equity draftsmen who were members of the Inns of Court, but not barristers—in other words, we see the cause for the rise of one of the classes of "practitioners under the bar."[8]

[1] The Compleat Solicitor 87; The Practick Part of the Law 38.
[2] Ibid 363; The Practical Register in Chancery (1714) 25.
[3] Below 625-627. [4] Vol. v 384-386.
[5] In 1672, The Black Books iii 82, contain the following entry, "Whereas itt hath been the usage of the Masters of the Bench of this Society, and of other Inns of Court, to conferr the degree and dignitie of Barrister att Lawe upon such of the Prothonotarys of the Court of Common Pleas as have been members respectively of their severall Houses:—Ordered that George Townsend Esq. . . . be and is hereby called to the bar, and declared to be a Barrister at law without further publication."
[6] Ibid iii 257—George Townsend is called to the bench; cp. Inner Temple Records iii 200—John Cooke, prothonotary of the Common Bench, is made associate of the Bench (1683); ibid 323—William Tempest, who held the same office, is called to the Bench (1696).
[7] Above 441, 443; their presence is admitted by the order made by Lincoln's Inn in 1556, Black Books i 316, that "No man that wryteth in any office shall use his chamber for that purpose."
[8] Romilly says, Memoirs i 52, "I had endeavoured to draw Chancery pleadings before I was called to the bar, as an introduction to business when I should be called. In that way, however, the occupation I got under the bar was very inconsiderable;

A similar set of causes gave rise to the other class of these practitioners—the conveyancers. In the Middle Ages the clerks employed by the large landowners, or the members of the monasteries, were competent to draw, and did draw, the conveyances needed in the ordinary course of estate management;[1] and lay conveyancers still flourished in the sixteenth,[2] and even in the seventeenth[3] centuries. They were assisted, no doubt, by the little books of precedents in conveyancing which were printed during the sixteenth century.[4] But, as the land law grew more complex, more skill was required; and the rise of the commercial jurisdiction of the common law courts caused a demand for precedents of various mercantile documents. Both the size and the contents of West's Symboleography illustrate the growth in the variety and the complexity of the demands made upon the draftsmen of conveyancing and other similar documents.[5] Naturally the drafting of these documents tended to become part of the legal practitioner's business. But, even at the close of this period, the legal profession did not monopolize it—the Scriveners then and later claimed to share it.[6]

Much less was it the peculiar property of either branch of the legal profession. It was practised both by barristers and attorneys. The future Lord Guildford, when a junior barrister, not only drew but engrossed conveyances.[7] West, the author of the Symboleography, was an attorney; and though Shepherd was indignant that "the pragmatical attorney" or "lawless scrivener" should meddle in this art, he was somewhat unreasonable. As Mr. Christian says,[8] "In every part of the country the attorney was at hand, ready to receive the client's instructions, while counsel were settled only in the large towns; and the operation of the statutes and rules of court, requiring the education and a long term of studentship for attorneys, had resulted in their being no longer mere ministerial persons of an inferior nature, but men reasonably well acquainted with the general body of the law, and competent to prepare at least such conveyances as were in common use." In fact, any clerk in a lawyer's office, who had experience in conveyancing, might undertake this class of work.

but soon after I was admitted to the bar I was employed to draw pleadings in several cases."

[1] Vol. iii 219.

[2] West, Symboleography Bk. I. s. 2, cited Christian, op. cit. 145.

[3] Shephard's Touchstone, Pref.

[4] Vol. v. 388-389.

[5] Ibid 389-390.

[6] Christian, op. cit. 141-142; for an account of their controversy with the London attorneys in the eighteenth century, see ibid 145-154; it was not till 44 George III. c. 98 § 14 that conveyancing was restricted to the legal profession.

[7] Lives of the Norths i 93; Roger North tells us, ibid iii 124, how he profited by the gift of his brother's books of precedents in conveyancing.

[8] Op. cit. 139, 140; and cp. C. G. Cock, English Law 44 (1651).

Roger North tells an amusing tale of how the future Lord Guildford got drunk at a circuit dinner, was run away with by his horse, and would have fallen off in the pond where his horse had stopped to drink, if he had not been rescued by a Mr. Andrew Card, who was then a barrister's clerk, but who afterwards became "an eminent practiser of conveyancing in Grey's Inn."[1] This tale shows that these clerks sometimes became members of the Inns of Court, and continued to practise their art. They were no more excluded than those clerks who specialized in pleading;[2] and, similarly, there was no reason why they should be called to the bar. Thus we get the rise of the other class of the practitioners under the bar. Neither class was definitely formed at this period; but we can see the causes which gave rise to them in the following period.[3]

Both these classes of practitioners were members of the Inns of Court. Both therefore approximated to the class of barristers rather than to the class of attorneys. It was otherwise with the last of these classes of new practitioners—the solicitors. From the earliest period in their history they were associated with the attorneys, and with the ministerial and clerical staffs of the courts.

(*b*) *The Solicitors.*

In the Middle Ages solicitors were not members of the legal profession. By the end of the seventeenth century they were as much a part of it as the attorneys; and they were rapidly tending to amalgamate with the attorneys. I must therefore endeavour to describe the origins of this new class of legal practitioners, and to account for the position in the legal profession which they came to occupy.

The history of the word "solicitor" tells something of date when this new class of practitioners emerged.[4] The word appears to have been used mainly in three senses. (1) It is used

[1] Lives of the Norths i 64-65.

[2] At Lincoln's Inn, till 1794, not only conveyancers, but paid clerks to conveyancers, were members of the Inn, and could be called to the bar when they wished; see Black Books iv 118-119 (1810) for a memorial from Mr. Silverlock, a clerk to a conveyancer and a member of the Inn, protesting against the refusal of the Bench to call him, because he had received a salary as clerk; the refusal by Lincoln's Inn to sell a chamber to a "practising clerk," Black Books iii xxxiv, was probably due to the fact that he was practising as clerk to an attorney or solicitor.

[3] Roger North, Lives of the Norths iii 124-125, saw that there was an affinity between these two classes of practitioners; he says: "Clerks without study have more skill, and are forwarder in this art (conveyancing) than good students, and many practisers, and for want of a formal reading and noting the substance of the divers sorts of deeds of use in the law. It is the like for records and drawing pleadings . . . and for that reason a youth bred a clerk and then brought to study doth better than a student first and then formalising after."

[4] Oxford English Dictionary, *sub voc.* Solicitor.

primarily to mean a person who urges, prompts, or instigates. (2) Hence it is easily used to mean a person who urges, instigates, or conducts business on behalf of another person. It was used in this sense long after it acquired a technical meaning in the law. Roger North so uses it;[1] and when, at the latter part of this period, the judges of the King's Bench and Common Pleas ordered that common solicitors should not be allowed to practice in those courts, unless they had been admitted attorneys by them, they were obliged to explain that this order did not extend to private solicitors, or servants of corporations or other masters.[2] (3) In the law it gets the technical meaning of a person who conducts legal business on behalf of another, but who is neither an attorney nor a barrister.

The word was beginning to acquire this technical meaning in the middle of the fifteenth century. We have seen that, in a Yorkshire will of 1452, fees paid to solicitors by executors were classed with fees paid to attorneys and counsel;[3] about the same date, Yelverton and John Paston were told by an anonymous correspondent that, "considering the matters hanging," they needed to have three solicitors;[4] and we shall see that it was just about this time that the king began to employ a solicitor-general.[5] By the middle of the sixteenth century solicitors employed for legal business—common solicitors—had become a recognized professional class, occupying a position similar to that occupied by attorneys. In 1557 an order of the Inner Temple provided that neither attorneys nor common solicitors should be admitted without the consent of the Parliament;[6] in 1574 the orders of the judges and the Privy Council provided that practising solicitors as well as practising attorneys should be excluded from the Inns of Court;[7] in the third edition of Smith's Republic, published in 1589, they were classed with the Prothonotarys and attorneys, and defined as persons who, "being learned in the Lawes, and informed of their Masters Cause, doe informe and instruct the

[1] "The first attack in the House was the cause of Bernardiston and Soam . . . there we had friends, and I was a solicitor," Lives of the Norths iii 157; cp. Pepys, Diary (ed. Wheatley) i 49-50, "I went to Mr. Phelps's house where he had some business to solicit, where we met Mr. Rogers, my neighbour, who did solicit against him"; the word is used also in this sense in the head note to Henloe v. Buck (1672) 2 Lev. 66.

[2] The Practick Part of the Law (3rd ed.) 247, 302; Praxis Utriusque Banci 15.

[3] Vol. iii 594 n. 1.

[4] Paston Letters (ed. 1872) i 521, "Ye nede at this terme rather to have had thre solicitours than in any other terme past this iii yere, on concydering the maters hangyng.

[5] Below 462.

[6] "That from henceforth there should be no attorneys nor others known to be a common solicitor of matters admitted into this House without the assent and agreement of Parliament," Inner Temple Records i 190, cited L.Q.R. xxvi 138.

[7] Dugdale, Orig. Jurid. 312.

Counsellors in the same";[1] and in the statute of 1605 they were classed with the attorneys, and submitted to substantially the same regulations.[2]

It would seem therefore that solicitors, as a professional class, began to appear in the middle of the fifteenth century; that they did not get a recognized status for another century; and that, in the course of the fifty years following, their status was recognized, and their place side by side with the attorney was ascertained. That it was in the last fifty years of the sixteenth century that they attained this definite status is rendered the more probable by the facts, firstly, that in the orders of all the Inns of Courts made in 1557 they are not mentioned along side of the attorneys;[3] secondly, that in the orders of the judges and the Privy Council issued in 1574 they are so included;[4] thirdly, that in these orders practising solicitors, as contrasted with practising attorneys, are tolerated if they use the exercises of learning and mooting;[5] and, fourthly, that in the orders of 1614 no distinction at all is drawn between attorneys and solicitors.[6]

The question arises, what was the cause for the rise of this new class of professional men? I think that the cause must be looked for in the limitations upon the sphere of the attorney's activity, which arose, partly from the older technical rules as to his appointment and functions, and partly from later rules which confined his activities to the court in which he was admitted as an attorney. Excessive technicality, which hinders necessary developments in legal rules, has often given rise to the development of parallel or supplementary rules to meet new business or social needs; and, similarly, the technicality with which the office of attorney had come to be surrounded gave rise to a new professional class to meet the new needs occasioned by new legal and social developments. This will be apparent if we look at the limitations which the older and the later rules imposed upon the sphere of the attorney's activities.

(i) The attorney represented his client for all purposes—to win or to lose.[7] He was his client's agent for all purposes connected with a particular piece of litigation, at a time when the idea of agency was not familiar.[8] Hence his authority came to be confined strictly to the preparation for the particular piece of

[1] De Republica Anglorum (Alston's ed.) 153; for this edition of 1589 see Alston's ed. 144, 147-167; vol. iv 210 n. 4.

[2] 3 James I. c. 7. [3] Dugdale, Orig. Jurid. 311. [4] Ibid 312.

[5] "If any hereafter admitted in Court, practise as Attorney or Solicitor, they to be dismissed and expulsed out of their Houses thereupon; except the persons that shall be Solicitors shall also use the exercising of learning and mooting in the House, and so be allowed by the Bench."

[6] Ibid 317.

[7] Vol. ii 311-312, 315-317. [8] Ibid 315-316.

litigation in hand, and to the litigation itself.[1] And, conversely, he alone could take the formal steps needed in that litigation.[2] But persons engaged in litigation, whether as principals or as attorneys, might require services which could not be considered to be directly concerned with the litigation, or with the preparations for it. As early as the days of Bracton we read of bailiffs or nuncii who might be employed in services connected with litigation, but who could not take formal steps in it, such as consenting to trial by a jury.[3] The need for the assistance of these persons did not grow less as time went on. Thus, a litigant who lived in the country might find it advisable to employ skilled persons to send him early information from Westminister of the next move of his opponent, or to watch and report upon his opponent's relations with sheriffs, possible jurymen, or witnesses, in the county where the action was to be tried.[4] We get many illustrations of services of this kind in the Paston letters and the Plumpton correspondence. The citation given above from the Paston letters shows the need for such agents,[5] and the letter from the Plumpton correspondence cited in the footnote,[6] which is typical of many others, points to the same conclusion.

[1] Vol. ii 315-316.

[2] Bracton's Note Book, case 1188—William the Falconer and Peter of Leicester, the men of Simon de Monfort, appeared to pursue an action against the burgesses of Nottingham; the burgesses of Nottingham defended, "Et quia predicti Willelmus et Petrus non sunt nisi nuncii nec habent potestatem ponendi se super inquisicionem sine domino suo, ideo sine die."

[3] Last note; Bracton f. 212b—"Et sciendum quod non potest ballivus quicquid potest dominus suus. Non potest animo cognoscere disseysinam quo minus procedat assisa, sed per assisam veritas declarabitur. Item nec potest transigere nec pascisci nec jocum partitum facere nec aliud, quo magis dominus suus seysinam amittat toto vel in parte, nisi hoc sit per judicum et assisam"; cp. Britton ii 15. 3; vol. ii 316.

[4] That such caution was then very necessary is clear, see vol. ii 458-459.

[5] Above 449 n. 4.

[6] The following letter was written to Sir R. Plumpton, Jan. 29, 1498-1499 by John Pullan, who had been admitted a student of Lincoln's Inn July 10, 1496 (Black Books i 106):—"Sir please yt your mastership to understand that I sent a letter to you with Bryan Pullan of Gawkthorpe of all the cyrcumstance of the matter betwene my master and your son and his wyfe, and William Babthorpe. . . . Sir, so yt is now that suerly they intend to have a *habeas corpora* agayn the Jurrours with a *nisi prius* this next assise in Lent, at Yorke. Therefore, Sir, ye must make speciall frynds to the Jurrours, that they may be laboured specially, to such as ye trust wylbe made frindly in the cause. Sir, I have letten Mr. Kyngesmell see the dede of gift of the chaunchery of Elton, and shewed to him as your mastership presented in after the deith of the last Incumbent, which presentee was in by the space of iiii or v days at the least, and desired of hym to have his best counsell. And he answered to me thus; that *subpena* lay not properly in the case: but the best remedy for your Incumbent was to have assise at the common law, if any land belonged to the sayd Chaunchre. And if he had no land, then to have a spoliacion in the spirituall court agaynst the preyst that now occupyeth, because he is one disturber, or else to suy a *quare Impedit* at the common law. And so is to take no *subpena*. And for these causes I rest to know your pleasure. . . . Sir, as for the *subpena* agaynst Sir John Hastyngs, I shall remember it. The accion of wast agaynst Sir John Hastings goeth forward, as fast as the law wyll serve. . . . From Lyncoln's Inn at London, this Tuesday next Candlemas day. Your servant and bedman, John Pullan," Plumpton Corr. (C.S.) 132-133.

Similarly, attorneys themselves might often need the same assistance. Edward Plumpton was general attorney for his kinsman Sir Robert Plumpton.[1] In 1489-1490 he wrote,[2] "Your matter in the Excheker is grevous; there is iii wryttes agaynst you. Whereof, I have a *dedimus potestatem* out of the Escheker, and another out of the Chauncre, both derected to Sir Guy Fayrfax, to resayve your hothes and my ladyes. The serch and the copy of the wrytts, out of one cort to another, costeth much money, and the fees of them, and great soliciting." In some bills of costs of the years 1532-1544 an item "pro misis et custagiis," in addition to the attorney's fee, appears with great regularity each term.[3] Probably some part of it at least was spent in agents employed by the attorney. And that these were the functions of the earliest solicitors is made more probable by the fact that, in 1668, the author of the "Compleat Solicitor" finds it necessary to protest in his preface, that "it is not enough for the Solicitor to be, as it were, the Loader to the Attorney, or the Intelligencer to the Client." It was probably exactly these functions that the solicitor of the fifteenth century performed.[4] In fact, we should probably not be wrong if we concluded that these early solicitors were either the trusted servants of the litigant, or the servants or clerks of the attorney. The use of servants or clerks for these purposes was legally possible because a servant could thus act for his master without being guilty of maintenance.[5]

Solicitors of these two types were known all through the seventeenth century. In 1615, in the case of *Bradford v. Woodhouse*[6] we see a solicitor of the first type. The plaintiff, an attorney of the court of Common Pleas, alleged that the defendant, as the solicitor of Sir Thomas Elvys had retained him, and had then refused to pay his fees. The defence was that the action should have been brought against Sir Thomas Elvys and not against "the servant or solicitor." We have seen, too, that in the orders issued by the King's Bench and Common Pleas at the end of this period, it was necessary to distinguish solicitors of this type from the common solicitor, whose admission to practice as an attorney it was desired to regulate.[7] Similarly, it is probable

[1] Plumpton Corr. (C.S.) 44 n. *b*. [2] Ibid 90, 91.

[3] Select Cases in the Star Chamber (S.S.) ii 196-205.

[4] See C. G. Cook, English Law (1651) 44, "And in these last times there sprang up, first under the wings of noblemen, and men of great estate, for the help of the attorney in judicial courts, but as attorney in the prerogative ones, a creature called a solicitor; these men rob both lawyers and attorneys and all subjects"; he adds that many practice as solicitors, "under the wing or name of the attorney"; the abusive language used of the solicitor is, of course, mere common law prejudice; but this passage indicates with some accuracy the origins of the professional solicitor.

[5] Y.B. 19 Ed. IV. Mich. pl. 9; cp. Hudson, Star Chamber 95, cited below 454 n. 2.

[6] Cro. Jac. 520. [7] Above 449.

from these orders that solicitors of the second type—the clerks to the attorneys—were well known.[1] But, to explain fully the reason for their existence, we must look at the second set of limitations which fettered the activity of the attorney.

(ii) We have seen that an attorney was an officer of the court, and could only practise in the court in which he was admitted an attorney.[2] But it is clear that, in the seventeenth century, and probably earlier, an attorney of one court could act as solicitor for his client in another court. This was laid down in so many words in the case of *Thursby v. Warren* in 1629;[3] and it was admitted in the earlier case of *Bradford v. Woodhouse* in 1615.[4] It is not improbable that this was an old practice;[5] and, if it was, it obviously helped towards the growth of a class of solicitors who were professional men. No doubt the attorney of the common Pleas, who acted as solicitor in the King's Bench, employed an attorney of the King's Bench, and shared the profits; and the same sort of profit-sharing arrangement could equally easily be entered into with a person who was an attorney of neither bench.[6] Thus we get the common solicitor who, according to the orders of the King's Bench and Common Pleas issued at the end of the seventeenth century, was, after five years' practice, qualified to be admitted as an attorney.[7]

It is clear that the growth of the new courts and councils of the sixteenth century had a great effect upon the development of this new professional class. It is in connection with them that we hear most of the solicitor, for the simple reason that attorneys who practised in the common law courts were not recognized by them.[8] Right down to the Judicature Acts, we may remember, the solicitor was associated principally with the court of Chancery. It is, in fact, to the new work and new needs introduced by the growth of the jurisdiction of such courts as the Star Chamber, the

[1] The Practick Part of the Law 247, 302-303—common solicitors are not to be admitted attorneys unless they have practised as common solictors for five years last past.

[2] Above 435-436.

[3] Cro. Car. at p. 160—"And all the Court conceived, that an attorney may well be a solicitor for his client in other Courts as well as in the Court where he is attorney, and is allowable, and a promise to pay him for it is lawful."

[4] Cro. Jac. 520—the plaintiff was retained as attorney in the Common Pleas where he had been admitted as attorney, and as solictor in the King's Bench, and he recovered on both retainers.

[5] It was certainly known in Elizabeth's reign, as Hudson, Star Chamber 94, cites a case of M. 45 Eliza., in which an attorney of the Common Pleas, who conducted a case in the Exchequer, was sentenced for maintenance; below 454 n. 2.

[6] Probably this accounts for the orders issued by the King's Bench and Common Pleas forbidding attorneys to allow unqualified persons to practice in their names, see Praxis Utriusque Banci, 65; the Practick Part of the Law, 247, 303.

[7] Above 436.

[8] See the passage cited from C. G. Cock, English Law (1651), above 452 n. 4.

court of Chancery, and the court of Requests, that the solicitor owes his elevation from the position of the servant or agent of the litigant or attorney, to the position of a professional man on a level with the attorney. To this view it may be objected that, if it were true, we should expect to find that solicitors attained a recognized professional position at an earlier period in the sixteenth century than they actually attained it. These new courts had been enlarging their jurisdiction and doing a large amount of business all through the sixteenth century. But solicitors did not, as we have seen,[1] attain their new position till the latter half of the century—in fact, even at the beginning of the seventeenth century, they were considered by Hudson and Egerton to be a new and undesirable class.[2] The answer to this objection is to be found in a difference between the manner in which the courts of common law and these new courts provided for the representation of litigants; and, as we shall now see, this difference has had an important bearing upon the rise and the future position of the solicitor.

In both sets of courts at this period many services were performed by their clerical staffs, which to-day are performed by the solicitors or attorneys of the parties.[3] But in the courts of common law the parties had always employed their own attorneys; and these attorneys, though officers of the court to which they were attached, were not part of the regular clerical staff of the court. It is true that members of this clerical staff sometimes acted as attorneys. But in so doing they were acting outside the scope of their official duties; and the practice seems to have been prohibited by the court of Common Pleas in 1633.[4] They might indeed elect to become attorneys, but then they would cease to be clerks of the court. Thus the attorneys, though

[1] Above 450.

[2] "But in our age there are stepped up a new sort of people called solicitors, unknown to the records of the law, who, like the grasshoppers of Egypt devour the whole land; and these I dare say (being authorized by the opinion of the most reverend and learned lord chancellor that ever was before him) were express maintainers, and could not justify their maintenance upon any action brought; I mean not where a lord or a gentleman employed his servant to solicit his cause, for he may justify his doing thereof; but I mean those which are common solicitors of causes, and set up a new profession, not being allowed in any court, or at least not in this court, where they follow causes," Star Chamber 94-95; in S.P. Dom. 1631-1633 497, ccxxx 18, one of the grievances in the law which ought to be reformed is said to be the "practice newly sprung up for every man that will to be a common solicitor of causes."

[3] "Even the formal work left to the attorney was not all that in that branch of his practice the modern solicitor or his clerk is called on to do. For a vast tribe of officials existed to prepare the process, enter the proceedings, make up the record, and so forth; judges' clerks, clerks to the *custos brevium*, clerks of the inrolments, clerks of the King's silver, clerks of the warrants, clerks of the essoyns, philizers, exigenters, curators, marshals, *cum multis aliis*," Christian, op. cit. 91-92.

[4] Praxis Utriusque Banci 113-115.

attached to the court, were independent professional men, who depended for their remuneration upon their own efforts in getting and keeping clients. On the other hand, the only persons who could acts as attorneys in the court of Chancery, the court of Requests, and the Star Chamber were persons who were on the clerical staff of the court. The litigant must employ some one member of this small body. In the court of Chancery the Six Clerks and their under clerks acted in this capacity.[1] The court of Requests had on its staff three attorneys who "served for the plaintiff and defendant to frame their complaints and answers."[2] Similarly, in the Star Chamber there were originally only two attorneys appointed for the court, but "afterwards" says Hudson, "there was a third attorney appointed, upon suggestion that it were fit the suitor might have election or some choice; and then there was a fourth added, which surely was most unnecessary."[3]

But, with the increase in the business of these courts, it became clearly impossible for these close bodies to attend adequately to the needs of litigants. A large field was therefore open to irregular agents—in other words to solicitors. That these solicitors had been employed in connection with the business of these courts all through the sixteenth century is almost certain. But it was the increase of the business of these courts in the latter part of the century which made it impossible to ignore them, and necessary to recognize them as a part of the legal profession. Conservative practitioners might regret the innovation—they might even hint that these common solicitors rendered themselves liable to the penalties of maintenance.[4] But it was quite clear that they had come to stay. They eventually took over many of the functions done by the Six and the Sixty Clerks, and thus rendered these officials and their underlings one of those almost useless pieces of antiquated machinery, which did so much to make the procedure of the court a grievous burden in the eighteenth century.[5] No doubt we should have

[1] Vol. i 421-422.

[2] Smith, De Republica Anglorum (Alston's ed.) 167.

[3] Star Chamber 45. The court of Exchequer seems, in this respect, to have approximated to the court of Chancery, above 435 n. 3; but the statute of 1729, 2 George II. c. 23, makes it clear that, by that time, the attorneys of the court of Exchequer were very much on the same footing as the attorneys of the two Benches.

[4] Above 454 n. 2.

[5] Vol. i 421-423, 440-442; Pt. II. c. 7 § 3; in 1661, Pepys, Diary ii 133, goes "to the Six Clerks Office to find me a clerk there able to advise me in my business with Tom Trice"; but he also employs a private solicitor, ibid iii 47, 183; and an attorney—"thence I to the Six Clerks Office and discoursed with my attorney and solicitor," ibid 313. Conversely, in the eighteenth century, the Sixty Clerks, in addition to their formal official duties, sometimes acted as private solicitors to the parties; thus Romilly relates, Memoirs i 21-22, that he was articled to Mr. Lally, one of the Sixty Clerks, who "acted, as did most of the other clerks, as a solicitor in Chancery, as well as a clerk in court."

seen a similar phenomen in the case of the court of Requests and the Star Chamber if those courts had survived. But they did not survive. Therefore the solicitor came to be associated mainly with the court of Chancery. Thus, although solicitors were known in the common law courts in the fifteenth century and later, owing to the technical rules relating to the appointment and functions of attorneys, they came to be chiefly used in connection with business in courts falling outside the scope of the common law, because those courts had adopted the vicious system of only allowing a small number of their own officials to act as attorneys. The inevitable break down of this system was the cause of, and the opportunity for, the attainment by the solicitor of a definite place in the legal system side by side with the attorney.

The statute of 1605[1] treated solicitors as belonging substantially to the same class in the profession as attorneys, and subjected them to similar rules. But it is clear from the provisions as to their admission that, even then, the solicitor was regarded as inferior to the attorney. The attorney must have been brought up in the king's courts or be "otherwise well practised in *soliciting* of causes," and also "have been found by his dealings to be skilful and of honest disposition": all that was required of the solicitor is that he must be known "to be a man of sufficient and honest disposition."[2] The soliciting of causes was regarded as preparatory work, which might qualify a man to become an attorney. That he held this inferior position may also be gathered from the protest against so regarding him, which appears in the preface to the edition of the Compleat Solicitor published in 1683;[3] and that it was not wholly unjustified is evident from the confession there made, that "every idle fellow whose prodigality and ill husbandry hath forced him out of his trade or employment takes upon him to be a solicitor."[4]

But, in spite of a certain amount of professional rivalry, it is clear that the two classes were tending to approximate. We have seen that the restriction of the attorneys to their separate courts was breaking down. Not only could the same person be admitted as an attorney in both the Benches,[5] but, even if not ad-

[1] 3 James I. c. 7. [2] Ibid § 2.

[3] "We give Preheminence (not unadvisedly) to the Solicitor thus qualified as the *Genus* wherein the *Species* Clerk and Attorney are comprehended. For though the Attorney in that Court wherein he is sworn, be by the Rule of the Court, the chief person interested in the practice thereof, yet whatever Business else he Transacts in any other Court but his own, he is no more than a Solicitor," cited Christian, op. cit. 76; there is at least one instance in 1685 in which, in the absence of counsel, the solicitor was allowed to address the House of Lords, Hist. MSS. Com. 11th Rep. 289 no. 430.

[4] Cited Christian, op. cit. 78. [5] Above 435.

mitted, they could practice as solicitors in the court to which they did not belong;[1] and common solicitors, who had been in practice for five years, could be admitted as attorneys.[2] A stage further in the process of amalgamation was reached when the Act of 1729 recognized the new conditions, by allowing an attorney of one court or a solicitor to practise in another court, if he got the consent in writing of an attorney of that court;[3] and by providing that attorneys could be admitted as solicitors,[4] and that a solicitor admitted in one court of equity might be admitted in another court of equity.[5] A still further stage was reached in 1750 when it was provided that solicitors could be admitted as attorneys.[6] From that time onwards we can say that this new class of legal practitioners has become substantially amalgamated with the attorneys.

Just as the influence of law administered by the new courts and councils of the sixteenth century helped to free English law from the technicalities which were cramping its development, so the rise of this new class of practitioners helped to free the attorney's profession from some of the restrictions which its mediæval origin had imposed upon it. The example of and the rivalry with equity liberalized the common law. Similarly the growth of this new class of practitioners in equity, who performed duties essentially similar to those of the attorney, broadened and liberalized the organization, the powers, and the capacities of the attorney's branch of the legal profession. With the amalgamation of these two classes this branch of the profession attains its modern form.

The changes in the higher branches of the legal profession.

(i) The growth of the pre-eminence of the law officers of the crown.

The attorney and solicitor-general are not mediæval officials. In the Middle Ages the king had his attorney or attorneys, his serjeants, and, from the reign of Edward IV. onwards, his solicitor; and these officials shared between them some of the work done by the modern attorney and solicitor-general. But the offices of attorney and solicitor-general only began to assume their modern shape in the course of the sixteenth century; and it was not till the end of the seventeenth century that they in substance attained it. By that date they had become the legal advisers of the crown. Either by themselves or their deputies they appeared on behalf of the crown in the courts. As the legal advisers and deputies of the crown they gave legal advice to all the

[1] Above 453. [2] Above 436. [3] 2 George II. c. 23 § 10.
[4] § 20. [5] § 21. [6] 23 George II. c. 26 § 15.

departments of the state, and appeared for them if they wished to take action in the courts. Like the judges, they received writs of attendance, requiring them to come to Parliament to give their advice to the House of Lords. But, unlike the judges, one or other of them was always a member of the House of Commons. They were coming to be regarded as the leaders of the Bar, and as its representatives if it wished to take collective action.[1]

I propose to consider, (*a*) the history of the process by which the law officers of the crown attained this position; and (*b*) the reasons why the king's attorney and solicitor attained this position during the latter half of the seventeenth century.

(*a*) *The process by which the law officers of the crown attained their modern position.*

From the very earliest period in our legal history the king has appeared by his counsel in his courts.[2] In the thirteenth century these counsel were called by various names. There were "attornati regis," "narratores pro rege," men "qui sequuntur pro rege," and the king's serjeants.[3] At a time when the legal profession had hardly attained even the outlines of its final form, we must not expect to find very much precision in the nomenclature of the officials who were appointed to appear for the king.[4] But in the fourteenth century some of these outlines were beginning to appear. The order of the serjeants was beginning to obtain its peculiar status and privileges, and to become separated from the junior barristers and the attorneys.[5] The king therefore began to appear both by his serjeants, and by his attorney

[1] For a summary account of the Law Officers see Anson, the Crown Pt. i 207-208; for a detailed account of their modern position, duties, and privileges see G. S. Robertson, Civil Proceedings by and against the Crown 9-16; for a specimen of the patent of the attorney and solicitor-general, and the summons of the attorney-general to the House of Lords, see App. II. (1), (2), (3).

[2] It is pointed out in Finch, Law (ed. 1759) 81-82 that, "the king is always present in court; and that is the cause that the form of entry in all suits for the king is *Henricus Hobart miles, attornatus domini regis generalis qui pro domino regi sequitur venit hic in curia, etc.*, and doth not say, *Dominus rex per Henricum Hobart attornatum suum, etc.* And therefore it is also that the king cannot be *nonsuit*, that all Acts of Parliament which concern the king are general, and the court must take notice without pleading of them, for he is in all, and all have their part in him"; we shall see that some of these ideas have played their part in differentiating the king's attorney from the ordinary attorney, below 467-469.

[3] See Bellot, The Origin of the Attorney-General, L.Q.R. xxv 406-409; apparently the earliest instance of the use of the term "Attornatus Regis" comes from 38 Hy. III.

[4] I agree with Dr. Bellot, ibid 409, that we can trace little difference between the persons called attornati regis in Edward I.'s reign and the persons classed by Dugdale as king's serjeants; but I do not altogether agree that the king's attorney never had "any connexion with attorneyship in its narrower sense," ibid 410, or that the "expression in its modern signification is an historical accident," ibid 411—at any rate it is an accident which I think admits of explanation, see below 467-469.

[5] Vol. ii 484-493, 504-506.

or attorneys. In the patents granted to these attorneys we can trace a gradual development of their office.

In the patents granted from the reign of Edward II. to the reign of Edward III. the powers of the king's attorney are limited, either in respect of the courts in which he is to practise, or in respect of the area over which his authority extends, or in respect of the business with which he is entrusted. Let us look at one or two illustrations. *Limitation as to courts.* September 5, 6 Edward II. the king appoints John de Norton his attorney for all his business in the King's Bench.[1] November 26, 16 Edward II., he appoints Walter de Fyngale at a salary of £10 a year for his business in the Common Bench.[2] And in this and the following reign there are many other examples of appointments limited to a particular court.[3] *Limitations as to area.* November 4, 37 Edward III., we get an elaborate patent which appoints William de Nassefeldt the king's attorney with power to practise in all the courts held in the counties of Yorkshire, Northumberland, Cumberland, and Westmoreland, as well within the liberties as without. The patent is remarkable in that it allows him to have a deputy, and specifies in great detail the particular business which he is to superintend.[4] *Limitations as to*

[1] Pat. Roll 6 Ed. II. pt. 1 (no. 138) m. 20—"Rex omnibus ad quos etc. salutem. Sciatis quod constituimus dilectum clericum nostrum Johannem de Norton attornatum nostrum ad negocia nos tangencia coram Justiciariis nostris ad placita coram nobis tenenda assignatis prosequenda et defendenda quamdiu nobis placuerit. Item quod idem Johannes officium illud habeat et teneat eodem modo quo alii attornati nostri officium predictum habuerunt temporibus retro-actis."

[2] Ibid 16 Ed. II. pt. 1 (no. 157) m. 15—"De attornato Regis in communi Banco assignato. Rex dilecto sibi Galfrido de Fyngale, salutem. Sciatis quod assignavimus vos ad negocia nostra coram justiciariis nostris de Banco prosequenda et defenenda quamdiu nobis placuerit, volentes quod quamdiu officio illo intenderitis percipiatis in eodem per annum decem libras."

[3] Ibid 1 Ed. III. pt. 1 (no. 166) m. 35—Alexander de Fyncham (K.B.); ibid m. 28 (C.B.); ibid m. 37—Alexander de Hadenham (C.B.); ibid 12 Ed. III. pt. 2 (no. 193) m. 8—John de Clone (C.B.); ibid m. 31—John de Lincoln (K.B.); ibid 23 Ed. III. pt. 3 (no. 229) m. 34—Simon de Kegworth (K.B.); ibid 34 Ed. III. pt. 1 (no. 259) m. 15—Richard de Fryseby (K.B.); ibid 40 Ed. III. pt. 2 (no. 274) m. 12—Thomas de Shardelowe (K.B.).

[4] Ibid 37 Ed. III. pt. 2 (no. 268) m. 25—"Rex universis et singulis Justiciariis vicecomitibus, Coronatoribus, Majoribus, Ballivis, Ministris et aliis fidelibus suis de Comitatibus Ebor., Northumbr., Cumbr., et Westmorel., tam infra libertates quam extra ad quos etc. salutem. Sciatis quod nos de fidelitate et industria dilecti nobis Willelmi de Nassefelde plenissime confidentes, constituimus ipsum attornatum nostrum ad negocia nostra in quibuscumque Curiis et placeis in quibus negocia illa deducenda fuerint vel expedienda in Comitatibus predictis . . . prosequenda et defendenda, volentes quod idem Willelmus habeat per se et deputatum suum visum et copias quarumcumque inquisicionum, tam coram vicecomitibus . . . quam quibuscumque aliis ministris nostris . . . ex officio capiendarum, et eciam copias exigendarum . . . vicecomitibus liberandarum, dantes ei plenam tenore presencium potestatem inquirendi de tempore in tempus de catallis felonum et fugitivorum, ac utlagatorum, necnon de wrecco maris et de wayf et de piscibus regalibus quociens sibi melius viderit expedire, et nos inde in Cancellaria nostra certificandi, ac omnia alia quæ pro commodo nostro in partibus illis faciendi viderit exequendi et explendi."

business. May 20, 41 Edward III., we get a patent to John de Asshewell giving him power to look into escheats, concealments, forfeitures, goods of felons, fugitives, and other profits of the crown in London and the suburbs.[1]

In a patent dated July 13, 9 Henry IV., we get for the first time a patent which gives to the attorney, Thomas Derham, the power to act for the king in the Common Bench "and all our other courts";[2] and this becomes the general form.[3] In a patent directed to John Herbert, August 12, 1 Edward IV., the powers of the attorney are still further extended. He is to act as the king's attorney in all courts in England, and in the courts of the counties of Carmarthen and Cardigan in South Wales, and he is to have the power to appoint a deputy or deputies.[4] This power of appointing deputies was recognzied as an existing practice, and elaborated, in a patent to William Husee dated February 14, 11 Edward IV.[5] From that time onwards the form of commission is practically stereotyped.[6] The only difference is that, while before Henry VIII.'s reign the attorney was as often as not appointed during good behaviour or for life, in Henry VIII.'s reign and after he is always appointed during pleasure.

We may conclude from the evidence of these patents that, during the Middle Ages, the tendency had been to supersede

[1] Pat. Roll 41 Ed. III. pt. 1 (no. 275) m. 20—"Rex omnibus etc. Sciatis quod assignavimus et deputavimus dilectum nobis Johannem de Asshewell attornatum nostrum ad negocia nostra tam de escaetis concelamentis forisfaturis catallis felonum et fugitivorum et aliis proficuis que ad nos pertinere potuerunt in Civitate nostra Londoniae et suburbiis ejusdem, quam de omnibus aliis ibidem unde processus per brevia nostra seu alio modo fieri contigerit prosequendis et defendendis et ad interessendum capcionibus omnium inquisicionum pro nobis seu nomine nostro in eisdem Civitate et suburbiis faciendas, et ad omnia alia facienda et exequenda quae pro nobis necessaria viderit vel opportuna quamdiu nostrae placuerit voluntati."

[2] Ibid 9 Hy. IV. pt. 2 (no. 379) m. 11—"Rex omnibus ad quos etc. Sciatis quod nos de fidelitate et circumspeccione dilecti nobis Thome Derham plenius confidentes ordinavimus et constituimus ipsum Thomam attornatum nostrum in communi Banco et in aliis curiis nostris habendum officium predictum quamdiu se bene gesserit in eodem percipiendum foeda eidem officio consueta."

[3] Ibid 1 Hy. V. pt. 5 (no. 393) m. 30; ibid 1 Hy. VI. pt. 1 (no. 407) m. 28; ibid 8 Hy. VI. pt. 1 (no. 426) m. 19.

[4] Ibid 1 Ed. IV. pt. 3 (no. 494) m. 27—"In omnibus curiis nostris tam in Anglia quam in Wallia in Comitatibus Kermerdyn et Cardigan in Southwallia habendum et occupandum officium illud per se vel per sufficientem deputatum suum seu sufficientes deputatos suos pro termino vitæ."

[5] Ibid 11 Ed. IV. pt. 2 (no. 528) m. 28—"Sciatis quod . . . ipsum (Husee) . . . assignavimus nostrum generalem attornatum in omni us curiis nostris de recordo in regno nostro Angliæ. . . . Dedimus eciam et tenore presencium damus prefato Willelmo plenam potestatem et auctoritatem faciendi ordinandi et deputandi tales clericos et officarios sub ipso in qualibus Curiis predictis quales aliquis alius officium illud habens sive occupans habuit fecit ordinavit et deputavit ac facere ordinare et deputare consuevit."

[6] See ibid 30 Hy. VI. pt. 2 (no. 475) m. 20; ibid 1 Ed. V. (no. 551) m. 4; ibid 1 Rich. III. pt. 5 (no. 556) m. 4; ibid 1 Hy. VII. pt. 1 (no. 561) m. 15; ibid 1 Hy. VIII. pt. 1 (no. 610) m. 4; ibid 6 Ed. VI. pt. 6 (no. 847) m. 13; 1 Mary pt. 2 (no. 865) m. 45; 1 Eliza. pt. 4 (no. 941) m. 18 (15).

several attorneys with limited powers by a single attorney with much wider powers, and to give this single attorney the power to appoint deputies; that this process was complete by the end of the fifteenth century; and that, as a result, the king's attorney has become, in the sixteenth century, the most important person in the legal department of the state, and the chief representative of the crown in the courts.

These conclusions are corroborated by evidence from other sources.

In the fourteenth and the beginning of the fifteenth centuries, it is clear, from the Parliament Rolls, that the king still employed several attorneys. Thus in 1334 we have a reference to the king's attorney in the Common Bench;[1] in 1363 to the king's attorney, "or any one who sues for the king";[2] and in 1414 to the king's attorneys.[3] It is clear too that the serjeants and the attorney acted together for the king.[4] But, later in the fifteenth century, it is usually the king's attorney who is referred to; and he is referred to, together with the serjeants and the judges, in such a way that it is clear that he is taking rank with them. Thus in 1432[5] and 1439[6] the judges of the two Benches, the serjeants, and the king's attorney, petition for payment of their salaries; and, though in many petitions relating to finance the king's attorneys are occasionally referred to,[7] in the great majority of cases it is the king's attorney.[8] Then too, in 1460, when the Duke of York had put forward his claim to the throne, not only the judges and the king's serjeants, but also the king's attorney were asked for their advice.[9]

These entries on the Parliament rolls show us that the king's attorney or attorneys, like the judges and the serjeants, were consulted by the House of Lords. It is therefore probable that from an early period they were summoned by writs of attendance. In Henry VIII.'s reign the king's attorney was an important person in the House of Lords. In some of the very first entries

[1] Rot. Parl. ii 83b (8 Ed. III. no. 45).
[2] Ibid 277a (37 Ed. III. no. 18).
[3] Ibid iv 20b (2 Hy. V. no. 18).
[4] Ibid ii App. no. 74; iv 19 (2 Hy. V. no. 12).
[5] Ibid iv 394a (10 Hy. VI. no. 20).
[6] Ibid v 13b, 14a (18 Hy. VI. no. 27).
[7] Ibid v 40a (20 Hy. VI. no. 9); 136b (25 Hy. VI. no. 18); vi 270a (1 Hy. VII.).
[8] See e.g. ibid v 139b (25 Hy. VI. no. 24); 143b (27 Hy. VI. no. 11); 176a (28 Hy. VI. no. 13); 214a (29 Hy. VI. no. 12); 219a (29 Hy. VI. no. 17); 247b (32 Hy. VI. no. 43); 473b, 528b (1 Ed. IV. no. 8); 517a (4 Ed. IV. no. 39); 616b (7, 8 Ed. IV. no. 12); vi 102a (14 Ed. IV. no. 25); 132b (14 Ed. IV. no. 30); 395a (3 Hy. VII. no. 14); 502a (11 Hy. VII. no. 37); 523a (19 Hy. VII. no. 3).
[9] Ibid v 376a (39 Hy. VI. no. 2)—"and then the seid Lordes consydering the answere of the seid Juges, and entendyng to have the advice and good counseill of all the Kynges Counseillers, sent for all the Kynges Sergeauntes and Attourney."

on the Journals of that House he is not only employed by it to take bills from the Lords to the Commons,[1] but also to amend bills and put them into shape.[2] All through the Tudor period it is the king's attorney who is usually consulted by the government on points of law; and it is he who conducts important state trials, not only in court, but also in their preliminary stages. We can see, for instance, that the work done by Coke and Bacon, in the courts and out of the courts, is in substance the same as that of a modern attorney-general.

Let us now turn to the king's solicitor.

The patents do not give us very much information. The earliest patent that I have seen is of March 12, 1 Edward IV.; and the fact that no mention of the king's solicitor occurs on the Rolls of Parliament before that reign[3] makes it probable that the office dates from that reign. This patent is addressed to Richard Fowler, and states that the king has appointed him his solicitor "in all matters pleas suits and quarrels affecting us within our realm of England," during good behaviour.[4] Solicitors at that date were known to the legal world;[5] and the general terms used in the patent obviously imply that Richard Fowler is to do for the king what an ordinary solicitor would do for his client. A patent of August 26, 1 Richard III., shows that certain profits had already come to be annexed to the office; and not only gives a certain fee and these profits to the solicitor, Thomas Lynom, but also an allowance for costs and expenses[6]—a fact which makes it probable that the king's solicitor was expected to do the sort of informal work connected with litigation which fell to the lot of the private soli-

[1] Lords' Journals i 5b—"Decretum est per dominos quod in crastino, per Clericum Parliamenti et Attornatum Regis ad Domum Communem, sive Inferiorem, portarentur Billa de ly Coroners, etc."

[2] Ibid i 4b—"Billa pro Reformacione Ecclesiastice Libertatis, *bis* lecta, tradita fuit Attornato et Sollicitatori Regiis reformanda et emendanda, et Billa de falsis Retornis et Billa de Apparatu similiter"; and see a similar entry at p. 5b.

[3] The first mention appears to be Rot. Parl. v 530a (4 Ed. IV. no. 40), and is a proviso in favour of Richard Fowler.

[4] Rot. Pat. 1 Ed. IV. pt. 2 (no. 493) m. 10—"Rex omnibus ad quos etc. Salutem. Sciatis quod nos de gratia nostra speciali ac pro bono et gratuito servicio quod dilectus serviens noster Ricardus Fowler nobis impendit et impendet in futurum, constituimus ipsum Ricardum Solicitarium nostrum de et in omnibus materiis placitis sectis et querelis nos infra reguum nostrum Angliæ tangentibus seu spectantibus, habendum et occupandum officium predictum quamdiu se bene gesserit in eodem, habendum et percipiendum de nobis annuatim pro officio illo decem libras" etc. Note that there is no reference to previous holders of the office, or to privileges and duties pertaining to the office, as in later patents, App. II. (2).

[5] Above 449, 451-452.

[6] Rot. Pat. 1 Rich. III. pt. 5 (no. 556) m. 7—he is given a fee of £10 a year, "unacum omnibus aliis proficuis libertatibus juribus et commoditatibus eidem officio quoquomodo pertinentibus sive spectantibus. Ac eciam nos grandes custas et expensas quos predictus Solicitarius noster in eodem officio et alias in servicio nostro sustinebit considerantes de uberiori gratia nostra concessimus eidem Thome annuitatim viginti libras" etc.

citor. Later patents do not differ in any very important points.[1] They often refer to the last preceding patent or two or three patents, and state that the present grantee is to hold it as the preceding solicitors held it.[2] There is the same diversity of practice as to the tenure of the office as in the case of the attorney;[3] but the practice of making the appointment during good behaviour appears to have lasted longer in the case of the solicitor than in the case of the attorney. It is not till after the Restoration that he is appointed during the king's pleasure.[4]

It is clear from the Journals of the House of Lords that, at least as early as 1509, the king's solicitor occupied in Parliament the same position as the king's attorney.[5] Like him he was summoned by a writ of attendance.

If I am right in thinking that the king's solicitor bore much the same relation to the king's attorney, as the private solicitor of the fifteenth century bore to the private attorney, it is not surprising to find that the office was from the first inferior to that of king's attorney, and soon came to be regarded as a stepping-stone to the latter office. If we look at the list of the law officers in Dugdale's Chronica Series, we shall see that from 1530, the date of the promotion of Christopher Hales from the post of king's solicitor to the post of king's attorney, it became the general rule, on a change of law officers, to make the king's solicitor the king's attorney.[6]

The names of the persons appointed attorneys and solicitors-general show us that, by the end of the sixteenth and the beginning of the seventeenth centuries, these offices had attained their modern importance in the state and in the law. In the Middle Ages there are very few of the king's attorneys who are known even to the legal historian;[7] and the same is true of many of the

[1] Rot. Pat. 1 Hy. VII. pt. 1 (no. 561) m. 3; 22 Hy. VII. pt. 3 (no. 603) m. 3 (24); 13 Hy. VIII. pt. 1 (no. 637) m. 11 (17); 25 Hy. VIII. pt. 1 (no. 666) m. 24 (23); 1 Eliza. pt. 3 (no. 940) m. 29 (10); 1 Charles I. pt. 24 (no. 2371) entry no. 4.

[2] E.g. ibid 1 Mary pt. 2 (no. 865) m. 46; 6 Ed. VI. pt. 6 (no. 847) m. 13.

[3] Above 460.

[4] Appointment of Finch, Chancery Docquet Books (Crown office) vii p. 2.

[5] Lords' Journals i 4b, 5b, above 462 nn. 1 and 2.

[6] In Wilkes v. The King (1768) Wilm. at pp. 329-330 it is said that "The Solicitor-General is the 'secundarius attornatus'; and as the Courts take notice judicially of the Attorney-General, when there is one, they take notice of the Solicitor-General, as standing in his place, when there is none. He is a known and sworn officer of the Crown as much as the Attorney; and in the vacancy of that office, does every act, and executes every part of it;" and cp. Rex v. Wilkes (1770) 4 Burr. at p. 2554; it is clear that the solicitor-general had come to occupy this position by the end of the sixteenth century; in the Journals of the House of Commons, April 11, 1614, it is said that, "the Solicitor's place is but a limb of Mr. Attorney's."

[7] In Edward I.'s reign, it is true, we get such names as Thornton, Inge, Lowther, and Mutford whose names appear in the Y.BB.; but we have seen that at this time the line between the king's serjeants and attorneys was not clearly drawn, above 458; later attorneys unless they became serjeants, e.g. Richard de Aldeburgh (1334), or had been serjeants e.g. William de Thorpe (1343) and William Husee (1472), are unknown men.

earlier solicitors. But from 1569 such men as Bromley, Popham, Egerton, Coke, Fleming, Hobart, Bacon, Yelverton, Coventry, Heath, Noy, Banks, Littleton, Heneage, Finch, Francis North, and Somers held these offices. All these are names well known to the legal historian, and many are famous in the wider sphere of general history. In the Middle Ages the high road of preferment to the Bench was by way of the degree of serjeant and the office of king's serjeant.[1] From the middle of the sixteenth century onwards, the high road of preferment to the woolsack and the presidency of the courts of common law, has been by way of the tenure of the offices of attorney and solicitor-general; and these offices could not be held by ordinary serjeants. They were at first regarded as inferior offices; and, at all times, the duties attached thereto made their tenure incompatible with the position of the ordinary serjeant.[2]

The position of these legal advisers of the king and government has naturally been affected by constitutional changes in the state. The first modification in their position, due to this cause, naturally occurs at the latter part of the sixteenth and in the seventeenth centuries. It was at the latter part of the sixteenth century that the House of Commons began to assume a position of increased importance in the state. This brought forward the question of the relations of the attorney and the solicitor-general to that House. It was obviously desirable that the legal advisers of the government should be able to explain to the House the legal bearings of the government measures before it. But the law officers were attached to the House of Lords.[3] They had no direct connection with the House of Commons; and it might well have been questioned whether a person summoned to the House of Lords, though only by a writ of attendance, was capable of being a member of the House of Commons. But in 1566 Richard Onslow, the queen's solicitor, was elected a member of the House of Commons; and, as the Crown desired that he should be made Speaker, the House decided that the fact that he was solicitor, and as such summoned by writ of attendance to the House of Lords, was no bar to his capacity to serve as a member of the House of Commons;[4] and,

[1] Vol. ii 492.

[2] Serjeants appointed to these offices got a writ of discharge, Dugdale, Orig. Jurid. c. liv; Chronica Series 95 (Popham), 99 (Fleming); on the other hand, the duties of king's serjeant, which was also a patent office, do not seem to have been regarded as incompatible; at any rate in 1814 Shepherd king's serjeant was also solicitor-general, Pulling, Order of the Coif 183-184; the rules as to the precedence of the ranks of the legal profession, below 477, long retained traces of the time when the king's serjeants were at the head of the Bar.

[3] Above 461-462; cp. D'Ewes Journal 45, 47.

[4] D'Ewes, Journal 121—"Sir Edward Rogers Knight, Comptroller of her Majesties Household, declared unto them, that forasmuch as Richard Onslow Esqr.,

having decided that he could so serve, they elected him Speaker.[1] In 1575 it was decided that a queen's serjeant, who was similarly summoned to the House of Lords by writ of attendance, could serve as a member of the House of Commons.[2] It might therefore have been supposed that the House would have no difficulty in applying the same rule to the attorney-general, if and when the question arose. Apparently the question did not arise till 1606, when it was shelved.[3] It arose again in 1614; and, in spite of the practical identity of the position of the attorney with that of the solicitor and the king's serjeants, the illogical decision was arrived at to allow the present attorney to sit, but not to allow the attorney to sit for the future.[4] The Commons were jealous of the influence of the Court; the Court particularly wished Bacon, then attorney, to remain a member; and so an illogical compromise was arrived at.[5] This rule, though illogical, was followed for some time.[6] Francis North (1673) seems to have been the first attorney-general to sit in the House of Commons;[7] and after the Revolution the practice became general. Pollexfen, William III.'s first attorney, was a member of the Convention Parliament: and both he and his successors, Treby and Somers, sat in the succeeding Parliaments without remark and without objection.

It is clear from this history of the relation of the attorney and solicitor-general to the House of Commons, that they had become such important officers of state that their position was necessarily affected by constitutional changes in the state. Modifications in their position which have taken place in the succeeding centuries have been due to these changes. Thus the changes involved in the growth of Cabinet government have

her Majesties Solicitor General, was a member of the said House . . . they would use some means to have him restored unto them (who as yet attended in the Upper House) to join with them in their election of a Speaker. And thereupon, notice thereof being given to the Lords of the Upper House . . . the said Mr. Onslow was sent down with the Queen's serjeant at law, Mr. Carus and Mr. Attorney General, to shew for himself, why he should not be a member of this House, who alledging many weighty reasons, as well for his Office of Sollicitor, as for his writ of attendance in the Upper House, was nevertheless adjudged to be a member of this House."

[1] D'Ewes, Journal 121. [2] Ibid 249.

[3] Journals of the House of Commons i 323-324—Nov. 22, 1606.

[4] Ibid i 459-460—April 11, 1614.

[5] In the debate Sir R. Owen said, "that he hath received this morning advertisement from honorable persons why now [for] special cause he should serve; which not fit to be discovered here publickly, but will presently inform any man of that cause (for matter of state this Parliament) he should be, this Parliament, of the House, with an order that hereafter no Attorney General should at any time be of the House," ibid i 459.

[6] Ibid Feb. 7 and 8, 1620; Feb. 9 and 10, 1625; Jan. 29, 1640, cited Hatsell, Precedents iii 18, 19.

[7] Lives of the Norths i 113-114—"His lordship sat in the House till he was made attorney-general: and then the same good friends began to discourse of his incapacity of sitting as a member of that House. . . . But the country party never ventured upon the point."

made them members of the Ministry, and, like other members of the Ministry, dependent for their continuance in office upon the support of the House of Commons; and, in these last days, changes in the character of legislation, resulting from changed ideas as to the objects which the state should seek to attain, have made it necessary that the attorney-general should be a member of the Cabinet.

Such then in outline is the history of the process by which the law officers of the crown have attained their present position in the state. We must now turn to a more difficult question. Why did the king's attorney and solicitor attain their modern position during the latter part of the seventeenth century?

(b) Why did the king's attorney and the king's solicitor attain their modern position during the latter part of the seventeenth century?

We may perhaps state the problem thus: How was it that the king came to appear in the courts, and to be advised on points of law by an attorney and a solicitor, at a time when the profession of attorney was becoming sharply divided from that of a barrister, and at a time when a solicitor was approximating to an attorney, but was still regarded as inferior to him?

In order to solve this problem we must, in the first place, consider the very large differences between the development of the king's attorney and solicitor, and the development of the ordinary attorney or solicitor; and, in the second place, the great change in the amount and the character of the demands made upon the king's legal advisers in the new age which opened in the sixteenth century. The solution of the problem will, I think, be found, partly in the results of the mediæval development of the office of king's attorney, and partly in the new needs of the modern state.

In dealing with the king or with any of his officials we must always remember that "the king is prerogative"; but that in the Middle Ages the king's position and rights differed originally rather in degree than in kind from those of other men.[1] The position of the king's officers, and the rules applicable to them, will be analogous to the position of and rules applicable to similar officials employed by other men, at the time when these officials and these rules first originated. But there will be a difference, for "prerogative means exceptionality."[2] And this characteristic of exceptionality is present, not only in the actual rules of law at any given period, but also, and to a far

[1] Vol. iii 460, 466; cp. P. and M. i 496. [2] Ibid 497.

greater extent, in the historical development of these rules. The fact that an official or a rule of law is connected with the king, will often cause the office or the rule to retain old ideas which elsewhere have long passed away.[1] The king is not affected by statutes unless they are specially made applicable to him; and his exalted position has often caused him and his officers to remain unaffected by the gradual changes and tendencies which affect common men. Thus, although in early days the king's officials and the law applicable to them were not so very different from the officials of, and the law applicable to, common men, they will both come, in the course of centuries, to be so different that it is difficult to see any resemblance whatsoever. The maintenance of old ideas, and the development, under the pressure of national necessities, of the differences between the rules applicable to the king's case and those applicable to the case of ordinary men, will produce a type of official and a body of law applicable to them, quite unlike anything else; and quite inexplicable, without an historical analysis of the complex pressure of the old ideas and the new needs, which have brought about the finished result.

Let us apply these principles to the problem in hand—the development of the position of the king's attorney and solicitor.

We hear of a king's attorney in the thirteenth century, that is at a time when the legal profession had not yet taken its final form. Like the attorneys of other people, he is often only appointed for a particular court;[2] like them he is sometimes formally admitted by the court;[3] and like them he can both plead and take all the necessary steps in the action. But there are differences. The king could appoint an attorney-general—an attorney to conduct any litigation that might arise—at a time when other persons could only do so by the express licence of the king.[4] The king's attorney did not represent the king in his courts, for the king was always theoretically present, but he followed the case on his behalf.[5] He must see that the rights of his theoretically present but actually absent principal did not

[1] For another illustration in the law relating to the liability of the servants of the crown see vol. iii 388.

[2] Above 459.

[3] Rot. Pat. 13 Ed. III. pt. 2 (no. 196) m. 24, after the patent making John de Clone king's attorney in the Common Bench, there is a mandate to the judges of the Common Bench to admit him.

[4] P. and M. i 191, 192; cp. Bellot, L.Q.R. xxv 402-404; the fact that the queen and the prince of Wales have attorneys-general, is an illustration of the way in which the law concerning the king and the royal family preserves archaic modes of thought, Robertson, op. cit. 6, 7; similarly, the only other attorneys-general are attached to the Duchy of Lancaster and the County Palatine of Durham—former franchise jurisdictions where similar archaisms might be expected to linger.

[5] Above 458 n. 2.

suffer; and the court must see that all the procedural advantages given to the king by his prerogative were given to his attorney. In the thirteenth and early fourteenth centuries, then, the king's attorney has all the powers and privileges of the attorneys of other men, and more besides; for "the king is prerogative." And the consequences deduced from this fact developed with the development of the law—"in the pleadings and proceedings themselves of the king's suits," said Bacon in 1616, "what a garland of prerogatives doth the law put upon them."[1]

It is clear that the king's attorney will not be affected by the later changes in the position of the private attorney, statutory or otherwise, which came with the growth of the professional attorney. Even if he could be regarded as an officer of the court of King's Bench, he was an officer of a standing very different from that of the private attorney. He was associated with dignified officials like the prothonotary or chief clerk of the crown, and not with the clerical staff of the courts.[2] He was not appointed by the court to which he was attached, nor was he subject to its discipline in the same way as the ordinary attorney. Like other attorneys, he had been educated at the Inns of Court; but, unlike them, he was generally called to the bar. Either by virtue of his powers as an attorney of the older type, or because he has been called to the bar, he can plead for the king; and he can do as well all that an ordinary attorney can do for his client.

At the same time, the differences which, from the outset, had existed between an attorney who appeared for the king, and an ordinary attorney, enabled his office to develop on its own lines. He could be a more general attorney than those of other men. He could be commissioned to appear, not only in all cases affecting the king in any one court, but also in all cases in any court in England.[3] Thus it was possible for the king to appoint a single attorney, who, together with the king's serjeants, was responsible for giving legal advice to the king; who, like them, was capable of appearing for the king in the courts. We have seen that, by the end of the mediæval period, this official was on a level with the king's serjeants and the judges;[4] and, like them, he was summoned by writ of attendance to the House of Lords.[5]

The king's attorney of the thirteenth century bears a strong family likeness to the attorneys of other people. By the end of

[1] The Case de Rege Inconsulto, Works (Ed. Spedding) vii 693.

[2] Roger North says, Lives of the Norths iii 138-139, "The Attorney-General in the King's Bench is an officer by the Constitution, and hath a place under the Chief Justice when he sits, and puts on a round cap like the prothonotary and chief clerk of the crown"; but, he adds, "profit calls him away, and to take the place of a pleader within the bar."

[3] Above 460. [4] Above 461. [5] Above 461-462.

the fifteenth century, the maintenance in his case of the old ideas connected with the office of attorney, the separate and distinct development of the ordinary attorney, and the development of the exceptional privileges of the attorney who appeared for the king, have caused the king's attorney to become an official wholly different from the ordinary professional attorney, and have thus given to his office a wholly unique character.

We can see a similar development in the office of the king's solicitor. As in the case of the king's attorney, we cannot explain, either the reason for his creation, or his original position, without a reference to the position of the ordinary solicitor. We have seen that these solicitors were employed by private litigants in the fifteenth century; that attorneys used them as their assistants; and that they performed services for their employers which did not fall within the scope of the ordinary attorney's duty; that therefore they were in the nature of trusted servants of the litigant, or servants or clerks of the attorney.[1] Now, although there were not the same set of limitations upon the sphere of action of the king's attorney as there were upon the professional attorney of the private person, it is clear that the king's attorney would often want assistance. It is significant that the time when the power to appoint a deputy becomes a usual clause in the attorney's patent, is the time when the king's solicitor first appears.[2] However that may be, it seems to have been recognized from the first that the expedient of allowing the attorney to appoint deputies, would not altogether meet the necessities of the case. Since the king had ceased to appoint several attorneys with co-ordinate powers, and had entrusted his business to a single attorney, it was probably thought desirable to appoint a person to act as a subordinate to the king's attorney. It was natural that he should take the title of solicitor, as the private solicitor of the period was often a person who acted as a subordinate to the attorney. From the first, therefore, the king's solicitor occupied the place which he occupies to-day; and, that being so, it was only natural that his office should develop rapidly in importance with the development of the office of king's attorney. That it was so developing at the very beginning of the sixteenth century, is clear from the fact that, in the earliest of the Journals of the House of Lords (1509), we find that he is an assistant to that House, and that he occupies a position similar to that of the king's serjeants and attorney.[3]

That this is a correct explanation of the origin and development of the office of the king's solicitor is rendered probable by

[1] Above 451-452. [2] Above 460, 462. [3] Above 463.

the fact that it has never had any special connection with the court of Chancery. On the contrary, it would seem that the king, in 1439, appointed an attorney for his business in the Chancery.[1] The private solicitor in later days was specially connected with that court. But we have seen that that connection was caused by the fact that the development of the solicitor was largely due to the inadequate provision made, both by that court and by the courts of Requests and Star Chamber, for the representation of litigants, and to the consequent employment by litigants of their own solicitors.[2] The king's solicitor really represents the older class of solicitors—those employed by litigants or attorneys in the common law courts to help them in their business. Here again, therefore, a royal official preserves the memory of an older order. Here again, the development of his office has resulted in giving to that office a wholly unique character.

At the beginning of the sixteenth century, therefore, both the king's attorney and the king's solicitor were important state officials. But they had not yet attained their modern position. They were not the only legal advisers of the crown. They were not the only persons employed by the crown to appear for him in the courts. Many of these duties were shared by the king's serjeants, who, like them, were summoned to the House of Lords, who then, and later, took precedence of them. It is during the sixteenth century that they ousted the king's serjeants from their position of equality with themselves, and thus became pre-eminently the law officers of the crown.

By the beginning of the seventeenth century this development was practically complete. Hudson tells us that it was resolved, in 1604, that the king's serjeant could not, like the king's attorney, proceed on his own motion by information in the Star Chamber.[3] He could apparently only act if he were specially instructed.[4] In other words, the attorney-general was the only person who could take the initiative in legal proceedings on behalf of the crown. Why was it that he had thus been able to gain so decisive a superiority to the serjeants?

The short answer to this question is because the king's

[1] Select Cases before the Council (S.S.) 103 n. 5.

[2] Above 455.

[3] Star Chamber, 134—"In 1 and 2 *Jac.* it was resolved by the court, that it belonged to the place of the attorney [to inform for the king]; and *serjeant Heale*, the king's serjeant, putting in a bill against *Sir John Luson* was denied that privilege."

[4] This was certainly the case later in the century; Roger North says, Lives of the Norths iii 138, "There used to be two serjeants, called the king's serjeants, for long time past, and these had a greater dignity and authority than the attorney-general; they hold the precedence still, but have little authority and no business but as Mr. Attorney call them."

serjeants were serjeants. Because they were serjeants their sphere of action was not so wide as that which was open to the king's attorney or solicitor. Though they could and did appear in other courts, their main sphere of action was the common law courts, and their chief sphere of action was the court of Common Pleas.[1] The king's attorney and solicitor could do all and more than all that a king's serjeant could do. They could even plead in the court of Common Pleas when they appeared for the king.[2] They were therefore more useful to the king than any member of the order of serjeants could be, in a century in which, because it was a century of change, men were required who could adapt themselves to new kinds of business. Again, because the king's serjeants were serjeants, their education and outlook were the education and outlook of common lawyers. As in the Middle Ages, it was the successful practitioners in the common law courts who became serjeants; and the successful serjeants who became king's serjeants.[3] But, in the sixteenth and seventeenth centuries, the king required lawyers who were versed, not only in the common law, but also in the law administered in the courts outside the common law courts. He required also lawyers who were conversant with the political problems of the day. The need for lawyers who had had a political as well as a legal training grew greater as the contests of jurisdiction between rival courts grew fiercer, and as the constitutional differences between king and Parliament became more bitter. If the Stuart kings found it necessary to choose judges who would take their view of the constitutional questions of the day,[4] much more did they find it necessary to choose legal advisers whose politics they could trust. But the serjeants, because they were pure common lawyers, could not be trusted to see eye to eye with the king on many of these political questions. They were too well read in that mediæval common law which taught that the law should be supreme in the state, and that Parliament had powers and privileges which could not be overridden.

The order of the serjeants was essentially mediæval; and the king's serjeants were mediæval officials. Like many other mediæval officials, they were obliged to give place to officials who had originally occupied a humbler position, because these officials were, for that very reason, more capable of adaptation to

[1] Vol. ii 490-491.

[2] "In the Common Pleas the attorney-general may come into and sit in the court, and appear to speak in the king's business, for he hath power *ad perdendum et lucrandum pro rege*, but he cannot take the place of a serjeant at the bar," Lives of the Norths, iii 139.

[3] Vol. ii 486-487.

[4] Vol. v 350-352, 439-441; below 508-511.

the needs of the modern state. Thus the rise of the king's attorney and solicitor, at the expense of the king's serjeants, is, in the legal sphere, a phenomenon of the same kind as the rise, in the political sphere, of the king's secretaries, at the expense of many older mediæval functionaries.[1]

The rule that the office of the king's attorney and solicitor could not be held by a serjeant had originated in the idea that any member of the order of the serjeants, and a fortiori a king's serjeant, was superior to the king's attorney or solicitor;[2] and, though in this period this reason for the rule was no longer applicable, the rule was maintained because the king found it a convenient rule. It enabled him to emancipate himself from the control of men who were primarily common lawyers, and to appoint as his legal advisers men who were in touch with the political questions of the day, and with his view of those questions. We shall now see that, as a result, the order of the serjeants began to lose that pre-eminence in the legal profession which it enjoyed in the Middle Ages. The former pre-eminence of the king's serjeants had, as we have seen, gradually passed to the law officers of the crown, who, by the end of the sixteenth century, had become the acknowledged heads of the profession. We shall now see that, during the seventeenth century, the pre-eminence of these law officers extended itself to a set of counsel who originally were immediately connected with them; and that this extension weakened still further the position of the whole order of serjeants.

(ii) The rise of the order of king's counsel.

It soon became clear that the king's attorney and solicitor could not by themselves do all the work which their office imposed upon them. It is to this cause that we must ascribe the rise of a body of "king's learned counsel," who are the ancestors of our modern king's counsel. It would seem from D'Ewes that a body of persons so designated was known at the very beginning of Elizabeth's reign. Describing the places which the various members or assistants or attendants upon the House of Lords occupied, he says,[3] "On the Woolsack on the left hand of the Estate, and on the south side of the House, sate the Master of the Rolls, the Lord Chief Baron, the Queen's learned Council, and others. And note that all these may properly be said to sit on the Innerside of the Woolsacks, and the Queen's Learned Council on the outside of the Woolsacks, next the Earls." The learned counsel here referred to may of course be only the judges and the

[1] Vol. iv 66-67. [2] Above 464 and n. 2.
[3] D'Ewes, Journal 10-11.

law officers. But, in a judges' order of 1594,[1] they are again referred to in a way that makes it reasonably clear that there was a body of counsel retained by the crown, who were regarded as ranking next after the serjeants; and it is quite certain that such a body was known at the end of Elizabeth's reign, because, in 1603, James I. says that he had continued in their places "the learned Councill to the late Queen our sister."[2] It is probable that these counsel were appointed by the crown, on the nomination of the attorney-general, to act as his assistants.

Francis Bacon was constantly employed by Elizabeth in legal work of the kind which fell to these learned counsel. And it would seem from the wording of James I.'s warrant in 1603 that he had been directly appointed by the queen. James does not say when he was so appointed, nor does Bacon when, at a later date, he was recounting the stages of his advancement in the legal profession.[3] But we may perhaps conjecture that Coke, in his capacity of attorney, would be the last person to nominate Bacon, and that Bacon's influence secured from the queen a direct appointment without reference to her attorney. And this conjecture is perhaps supported by the fact that Bacon's appointment had not apparently been renewed at the beginning of the new reign.[4] It is fairly clear from James I.'s warrant that Bacon's position was no better than that of any other of the queen's learned counsel.[5] Probably they all had a certain precedence[6]—but that is all. Bacon himself admits that the office was "without patent or fee," and very vague in character.

But in the following year Bacon managed to get this office

[1] Dugdale, Orig. Jurid. 314—"The names of such as have Read Double, or shall Read Double, shall be given to the Judges who have promised to give them preheminence of hearing, after Serjeants, and her Majesties learned Councell."

[2] Egerton Papers (C.S.) 368—in a warrant addressed to Egerton, James I. says, "Where we have perceaved by a lettre from our Councell at Whitehall that Francis Bacon Esq., was one of the learned Councell to the late Queen, our sister by speciall commandement, and that in the warrant granted by us to them for the continewance of their places he is not named, we have thought good to allow him in such sort as she did. And therefore doe require you to signify our pleasure to him and to the rest of our learned Councell, and others to whom it shall appertain to be thereof certefyed, that our meaning is that he shall continew to be of our learned Councell, in such manner as before he was to the Queen, during our pleasure"; cp. S.P. Dom. 1600 cclxxiv 118 (cited Tanner, Constitutional Documents 248) where they are referred to in a way which shows that they were distinct both from the Council and the judges; S.P. Dom. 1611-1618 123, lxviii 72 where Lord Harrington asks Salisbury to cause a suit to be referred to the king's counsel at law, because he can get a more speedy decision from them than from the judges who were then on circuit; and they are referred to again as assistants of the attorney-general in 1620, S.P. Dom. 1619-1623 191, cxvii 71.

[3] "You found me of the Learned Counsel Extraordinary, without patent or fee; a kind of *individuum vagum*. You established me and brought me into Ordinary. Soon after, you placed me Solicitor, where I served seven years," Letter of Bacon to the king 1620-1621, Spedding, Letters and Life vii 168.

[4] Above n. 2. [5] Ibid. [6] Above n. 1.

"established and brought into ordinary." The patent[1] recites that the king has appointed Bacon "our councillor at law or one of our Counsel learned in the law";[2] that he has given him, place and precedence in our courts or elsewhere, all the other advantages that pertain to the office, and all powers necessary to the performance of its duties;[3] that the office is to be held during good behaviour with as ample an authority "as any other of our counsel learned in the law or as the said Francis himself by the word of Queen Elizabeth our predecessor or by our warrant has held it, provided that this grant does not derogate from any office heretofore granted by us or our ancestors";[4] and lastly the king has granted Bacon a fee of £40 a year for his life. This precedent was followed. It is probable that at least one other patent was granted by James I.;[5] and it is certain that patents, similar to that granted to Bacon, were granted by Charles I.[6] The variations in these patents from the Baconian model are trifling. Similar patents were issued after the Restoration—but the fee granted, Roger North tells us, was never paid. Instead, these counsel were paid for the work which they actually did.[7]

The effect of these patents upon the position of the king's learned counsel seems to have been exactly as Bacon stated it—"they were established and brought into ordinary." Instead of being informally appointed by the law officers of the crown as before, they were appointed directly by the crown by letters patent. They therefore became an established order in the legal profession, comparable to that of the serjeants, who were appointed

[1] App. III. (1).

[2] "Consiliarium nostrum ad Legem sive unum de Consilio nostro erudito in Lege."

[3] "Dedimus . . . præfato Franscisco locum et præsidentiam in curiis nostris vel alibi et præaudientiam, neconon omnia et singula proficua advantagia emolumenta jura præeminentia confidentias, seu alia quæcumque quæ ad unum consiliarium nostrum ad legem, ut consiliario hujusmodi, et minime ratione alicujus specialis officii, spectant aut pertinent, aut spectare aut pertinere consueverunt aut de jure debent."

[4] "In tam amplis modo et forma quam aliquis alius de consilio nostro erudito in lege, vel ipse Fransciscus, ratione verbi Regii Elizabethæ nuper antecessoris nostri, vel ratione warranti nostri sub signatura nostra regia, habuit tenuit gavisus est vel executus est, nichilominus nolumus quod hæc concessio nostra deroget alicui officio antehac, per nos aut antecessores nostros dato vel concesso."

[5] Foss, Judges vi 35, notes that "in the patent granted to the two Temples in 1608, Sir Henry Montague, the recorder, is designated one of our counsel learned in the law"; that he had such a patent is clear from the patent granted in 1626 to Finch, afterwards lord-keeper, App. III. (1); it gives him the same rights of preaudience as Sir Henry Montague, Francis Bacon, or any other.

[6] Pat. Rolls, 1 Charles I. pt. 7 no. 2—Finch; ibid 8 Charles I. pt. 1 no. 3—Radcliffe; ibid 10 Charles I. pt. 39 no. 10—Shelton; ibid 17 Charles I. pt. 1 no. 2—Levingston; for these patents see App. III. (1); cp. Foss, Judges vi 233.

[7] Lives of the Norths iii 128—"We in our patents of King's Counsel had a pension of £40 per annum granted, but not paid, and in consideration of that the solicitors had orders to give us fees as business required"; but North says they never took fees in capital cases "either to consult or plead."

by royal writ. At the present day the declaration which they make,[1] and the ceremony of being called within the bar of the several courts, are strongly reminiscent of the serjeants' oath, and the ceremony used in the court of Common Pleas on the creation of a serjeant.[2] But, though they thus became an established order in the legal profession, the nature of their duties was at first in no way affected. They were appointed to give assistance and advice to the law officers of the crown. Thus in Charles II.'s reign they were consulted in capital cases and in "cases of state."[3] In James II.'s reign they were expected to give a favourable opinion as to the legality of the proposed exercise of the dispensing power.[4] Roger North tells us that, after he had been made king's counsel, his brother "ordered the matter so that I was ordered to attend the attorney-general upon all capital and other cases of state, to consult with and assist Mr. Attorney, for the more steady conduct of the king's law business."[5] And the rule which exists at the present day, that a king's counsel cannot appear against the crown without a licence from the crown, is a survival from the days when these counsel were really the king's counsel, and the assistants of the law officers of the crown.[6]

There were signs, even at the end of the seventeenth century, that this new order of counsel was ceasing to be in any real sense the king's counsel. Roger North tells us that "of late their appointment hath been more frequent and out of favour more

[1] For the serjeants' oath and the modern declaration of a King's Counsel see App. III. (2).

[2] For the ceremony in the court of Common Pleas used at the creation of a serjeant see vol. ii 488-489; for the formalities surviving in the eighteenth century see Foss, Judges viii 220-221; the serjeants' feasts were discontinued at the beginning of George III.'s reign, and the gift of rings to the judges and officers of the courts in 1787—though the gift of rings to other officers of state continued, ibid.

[3] "When matters of life and death were depending he (Sir Robert Sawyer, the attorney-general) used to summon the king's counsel to attend him at his chamber, where it was freely consulted if there were a fitting evidence to proceed upon or not; and if the general opinion was that the evidence did not come up, he never pushed any trial against any man," Lives of the Norths i 377-378; similarly North tells us, Examen 38-39, that Bridgman, L.K., consulted them as to the issue of commissions of martial law, and as to the issue of injunctions in the Bankers' Case—"I remember about this time, there was at his house a meeting of the Attorney and Solicitor-general and some of the King's Counsel to consult upon these two points; and they all agreed they were rocks upon which they must split, if they could not otherwise decline them."

[4] "In this time of peril he (Sir Robert Sawyer) was so kind to his friends, the king's counsel, as to give them warning to study the points; for they would be asked whether the king might not, by his royal grant, appoint officers unqualified with *non obstantes* to the test laws; and that the first case would be concerning the soldiery," Lives of the Norths i 378.

[5] Ibid iii 125.

[6] The phrase which Blackstone, Comm. iii 27 uses, is reminiscent of the older order; he says, "From both these degrees (serjeants and apprentices) some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney and solicitor-general."

than merit in the profession";[1] and it was only natural that the law officers should not wish to consult men promoted on these grounds. Apparently it was chiefly by the favour of his brother that Roger North himself was consulted.[2] Obviously the order of king's counsel was coming to be a body of counsel to whom precedence had been given, either because of their professional eminence, or because they could bring interest to bear in the right quarter. In the eighteenth century they came to be simply a class of counsel who, for one reason or another, had been given a rank superior to that of ordinary counsel.[3] But they were still exposed to disabilities which were survivals from the time when they were really the king's counsel. They could not appear against the crown without the crown's licence; and, as the office was a paid office, appointment to it vacated a seat in Parliament. On that account barristers sometimes, instead of becoming king's counsel, got a patent of precedence, which gave them the same precedence as king's counsel, without exposing them to the disabilities of that office.[4] This practice shows that the king's counsel had ceased to perform the functions for which they were originally created. The assistance which they formerly gave to the law officers of the crown came to be given by the treasury solicitor—the germs of which office we can see in the seventeenth century,[5] or by counsel employed and paid by the treasury.

[1] Lives of the Norths iii 138; the alteration in the mode of payment, above 474 n. 7, points in this direction.

[2] Above 475.

[3] See Pulling, Order of the Coif. 194-196.

[4] "A custom has of late years prevailed of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction: whereby they are entitled to such rank and preaudience as are assigned in their respective patents, sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts: but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown," Bl. Com. iii 28; when Strange resigned the office of solicitor-general and his other appointments in 1742, the king gave him a patent of precedence next after the attorney-general, 2 Strange at p. 1176.

[5] Lives of the Norths iii 138—"Still new under officers are made, as the Solicitor of the Exchequer, who was a runner up and down to call for process about the king's debts and dispatch them, is a sort of mechanic Attorney-General, and doth in effect more, as to the prosecuting and soliciting part, then attorney and solicitor put together. This employment was first conspicuous under Jones who prosecuted the popish plot; after came to Graham and Burton [as to whom see Burnet, History of My Own Times Pt. I. ii 298], and since to Whitmore and Aaron Smith"; the whole passage is interesting as a first, though somewhat slight attempt to trace the history of the law officers of the crown. North was, in a sense, not so very wide of the mark when he said that, "the attorney-general was anciently little more than a sort of Aaron Smith in the law"—but he probably did not grasp quite firmly the fact that, when the king's attorney first appeared, the modern distinctions between the ranks in the legal profession had not grown up, and that consequently the king's attorney never held quite the same position as that of the ordinary attorney; cp. Examen 114 (the pages are here wrongly numbered and it should be p. 122) for an account of Mr. Graysham, who held the office of solicitor of the Exchequer; it is clear that he did for the king the work done for an ordinary suitor by his attorney—he had, as North says, "The

The effect of these changes upon the older ordering of the legal profession were threefold. They affected the precedence of the various orders of barristers; they affected the position of the serjeants; and they affected the Inns of Court.

Firstly, in the Middle Ages the king's serjeants were at the head of the bar, then came the serjeants, and then the other barristers.[1] In the earlier half of the seventeenth century no clear rules of precedence seem to have existed. Apparently the serjeants had precedence in the court of Common Pleas, even over the attorney and solicitor-general, unless the attorney or solicitor were appearing for the crown;[2] and in the court of Chancery Bacon seems to have assumed that he, as chancellor, could settle questions of precedence as he pleased.[3] But probably by the end of the seventeenth century,[4] and certainly before Blackstone wrote,[5] it was settled that the king's serjeants took precedence of the attorney and solicitor-general, that the attorney and solicitor-general took precedence of all the king's counsel or barristers who had got patents of precedence, and that the king's counsel or barristers with patents of precedence took precedence of the serjeants. Though the attorney and solicitor-general had long been in fact the leaders of the bar, it was not till 1814 that they were given by royal warrant precedence over the king's serjeants.[6] It is clear, however, that, by the end of this period, the general body of the serjeants had ceased to be at the head of the bar, and that the precedence of the various members of the bar was beginning to be settled in its modern form.

But, secondly, the serjeants lost more than mere precedence. It is true that they still had a monopoly of practice at the Common Pleas bar.[7] But their most valuable privilege—the privilege that

Practic part of the king's law business in his hands, under the direction of Mr. Attorney-General"; these offices were valuable—in 1695 the office of solicitor of the customs was said to be worth nearly £1000 a year, Luttrell's Diary iii 507; for the shady practices of some of these officials see Foxcroft, Life of the Marquis of Halifax i 436; ii 153, 155 n., 158.

[1] Vol. ii 486-487, 490.

[2] In 1616 Coke ruled that Bacon, who was then attorney-general, could not move before a serjeant unless he was appearing for the king; Coke said, "When I was the king's attorney I never offered to move before a serjeant, unless it was for the king," 3 Bulstr. 32.

[3] "Besides these great ones (the attorney and solicitor-general) I will hear any judge's son before a serjeant, and any serjeant's son before a reader, if there be not many of them," Speech on taking his seat in the Chancery, Spedding, Letters and Life vi 192. Note that in 1770 Lord Mansfield gave to Dunning, on his vacating the office of solicitor-general, precedence in his court next after the king's counsel and serjeants, and the recorder of London, 5 Burr. at p. 2586.

[4] Lives of the Norths iii 138.

[5] Bl. Comm. iii 28 n. *a*.

[6] See the warrant cited in a note to The Attorney-General v. the Lord Advocate (1834) 2 Cl. and Fin. at p. 483; cp. Reg. v. Comptroller-General of Patents [1899] 1 Q.B. at p. 913.

[7] Vol. ii 490; it was not taken away till 1846, 9, 10 Victoria c. 54; Pulling, Order of the Coif. 99-101.

the judges should be exclusively appointed from their order—had practically disappeared. It survived, but in name only. From the Tudor period it had become the custom to make any barrister, whom it was desired to appoint to a seat on the bench, a serjeant pro forma.[1] Thus, although nominally the judges and serjeants were still brothers of one order, though they still had their Serjeants' Inn where they occasionally consulted together on pending cases,[2] in fact the old solidarity of the order had gone. During this period the law officers of the crown had established a prescriptive right to the best judicial appointments; and they were never ordinary serjeants. This meant that the bench was not in fact composed of men who had at heart the privileges and interests of the order of serjeants. Francis North, when chief justice of the Common Pleas, countenanced the practice of allowing other barristers to make "side bar" motions—a practice by which his brother, then newly called, benefited; and when the serjeants, to mark their disapproval, refused to plead, he threatened to throw open the Common Pleas bar.[3] The members of the new order of king's counsel were appointed from among lawyers whose politics the government thought that it could trust.[4] Obviously they were far more likely than the serjeants to be promoted to the bench, in an age in which the politics rather than the learning of the judges were the main consideration. Hence we must date from this period the beginnings of the decline of the order of the serjeants.[5] Their position was perhaps slightly strengthened after the Revolution, when the judges ceased to be appointed for political reasons. But the fact that the law officers were never members of their order, and the fact that the king's counsel took rank above them, condemned them to an anomalous position, in which we can see one of the causes for their ultimate extinction.

The third effect of these changes was to alter somewhat the constitution of the Inns of Court. These Societies had been and to a large extent still were wholly self-governing. Their benches

[1] Vol. v 340-341.

[2] See Lives of the Norths i 89 for a tale of how Hale, C.B., made the case of Barnardiston v. Soame, "a table case in Serjeants' Inn Hall," in order that if the serjeants' opinions coincided with his own, "his sentence in court might be adorned with the adjunct of the opinions of the serjeants' bench; to whom (as is sometimes done) the case had been put."

[3] Ibid 132-134; Roger North thus describes these side bar motions: "It hath been the usage of the King's Bench at the side bar below in the hall, and of the Common Pleas in the chamber within the Treasury, to hear attorneys and young counsel that came to move them about matters of form and practice."

[4] Above 472-475.

[5] It was probably rare for any king's counsel to become a serjeant unless he was about to be promoted to the bench; but there is one instance; in 1682 Thos. Raymond, at p. 360, notes that Sir J. Kelyng, K.C., was made serjeant.

had been recruited by co-opting the ablest members of the Inn; and it was obligatory upon all benchers to read or to have read a certain number of lectures.[1] But, in the latter half of the seventeenth century, this manner of recruiting the benchers was affected by the claim of the king's counsel to be elected as of right. It is obvious that this meant that the crown could practically make a barrister a bencher by appointing him king's counsel.

The question whether the king's counsel had this right was raised by Francis North in 1668, who claimed to be raised to the bench of his Inn on his appointment to the office of king's counsel.[2] It was obviously a question upon which there could be no direct authority. The king's counsel were a comparatively new order; and the question never arose in the case of serjeants, because the serjeant, on his appointment, ceased to be a member of his Inn of Court, and became a member of Serjeants' Inn.[3] But the prevailing tendency was in favour of North's claim. In the latter part of the sixteenth and in the earlier part of the seventeenth centuries the Readers and benchers had shown themselves amenable to influences of various kinds.[4] Francis Bacon owed his rapid advancement at Gray's Inn to his family connections.[5] In 1614 Lincoln's Inn specially admitted without fees a relation of Lord Ellesmere.[6] In 1618 a member of the Council of the North was called to the bench by Gray's Inn and excused from reading.[7] In 1622 the bench of Gray's Inn revoked an order as to the precedence of a bencher in obedience to letters from the king.[8] It was coming to be customary to elect other lawyers whom the king had directly or indirectly appointed to high posts in the administration of the law—such as prothonotaries[9] or masters in Chancery.[10] In the case of North, therefore, the judges had no difficulty in coming to the conclusion that his appointment as king's counsel gave him a right to be called to the bench; and the benchers were obliged reluctantly to

[1] Vol. ii 497, 503, 504; vol. iv 263-264; below 490-491.

[2] Lives of the Norths i 50, 51.

[3] Vol. ii 487.

[4] See the orders of the Judges, 1594, § 7, Dugdale, Orig. Jurid. 315—"that none be called to the Barr by any letters, corruption, or reward, upon pain of expulsing the *Reader* that calleth any such, and the party so called out of the House and fellowship"; the Reader in former days often called the students as he was the head of the educational side of the Inn during his tenure of office vol. ii 497 and n. 2; at this date, as Lincoln's Inn explained, Dugdale, loc. cit., it was their custom that the call should be made, not by the Reader, but by "common Counsell."

[5] Pension Book of Gray's Inn 72 n.

[6] Black Books ii 163.

[7] Pension Book 231.

[8] Ibid 253-255.

[9] Above 446.

[10] Black Books iii 13 (1661)—an order that masters in Chancery, being benchers, are not to be privileged by their office, "from performing the usual exercises of this House"; ibid 31—a search for precedents is directed to see if a bencher, being a master of Requests, has any special precedence.

acquiesce.[1] The Inns recovered their liberty of choice after the Revolution.[2] But they usually called king's counsel to the bench; and it was not till 1845 that it was solemnly decided that they were under no legal obligation to do so.[3]

It is clear that the fact that the benchers, whether under compulsion or voluntarily, elected those to whom the crown had given the rank of king's counsel or other legal preferment, tended to alter the character of the benches of the Inns. Their benches ceased to be composed solely of the able men of the junior bar, who had won their way thither, partly by their abilities in the courts, and partly by their willingness to take an important part as Readers in the educational work of the Inns. Instead, they were composed of men who were sometimes distinguished practitioners, and generally, in addition, rising politicians of the legal variety.[4] Such men could not be expected to take the whole-hearted interest in the educational work of the Inn that had been taken by the benchers of the older school. The benchers who had refused to call Francis North had evidently perceived this. They alleged, says Roger North, "that if young men by favour so preferred came up straight to the Bench, and by their precedence topped the rest of the ancient benchers, it might in time destroy the government of the Society."[5] And events proved that there was some reason in these apprehensions. Just as these changes struck at the collegiate life of the order of the serjeants, so they struck at the collegiate government and education of the Inns of Court. In the middle of the nineteenth century vice-chancellor Stuart said, "the multitudinous and indiscriminate creation of Queen's Counsel has made the number of Benchers in the two most considerable Inns of Court too unwieldy for the proper government of those societies."[6] Their

[1] North having represented his case to the judges, they reprimanded the benchers when they appeared in court, "for their insolence, as if a person whom his majesty had thought fit to make one of his counsel extraordinary was not worthy to come into their company; and so dismissed them unheard with declaration that until they had done their duty in calling Mr. North to the Bench, they must not expect to be heard as counsel in his majesty's courts. This was English, and that evening they conformed and so were reinstated"; cp. Black Books iii 141 (1683) for a call to the bench of a barrister because he was made king's counsel.

[2] Inner Temple Records iii 321-322—on an appeal to the judges brought by one Fry, an ancient of Gray's Inn in 1689-1690, complaining that he had been twice passed over in calls to the bench, the judges held, "that the call to the Bench was no matter of right in any person, but was in point of government only, and that it was discretionary, and both person and time ought to be left to the judgment of the Bench, in whom the government of the society resided, and that unless the appellant had been called and then disbenched no cause need be assigned why the Bench refused the appellant"; cp. Foss, Judges vi 38.

[3] In the case of Mr. Hayward, cited Pulling, Order of the Coif. 171 n. 2.

[4] Francis North's promotion was a conspicuous instance, above 205-206, below 531-533.

[5] Lives of the Norths i 50.

[6] Report on the Inns of Court (1854) App. 262, cited Pulling, Order of the Coif. 197 n. 1.

effects on the educational system of the Inns were more immediately felt, because they were only one of the many causes which, as we shall see immediately, were destroying the older educational system. But we can hardly doubt that the effect of these causes was aggravated by this change in the personnel of the governing bodies of the Inns, which was the indirect consequence of the new grouping of the higher ranks of the legal profession.

The Educational System of the Inns of Court

The first half of the sixteenth century was the golden age of the educational system of the Inns of Court. The system of legal education created in the Middle Ages[1] then reached its fullest development.[2] It was a system eminently well suited to the needs of a youthful system of law, the literature of which was as yet of a manageable size. It was perhaps the only system possible for an age in which there was no printed books. It was a very practical system—it produced pleaders and advocates; and at the same time theory was not neglected—it produced accomplished lawyers. This system was maintained right down to the outbreak of the Great Rebellion. But it had begun to decline in the latter part of the sixteenth century, and it was maintained with increasing difficulty in the earlier half of the seventeenth century. It collapsed during the Commonwealth period; and, in spite of attempts by the Inns of Court and the judges to revive it after the Restoration, it never recovered. By the end of this period the Inns of Court had ceased to be educational bodies; and the student was left to make his own arrangements for his education.

The history of the decline and fall of the educational system of the Inns of Court thus falls into three periods:—(1) the late sixteenth and early seventeenth centuries; (2) the Commonwealth period; and (3) the latter part of the seventeenth century.

(1) *The late sixteenth and early seventeenth centuries.*

That we must date the beginnings of the decline of the educational system of the Inns of Court from the latter half of the sixteenth century, is reasonably clear from a comparison of two sets of Judge's orders, issued in 1557[3] and 1591[4] respectively. In the first of these sets of orders it is provided *inter alia* that moot cases in the vacation shall not contain more than two arguable points, and that none of the bench are to argue more than two points.[5] We gather from this that the Reader's cases had been

[1] Vol. ii 506-508; see Putnam, Justices of the Peace (Oxford Studies vol. vii) 167-173.
[2] Vol. iv 263-264,268-272.
[3] Dugdale, Orig. Jurid. 311.
[4] Ibid 313.
[5] § 5.

too full of arguable points, and that the benchers engrossed all the argument. This clearly points to such excessive zeal on the part of Readers and benchers that the moots were not so instructive to the students as they might have been. The second set of orders tells a very different tale. "Whereas," it runs, "the Readings in Houses of Court have time out of mind continued in every Lent and every August yearly, by the space of three weeks at the least, till of late years, that divers Readers in the same Houses have made an end of their reading in farr shorter time, and have read fewer Readings, than by the antient Orders of the said Houses they ought to do; to the great hindrance of learning, not only in the said Houses of Court, but also in the Houses of Chancery, by reason that the Exercises of Moots, very profitable for study, are by occasion thereof cut off almost the one half thereof or more . . . . which, if it should be permitted, would be almost an utter overthrow of the learning and study of the law"—therefore the judges proceed to make orders that the accustomed length and number of readings be maintained.[1]

The causes for this decline of the educational system during this period are mainly three—the introduction of printing, the disinclination of the students, and the disinclination of their teachers.

(i) The effects of the introduction of printing upon the system of legal education were as extensive as its effects upon the system of law reporting.[2] It led to the growth of a very much larger legal literature, and it made this literature far more accessible. The students could buy books; and the Inns began to pay increased attention to their libraries.[3] Coke recognized that "timely and orderly reading" was as necessary a part of legal education as the practice of moots, and attendance upon Readings and at the courts.[4] The list of books which D'Ewes read in the course of his studies at the Temple, shows that this fact was well ap-

[1] "That all Single Readers in every of the said Houses of Court, shall continue every of their Readings by the whole space of three weeks, or till Friday in the third week after the beginning of every such Reading, at the least. And that there shall be as many Readings, in every of the said three weeks, as by Antient Orders of the same Houses have been accustomed. And if there shall be any cause allowed by the Benchers of the said Houses for fewer Readings; there shall be, notwithstanding any such cause or excuse, three Readings in every of the said three weeks at the least; any Order to be taken to the contrary notwithstanding."

[2] Vol iv 357-374.

[3] The earliest reference to Gray's Inn Library is in 1555, but till 1646 there was no librarian, Pension Book xlix; in 1629 the barristers and students of Lincoln's Inn petitioned that the library might be made more convenient for them, Black Books ii 290, 291; in 1631 general orders were made for the library, ibid 299; in the Middle Temple the library dates from 1641, Ingpen, Master Worsley's Book, 107.

[4] Co. Litt. 70b.—he advises the student to look up the cases he hears cited at Readings or in the courts, "but that must not hinder his timely and orderly reading, which (all excuses set apart) he must bind himself unto."

preciated by serious students.[1] But this introduced a new problem into legal education. What should be the relation of the students' reading to lectures, and to practical exercises in pleading or advocacy? Coke saw that it was a serious problem, and he warned the student that he could not safely neglect either method of acquiring legal knowledge. "There be two things," he said, "to be avoided by him as enemies to learning, *præpostera lectio*, and *præpostera praxis*." [2]

(ii) The second of the causes for the decline of the old system is largely a direct consequence of the first. Many students neglected Coke's advice. The printed book seemed to provide a short cut to knowledge; and they thought that they could safely neglect the readings, moots, and other exercises required by the Inns. Then, as now, they excused themselves for their non-compliance with the academic routine, by the plea that they could get all the knowledge they wanted more easily and more accurately by their own reading; and this excuse was exceedingly likely to be used by the many students of good family who came to the Inns, not that they might live by the law, but that they might get a good general education.[3] Two entries on the records of Lincoln's Inn illustrate this feeling among the students. The first shows that they had devised a plan of doing their mooting by deputy. In 1615 the Bench found it necessary to order that in the case of those who "doe the graunde mootes by deputyes, the deputyes shalbe entred into the Booke of Exercises, and not those that take them up." [4] Another method of evasion called forth the following order in 1628: "Forsomuch as it is generally observed that very many of the Utter, Barristers and students of this Society under the Barr, lyable to be charged with the exercises of the House, put themselves out of commons when they should be charged . . . althoughe such as so continue out of commons remayne in the House or towne; it is ordered that such as shall so doe shall be nevertheless lyable to exercise, notice being left at their chamber, and shalbe cast againe in commons." [5]

(iii) If the barristers and benchers had been as determined to carry on the old system as their predecessors, they could no doubt have overcome the disinclination of the students. But they themselves had begun to show signs of a similar disinclination. This

[1] Below 486. [2] Co. Litt. 70b.

[3] "For that the institution of these Societies was ordained chiefly for the profession of the Law; and in a second degree for the education of the sons and youth of riper years of the Nobility and Gentry of this realm," Orders of the Judges and Benchers, 1614, Dugdale, Orig. Jurid. 317; above 436; vol. ii 509-510; Evelyn remarks in his Diary, October 4, 1699, that his brother, who had died in that year, aged 83, had gone to the Middle Temple, "as gentlemen of the best quality did, but without intention to study the law as a profession."

[4] Black Books ii 174. [5] Ibid 282.

was perhaps partly due to the same cause. Many probably thought that less teaching was needed, now that the students could read the printed books. But it was also due to the prosperity of the legal profession.[1] The lawyers found that the time required for the preparation of readings interfered so much with their practices, that they were willing to pay a fine to escape this duty. Thus the Inns found it almost impossible to get any of their members to "read double"; and very difficult to get any one to read single.[2] Sometimes it was necessary to bribe them to take office. This is illustrated by an entry in the Black Books of Lincoln's Inn of the year 1605. A Mr. Thomas Hitchcocke, whose turn it was "to read single," was "intreated" to take office. "Who answered and confessed that he had thought upon his Reading, and made some entrance and progresse therein, but protested that he coulde not goe throughe and finishe the same to Reade this sommer wthoute refrayninge and loseinge a greate parte of his practize this presente terme and the next allso." He was nevertheless appointed Reader, but given £20 above the usual allowances, "towards his losse and hinderannce."[3] Similarly barristers preferred to be fined and to pay rather than to take the office of Reader in the Inns of Chancery.[4] It is no wonder that students found the readings dull,[5] or that Coke, comparing the modern with the ancient readings, complained that the former had lost their former authority and were "obscure and dark."[6] They were often the work of reluctant teachers lecturing equally reluctant students. The old system needed the willing co-operation of students, barristers, and benchers. All now desired to see the end of it.

Nevertheless the judges and the governing bodies of the Inns tried hard to arrest this decline. We have seen that the judges issued orders on this subject in 1591.[7] Gray's Inn and the judges issued more detailed orders with the same object in 1594.[8] In

[1] See vol. iv 255-256 for the large increase in the business of the courts in the latter part of Elizabeth's reign.

[2] See e.g. Black Books ii 33—"It seemeth very difficulte to affect (i.e. to get Benchers to read double) for that they suppose that theire duble Readinge is rather a hindrance then a furtherance unto them in theire proceedinge, besides theire charge;" for fines for not Reading see ibid 10, 15, 217; Pension Book 21, 106, 171, 177, 270, 271, 272; at Lincoln's Inn, and probably at the other Inns, a bencher who paid his fine for not reading, retained his seat on the bench, Black Books ii 180; this was certainly the case later in the century, below 489 n. 3.

[3] Black Books ii 87.

[4] Ibid 229, 250, 270, 294; and sometimes, if a Reader appeared, he found no audience ibid 293.

[5] D'Ewes, Autobiography i 251—"Mr. Ward, the reader, began on Monday morning August the 2nd (1624), being but a dull and easy lawyer, and gave little satisfaction to his auditors all the time of his reading."

[6] Co. Litt. 280b—"By the authority of Littleton, ancient Readings may be cited for proof of the law, but the new Readings have not that honour, for that they are so obscure and dark."

[7] Above 481-482.

[8] Dugdale, Orig. Jurid. 313-314.

the same year similar orders were issued by the judges to Lincoln's Inn. The benchers criticized some of these orders, but promised to see that most of them were carried into effect.[1] Further orders were issued by the judges and the benchers of the four Inns in 1595[2] and 1614,[3] and by the judges in 1627.[4] In 1630 the judges, at the command of the Privy Council, again repeated their orders.[5] The need for these repeated orders illustrates the decline of the old system; but they were not wholly without effect. Good readings were sometimes given. D'Ewes, in his autobiography, notes that February 27, 1626, "Mr. Thomas Mallet, the Queen's Solicitor, began his Lent Reading in our Middle Temple, and performed it very well."[6] The Inns backed up the orders of the judges by detailed regulations;[7] and the judges rebuked Readers who had failed to read, or had read too shortly,[8] and also the benchers, if they discovered that their orders had been disobeyed.[9]

D'Ewes summary of his performances, while a student and a barrister, shows that the system was still alive.[10] "I had, during my continuance in that society or Inn of Court, which was in all but five years at the uttermost, twice mooted myself in law French before I was called to the bar, and several times after I was made an utter-barrister in our open hall. Thrice, also, before I was of the bar, I argued the readers' cases at the Inns of Chancery publicly, and six times after. And then also, being an utter-barrister, I had twice argued our Middle Temple readers' case at the cupboard . . . and sat nine times in our Temple Hall at the bench, and argued such cases in English as had been before argued by young gentlemen or utter-barristers themselves in law French bareheaded. For which latter exercises I had but usually a day and a half's study at the most, ever

[1] Black Books ii 31-34.
[2] Dugdale, op. cit. 316; Black Books ii 47-48.
[3] Dugdale, op. cit. 317-318; Black Books ii 440.
[4] Dugdale, op. cit. 319-320; Black Books ii 456.
[5] Dugdale, op. cit. 320-321; Black Books ii 454.
[6] Op. cit. i 295.
[7] Black Books ii 54, 94, 262; and see ibid 165-167 for a comprehensive set of rules for moots and exercises published in 1614; Pension Book 4, 16-17, 39, 243.
[8] A number of delinquents from Gray's Inn were directed to be sequestered from the bench and from commons by the judges in 1605, Pension Book 169, 170.
[9] In 1606 the benchers of Lincoln's Inn and of the other Inns had been summoned by the judges to answer for their disobedience to their orders; they were told, "that offence was taken in yt ye Readers wch were in ye Lent last before past in every ye same Inns of Court, did not contynew theire Readinges soe longe tyme as they should have done; and yt for ye same defaltes . . . as also for faile of attendance and assistaunce to ye Reader of ye Inner Temple (who . . . was forced to give over his Readinge at ye beginninge of ye 3 weeke for want of company both at Bench and Barr) the Judges thought fitt yt ye Governors in ye same Houses of Court should proceed to censure and course of reformacion accordinge to theire private Orders therein," Black Books ii 97-98.
[10] Op. cit. i 304-305.

penning my arguments before I uttered them, and seldom speaking less than half an hour in the pronouncing them. I brought in also many law cases after dinner, and argued them in English; upon which I bestowed not much less study than upon the cases or moot points upon which I sat, as many of them still remaining by me in written copies do sufficiently witness." But we can also see from his autobiography that the old lectures, moots, and exercises were not now the only methods by which the student acquired his knowledge. D'Ewes tells us how he read Littleton's Tenures—"the very key as it were of the common law,"[1] parts of Coke's reports, and Keilway's reports.[2] He tells us how he made reports in the Star Chamber and the Common Pleas,[3] and how he studied records at the Tower. At first he studied these records "only to find out the matter in law contained in them," and then for the light which they threw upon English history.[4] So interesting did he find this study that it usurped the place of the common law, and led to the production of his book on the Elizabethan Parliaments by which he is chiefly remembered.[5]

But for the constitutional disturbances which led up to the outbreak of the Great Rebellion, the Privy Council, the judges, and the Inns might perhaps have succeeded in adapting the old system to the new conditions. If they could have done this, the Inns would have continued to be a legal university, and the public teaching of English law would have had a continuous history. This was not to be.

(2) *The Commonwealth period.*

During the Great Rebellion the old system of legal education collapsed. Nothing had been done before the outbreak of

[1] Op. cit. i 181—"Friday morning, April 13 (1621) I added an end to my reading of Sir Thomas Littleton's French Tenures, being the very key, as it were, of our common law, and accounted the most absolute work that was ever written touching it."

[2] Ibid 216—April 1622 he read most of the first four parts of Coke's reports; ibid 224—Feb. 1623 he finished Co. Rep. pt. 5, and began Keilway's reports, "which I read afterwards with more satisfaction and delight than I had done formerly any other piece of our common law"; ibid 231—April 1623 he read Co. Rep. pt 6.

[3] Vol. v 163 n. 1, 369 n. 2; op. cit. i 220, 243, 257, 300.

[4] "On Thursday, the 4th day of September, in the afternoon, I first began studying records at the Tower of London. . . . From this day forward, I never wholly gave over the study of records; but spent many days and months about it, to my great content and satisfaction; and at last grew so perfect in it, that when I had sent for a copy or transcript of a record, I could without the view of the original, discover many errors which had slipped from the pen of the clerk. I at first read records only to find out the matter of law contained in them, but afterwards perceiving other excellencies might be observed from them, both historical and national, I always continued the study of them after I had left the Middle Temple and given over the study of the common law itself. I especially searched the records of the Exchequer: intending . . . to restore to Great Britain its true history—the exactest that ever was penned of any nation in the Christian world," op. cit. i 235-236.

[5] Vol. v 405; cp. ibid i 409-410 for his account of the transcription of the Journals of the Houses of Lords and Commons.

the civil war to adapt the old system to the new conditions; and, when war broke out, it was obviously quite impossible to undertake an adjustment, which would have needed tactful and patient consideration on the part of judges, benchers, and students, and equally tactful exercise of authority on the part of the Privy Council.

The records of the Inns show that attempts were made to restore the old order. Thus, in 1646, it appears that at Gray's Inn the students were complaining that they had no opportunity of performing their exercises, and so qualifying for call. The bench therefore ordered that the ensuing vacation should be kept as in the old days;[1] and in 1647 the students were allowed to keep their exercises by performing only one moot a day.[2] In 1651 Lincoln's Inn ordered the due performance of the customary exercises both in term and vacation.[3] But it appears from a further order in 1655 that the order of 1651 had been entirely neglected—and more neglected at Lincoln's Inn than at the other Inns.[4] So bad, in fact, was the state of affairs at that Inn that "the Judges in the Publique Courts att Westminster" took notice of the neglect of exercises in that House.[5] But, in spite of the recommendations of Parliament,[6] and the efforts of judges and benchers, the old system of legal education could not be revived. The readers refused to read.[7] The orders issued were neglected by benchers, barristers, and students.[8] It was growing more and more antiquated, and no attempt was made to reform it intelligently. As we shall now see, not even the Restoration of the old order in Church and State could restore it.

(3) *The latter part of the seventeenth century.*

In 1669 Prynne, in the preface to his Animadversions on Coke's Fourth Institute, put in a strong plea for the revival of

[1] Pension Book 360. [2] Ibid 365.

[3] Black Books ii 391; cp. Pension Book 413-414—an order of 1655.

[4] Black Books ii 405—"the Masters of the Bench, beinge unwillinge to be behind other Inns of Court in a thinge tendinge to the furtherance of students in the lawe, doe order that the usuall exercises of moots and bolts be continued."

[5] Ibid ii 410—"Whereas the Judges in the Publique Courts att Westminster have taken notice of the neglect of exercise in this House, that therefore it is ordered that exercise be performed accordinge to the antient orders of this House. . . . And that none be hereafter called to the Barr till they have done theire compleate exercise."

[6] In 1657 Parliament recommended Cromwell and the Council to make the judges revive readings and exercises in the Inns of Court, Burton, Diary, June 26, 1657—cited Robinson, Anticipations under the Commonwealth of Changes in the Law, Essays A.A.L.H. i 477.

[7] Pension Book xliv-xlv; Black Books ii *xxvii*.

[8] "During these eleven years (1642-1660) a recommendation of the Council of State and 17 minutes of the Bench endeavour to revive education . . . but the result is best put in the words of the Minute of 1659, 'that the holding up of the Commons in Vacation, intended by the Bench for reviving exercises in the Vacations, which have been nevertheless neglected, is a charge, *beside the fruitlessnesse thereof*, too great for the Revenue of the House,'" Black Books ii *xxvii*.

the old educational system of the Inns of Court. "I shall importunately intreat all Benchers and others of my own profession to gratifie both themselves, their posterities, yea, the King and whole kingdom, by their unanimous cordial endeavours to support, (and) encourage the declining diligent study, and publicke exercises of the Common law . . . especially Readings in all Innes of Court and Chancery now overmuch neglected, discontinued, or perfunctorily performed, through sloathfulness, selfishness, or pretended novel Exemptions from them by those advanced by the law, who have least reason to decline and discourage them, or for want of publicke Privileges formerly due and peculiar to Readers:[1] which I hope they shall uninterruptedly enjoy for the future, especially from those of their own Robe."

Prynne's hopes were not destined to be realized; but there were many who recognized the justice and urgency of the cause which he pleaded. The Inns of Court tried to reconstitute the old machinery;[2] but their orders do not seem to have had much effect; and, in 1664, their efforts were enforced by a set of orders, issued by the lord chancellor and all the judges, for the government of the Inns.[3] The benchers were to see to the proper government of the Inns of Chancery. Only genuine students of the law were to be allowed to reside in the Inn. No student was to be called unless he was of seven years standing, had been frequently in commons, and had kept his exercises; and no barrister was to practise in the courts at Westminster till he was of three years standing. Benchers or Readers who refused to read were to be fined, and, if that was of no avail, complaint was to be made to the judges. Readings were to continue for the periods heretofore usual, and members of the Inns were to attend to argue the Reader's cases. Benchers must see that commons were kept both in term and vacation, and that the usual exercises were then performed.

These orders of the judges had no more permanent effect than the orders of the Inns. It is true that attempts were made to carry them out.[4] Orders were issued for the performance of exercises;[5] and benchers who refused to read were fined,[6] suspended[7]

[1] This perhaps refers to the fact that, in some of the Inns, the call to the Bar was made, not as before by the Reader, but by the governing body of the Inn; thus at Gray's Inn in 1629 it was ordered that "the calling to Barre shalbee onely by pencion, and not by the Reader," Pension Book 290.

[2] See Black Books iii 9-10, 17, 32-33, 40, 60, 61; Calendar of Inner Temple Records iii 4, 13, 21, 22; Pension Book 437-438, 442, 446, 448.

[3] Black Books iii 445-449.

[4] Calendar of Inner Temple Records iii 186-187; Black Books iii 61, 85, 103, 123, 160.

[5] Ibid.

[6] Pension Books 458-459; Calendar of Inner Temple Records iii 160; Black Books iii 32-33, 56, 58, 84.

[7] Ibid 22, 40, 88; Calendar of Inner Temple Records iii 13, 15, 85, 273; Pension Book, 437, 442, 445, 446, 448.

and even reported to the judges.[1] At Lincoln's Inn, for instance, these attempts were made up till 1677; but apparently at that date those who opposed the revival of the old educational system gained the upper hand.[2] The last reading at Lincoln's Inn took place in that year; and readings in the other Inns of Court ceased at about the same period.[3] It was obvious that, when the benchers ceased to perform their educational duties, they could not expect that the barristers and students would perform theirs. Barristers ceased to be expected to take any share in the education of the students, and, like the benchers, wholly escaped their obligations. Like the benchers, too, they ceased even to incur a fine for their neglect. The students also escaped, but at a price. "It is now usual," said Master Worsley in 1734, "that when a gentleman hath failed, and been fined for so doing, to account his exercise over, he being no more called to that exercise. But formerly such fine was only lookt upon as a punishment for the neglect and did not excuse the performance of the exercise."[4] Apparently at the Middle Temple all the obligations of the student could be compounded for the sum of £38 6s. 2d.[5] It was the same with the obligation of residence. In theory residence was obligatory on all students. But Master Worsley explains the ingenious device by which it was evaded. The student agreed "with those who made a practice of supplying gentlemen" as follows:—the tenant of the chambers surrendered them to the student. The student gave a bond to re-surrender in three years. He was then admitted on the terms of the bond. The whole cost, including the fee to the tenant of five guineas, came to £8 4s.[6]

Roger North described the state of affairs at the end of this period with substantial accuracy when he said, that,[7] "Of all the professions in the world, that pretend to book-learning, none is so destitute of institution as that of the common law. Academick

[1] Black Books iii 103-104—"to the end," it is there said, "that they may not practise or be heard at the Barr or in the Circuit, nor have any other privileges of their profession till they conforme;" cp. Pension Book, 255, 256.

[2] Black Books iii *xiii*, *xiv*.

[3] See Pension Book 457 n. 4; Master Worsley's Book 125 n. 1, from which it appears that at the Middle Temple the last Reader who read was appointed in 1684; we may perhaps see the last stage before final abolition in an order of the Inner Temple made in 1685-1686, Calendar iii 231, "William Longueville, chosen reader, having paid 150 li., is declared an absolute and complete reader,"—when a person can get the status of reader by payment it is clear that the whole institution will soon disappear. For an elementary reading at New Inn in 1692 see below 563.

[4] Master Worsley's Book 136.

[5] Ibid 212—this sum was made up of a number of payments, due in the case where "a gentleman forfeits his vacations, keeps not his terms, and fails in the performance of his exercises."

[6] Ibid 210-211—a clause must also be inserted that his executors would pay the value of the chambers if he died within the three years, as in that case the chambers went to the Inn.

[7] A Discourse on the Study of the Laws 1-2.

studies, which take in that of the civil law, have tutors and professors to aid them, and the students are entertained in colleges, under a discipline, in the midst of societies, that are or should be devoted to study. . . . But for the Common law, however, there are Societies, which have the outward show, or pretence of collegiate institution; yet in reality, nothing of that sort is now to be found in them; and, whereas, in more ancient times there were exercises used in the Hall, they were more for probation than institution; now even those are shrunk into mere form and that preserved only for conformity to rules, that gentlemen by tale of appearances in exercises, rather than any sort of performances, might be entitled to be called to the Bar. But none of these called Masters, and distinguished as Benchers, with the power of ordering, and disposing all the common affairs of the Society, ever pretended to take upon them the direction of the students, either to put them, or lead them in any way."

Why then did the old system so completely and irrevocably break down during this period, in spite of all efforts to revive it? There were three main causes. Firstly, all the causes which were leading to its decline in the earlier part of the century were operating with increased force in this period.[1] Secondly, the Privy Council and the judges did not exercise so strict a control as in the preceding period. The executive government, at the latter part of the Stuart period, had neither the power nor the wish to superintend the activities of bodies entrusted with educational, commercial, or governmental duties in the same spirit and in the same way as it had superintended them in the preceding period.[2] No doubt the government was careful to see that the members of these bodies were politically and religiously orthodox; but its activity generally stopped there. In 1686, it is true, there was "great discourse of a visitation intended by the lord chancellor into the several societies belonging to the law, and that there will be a great regulation made amongst them, especially amongst the bench in each society"[3]—but it came to nothing. Thus the Inns of Court, like other similar bodies, were left to go their own way. Thirdly, to the governing bodies of the Inns their educational and disciplinary duties were growing more and more distasteful. Of the reasons for this distaste, which gave the final blow to the old system, I must say a few words.

We have seen that the rule that all king's counsel must be called to the bench tended to alter the character of the bench.[4] There was no need for these benchers to read in order to gain further promotion in the law. They had therefore no inducement

[1] Above 482-486.
[2] Above 215-216, 233, 349.
[3] Luttrell's Diary i 378-379.
[4] Above 480.

to read; and, similarly, the custom of electing such persons as masters of Chancery[1] or masters of Requests[2] supplied another class of benchers who were quite unfitted to take their part in the old educational routine. On one occasion the king interfered when the benchers fined a fellow-bencher, who was a master of Requests, because he refused to read;[3] and this was not a solitary instance of royal interference with a similar object.[4] Even if the benchers were not king's counsel or high officials, there was not the same inducement to read as heretofore. In former days it was the Readers who became benchers, and finally serjeants. But the degree of serjeant was now given by favour,[5] and to have been a Reader no longer improved a lawyer's chances. Sir John Bramston in his autobiography ascribes, with some reason, the cessation of readings to this cause.[6]

But, though readings ceased, the Readers' feasts continued longer. In the earlier part of the century the judges' orders had attempted to restrain the extravagance of these feasts.[7] After the Restoration they became so extravagant that in 1664 the judges,[8] and in 1678 the king,[9] interfered to limit the expenditure of all Readers other than the Recorder of London or a king's counsel. Their extravagance can be seen from Roger North's account of the feast given by his brother, when he read in 1672, during his tenure of the office of solicitor-general. In the three

[1] In 1661 it was declared that a master in Chancery, being a bencher, was not exempt from the usual exercises, Black Books iii 13; but, in 1663, when such a master insisted that, being a master, he could not be compelled to read, he was passed over, and "it was left to his own discretion what compensation he will make for this indulgence and favour," ibid 33.

[2] Ibid 32.

[3] Ibid 64, 449, 450 (1669).

[4] Thus, in 1662, the king asked the Inner Temple to excuse the attorney of the Duchy of Lancaster from reading, Calendar of Inner Temple Records iii 9; S.P. Dom. 1661-1662, 342-343, liii 60; ibid 1673-1675, 327; for an earlier interference in 1622, made in order to override a decision that a particular bencher should always take place after all who have or shall read, see Pension Book 252-255.

[5] Vol. v 353.

[6] Sir John Bramston tells us that his father read twice before he was made a serjeant, "And here I cannot slip observing the difference of the tymes. . . . Now since the restitution of the Kinge more are called to be serjeants that never read at all than that have read once. The reasons given were that there wanted serjeants, there was not tyme for readings, that manie fitt had binn on the King's side in the warr, and either wanted monie or were to be indulged, etc.; yet readings were inioyned, and some read that found noe advantage. Formerly, they read constantly a fortnight, since but a week, and at this tyme readings are totally in all the Inns of Court layd aside; and to speake truth, with great reason, for it was a step once to the dignitie of a serjeant, but not soe now," Bramston's Autobiography (C.S.) 6; the manner in which any excuse was seized upon to put off readings is illustrated by an order of the Inner Temple in 1672 to the effect that, as the other three Inns had put off their readings that summer vacation, and as there was no precedent for one Inn alone holding a reading, the reading is to be put off, Calendar iii 86.

[7] Dugdale, Orig. Jurid. 311, 313, 316.

[8] Black Books iii 448.

[9] Ibid 120; cp. Calendar of Inner Temple Records iii 56, for an order of the Inner Temple in 1661 directed against the extravagance of these feasts.

or four days which it lasted it cost at least £1000—"the grandees of the Court dined there and of the quality (as they call it) enough."[1] It is obvious that the prospect of being obliged to incur this enormous expense would make most persons far prefer to pay a moderate fine to escape from reading.

It is not surprising to find that under these influences the collegiate life of the Inns disappeared At the present day the best dean of a college is a man who understands and is understood by the undergraduate members of his college; and that understanding can only be created by the intimate relations of teacher and pupil, supplemented by social intercourse. When the benchers were really the teachers of the students and barristers, when they lived with them and mixed with them, it was not difficult to maintain good relations between them. But when the benchers, who governed the Inns, ceased to be in these intimate relations with barristers and students, difficulties began. We hear of disorder in the Inns aggravated by want of tact, of the breaking of windows, and threats to pump the benchers or some of them.[2] In 1678-1679, just before the fire in the Middle Temple, a formidable rebellion had begun, and the benchers dared not come into the Hall.[3] In 1680 there were disorders at Lincoln's Inn,[4] and in 1681 a rebellion at the Inner Temple, which could only be appeased by the intervention of the judges.[5] Obviously such difficulties were increased by the extravagant Readers' feasts. They encouraged disorder;[6] and it was of little use for the judges or benchers to attempt to suppress extravagance among the junior members of the Inn in the face of such examples.[7] The disorders at the Readers' feasts were made an excuse—poor enough as North pointed out[8]—for suppressing readings; and,

[1] Lives of the Norths i 97-98.

[2] Roger North, alluding to the Christmas festivities, in the course of which much pleasantry was directed against the bench, says, "the wiser sort make a jest of it . . . but the ill-bred sour part of the Bench will be as ridiculously in earnest, and like state politicians argue for their own government, as if they were the Pope's consistory, and these are they which the young gentleman usually fall upon and affront; either by breaking windows (which is the way of Temple distress) or threatening to pump them, or such other insolences;" but, as he admits, matters sometimes got more serious, and recourse was had to those judges who were members of the society, Lives of the Norths iii 46-47.

[3] Ibid 47.

[4] Black Books iii 131—the barristers and students attended the judges and apologized for the disorders in Hall.

[5] Calendar iii 161-162—the barristers and students had assembled in Hall, passed votes, made orders, generally taken on themselves the government of the Society, and threatened the servants if they refused to screen their orders; cp. ibid 187-189 for another riot in 1682-1683.

[6] See North's account of the scenes in Hall at his brother's feast, Lives of the Norths i 98.

[7] For orders of the Benchers forbidding the practice of treating the Hall on call see Black Books iii 323 (1741); for the judges' orders of 1664 see ibid 448.

[8] "I do not think it was a just regulation when, for the abuse, they took away such a profitable exercise," Lives of the Norths i 98; as he there points out, the old

similarly, the difficulty which the new school of benchers found in governing their Inns, made them ready enough to suppress the collegiate life of the Inns, by acquiescing in the breach of the rules which required all students to reside there during term and during some parts of the Vacation.[1]

Thus both the educational and the collegiate character of the Inns disappeared. The educational system was no doubt antiquated; but it still had in it very great virtues. In our own days the system of mooting has been revived in various centres of legal education, to the profit of teacher and student alike. If the benchers had really wished to do their duty, they could have reformed and worked the old system. The trouble was that they did not want to reform it. They had come to be a set of men who were, or who considered themselves to be, too busy or too important to be troubled with the education of students; they failed to do their duty; and their example was easily followed both by barristers and students. The decay of the educational system, having made it unnecessary to insist upon the residence of the students, the rules as to residence fell into abeyance; and thus a collegiate system—which of all systems is the best aid to education, and of all the most difficult to create artificially—was destroyed. The age was corrupt. The standard of public morality was low. But, after making all possible allowances of this kind, we must admit that the injury inflicted upon English law by the benchers of this period, was as great as the benefits conferred by their ancestors who had founded the Inns, and created the system of legal education there carried on. By their action all public teaching of English law was stopped for nearly a century and a half. It is only gradually that the Inns of Court, following the example of other educational bodies, have in our own days again begun to fulfil those functions in return for which the state had, long ago, given them the exclusive privilege of licensing their students to practise in the courts.[2]

From the latter half of the seventeenth century to the middle of the nineteenth century the student was left to his own resources. We have seen that, in the earlier part of the century, books had been written to instruct him as to his course of reading.[3] During this period some valuable advice on this subject

readings on statutes gave valuable hints to lawyers and their clients as to the true construction of new statutes; that this was long regarded as one of their chief uses can be seen from the fact that a large proportion of the old readings were on statutes, vol. v 394-395; cp. Putnam, Justices of the Peace, 177-181.

[1] Above 489; thus reversing the old policy which insisted that terms and "learning vacations" should be kept, vol. ii 507; Dugdale, Orig. Jurid. 317, 320; Black Books iii 446, 448, 449.

[2] As to this see an article by the author in Col. Law Rev. 1910, 735-737.

[3] Vol. v 23-24, 397-398.

was given by Hale in his preface to Rolle's Abridgment,[1] and by Phillips in a book entitled "Studii Legalis Ratio, or Directions for the Study of the Law," published in 1675; but the best of these books is "A Discourse on the Study of the Laws" by Roger North, which was not published till 1824. This little tract displays all the excellencies which made North so admirable a biographer.[2] His eye for picturesque details, his enthusiasm for anything which had aroused his interest, his capacity for shrewd criticism, and his broad common sense, give this Discourse an interest which books on methods of study rarely possess. The telling illustrations with which he points his remarks and his counsels, give us glimpses of the state of professional feeling, and of the standards of professional conduct, not to be found elsewhere. It is a valuable historical document because the author thought it worth while to write down information which many lawyers of that day would have regarded as mere commonplaces. From this point of view it is comparable to Fortescue's De Laudibus.[3]

North begins by warning the student that the law is a jealous mistress—"it requires the whole man, and must be his north star, by which he is to direct his time, from the beginning of his undertaking it, to the end of his life."[4] At the same time he reminds him that, if he would be a really learned lawyer, he must, as aids to the study of English law, know something of English history[5] and of the civil law.[6] "Similarly it is a vast advantage to be not only a common lawyer, but a general scholar, as in latter times Selden was; for that you call a mere lawyer, seldom reaches better preferment than to be a puisne judge, if at all to be ever invited from his chamber."[7] To acquire knowledge of the law the student must read, commonplace, report, and converse about law. When he has become an adept in these arts, he may then begin to think about practising.[8]

To read law a knowledge of law French was regarded by North as quite indispensable—"lawyer and law French are coincident." There had been a revival of that tongue after the Commonwealth period; and North's political bias led him to exaggerate somewhat its permanence.[9] But, even now, there

[1] Collect. Jurid. i at pp. 276-278.

[2] For Roger North and his books see below 619-624.

[3] Vol. ii 570.

[4] At p. 7.

[5] "It often lays open the reasons and occasions that have been for changes that have befallen the Common Law, either by authority of Parliament, or of the Judges in Westminster Hall," p. 8.

[6] "A man of the law would not be willing to stand mute to the question, what is the difference between the Civil and the Common Law; what is the Imperial Law, what the Canon, what the Pandects, Codes, etc." pp. 8-9.

[7] At p. 9.

[8] At pp. 36-37.

[9] "During the English times, as they are called, when the Rump abolished Latin and French, divers books were translated, as the great work of Coke's Reports, etc.; but upon the revival of the law, these all died, and are now but waste paper," p. 12.

is some truth in his dictum that "a man may be a wrangler, but never a lawyer, without a knowledge of the authentic books of the law in their genuine language."[1] Littleton was still the primary text book; and North wisely advises the student to begin by reading it in the original French,[2] and without Coke's comment.[3] Coke's comment he perhaps unduly depreciates—Coke was not a royalist; but there is some truth in his dictum that it is "only a commonplace book exhausted," with the titles so disposed as to follow Littleton's text.[4] He does not advise the ordinary student to attempt to read all the Year Books; but the Year Books of Henry VII. he regards as indispensable;[5] and he notes that really great lawyers, like Hale, Maynard, and others, have made themselves masters of them.[6] The actual course of reading which he recommends will best be seen from his own table:—[7]

Course.	*Aids.*
Littleton Perkins	Terms of the Law Diversity of Courts Old Tenures and Doctor and Student.
Plowden.	Fitzherbert's Natura Brevium Crompton's Jurisdiction of Courts Staunford's Pleas of the Crown.
Henry VII. Keilway	Coke's Jurisdiction of Courts Coke's Pleas of the Crown Coke's Commentary on Magna Charta.
Leonard	Petit Brook.
Coke's Reports Dyer Moor Crook Palmer	Coke on Littleton Bracton Britton Fleta Glanville.

The older books—Bracton, Britton, Fleta and Glanville—are, he admits, "to be looked into chiefly for curiosity and accomplishment."[8] But let us, who write or read legal history, not forget that he spoke the words which I have printed on the title page of this work—"To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now

[1] At p. 14.

[2] "I should absolutely interdict reading Littleton etc. in any other than French, and, however it is translated, and the English concolumned with it, it should be used only as subsidiary, to give light to the French when it is obscure, and not as a text. For really the Law is scarce expressible properly in English, and, when it is done, it must be Francoise, or very uncouth," pp. 12-13.

[3] At p. 11.

[4] At pp. 22-23.

[5] At pp. 19-21.

[6] At pp. 19-20.

[7] At p. 41.

[8] At p. 40.

stands resolved, yet it is a wonderful accomplishment, and without it a lawyer cannot be accounted learned in the law."[1]

North recognized that reading was of little use unless the student "commonplaced" what he read. By "commonplacing" he meant the construction of an alphabetical abridgment of the law. It was an old and well-established method of acquiring legal knowledge.[2] The Abridgments of the Year Books,[3] and Rolle's Abridgment,[4] are practitioners' commonplace books (very possibly begun in their authors' student days) which have got into print. But it is probable that the decay of the educational system of the Inns of Court, was the reason why all the books, written at this period to advise students, stress the importance of making such a commonplace.[5] North gives practical advice as to its construction;[6] and repeats the warning, needed as much now as then, that no one else's commonplace will be of the slightest value.[7] In fact, as he truly says, ready-made commonplaces, abridgments, or indices "are the student's enemies."[8]

The commonplace book or abridgment of North's day, and long afterwards,[9] was for the most part an abstract of case law. From the days of the earliest Year Books,[10] commonplace books were of this type. And, similarly, from these early days, it was recognized that students must not only abridge the older cases reported by others: they must also go to the courts and report modern cases for themselves.[11] So well was this fact recognized that the judges encouraged their presence, and sometimes explained points of law with a view to assist the students. The Crib, of which we read in the Year Books,[12] had its counterpart in the seventeenth century. "I have known," says North,[13] "the court of King's Bench sitting every day from eight till twelve, and the Lord Chief Justice Hales managing matters of law to all imaginable advantage to the students, and in that he took a pleasure or rather pride; he encouraged arguing when it was to the purpose,

[1] At p. 40.

[2] Hale's remarks, Collect. Jurid. i 276-278, are chiefly directed to the use and right mode of constructing such a book.

[3] Vol. ii 543-545.

[4] Vol. v 376-377.

[5] See note 30 at pp. 101-102 of North's Discourse.

[6] At pp. 26-29, 41-42.

[7] "Now this advantage is not had from perusing Indexes, Commonplaces, or Abridgments of others, for there no more is known than what falls under the eye, and, that, perhaps so short and imperfect that it breeds in the mind rather confusion than the distinction and information of Law," pp. 25-26.

[8] Ibid p. 19.

[9] Romilly tells us, Memoirs i 33-34, that, when he became the pupil of an equity draftsman, he formed a commonplace book which had been of the greatest use to him throughout his career—"it is indeed the only way in which law reports can be read with much advantage."

[10] Vol. ii 543.

[11] Above 486.

[12] Vol. ii 315 n. 5.

[13] At pp. 32-33.

and used to debate with counsel, so as the court might have been taken for an academy of Sciences as well as the seat of justice." It had also its counterpart in the eighteenth and nineteenth centuries, as a famous tale told by Lord Campbell about Lord Kenyon, a student, and "a porcelain vase with a handle to it" will testify.[1] North gives the student some advice about reporting. He advises him, firstly, to avoid the court of King's Bench, which was often crowded with people who came to hear the latest *cause célèbre*, and to attend the court of Common Pleas, where solid matters of law were debated;[2] and, secondly, not to begin reporting till he was well grounded in law by his reading and commonplacing, and could profit by what he heard.[3]

Lastly the students must discuss legal cases among themselves. "I have heard Serjeant Maynard say the law is *ars bablativa*, meaning that all the learning in the world will not set a man up in bar practice without a faculty of a ready utterance of it."[4] It is, in fact, the place which discussion should occupy in a legal curriculum that distinguishes a training in law from the training in other sciences. Reading, commonplacing, and reporting may teach a man the principles of the law: they will not teach him to be a practical lawyer. It was the recognition of this fact which was the strong point of the older system of legal education. It is the non-recognition of this fact which is the weak part of our modern system of public teaching and examinations in law. The sacrifice of the old system destroyed to a large extent that organized discussion which prepared the students for actual practice. In our modern system it does not take the place which it once took, unless, as at Oxford and at one or two other places, the pupils are wiser than their teachers, and set up for themselves a moot club, which reproduces some of the advantages of that old system which the benchers of this period were too selfish to maintain.[5]

[1] Lives of the Chief Justices iii 85 n.; cp. ibid ii 329 and note—"I have a lively recollection that at Guildhall, the students having a box close by him (Lord Kenyon) he handed the record to us, and he would point out to us the important issues to be tried."

[2] "The other error is going to the King's Bench and not the Common Pleas. It is said that the Common Law is at home in the Common Pleas, but a guest in the King's Bench; and it is certain that the business of that court is less frequent of law than at the Common Bench. The causes of the Crown, Corporations, matters of the Peace, and concerning the Government, take up most of that little time they allow, which, as I said, are more faction and wrangling than law. But at the Common Pleas there is little but merely matters of law agitated," p. 35; a student can, he says, always get a place in the Common Pleas, but in the King's Bench he may go at six, and yet not get a good place, p. 36.

[3] At pp. 33-34.

[4] At p. 29.

[5] Romilly tells us, Memoirs i 48-49, that he, Baynes, Holroyd, and Christian, "formed a little society for arguing points of law. . . . One argued on each side as counsel, the other two acted the part of judges, and were obliged to give at length the reasons of their decisions."

North does not say anything in his Discourse of the modern practice of reading in Chambers, probably because it was not then established.[1] But it is clear that in his day the junior barristers gained experience in somewhat similar ways. Jeoffrey Palmer, the attorney-general, "took a pleasure to encourage young students, and admitted diverse of them, in his Society of the Middle Temple, to have access to him at evenings, and to converse familiarly with him; and he was not only affable, but condescended to put cases, as they term it, with them."[2] Francis North gained much from his connection with him;[3] and he never ceased to be grateful to his family.[4] Roger North was helped in a similar way by his brother.[5] As we have seen, the students sometimes did the work of solicitors,[6] and gained experience by court keeping[7]—occupations which correspond to the modern custom of reading for some months in a solicitor's office.

North's Discourse gives us a detailed account of the manner in which the students of the seventeenth century supplied for themselves the place of the instruction formerly given by the Inns of Court. It is clear from his account that legal education, like many other things, then began to present the characteristics which it preserved till quite modern times; and we begin to see some of its effects. A student who pursued with industry such a course as North suggested, could make himself a competent English lawyer; but he would probably learn very little else but the rules of English law. And, knowing little else, he would naturally be wholly destitute of any power to criticize what he knew. This was one of the causes of that complacent assurance of the excellence of English institutions and English law, which characterized the lawyers of the eighteenth century, and found its literary expression in Blackstone's Commentaries. Thus the solitary education, to which the law student was condemned, produced effects which, from this point of view, were not unlike the effects of the narrow and self-centered outlook of the mediæval common lawyers.[8]

Great lawyers appeared, as we shall see, who rose superior to all the defects of the legal education of the period. Genius will

[1] Lord Campbell, Lives of the Chief Justices ii 329 says, that "the *pupilizing* system" was introduced at the latter part of the eighteenth century by the celebrated Tom Warren and Mr. Justice Buller; Romilly tells us, Memoirs i 33, that he became the pupil of Mr. Spranger, an equity draftsman; and that though "his drawing business was hardly sufficient to give employment, even to a single pupil," he allowed Romilly the use of his library, and let him pass all mornings and most evenings at his house—"he directed my reading; he explained what I did not understand; he removed many of the difficulties I met with."

[2] Examen 511.

[3] Lives of the Norths i 45, 47.

[4] Ibid 193.

[5] Ibid iii 90, 129.

[6] Above 442.

[7] Above 438.

[8] Vol. ii 591-596.

always strike out a path. But we cannot doubt that the average standard of the learning of the English lawyer in this period and the next would have been both higher and more liberal; we cannot doubt that the development of English law would have been freer and less technical; if the older system of legal education, instead of being destroyed, had been adapted to the needs of modern English Law. This will appear more clearly in the eighteenth than in the seventeenth century. But, as we shall now see, we begin to see the effects of the new conditions in the lawyers, in the legal literature, and in the state of the law of this period.

II

The Lawyers

There are famous names among the lawyers of this period; but, until the Revolution, the causes which had made for the deterioration of the Bench in the first half of this century operated with increasing force.[1] Nor is the reason far to seek. The abolition of the jurisdiction of the Council,[2] and the position of supremacy to which, as a result of the Great Rebellion, the common law had attained,[3] brought it into much closer connection with the political controversies of the day. As these controversies became more and more embittered, it became a matter of the first importance to the government to have a bench of judges upon whom it could rely. Thus judges were appointed and dismissed for purely political reasons more freely than at any other period in our legal history;[4] and, as the leaders of the profession refused to accept office upon these terms, the bench not only ceased to be respected, but even excited feelings of hatred and contempt.[5] Then, too, the period of transition, through which legal education and the organization of the profession were passing, did not tend to raise its tone. The old order was passing and the profession had not yet settled into the new ways.[6] For both these reasons the reigns of the last two Stuart kings, as compared with the sixteenth and earlier part of the seventeenth centuries, show a marked deterioration in the quality both of the bench and of the practising lawyers. It is true that we begin to see the results of the victory which the common law had won in the appearance of new branches of the common law,[7] and in the manner in which old branches of the common law were beginning to assume their modern shape.[8] It is true that the relations of equity to the law were beginning to

[1] Above 28-29, 213-216.
[2] Vol. i 514-516.
[3] Above 162, 204-207.
[4] Below 508-511.
[5] Below 510.
[6] Above 466 seqq.
[7] Below 634-640.
[8] Below 627-634.

assume their modern form; and that the principles of equity were beginning to be systematized.[1] Modern conditions and modern principles were beginning to emerge; but the political controversies, and the changes in professional education and organization, were retarding influences. It is not till the Revolution had settled these political controversies that the improvement in the quality of the Bench, and the gradual reorganization of the profession, enabled the development of our modern rules of common law and equity to progress rapidly and continuously.

The history of the career of some of the leading lawyers of this period will illustrate these features of the legal development of this period. I shall say something, firstly, of the judges, and other distinguished common lawyers; and, secondly, of the chancellors, the officials of the court of Chancery, and the Chancery Bar.

The Judges and Other Distinguished Common Lawyers

A large number of the common lawyers belonged to that party of Parliamentary royalists, who had come over to the side of the king before the outbreak of the civil war.[2] Others, who had continued to side with the Parliament, or who had even accepted office under the Commonwealth, had welcomed or even helped to forward the Restoration. Lord Chancellor Clarendon had therefore a good field from which to choose the judges. And he was very competent to make a good choice. In his earlier years he had been associated with that band of literate lawyers of whom Selden was the most distinguished;[3] and in his choice of some of the judges we can see the influence of these old associations. Hale, the most learned lawyer of this or any period, was made chief baron of the Exchequer; and Bridgman was made chief justice of the Common Pleas. Of them I shall speak later.[4] Wadham Wyndam[5]—the nephew and the brother of a judge—was made a judge of the King's Bench. Roger North classes him with Rolle and Hale as a student of records;[6] he won the praise of his contemporaries for his abilities as a judge;[7] and his learning lives in the notes to Hale's edition of Fitzherbert's Natura Brevium. In Clarendon's appointments to the post of chief justice of the King's Bench political or personal influences are more apparent. Robert Foster[8] (1660-1663), Robert Hyde[9] (1663-1665)—a cousin of Clarendon and a nephew of Sir Nicholas

[1] Below 640-671.
[2] Above 121, 137, 141.
[3] Vol. v 402-403.
[4] Below 574-595.
[5] Foss, Judges vii 198.
[6] Lives of the Norths i 353.
[7] See the testimonies of Siderfin, Sir Th. Raymond, and Sir J. Hawles, S.G. in the reign of William III., cited Foss, op. cit. vii 198-199.
[8] Foss, Judges vii 97-99.
[9] Ibid vii 134-137.

Hyde[1]—and John Kelyng[2] (1665-1671), were all strong royalists. Some of Kelyng's proceedings—notably his action in fining jurors for returning verdicts contrary to the direction of the court—were voted to be illegal by the House of Commons in 1667.[3] But all these chief justices were competent lawyers; and we shall see that Kelyng has left some valuable reports.[4] Further, it should be noted that, for a few years after the Restoration, the tenure of the judges' offices was not "durante bene placito," but "quamdiu se bene gesserint."[5]

For a few years after Clarendon's fall the character of the bench was maintained. Hale succeeded Kelyng as chief justice of the King's Bench in 1671; and Edward Turnor, who had served as Speaker from 1661-1671, and had been made solicitor-general in 1670, succeeded Hale as chief baron of the Exchequer.[6] Vaughan,[7] famous for his decision in *Bushell's Case*,[8] was made chief justice of the Common Pleas in 1668. He was a royalist, who had retired both from politics and from the exercise of his profession, during the Great Rebellion and the period of the Commonwealth.[9] He sat in the Restoration Parliament; was noted for his eloquence and his liberal opinions;[10] and was pronounced by Evelyn to be a "very wise and learned person."[11] On the other hand, Clarendon, though he admitted that he was a man "of great parts in nature and very well adorned by arts and books,"[12] described him as supercilious in his manners, and specially devoted to those parts of the law "which disposed him to least reverence to the crown, and most to popular authority."[13] In

[1] Vol. v 342. [2] Foss, Judges vii 137-140.

[3] 6 S.T. 992-995—the House resolved that these proceedings were "innovations in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequence to the lives and liberties of the people of England, and tends to the introducing of an arbitrary government;" and further that, "in the place of judicature he hath undervalued, vilified, and condemned Magna Carta, the great preserver of our lives, freedom, and property."

[4] Below 560.

[5] Foss, Judges vii 4; see Thos. Raym. 217, where it is noted that Archer, J., refused to surrender his patent as he held it on these terms.

[6] Ibid vii 177-179; North, Lives i 68 says that he retired from the Speakership because the discovery that he had received a small present from the East India Company had destroyed his credit—"the anti-court party . . . made a mountain of this mouse for it was but a trifle."

[7] Foss, Judges vii 187-190; Dict. Nat. Biog.; Pref. to his reports.

[8] Vol. i 344-347. [9] Clarendon, Life 924 (ed. 1843).

[10] Pepys, Diary iv 91-93—"the great matter to-day in the House hath been that Mr. Vaughan, the great speaker, is this day come to towne, and hath declared himself in a speech of an houre and a half, with great reason and eloquence, against the repealing of the Bill for Triennial Parliaments, but with no success; for a summary of this speech see S.P. Dom. 1661-1662 330, liii 7.

[11] Evelyn, Diary, August 1st, 1667.

[12] Clarendon, Life 923; cp. Foss, Judges vii 190 for other appreciations.

[13] "He was of so magisterial and supercilious a humour, so proud and insolent a behaviour, that all Mr. Selden's instructions and authority and example could not file off that roughness of his nature. . . . He looked most into those parts of the law

fact he seems to have hated arbitrary authority; and this probably led him to promote with some zeal Clarendon's impeachment—an action which may have helped him to the attainment of his seat on the bench[1]—and to arrive at his decision in *Bushell's Case*. It should be remembered, too, that in the case of *Thomas v. Sorrel*[2] he made a not unsuccessful attempt to explain the principles, and to reduce to some sort of order, "the dark learning"[3] as to the limits of the crown's dispensing power. He was a friend of Selden, and one of his executors; and, as his reports show, learned in the common and ecclesiastical law. But the appointment of men of this calibre ceased to be made, when the increase in the violence of party passion began to influence the appointments of the judges. It was found necessary to appoint them during pleasure, and to make the fullest use of the royal pleasure in order to secure decisions favourable to the king.[4] The effect upon the quality of the bench was disastrous; and it was the more disastrous as the policy pursued by the king became more and more divergent from the political creed of the majority of the abler lawyers of the day.

It is quite clear that the majority of the lawyers belonged to what we may call the constitutional party.[5] Their principles were in substance those set forth by Hale.[6] They stood for the supremacy of the law, and for the maintenance, both of the prerogative as defined by law, and of the rights and privileges of Parliament. In other words, they formed the backbone of the party which came to be called Whig. As the king's policy developed, it became increasingly difficult to find an able lawyer who would adopt the king's views as to the relation of the prerogative to the law and to Parliament. No doubt, able lawyers could be found, who honestly thought that the prerogative had a greater weight in the constitution than Hale, and those who thought with him, admitted. Finch, afterwards lord chancellor Nottingham, is the most eminent example;[7] and another is Francis North, chief justice of the Common Pleas and afterwards lord keeper.[8] But the reasoned royalist views of such men did

which disposed him to least reverence to the crown, and most to popular authority; yet without inclination to any change in government," Clarendon, Life i 923-924; and cp. Pepys' Diary v 352 for a somewhat similar estimate of his character.

[1] Foss, Judges vii 189. [2] (1673) Vaughan Rep. 330.

[3] Ibid at p. 332; above 223.

[4] "A direct proof of the attempt to render the judges subservient to the court is to be seen in the substitution of the old form in their patents, of 'durante bene placito,' for 'quamdiu se bene gesserint,' which had been conceded by Charles I., and had been adopted in all the earlier patents after the Restoration," Foss, Judges vii 4.

[5] North, Lives i 50; in the Examen at p. 513 he says—"So few gentlemen of the law were noted for loyalty (I use the word of that time) that it was made a wonder at court that a young lawyer should be so;" see Luttrell's Diary i 99-100 for an illustration of the state of the feeling in the Inns of Court in 1681.

[6] Above 204-205. [7] Below 539-540. [8] Below 531-535.

not meet the needs of the Court in cases of political importance. The Court could never be quite sure that they would not allow their judicial qualities to get the upper hand. It wanted men of whom it could be sure. That being so, it was quite certain that a judge, who was both learned and honest, would hold his seat on the bench by a very precarious tenure; and that, in cases of great importance, very extraordinary means would be taken to ensure a favourable decision. The career of Francis Pemberton, and the appointment of Saunders are very good illustrations of the sort of measures to which the Court was obliged to have recourse.

Pemberton [1] was a good lawyer with a large practice, and he was quite prepared to go to some lengths to meet the wishes of the Court. But he proved himself to be too honest a lawyer to be wholly trustworthy. In 1679 he was made a judge of the King's Bench; but he was removed the following year, probably at the instigation of Scroggs, because he did not show that implicit belief in the witnesses for the Popish Plot which Scroggs then professed.[2] In 1681 he was made chief justice of the King's Bench; but in 1683 he was removed to the Common Pleas, because it was not quite certain that his views upon the Quo Warranto proceedings against the City of London were favourable to the Crown.[3] In the same year he was dismissed, probably because he showed a judicial impartiality on the trial of Lord Russell, which, in the opinion of the Court, was wholly out of place in the conduct of a trial for high treason.[4] Saunders, who succeeded Pemberton as chief justice of the King's Bench in 1683, was, as we shall see, a great pleader, and the author of some famous reports.[5] He owed his promotion to the fact that a favourable decision in the case against the City of London was vital to the success of the design so to remodel the corporations as to render them subservient to the crown. Extraordinary emer-

[1] Foss, Judges vii 149-155; that neither North, Lives i 291-293, nor Burnet, History (Airy's ed.) Pt. I. ii 291, wholly approved of him, is the best evidence of his impartiality; Evelyn, Diary, October 4th, 1683 says that he "was held to be the most learned of the judges, and an honest man;" Pepys, Diary vii 316, wrote in 1667-1668, "It was pretty here to see the heaps of money upon this lawyer's table; and more to see how he had not since last night spent any time upon our business, but begun with telling us that we were not at all concerned in that Act: which was a total mistake, by his not having read over the Act at all."

[2] Burnet, op. cit. Pt. I. ii 291; Foss, Judges vii 151; "He was too much opposite," says Luttrell, "to the court interest," Diary i 36.

[3] Burnet, op. cit. 347.

[4] "Pemberton was the head of the Court, the other bench not being yet filled. He summed up the evidence at first very fairly: but in conclusion he told the jury, that a design to seize the guards was surely a design against the king's life, but, though he struck upon this, which was the main point, yet it was thought that his stating the whole matter with so little eagerness against Lord Russell was that which lost him his place," Burnet, op. cit. Pt. I. ii 376.

[5] For Saunders and his career see below 564-567.

gencies demand extraordinary measures; and so Saunders, who had drawn the pleadings for the crown in that case, was raised to the bench. He only just lived long enough to perform the service which was expected from him.[1]

The type of man that the crown found to be most amenable to its wishes was the political lawyer, without principles, with a fluent tongue, and with a little knowledge of law. Very perfect examples of this type were found in Scroggs and Jeffreys. Jeffreys became lord chancellor, and I shall speak of his career in that connection.[2] He attained to a much higher degree of infamy than Scroggs, and he was a good deal the abler lawyer and politician. But the career of Scroggs will illustrate sufficiently well the kind of man to whom the Court was obliged to have recourse, if it wished to secure verdicts in important cases.

Scroggs[3] entered Gray's Inn in 1641, and was called to the bar in 1653. He became a bencher of Gray's Inn and serjeant at law in 1669. Through the importunity of Danby, he was made a judge of the King's Bench, in place of Sir W. Ellis, in 1676.[4] He signalized his promotion to the Bench by a speech which was said to contain more loyalty than the many hundred sermons that had been printed since the Restoration.[5] In 1678 Sir Richard Rainsford—a respectable but mediocre lawyer[6]—was removed from the office of chief justice of the King's Bench to make way for Scroggs. There were some fears that this change would cause popular apprehension;[7] and the conduct of Scroggs soon showed that these fears were well grounded. After holding office for three years, his unpopularity became so great that the

[1] "When sentence was to be given, Saunders was struck with an apoplexy: so he could not come into court: but he sent his judgment in writing, and died a few days after," Burnet, op. cit. 347.

[2] Below 527-530. [3] Foss, Judges vii 164-171; Dict. Nat. Biog.

[4] "The Lord Treasurer declared that he was forced to be unmannerly with the King in his expressions before he could prevail with him to out Ellis," Hatton Correspondence (C.S.) i 132; for a curious question of precedence which arose when Ellis was reappointed in 1678 see Thos. Raym 258.

[5] Correspondence of Henry Hyde earl of Clarendon i 2, cited Dict. Nat. Biog.; for his speech when he was made chief justice see S.P. Dom. 1678 197-198—he alluded to the King's Bench as "this busy and stirring court where a man should have a lion's courage to support the throne."

[6] Foss, Judges vii 155-158.

[7] There is an interesting account of this transaction in the Hatton Correspondence (C.S.) i 163-165; Danby thought that Rainsford should be dismissed, as soon as Parliament was up, on the ground of his incapacity—"he most commonly slept on the bench." But Temple said that, "if it was done immediately after the rising of the Parliament, there being now such jealousies of an arbitrary government, people would not believe that the lord chief justice was laid aside for incapacity for the place, but it was only to make room for him who would better serve a turn"; this advice was accepted; and the chancellor recommended that Rainsford, Twisden, and Wilde should be pensioned; but "the king said he would not pay 15 judges and have but 12 in service, but he would for Scroggs his sake give £1000 a yeare, and immediately ordered Rainsford to be removed."

king found it necessary to remove him. But he had served the king faithfully; and so he was solaced by a pension of £1500 a year, and by the promotion of his son to the rank of king's counsel.[1] He died in 1683.

Roger North says of Scroggs,[2] "His person was large, visage comely, and speech witty and bold. He was a great voluptuary, and companion of high court rakes. His debaucheries were egregious and his life loose." His capacity for drink was only equalled by that of Jeffreys. Wine is the main theme of all his letters preserved in the Hatton correspondence,[3] and apparently he suffered from the gout even while he was at the bar. In the amusing account, which Charles Hatton gives of the confusion caused in Westminster Hall by the incursion of a mad cow, he relates that, "Serjeant Scroggs, who of late hath had a fit of the gout, was perfectly cured, stript himself of his gown and coif, and with great activity vaulted over the bar."[4] Similarly, Jeffreys was his only rival in his capacity for abusive and intemperate language.

The course which he took in the various trials arising out of the Popish Plot showed that the court had chosen the right man to serve it. It is quite clear that he was animated by a desire, not to discover the truth, but to please the court. In the first trials the testimony of Oates and his fellows was admitted without criticism, and the existence of the Plot was treated as clearly proved.[5] Scroggs seems to have thought that this course of action was pleasing to the Court, where he erroneously supposed Shaftesbury to be all-powerful. But Oates's further disclosures seemed likely to implicate the queen. Before the trial of Wakeman, the queen's physician, Scroggs had visited the Court at Windsor. This visit, and perhaps the instructions or hints

[1] Foss, Judges vii 171. [2] Lives i 196. [3] Vol. i 115-117.

[4] "Only yesterday there was so great an alarm in Westminster Hall that the gates were commanded to be shut. The King's Bench rose up in great disorder; but when they understood it was only a mad cow, they sat down again. But the fright in Westminster Hall hath furnished the whole town with discourse; for she, having tossed several persons in King's Street, and coming into the Palace Yard towards the Hall gate, several persons drew their swords; others endeavoured to seize upon the officers' staves at the door to defend themselves with. Those in the hall, who saw the bustle and swords drawn, were affrighted, and some cried out the fifth monarchy men were up and come to cut the throats of the lawyers who were the great plague of the land. Some flung away their swords that they might not seem to make any defence; others their periwigs, that they might appear to be meaner persons; the lawyers their gowns; and your friend Serjeant Scroggs, who of late hath had a fit of the gout, was perfectly cured, stript himself of his gown and coif, and with great activity vaulted over the bar, and was presently followed by the rest of his brethren," Hatton Correspondence (C.S.) i 60-61.

[5] Trial of William Staley (1678) 6 S.T. 1501; Trial of Edward Coleman (1678) 7 S.T. 1; Trial of Ireland, Pickering and Grove (1678) 7 S.T. 79; Trial of Green, Berry and Hill (1679) 7 S.T. 159; Trial of Whitehead, Harcourt, Fenwick, Gawen and Turner (1679) 7 S.T. 311; Trial of Langhorn (1679) 7 S.T. 418.

there given to him, caused him to doubt the correctness of his views as to the attitude of the Court to the Plot; and North told him plainly that Shaftesbury had no influence at all at Court.[1] Scroggs never did things by halves. At the trial of Wakeman and others[2] he turned against Oates, and the prisoners were acquitted. But in later cases he apparently continued to rely upon the testimony of Oates and his fellows, notwithstanding his strictures upon them in Wakeman's Case.[3] On the other hand, in *Elizabeth Cellier's Case*, he refused to receive Dangerfield's evidence;[4] and in the *Earl of Castlemaine's Case* he disparaged his credibility and procured an acquittal.[5] It is fairly clear that in all these trials his course was shaped by what he knew or conjectured to be the wishes of the Court. Similarly, he probably obeyed instructions when he suppressed a Protestant paper—the Weekly Pacquet of Advice from Rome[6]—and convicted the editor for a libel on himself;[7] and he certainly obeyed instructions when he defeated Shaftesbury's attempt to indict the Duke of York as a popish recusant, by discharging the grand jury.[8]

His action on Wakeman's trial, at a time when Protestant fervour was at its height, aroused so great a storm of indignation that he thought it necessary to defend his action by a speech delivered in the court of King's Bench.[9] But it made little impression. Oates and Bedloe exhibited to the Council thirteen articles, recounting his misdeeds in his conduct of the Popish Plot trials, and his suppression of the Weekly Pacquet,[10] and commenting upon his loose life.[11] But, as we might expect, the Council, "were satisfied with Scroggs' vindication, and left him to his remedy at law against his accusers."[12] Parliament, however, intervened, and, in 1680-1681, impeached him for high treason—

[1] North, Lives i 196—"Coming from Windsor in the Lord Chief Justice North's coach, he took the opportunity, and desired his lordship to tell him seriously if my lord Shaftesbury had really so great power with the king as he was thought to have. His lordship answered quick, 'No my lord no more than your footman hath with you.' Upon that, the other hung his head, and considering the matter said nothing for a good while, and then passed to other discourse. After that time he turned as fierce against Oates and his plot as ever before he had ranted for it."

[2] Trial of Wakeman, Marshal, Rumley and Corker (1679) 7 S.T. 591.

[3] Trial of Anderson, Russel, Parris, Starkey, Corker, Marshal, and Lumsden (1680) 7 S.T. 811.

[4] Ibid 1043. [5] Ibid 1067. [6] 8 S.T. 198.

[7] (1680) 7 S.T. 1111; Luttrell's Diary i 50-51.

[8] 8 S.T. 198.

[9] 7 S.T. 702; cp. Hatton Correspondence (C.S.) i 187, 192; Luttrell's Diary i 74.

[10] 8 S.T. 163.

[11] "That the Lord Chief Justice is very much addicted to swearing and cursing in his common discourse; and to drink to excess, to the great disparagement of the dignity and gravity of his said place," 8 S.T. at p. 170; Oates told the Lords of the Council that "he believed he should be able to prove that my lord Chief J. danced naked," Hatton Correspondence (C.S.) 220; for a similar escapade of Jeffreys see below 530.

[12] Luttrell's Diary i 32.

of which he was clearly not guilty.[1] The proceedings were suspended by a dissolution; but they were resumed in the ensuing Parliament, and Scroggs put in an answer.[2] The speedy dissolution of Parliament put an end to the proceedings. But, as we have seen, the Court found it advisable to dismiss him.[3]

Such chief justices as Scroggs and Jeffreys lowered the tone of the bench; and the policy which led to their appointment lowered it still further, because it necessarily involved the dismissal of many other judges. Some judges were dismissed because they could not get on with these chiefs. Probably both Pemberton[4] and Robert Atkyns[5] were dismissed because they could not agree with Scroggs. Others were dismissed to facilitate the promotion of these men. Thus, Scroggs' upward career involved the dismissal of Ellis and Rainsford.[6] A still larger number were dismissed because they could not be relied upon to give the decisions desired by the court. In 1679, Bertie, a judge of the Common Pleas, Wilde, a judge of the King's Bench, Thurland and Bramston, barons of the Exchequer, were suddenly and simultaneously dismissed, probably for political reasons;[7] and Dolben, a judge of the King's Bench, was dismissed in 1683, because it was thought that he was likely to decide against the crown in the Quo Warranto proceedings against the City of London.[8] Moreover, many of the persons whom these chief justices recommended as judges, were wholly unfit for the post. We shall see that Jeffreys, in spite of lord keeper Guildford's opposition, got Robert Wright made a judge, although he was not only a notoriously incompetent lawyer and a

[1] He was accused of having traitorously endeavoured to subvert the established law and religion; of arbitrarily discharging the grand jury before it had made its presentments; of his actions in relation to the Weekly Pacquet; of the imposition of arbitrary fines; of refusal to accept bail; of granting general warrants; of defaming the witnesses to the Popish Plot; of excesses and debaucheries and atheistical discourses, 8 S.T. 197-200; pending the impeachment, he did not preside in his court, "being (as is said) commanded by the king to forbear," Luttrell i 64.

[2] 8 S.T. 215.

[3] For a case in which he was alleged to have used his position to evade payment of a judgment debt see Hist. MSS. Com. 11th Rep. Pt. ii 197 no. 284.

[4] Above 503.

[5] Foss, Judges vii 307-308—his Whig views also brought him into collision with North; for his subsequent career see below 515.

[6] Above 504.

[7] Foss, Judges vii 56-57, says that, "it is a remarkable circumstance that, five days previous, all these four judges were in the commission for the trial of Nathanael Reading, indicted on the testimony of the infamous Bedloes for endeavouring to stifle and lessen the king's evidence against the lords then in the Tower; and it may be a question how far their conduct or opinions on that trial caused their dismissal"; it would appear, however, that Thurland was old and wished to resign, ibid 175; Burnet tells us that Wilde had called Bedloe a perjured man, History Pt. I. vol. ii 199; no reason was alleged in Bramston's case, but he was given a pension which was only paid for one year, Bramston, Autobiography (C.S.) 30-31.

[8] Foss, Judges vii 312-314—he was reappointed by William III. in 1689; Luttrell's Diary i 255.

man of immoral life, but also guilty of perjury.[1] It was not likely that such judges would resist any opportunity which they might have of adding to their incomes. It was alleged that Scroggs was bribed to procure the acquittal of Wakeman[2]—though, when this was hinted at by Shaftsbury, he denied that he had been offered any money.[3] Roger North tells us that Jeffreys made large sums of money out of the chartered towns, by frightening them into a surrender of their charters, and by getting paid for procuring new charters;[4] and it is certain that he and other courtiers made large sums of money out of those accused of complicity in Monmouth's rebellion.[5]

The marquis of Halifax wrote his pamphlet entitled "The Character of a Trimmer"[6] at some date between 1684 and 1685.[7] From that pamphlet I shall transcribe a few sentences, because they describe with substantial accuracy the state of the bench at the end of Charles II.'s reign, and because they contain a prophetic warning of the consequences of allowing such a state of things to continue. He says[8]:—"The authority of a king, who is head of the law, as well as the dignity of public justice, is debased when the clear stream of law is puddled and disturbed by bunglers, or conveyed by unclean instruments to the people. Our Trimmer would have them appear in their full lustre, and would be grieved to see the day when, instead of their speaking with authority from the seats of justice, they should speak out of a grate with a lamenting voice, like prisoners that desire to be rescued. He wisheth that the Bench may ever have a natural as well as a legal superiority to the Bar; he thinketh men's abilities very much misplaced when the reason of him that pleads is visibly too strong for those who are to judge and give sentence. . . . If ever such an unnatural method should be introduced, it is then that Westminster Hall might be said to stand upon its head; and though justice itself can never be so, yet the administration of it would be rendered ridiculous. . . . When men are made judges of what they do not understand the world censureth such a choice,

[1] Below 530.

[2] Luttrell says, Diary i 74, "the Portugall gold had so blinded his eyes, that he could not distinguish high treason (with which Wakeman was accused) from loyalty to his king."

[3] Hatton Correspondence (C.S.) i 209.

[4] Examen 625-626.

[5] Foss, Judges vii 236-237—"the journals of Parliament prove, among other items, that he extorted above £4000 from Mr. Prideaux to save him from prosecution," 11 S.T. 297, there cited; Foxcroft, Life of the Marquis of Halifax i 446 n., cites an unpublished letter of Reresby, which mentions a report that Herbert, who had quarrelled with Jeffreys, had said that, "ye poor and miserable were hanged, but ye more substantiall escaped."

[6] Printed by Foxcroft, Life and Works of Halifax ii 280-342.

[7] Ibid 273.

[8] Ibid ii 285-286.

not out of ill will to the man, but fear for themselves. . . . The inferences will be very severe in such cases, for either it will be thought that such men bought what they knew not how to deserve, or which is as bad, that obedience shall be looked upon as a better qualification in a judge than skill or sincerity. When such sacred things as the laws are not only touched but guided by profane hands, men will fear that out of the tree of the law, from whence we expect shade and shelter, such workmen will make cudgels to beat us with. . . . To see the laws mangled, disguised, made speak quite another language than their own; to see them thrown from the dignity of protecting mankind to the disgraceful office of destroying them, and, notwithstanding their innocence in themselves, to be made the worst instruments that the most refined malice and villainy can make use of, will raise men's anger above the power of laying it down again, and tempt them to follow the ill example given them of judging without hearing when so provoked by their desire of revenge."

Halifax's warnings were addressed to Charles II. It is doubtful whether he would have listened to them. James II. wholly disregarded them. The spirit in which he expected his judges to administer what he was pleased to call justice, is very fairly represented by a sentence from Jeffreys' speech, as chancellor, to Herbert, when he was made chief justice of the King's Bench. "Be sure," he said, "to execute the law to the utmost of its vengeance upon those that are now knowne, and we have reason to remember them, by the name of Whigs; and you are likewise to remember the snivelling trimmers; for you know what our Saviour Jesus Christ says in the Gospell, that 'they that are not for us are against us.'"[1] James, as he told Sir Thomas Jones when he dismissed him from the post of chief justice of the Common Pleas, was determined to have twelve judges of his opinion.[2] But, as he was of opinion that he could *inter alia* repeal all the penal laws against religious dissenters by the exercise of his dispensing and suspending powers, and that he could govern his troops by martial law in time of peace,[3] he naturally found it difficult to find twelve lawyers who would support him. Even those who were prepared to go some distance in upholding the prerogative, were not prepared to sanction such projects as these.[4]

But, though James could not get twelve lawyers to do his

[1] Collect Jurid. ii 407.

[2] Foss, Judges vii 249, 250.

[3] The judges, on being consulted, are said to have declared this to be illegal in Charles II.'s reign, Hatton Correspondence (C.S.) i 111; above 475 n. 3.

[4] See North, Lives i 377-378, for an account of the resignations of Sir Robert Sawyer, the attorney-general, and Sir Heneage Finch, the solicitor-general, on this ground; and cp. Reresby, Memoirs 361.

bidding, he was determined to get twelve judges. The least disobedience was the signal for dismissal. Herbert, who had gone all lengths in magnifying the prerogative in the case of *Godden v. Hales*,[1] was removed to the Common Pleas, because he refused to order a soldier, who had been condemned and sentenced at Reading, to be executed at Plymouth;[2] and Wythens, who had concurred with him, was dismissed.[3] Holt lost his place as recorder of London for refusing to sentence to death a soldier found guilty of desertion.[4] Jones, whom Parliament had directed to be impeached with Scroggs in 1680, who had given the decision against the City of London, who had shown much harshness to the accused at the trials of Elizabeth Gaunt and Cornish, was dismissed in 1686 because he declined to uphold the dispensing power.[5] At the same time chief baron Montague[6] and baron Nevill[7] were dismissed for the same cause; and the old cavalier, Sir Job Charlton, who, much to his regret, had been removed from the chief justiceship of Chester to the bench of the Common Pleas to make room for Jeffreys, was dismissed from the Common Pleas and sent back to Chester.[8] Levinz was dismissed because he refused to sentence a soldier for desertion, and for opposition to the dispensing power.[9] Sir John Powell and Sir Richard Holloway were dismissed for their opinions in *The Seven Bishops' Case*.[10] Their successors were objects of contempt to the nation at large. Reresby notes that the attendance at the assizes to meet Allibone—one of James II.'s Roman Catholic judges—was, much to Allibone's disgust, very scanty.[11] Luttrell notes in 1686 that "the judges, since their opinion of the king's dispensing power, have not in their circuits had that respect as formerly."[12]

Most of the judges who had been dismissed returned to

[1] (1686) 11 S.T. 1166; above 223-225.
[2] Foss, Judges vii 222.
[3] Ibid 288.
[4] Below 517.
[5] Foss, Judges vii 249-250.
[6] Ibid 259-260.
[7] Ibid vii 397-398—he was restored to his former position in 1689.
[8] Ibid vii 217; Roger North, Lives i 276-277, describes him as an "old cavalier, loyal, learned, grave, and wise"; he had, North tells us, resolved to remonstrate with Charles II. on his removal from Chester; so "he went to Whitehall and placed himself where the king, returning from his walk in St. James's Park, must pass; and then sat him down like hermit poor. When the king came in and saw him at a distance, sitting where he was to pass [he] concluded that he intended to speak with him, which he could not by any means bear: he, therefore, turned short off and went another way. Sir Job seeing that, pitied his poor master, and never thought of troubling him more but buckled to his business in the Common Pleas. And may Westminster Hall never know a worse judge than he was."
[9] Foss, Judges vii 252-253.
[10] Ibid vii 339, 225.
[11] Memoirs 378—"this disappointment and aversion (at not being able to get up an address to thank the king for his Declaration of Indulgence) put the judge in some heats, which were also increased by but one Protestant justice of the peace attending the sheriff when he came to meet the judges, so that he told me (I mean Judge Alabon) that he would complain to the King, for that this looked more like a disrespect to him than to them."
[12] Diary i 384.

practice.[1] Thus practically all the legal talent of the day was to be found at the bar. This is sufficiently illustrated by the names of the counsel who appeared for the Seven Bishops. They included the late chief justice Pemberton, the late Judge Levinz, the late attorney-general Sir Robert Sawyer, the late solicitor-general Heneage Finch—Lord Nottingham's son, Pollexfen, William III.'s first chief justice of the Common Pleas, Sir George Treby, Pollexfen's successor in that office, and Somers, the future lord chancellor. When we compare these names with the names of the judges who tried the case—with Wright and Allibone, and even with Holloway and Powell, we must admit that Halifax's prophecy had come true. Westminster Hall was indeed standing on its head.

From the list of eminent lawyers who appeared in that famous case two well-known names are absent—Maynard and Holt. They were absent because, being king's serjeants, they could not appear for the bishops; and they would not appear against them. Of Holt I shall speak at some length a little later.[2] Here I must say something of Maynard.[3] His life covered almost the whole of the seventeenth century (1602-1690); and his career forms a connecting link between the lawyers of the early seventeenth century and the lawers of the eighteenth century—between lawyers of the type of Coke and lawyers of the type of Holt.

From his early manhood Maynard had played some part in the political, and an important part in the professional, life of the day. He was pupil of Noy, and sat in Charles I.'s first Parliament. During the period before the Long Parliament he had been a friend of the future lord chancellor Clarendon, who admired his abilities while lamenting his defection from the king.[4] He had been one of the managers of Strafford's and Laud's impeachments, had sat in Cromwell's Parliament of 1656, been imprisoned for a legal argument he had urged against one of Cromwell's collectors of customs, and served as serjeant to the Commonwealth and to the Protector. He had sat in Richard Cromwell's Parliament; and had taken some part in forwarding the Restoration. At the Restoration he was made king's serjeant and knighted; and, as king's serjeant, he had walked in the coronation procession of Charles II., as he had walked, as the Protector's serjeant, in the funeral procession of Oliver Cromwell.[5] He was a member of all

[1] Luttrell, Diary i 35, notes that Pemberton, "since he hath been turned out, hath come to the chancery barr to practise, and clients come in very fast."

[2] Below 516-523.

[3] Foss, Judges vii 325-334; Dict Nat. Biog.

[4] Clarendon, Life 931.

[5] "His actions in the rebellious times made the Act of Indemnity smell sweet," North, Lives i 149; and for a similar view cp. Pepys, Diary ii 25.

the Parliaments of Charles II.'s and James II.'s reigns, and generally supported constitutional principles[1]—a support which he found the easier to make compatible with his position as king's serjeant, because his views on specific points of constitutional doctrine had the vagueness which was characteristic of a lawyer of the earlier half of the seventeenth century.[2] In James II.'s reign he definitely opposed the grant of supply for a standing army, and a bill which would have made the mere verbal assertion of the Duke of Monmouth's legitimacy treason.[3] He lived to congratulate William III. in the name of the legal profession; and, to the king's remark that he had outlived all the men of law of his time, to make his historic reply that "he had like to have outlived the law itself if his highness had not come over." He took a leading part in the debates upon the Bill of Rights in the Convention Parliament, and acted as one of the commissioners of the great seal till a few months before his death in 1690.

Like most of the eminent lawyers of the old school, he was a student of Year Books and records. "He had such a relish of the old Year Books, that he carried one in his coach to divert his time in travel, and said that he chose it before any comedy."[4] His MS. of the Year Books of Edward II.'s reign, and certain Exchequer memoranda of Edward I.'s reign, were published as the first volume of the 1678 edition of the Year Books; and, with it, was printed his digest to the MS.[5] Both, as we have seen, were printed with scandalous carelessness.[6] That he was a student of records his collection in Lincoln's Inn library clearly shows.[7] Like all the lawyers of this school, he was an accomplished pleader. North regards him as incontestably the most eminent pleader of the latter part of the seventeenth century—the greatest praise that he can give that famous pleader, chief justice Saunders, is to say that he came nearest to Maynard.[8] He was, as we

[1] "Though the serjeant never failed to conform to all things required of him in public, as oaths, tests, etc., yet for all that, he continued a favourite in the Presbyterian congregations; and is at this day among them extolled as a saint, and his wonderful charities and other good works related: and to give him his due, he was to his last breath at the bottom as true as steel to the principles of the late times, when he first entered upon the stage of business," North, Lives i 149.

[2] "On constitutional questions he steered as a rule a wary and somewhat ambiguous course, professing equal solicitude for the royal prerogative and the power and privileges of Parliament, acknowledging the existence of a dispensing power, without either defining its limits, or admitting that it had none, at one time resisting the king's attempts to adjourn parliament by a message from the Speaker's chair, and at another counselling acquiescence in his arbitrary rejection of a duly elected Speaker," J. M. Rigg, Dict. Nat. Biog.

[3] Ibid.

[4] North, Lives i 26.

[5] Y.B. 1, 2 Ed. II. (S.S.) xxi, xxii.

[6] Vol. ii 530.

[7] Hunter's Catalogue, Report of Commissioners on Public Records (1837) 376-383.

[8] Lives i 294.

might expect from his studies, a mine of information upon old crown law,[1] and, for this reason, eminently fitted to be king's serjeant.

But, eminent as he was as a lawyer, it cannot be said that he was noted for a very high standard of professional honour. North tells us that it was credibly reported of him that, "being leading counsel in a small fee'd cause, he would give it up to the judges' mistake, and not contend to set him right that he might gain credit to mislead him in some other cause in which he was well fee'd";[2] and further, that in his pleadings he "used to lay traps for the judges and very cunning ones"—though he admits he employed this device with tact and discretion.[3] A Chancery suit, which Lord Nottingham decided against him, would seem to show that he had no very fine sense of equity in his business dealings;[4] and, though reputed charitable,[5] he was, if North is to be believed, capable of great meanness in money matters.[6]

Both as a lawyer and as a politician he was typical, intellectually, of the learned practitioners of the early seventeenth century—a master of pleading and practice, and both professionally and politically attached to constitutional principles; but too much the legal practitioner to care to risk much for those principles. He had indeed outlived all the men of law of his time; for he was the last survivor of that generation of lawyers who form the connecting link between the mediæval and modern common law. The lawyers for whom he spoke, when he congratulated William III. in the name of the legal profession, were essentially modern lawyers—modern in the manner of their legal education, in their professional environment, in their mental outlook. Those among

[1] North, Lives i 57, speaking of the Forest Eyre, says, "Here the whole time of the several sessions being taken up with the transaction of causes of this nature, the judges well skilled in the old crown law and the prerogative, and no person more deeply learned than Serjeant Maynard, who though a counsel was also an assistant to the court"; extensive collections illustrative of forest law are among his MSS., Report of Commissioners on Public Records (1837) 376.

[2] Lives i 59. [3] Ibid 146.

[4] Maynard v. Moseley (1676) 3 Swanst. 651.

[5] Above 512 n. 1.

[6] Lives i 148-149—"One afternoon at the *nisi prius* court of the Common Pleas in Westminster Hall, before the judge sat, a poor half-starved old woman who sold sweetmeats to school boys and footmen at the end of the bar, desired the serjeant to pay her two shillings for keeping his hat two terms. She spoke two or three times and he took no notice of her: and then I told the serjeant, 'the poor woman wanted her money and I thought he would do well to pay her.' The serjeant fumbled a little, and then said to me 'Lend me a shilling.' 'Ay with all my heart,' quoth I, 'to pay the poor woman.' He took it and gave it her; but she asked for another. I said, 'I would lend him that also to pay the woman.' 'No don't boy (said he) for I never intend to pay you this.' And he was as good as his word; for however he came off with that woman, having been as they say a wonderful charitable man, I am sure he died in my debt. But in this manner (as I guess he intended) I stood corrected for meddling."

them who were shortly afterwards raised to the bench, were destined to occupy in the state a constitutional position which was equally modern.

From the beginning of William III.'s reign the judges ceased to be appointed "durante bene placito";[1] and we have seen that the Act of Settlement gave statutory stability to their tenure of office.[2] From the point of view both of our constitutional and of our legal history, this new independence of the bench was one of the most important results of the Revolution. From the point of view of constitutional history its effect has been, as we have seen, to establish finally that rule of law for which Coke had contended.[3] Though the judges still attended at Whitehall[4] to receive instructions as to the conduct of business on circuit, it was now wholly impossible for the government to use them, as they had been used in the seventeenth century, to support the legality of government measures. From the point of view of legal history its effect has been to guarantee an orderly development of the law free from all governmental interference, and to raise the tone of the legal profession. From henceforth, as Foss puts it,[5] "the judges succeeded each other in quiet independence, scarcely even leaving the seats they occupied till incapacitated by infirmity or removed by death." And their remuneration[6] was sufficient to attract the ablest men. We have seen that in 1627 Whitelock reckoned his clear profit as judge of the King's Bench as £974 10s. 10d.; and that Mr. Justice Rokeby, a judge of the Common Pleas from 1689 to 1695, and of the King's Bench from 1695 to 1699, received an annual income which averaged something over £1500 a year.[7]

William III.'s judges were of course men who supported the Revolution settlement. They had been party men—as many of our judges at the present day have been party men. But there were no lack of good lawyers who satisfied the political test; for, as we have seen, the Revolution was the victory of exactly those principles which the majority of the common lawyers had held throughout the century.[8] Pollexfen was made chief justice of the Common Pleas. I shall say something more of him when dealing with his reports.[9] Here it will be sufficient to say that,

[1] Foss, Judges vii 291.
[2] Vol. i 195; above 234.
[3] Above 234, 262-263.
[4] Luttrell's Diary ii 261 (1691), "The judges attended at Whitehal, and received their instructions from the lord president how to behave themselves in their respective circuits"; ibid 492 (1692) there is a similar entry; cp. vol. i 273.
[5] Judges vii 291.
[6] It was not till much later that they were paid wholly by fixed salary vol. i 254-255—though Hobbes had pointed out the advantages of this in his Leviathan at p. 166.
[7] Vol. i 254-255; above 234 n. 12.
[8] Above 258-262.
[9] Below 561-562.

though he was quite competent to fill this position, he was perhaps more famous as an advocate than as a lawyer. His successor Treby[1] was a first rate lawyer. He was the author of the annotations in the margin of Dyer's reports; and, as Foss says, "his various arguments on the question of monopolies, in defence of the city charters, and in the bankers' case (in which he differed from his colleagues) sufficiently attest the extent of his learning." Sir Robert Atkyns,[2] who became chief baron of the Exchequer, had a family and an hereditary connection with that court. His father had been baron of the Exchequer from 1660 till his death in 1669;[3] and his younger brother had held the same post from 1679 to 1686, when, on the dismissal of Montague, he had been made chief baron.[4] He himself had held the post of judge of the Common Pleas from 1672 to 1680. He had then been dismissed, mainly because his political views were not in agreement with those of his chief, North, or of Scroggs. After his dismissal he lived in retirement, but he had taken an active interest in politics, and in cases of political importance. He had advised Lord Russell as to his line of defence, and maintained his innocence in two controversial pamphlets.[5] He wrote two pamphlets on the dispensing power—one an historical summary of the subject, and the other a reply to Herbert's defence of his judgment in *Godden v. Hales*;[6] and a third on James II.'s ecclesiastical commission.[7] He also published his own argument in defence of Williams, the Speaker of the House of Commons, who was indicted for publishing, by order of the House, Dangerfield's narrative of the Popish Plot.[8] As was perhaps to be expected, the argument unduly magnifies the privileges of Parliament, and it maintains that the courts have no jurisdiction to inquire into their limitations.[9] He seems to have been averse to accepting the post of chief baron at the Revolution,[10] probably because he did not wish to supersede his brother. But when he saw that his brother would be superseded in any event, he consented to accept it. He held it till

[1] Foss, Judges vii 364-366; Evelyn says of him, Diary, Dec. 8th, 1700, that "he was a learned man in his profession of which we have now few, never fewer."

[2] Foss, Judges vii 306-310. [3] Ibid 53-55. [4] Ibid 210-211.

[5] The letters he wrote to Russell, together with the pamphlets, are contained in his collection of Parliamentary and Political Tracts published in 1734; they are printed also in 9 S.T. 719.

[6] Printed in the collection of 1734, and in 11 S.T. 1200.

[7] Printed in the collection of 1734, and in 11 S.T. 1148.

[8] Printed in the collection of 1734, and in 13 S.T. 1380; it is not certain that he actually delivered the argument; he is stated to have done so in 13 S.T. 1380, but the other reports (2 Shower 471; Comb. 18) do not mention his name.

[9] See above 270-272 for Holt's views upon this matter.

[10] Spencer House Journals, Foxcroft, Life of Halifax ii 230; he seems to have wished for the post of chief justice of the Common Pleas, Hatton Correspondence (C.S.) ii 130, 131.

1694, when he resigned at the age of seventy-three. He still continued to take a literary interest in law and politics; but the topics which he chose were reminiscent of the politics of his youth. Of the two tracts which he published, one was written to prove that the Chancery had no power to issue injunctions to stop common law actions,[1] and the other to prove that the House of Lords had no power to hear appeals from the court of Chancery.[2] They were naturally quite powerless to revive controversies which, when he wrote, were completely settled. But these and the other tracts which he wrote show that he was a very learned lawyer, and a man of well-balanced mind—a worthy companion of such colleagues as Treby and Holt.

Holt—the most distinguished of all the judges appointed after the Revolution—was made chief justice of the King's Bench in 1689. He may be considered as representative of the common law of the latter part of the seventeenth and the earlier years of the eighteenth centuries, as Maynard is of the common law of the early seventeenth century. Of him, therefore and of his career I must speak at somewhat greater length.

Holt [3] was born at Thame in 1642. His father was a serjeant at law, and recorder of Reading and Abingdon. He left Oxford without taking a degree, and was called to the bar in 1663. Towards the latter part of Charles II.'s reign he had acquired a large practice. In 1679 he was one of the counsel for Danby upon his impeachment, and for two of the popish lords accused of complicity in the popish plot. He appeared for the crown in some of the state trials of the period; but, towards the end of the reign, he was more generally employed for the defence. He defended Pilkington, who was charged with riot in connection with the disputed election to the office of sheriff of the City of London,[4] Sir Patience Ward who was charged with perjury,[5] and Lord Russell who was charged with high treason.[6] But, though he was inclined to Whig opinions, he never took part with the more extreme Whigs. He argued in favour of the East India Company in the great case of Monopolies;[7] and, what was more important, he seems to have been convinced of the legality of the decision in the Quo Warranto proceedings against the City of London.[8]

It was probably both the moderation of his political opinions, and his rising legal reputation, that induced James II. to knight

[1] Vol. i 464-465; vol. v 236-237; it was perhaps inspired by the attempts which were made after the Revolution to effect this result by legislation, vol. i 464.
[2] Ibid 375 n. 1; above 182-183.
[3] Foss, Judges vii 386-395, Dict. Nat. Biog.
[4] (1683) 9 S.T. 187. [5] Ibid 299. [6] Ibid 578.
[7] (1683) 10 S.T. 371. [8] Foss, op. cit. vii 388-389.

him in 1686, and to give him the posts of recorder of London and king's serjeant. The office of recorder he only held for a very short time. A soldier was tried before him at the Old Bailey for desertion, and found guilty. Holt doubted whether the offence was felony, and delayed sentence, acquainting the chancellor, Jeffreys, with his doubts. The judges were summoned to advise upon the point. Nine of them met and decided that the offence of desertion was felony. Notwithstanding this opinion, Holt refused to give sentence—"but in his absence his Deputy gave judgment, and the soldier was executed."[1] Though dismissed from his office of recorder,[2] he was allowed to retain his post of king's serjeant, which prevented him from appearing against the crown; and, as we have seen, it was probably for this reason that he was not briefed in the case of the Seven Bishops.

He attended the Convention Parliament as a legal assessor. In 1689 he became a member of the House of Commons; and, at a conference with the House of Lords, he defended the view of the Commons that the action of James in leaving the kingdom was an "abdication" rather than a "desertion." But his career as a member of Parliament was short. In April, 1689, he was made (with universal approval) chief justice of the King's Bench; and, in the following September, a privy councillor. On the dismissal of Somers in 1700 William III. offered him the Great Seal; but, contrary to general expectation,[3] he declined it, saying that, "he had never had but one Chancery cause in his life, which he lost, and consequently could not think himself fitly qualified for so great a trust." No doubt also he thought it unwise to exchange his secure position as chief justice for the unstable office of chancellor. He consented, however, to act as chief commissioner of the seal till a new keeper was appointed. On the death of William he was immediately reappointed chief justice, and held the office till his death in 1710.

The Revolution had created a new set of political conditions; and expanding trade was creating a new set of commercial conditions. Under these circumstances, the common law had need of a judge, who was sufficiently conversant with modern needs and modern thought to appreciate the nature of the problems demanding solutions; who had sufficient statesmanship to see the best solutions; who was a sufficiently good lawyer to put those solutions into a form which harmonized with the principles and technical rules of the common law. Holt satisfied all these needs. He was a learned common lawyer; but he fully appreciated the modern political and commercial

[1] Bramston, Autobiography (C.S.) 245-246.
[2] Ibid 276.
[3] Luttrell's Diary iv 640.

conditions under which he administered justice. Consequently he used his legal learning so to develop the rules of the common law that they could do substantial justice under these new conditions. From this point of view we may regard him as the father of the long line of great judges who have made our modern common law.

The three fields of law in which these powers were conspicuously displayed were criminal law, constitutional law, and commercial law. With Holt's contribution to constitutional law I have already dealt.[1] I shall therefore deal here only with his contributions to criminal and commercial law.

(i) *Criminal Law.*

In the field of criminal law he introduced and established the modern attitude of the judge to the criminal. It is true that, like his predecessors, he still took the preliminary examinations of accused persons;[2] it is true that he still thought himself at liberty to interrogate the prisoner for the purpose of extracting an admission.[3] But, in his demeanour to the prisoner and in the conduct of the trial, he behaved like a judge of to-day. His predecessors had sometimes defended the rule which denied the help of counsel to prisoners accused of treason or felony, by saying that the judge was counsel for the prisoner.[4] We may fairly say that Holt was the first judge to put this theory into practice. He allowed and even invited interruption if the prisoner thought that he was not stating his case fairly[5]—once he even allowed a prisoner to urge a new defence after he had finished his summing up.[6] He refused to admit evidence to be given that a prisoner had formerly committed an offence, in order to establish a probability that he had committed the offence for which he was being tried.[7] He stopped the practice of keeping prisoners in irons during their trial.[8] His attitude towards witch trials, in

[1] Above 264-268, 270-272.

[2] Campbell, Lives of the Chief Justices ii 175-176, citing Clarendon's Journal ii 328-329.

[3] Ibid 174, citing the Trial of Haagen Swendsen (1702) 14 S.T. at p. 581.

[4] Vol. v 192.

[5] See the extracts from the Trials of Lord Preston (1691) 12 S.T. 646-822, and Rookwood (1696) 13 S.T. 154, cited Campbell, Lives of the Chief Justices ii 143-145.

[6] Trial of Lord Preston (1691) 12 S.T. at p. 743. Lord Preston admitted Holt's fairness to him, ibid at p. 739.

[7] Trial of Harrison (1692) 12 S.T. 834 at p. 864.

[8] Trial of Cranburne (1696) 13 S.T. 222—"Look you, keeper, you should take off the prisoners' irons when they are at the bar, for they should stand at their ease when they are tried"; this was also one of the resolutions of the judges on the trial of the regicides in 1660, Kelyng's Rep. 10; but obviously little regard had been paid to it; in Layer's Case (1722) the rule was strictly construed, and held not to apply to the time of arraignment, Bl. Comm. iv 317.

which he never failed to procure an acquittal,[1] and his action in causing the prosecutor in one of these trials to be indicted as a cheat, stopped this form of persecution.[2] It would not be going too far to say that Holt revolutionized the conduct of criminal proceedings; and it was this achievement which most impressed his lay contemporaries. Steele wrote of him in the Tatler,[3] "Wherever he was judge, he never forgot that he was also counsel. The criminal before him was always sure he stood before his country, and, in a sort, the parent of it. The prisoner knew, that though his spirit was broken with guilt, and incapable of language to defend itself, all would be gathered from him which could conduce to his safety; and that his judge would wrest no law to destroy him, nor conceal any that could save him."

(ii) *Commercial Law.*

Both the extent and the nature of the influence which Holt's decisions have had on the development of our commercial law have been very remarkable. I shall deal firstly with its extent, and secondly with its nature.

(1) We have seen that Coke's attack on the court of Admiralty, and the political results of the Great Rebellion, had given the common law a large commercial jurisdiction.[4] We have seen, too, that the latter part of the seventeenth century was an era of expanding trade.[5] Commercial cases, therefore, came with increasing frequency before the common law courts. But the judges of this period had shown very little appreciation of these new conditions. They were far more at home with the rules of pleading procedure and process, with established doctrines of the land law, and with the other branches of the common law which figured largely in the older books. Holt was the first judge since the Restoration to appreciate the modern conditions of trade, and the importance of moulding the doctrines of the common law to fit

[1] Foss, Judges vii 395; the following tale, related by Foss, will bear repetition: "In a trial of an old woman for witchcraft the witness against her declared that she used a 'spell.' 'Let me see it,' said the judge. A scrap of parchment being handed up to him, he asked the old woman how she came by it, and on her answering, 'A young gentleman, my lord, gave it me to cure my daughter's ague'; inquired whether it cured her. 'Oh! yes, my lord, and many others,' replied the old woman. He then turned to the jury and said, 'Gentlemen, when I was young and thoughtless, and out of money, I and some companions, as unthinking as myself, went to this woman's house, then a public one, and having no money to pay our reckoning, I hit upon a stratagem to get off scot free. Seeing her daughter ill of an ague I pretended I had a spell to cure her. I wrote the classic line you see, and gave it her; so if any is punishable, it is I, and not the poor woman."

[2] Trial of Hathaway (1702) 14 S.T. 639.

[3] No. xiv (May 12, 1709).

[4] Vol. i 553-558, 570-573; vol. v 143-148, 153-154.

[5] Above 341.

them. Of the many branches of the law, in which he showed this power, I shall say something later in this chapter,[1] and in the second Part of this Book.[2] Here it will be sufficient to give four illustrative instances.

In the first place, he firmly fixed in the common law the modern doctrine of employer's liability. It was a modification of the older principles of liability, which was rendered absolutely necessary by the changed commercial conditions.[3] That Holt appreciated the nature of this necessity is clear from the fact that he not only expounded it in its modern form, but also based it upon the principle now generally accepted. In *Sir Robert Wayland's Case*[4] he said, "It is more reasonable that he (the master) should suffer for the cheats of his servant than strangers and tradesmen." When we look at the confused reasons for the doctrine given by many of the judges of this and later periods,[5] we must admit that this is a remarkable instance of Holt's power of stating modern doctrine in the form, and of basing it upon the grounds, which have been ultimately adopted. In the second place, his decisions go a very long way towards introducing into, and making part of the common law, the main principles of the law as to negotiable instruments.[6] We shall see that, before his time, these instruments had been well enough known to the merchants, and that they had come before the courts. But we shall see that the courts, contenting themselves with following mercantile practice, had done little to make this mercantile practice a part of the law. Holt incorporated this mercantile practice into the common law. As a result of his decisions, the common law acquired definite rules as to the legal position of the various parties to a bill of exchange, and as to the effects of drawing and negotiating such a bill. He recognised also the assignability of a bill of lading.[7] In the third place, in the case of *Coggs* v. *Bernard*,[8] he went a long way towards settling the various forms of the contract of bailment. In the fourth place, he would have liked to relax some of the older restrictions on the activities of traders, the wisdom of which was beginning to be questioned by commercial men and economic thinkers. As we have seen, he disliked the claim of cities to restrict trade in the city to a narrow circle;[9] and a case decided in 1692 shows that he was prepared to modify, when necessary, the severity of the common law rules as to forestalling

[1] Below 631, 634-640.
[2] Pt. II. c. 4 I.
[3] Wigmore, Responsibility for Tortious Acts, Essays A.A.L.H. iii 525-527; Pt. II. c. 5 § 6.
[4] (1708) 3 Salk. 234.
[5] Wigmore, op. cit. 531-537.
[6] Pt. II. c. 4 I. § 2.
[7] Evans v. Marlett (1698) 1 Ld. Raym. 271.
[8] (1704) 2 Ld. Raym. 909.
[9] Vol. i 568 n. 5; above 337.

and regrating.[1] Those rules were not wholly obsolete,[2] nor were they altogether unreasonable.[3] But Holt saw, and the legislature indorsed his opinion,[4] that some modifications were needed to bring them into conformity with new social and commercial conditions.

(2) The nature of Holt's influence upon commercial law was necessarily determined by the nature of his intellectual equipment. It has sometimes been said that he was learned in the civil law. It is true that in *Coggs* v. *Bernard*[5] he cites Justinian's Institutes, and quotes the commentaries of Vinnius. It is true that he may have looked at some of the authorities which the civilians were accustomed to cite, when they argued questions of maritime and commercial law before him. But it is clear from *Coggs* v. *Bernard* that he knew a great deal more about Bracton, from whom he cites large extracts, and the other English authorities, than of the writers upon the civil law. And it is fairly clear that, in the numerous cases in which he settled the leading principles of the law of negotiable instruments, he relied mainly on the evidence of the merchants. There is no evidence that he was learned, as Lord Mansfield was learned, in the civil law or in foreign systems of commercial law. He was very much alive to the importance of understanding the commercial needs of his own day; and he appreciated the necessity of so moulding the common law that it could satisfy them. But he was essentially a common lawyer; and, unlike Lord Mansfield, he had many of the conservative instincts of the common lawyer. Thus, Lord Mansfield developed the conception of quasi-contract; but we shall see that Holt was averse to the extension of assumpsit, by which this development was effected.[6] Holt once described the appeal of murder as "a noble remedy, and a badge of the rights and liberties of an Englishman."[7] We can hardly imagine Lord Mansfield using these words. Then, too, the obstinacy of his refusal to allow that promissory notes were negotiable, was partly caused by his legal conservatism. No doubt, as we shall see,[8] it was not due entirely to this cause. It was due partly to his perception that promissory

[1] *Anon.* 1 Shower, K.B. 292; the report runs as follows:—"Indictment for forestalling by buying at Billingsgate of fish. And held by Holt Chief Justice on trial at Nisi Prius, that the party was not guilty; for Billingsgate was a market time out of mind, and so the party was acquitted; and by him, were it otherwise, all the fishmongers were liable to prosecutions. *Note.*—This was at the instance of that company against a poor woman that cried fish;" for the law on this topic see vol. iv 375-379.

[2] In 1693 and 1698 the law against forestalling and regrating was put in force against dealers of grain and other victuals, Tudor and Stuart Proclamations nos. 4131, 4253.

[3] Vol. iv 379.

[4] 10 William III. c. 13.

[5] (1704) 2 Ld. Raym. 909.

[6] Pt. II c. 3 § 3; cp. vol. iii 450-451.

[7] R. v. Toler (1701) 1 Ld. Raym. at p. 557.

[8] See Pt. II. c. 4 I. § 2 for the detailed history of this matter.

notes differed from bills of exchange; and his inference (for which he had authority in foreign systems of law) that it was only bills of exchange which had the status of negotiability. This reason is quite intelligible. But the resistance of the merchants to this view of the law roused in him a feeling of indignation, because, as he thought, mere merchants were attempting "to give the law to Westminster Hall;" and this indignation blinded him to the practical inconvenience of his decisions. Probably Lord Mansfield would neither have felt this indignation, nor disregarded the practical consequences of so deciding.

Holt's legal conservatism perhaps prevented him from developing our commercial law so rapidly as it might otherwise have been developed. It prevented its condition from being in his time, and for some time to come, wholly satisfactory to the merchants.[1] But it has had one beneficial effect—it has helped to make the common law more uniform. If Holt had been more learned in foreign systems of law, he might have been tempted to introduce their principles in bulk. The result would have been that commercial law, though administered by the common law courts, would have remained a very separate branch of the common law. The nature of Holt's training prevented him from being able to do this. Though he was quite aware that new principles must be introduced to meet new needs, though he did not hesitate to introduce them, he naturally expressed them in the technical form, and supported them by the technical reasoning, of the only system of law with which he was thoroughly well acquainted. They were thus incorporated into the common law and became an integral part of it. To accomplish this feat a man of Holt's intellectual equipment was needed. Coke had conquered a large commercial jurisdiction for the common law. Holt made good progress in the settlement of this domain on common law principles. No doubt to complete its settlement the cosmopolitan learning of a jurist like Mansfield was needed. But the fact that a common lawyer like Holt had begun that settlement, made it easier for the common law at a later date to assimilate intelligently the foreign ideas which were necessary for its completion. Thus the fact that Holt combined appreciation of modern commercial conditions, with an exclusive or almost exclusive training in the common law, helped, in no small degree, to ensure ultimately a very much more thorough incorporation of the principles of the Law Merchant with the common law, than would otherwise have been possible.

We must now turn from common law to equity. We shall see that the careers of some of the chancellors, like the careers of some

[1] Vol. i 572-573.

of the judges, show us that, by the end of the century, the modern conditions of legal development have been reached.

The Chancellors, the Officials of the Court of Chancery, and the Chancery Bar

The chancellors[1] of the latter part of this century illustrate both the transition character of the period through which equity was passing, and the varying influences which, from that day to this, the political conditions of the day have had upon the appointments to this office. The transition character of the period is illustrated by Clarendon—Charles II.'s first chancellor. He was essentially a statesman, who, from some points of view, recalls the great ecclesiastical chancellors of the Middle Ages. The other chancellors of the period illustrate the influence of the different sets of political conditions under which they were appointed. Political conditions have always influenced the appointments to this office, because the holder is not only a judge, but also a great officer of state; and varying political conditions have given rise to various types of chancellors, some of which have been very constant throughout our legal history. Let us look at the types of chancellors which, under these influences, emerge during this period. Firstly, we have a type represented by Shaftesbury and Jeffreys. They were men who owed their position entirely to the exigencies of the party politics of the day, and were obviously not well fitted to preside in the court of Chancery. Fortunately this type of chancellor did not survive the Revolution. The remaining types have been more constant. Secondly, we get a type composed of men who were both able politicians and good lawyers. This type is represented in this period by North and Somers. Thirdly, it sometimes happened that the political situation, and the state of the legal profession, were such that no very eminent man was available

[1] The following is the list:—

Clarendon 1658-1667.
Bridgman 1667-1672.
Shaftesbury 1672-1673.
Nottingham 1673-1682.
North 1682-1685.
Jeffreys 1685-1689.
Maynard, Keck, Rawlinson } Commissioners 1689-1690.
Trevor, Rawlinson, Hutchins } Commissioners 1690-1693.
Somers 1693-1700.
Holt, Treby, Ward } Commissioners May 5-May 21, 1700.
Wright 1700-1705.

for the post. Thus we get comparatively undistinguished chancellors, who owed their appointment to a lucky accident. This type is represented by the two lord keepers Bridgman and Nathan Wright. Lastly, we have the chancellors whose names are landmarks in our system of equity. This period produced one chancellor of this type—Lord Nottingham—to whose genius it is largely due that our modern system of equity begins to emerge. The careers of these various types of chancellors will tell us something of the conditions under which equity was developing, during this period, into a regular system.

Clarendon belongs to the general history of England rather than to legal history.[1] Both as a lawyer and as a politician he belonged to the earlier half of the seventeenth century; and we have seen that the fact that he preserved the prejudices and ideals of that period helped him, at the Restoration, to resettle the government upon its old foundations.[2] We have seen, too, that his adherence to his old political ideals gradually alienated the king, and exasperated the Parliament; and that he died in exile[3]—the last of the constitutional statesmen of the early seventeenth century. While he was chancellor he had but little time to devote to the judicial duties of his office. The orders which he issued, generally in conjunction with Sir Harbottle Grimstone the master of the Rolls, effected some improvements in the organization and procedure of the court.[4] His administration of justice is generally admitted to have been pure;[5] his judicial appointments were as good as many of those after his fall were bad; and his practice of never sitting without the assistance of two judges,[6] if it did not make for much progress, made at least for order and continuity in the development of equity.

Let us now turn to the different types of chancellors to which various political conditions have given rise.

Firstly, we have two chancellors—Shaftesbury and Jeffreys—who owed their appointments entirely to the political exigencies of the day, and were obviously not well fitted to preside in the court of Chancery.

Anthony Ashley Cooper,[7] the future earl of Shaftesbury, was a

[1] Above 137, 141, 175, 178; see also Foss, Judges vii 122-134; Dict. Nat. Biog.; his life written by himself (ed. 1842).

[2] Above 175-176.

[3] Above 176-178.

[4] Sanders, Chancery Orders i 292-322.

[5] For Anthony Wood's allegations to the contrary see Foss, Judges vii 132—as Foss says—"the general imputation of bribery is sufficiently refuted, as well by the absence of any specific charge being brought forward at a time when they would have been welcomed and encouraged, as by his leaving, after such opportunities of accumulation, his family so poorly provided for."

[6] Foss, Judges vii 133.

[7] Ibid vii 70-84; Dict. Nat. Biog.; Christie, Life of the First Earl of Shaftesbury.

member of Lincoln's Inn; and his first wife was a daughter of lord keeper Coventry. But, though he moved in legal circles, he never practised. He had devoted himself to politics, first on the side of the king, and then on the side of the Parliament. During the Commonwealth period he had taken an active interest in the extensive law reforms then projected;[1] and it is probable that his experience at this period gave him a good insight into some of the most crying abuses of the law and the law courts, and particularly of the court of Chancery. He was active in promoting the Restoration; his abilities, industry, and wit soon gained him the favour of Charles II.; and he was made chancellor of the Exchequer in 1660. Though he opposed Clarendon's impeachment, he was wholly opposed to Clarendon's policy. His outlook was, in a greater degree than that of any other statesmen of the day, towards the future;[2] and in many points his policy agreed with that of Charles. Like the other members of Cabal, he favoured toleration, and a war with Holland. But he was wholly opposed to Charles's ulterior design of overthrowing the constitution and the church by means of French arms. His discovery of these designs threw him into opposition. As a leader of the opposition he became the first great demagogue and party leader that England had yet seen.[3] He helped to carry the Habeas Corpus Act; and he led the agitation for Exclusion. But he was out-manœuvred by Charles; and, after the dissolution of the Oxford Parliament in 1681, his party was ruined. He dabbled in treason, and ended his days in exile in Holland.

It was in 1672 that he was made lord chancellor. Lord keeper Bridgman had made difficulties about sealing the Declaration of Indulgence, though he eventually complied.[4] He had refused to issue a proclamation prohibiting the bankers' creditors from suing them;[5] and it is said that he made difficulties about

[1] Vol. i 431-434; above 412 seqq.

[2] Ranke, History of England iv 166-167—"He started from the conception of tolerance as Locke had done. . . . He may be regarded as the principal founder of that great party which, in opposition to the prerogative and to uniformity, has inscribed upon its banner political freedom and religious tolerance."

[3] Traill, Shaftesbury (English Worthy Series) 206—"Those three most notable actors on the stage of English politics, the modern demagogue, the modern party leader, and the modern Parliamentary debater—are in him foreshadowed."

[4] Christie, op. cit. ii 93-94; Christie thinks "that he had made difficulties about affixing the Great Seal to the Declaration of Indulgence, and that his objections, which probably applied only to the Roman Catholics, were removed by the addition of a proviso that they were not to be allowed the privilege of public worship."

[5] Ibid ii 94-95 Christie gives good reasons for thinking that North's account of Bridgman's refusal to issue injunctions to stop actions brought against the bankers (Examen 38; Lives of the Norths i 115) is inaccurate; he says—"What is probably true is that Bridgman refused, not to grant an injunction in Chancery, but to sanction a declaration under the great seal for protection of the bankers;" this is made more probable by Shaftesbury's letter to Locke of November, 1674, cited Christie ii 60, in which he says,

issuing a commission to try by martial law offences of the troops which the king was raising for the Dutch war.[1] It was clearly advisable to have a chancellor more in sympathy with the government. Shaftesbury had indeed opposed the stop of the Exchequer;[2] but he had defended it in Parliament;[3] and he certainly issued at least one injunction *nisi*, the effect of which was to delay a creditor's action against a banker.[4] It is not clear that he was ever asked to seal a commission to try troops by martial law; but it is clear that he was in favour of religious toleration, and would not therefore have opposed a Declaration of Indulgence. He was essentially a politician, and a strenuous advocate of the political cause with which he happened to be identified. His career shows us that he had some of the modern demagogue's contempt for legal technicalities when they impeded his programme, and all his reverence for them when they could be made to serve his purpose[5]—a weakness upon which Charles II. observed with his accustomed wit and grossness of language.[6] Such a chancellor was not likely to be popular in his court. We cannot, indeed, accept Roger North's account[7] as literally true; for he was a bitter political opponent. But we can well believe that the conservative officials of the court, and the older members of the Chancery bar, suspected a man who had had a hand in the projected reforms of the Commonwealth period, and intended to

"This worthy scribbler, if his law be true, or his quotation to the purpose, should have taken notice of the combination of the bankers, who take the protection of the court (i.e. the king), and do not take the remedy of the law against those upon whom they had assignments, by which they might have been enabled to pay their creditors; *for it is not to be thought that the king will put a stop to the legal proceedings in a court of justice.*"

[1] North, Examen 38; Lives of the Norths i 115.

[2] Christie, op. cit. ii 58-66. [3] Ibid ii 114.

[4] Ibid ii 163-164, citing North, Examen 47; cp. his letter to Locke of November, 1674, cited above 525 n. 5.

[5] For his attempt to present the Duke of York as a recusant, and the manner in which the London grand jury ignored an indictment of treason against him, see Foss, Judges vii 81; for the actions of scandalum magnatum brought by him against his persecutors see Christie ii 441-442; the actions were abandoned when the court moved the trial to another county, Luttrell, Diary i 182-183, 185-186, 190.

[6] "From that the king run out into much discourse about Lord Shaftesbury, who was shortly to be tried. He complained with great scorn of the imputation of subornation that was cast on himself. He said that he did not wonder that the earl of Shaftesbury, who was so guilty of those practices, should fasten them on others; and he used upon that a Scotch proverb very pleasantly, 'At doomsday we shall see whose ass is blackest,'" Burnet, Own Times ii 300.

[7] He tells us that his "appearance was more like a young nobleman at the University than a High Chancellor of England," Examen 60; that, though ignorant of law, he trampled upon the forms of the Court, till the bar hit on the device of letting him make what orders he pleased, and then moving to discharge them, giving reasons which showed their absurdity—"And this speculum of his own ignorance and presumption coming to be laid before him every motion day, did so intricate and embarass his understanding, that, in a short time, like any haggard hawk that is not let sleep, he was entirely reclaimed," ibid 58; cp. also Lives of the Norths i 259.

issue a comprehensive set of orders to correct abuses in the procedure of the court;[1] and that they were scandalized by his fashionable appearance, and by the manner in which he brushed aside technicalities in order to do speedy justice. That the justice he did was both pure and speedy, Dryden—another political opponent—has testified in a well-known passage of his Absalom and Achitophel;[2] and we may reasonably suppose that he represented the views of the suitor, as North represented the views of the official and the practitioner. If Shaftesbury had held office longer, his talents and experience as an administrator might have effected some valuable reforms in the organization of the court; and the litigant would have rejoiced in his clear intellect and impatience of unnecessary delay. But we can hardly suppose that he could have done anything for the technical development of the principles of equity.

The career of Jeffreys[3] is the most striking proof of the bitterness of political faction at the latter part of Charles II.'s, and during the whole of James II.'s reigns. Jeffreys was not without legal ability, as may be seen from his judgment in the *East India Company* v. *Sandys*.[4] He was a skilful examiner and cross-examiner;[5] and, at the trial of Titus Oates, he laid down the salutary rule that a witness ought not to be produced "to swear that he did forswear himself before."[6] Apparently, too, he would have favoured a change in the law which prohibited prisoners accused of treason or felony from having the assistance of counsel, or their witnesses sworn.[7] He was quick to seize the crucial

[1] For these orders, which were drawn up, but apparently never put into force, see Sanders, Orders in Chancery ii 344 n. a; and 1050-1077; below 615.

[2] "Yet fame deserved no enemy can grudge;
The statesman we abhor, but praise the judge.
In Israel's courts ne'er set an Abuthden
With more discerning eyes or hands more clean;
Unbrib'd, unbought, the wretched to redress,
Swift of despatch, and easy of access."

[3] Foss, Judges vii 226-243; Dict. Nat. Biog.; Life by H. B. Irving; the last-mentioned work says what can be said for him; but it shows clearly how little that is.

[4] (1683) 10 S.T. 371; and see Stephen, H.C.L. i 411-412 as to the law laid down in Sidney's trial; ibid 413 as to the law laid down in Lady Lisle's trial; ibid ii 314, 315 as to the law laid down in the cases of Baxter and Samuel Johnson.

[5] Thus Stephen, H.C.L. i 413, dealing with Lady Lisle's case, says—"The most disgraceful part of the trial . . . is the way in which the judge treated the principal witness Dunne, at whom he repeatedly swore and railed. It ought, however, to be said that Dunne was a liar, and that, striking out the brutality and ferocity of his language, Jeffreys' cross-examination was masterly, and not only involved Dunne in lie after lie, but at last compelled him to confess the truth."

[6] (1685) 10 S.T. at p. 1186; cp. Trial of Elizabeth Canning (1754) 19 S.T. at pp. 609-611.

[7] Trial of Rosewell (1684) 10 S.T. at p. 267—"I think it a hard case that a man should have counsel to defend himself for a twopenny trespass and his witness upon oath, but if he steal, commit murder or felony, nay high treason, when life, estate, honour and all are concerned, he shall neither have counsel nor his witnesses examined upon oath."

points of a case; and both as an advocate and as a judge he could present it skilfully to a jury.[1] He had a keen eye for the misbehaviour of other magistrates—as the aldermen of Bristol, engaged in the lucrative trade of transporting rogues to the West Indies and then selling them, found to their cost.[2] These qualities gained him some praise as a judge and a chancellor in cases where neither the crown nor his party were concerned. But in cases where they were concerned there was nothing judicial in his manners or behaviour. His loud voice, his extraordinary powers of invective, and the ferocious aspect which he could assume, made him terrible to the unfortunate persons who appeared before him, professionally or otherwise; and the effects of these qualities were heightened by the drunken orgies in which he constantly indulged. The state trials, in which these qualities were displayed, made the most noise in his own day, and have given him the historical reputation which he deserves.[3]

In early life he seems to have kept these weaknesses under some control. He was then, as his first marriage shows,[4] capable of doing a generous act; he managed to ingratiate himself with Hale;[5] and, even in later life, there are very occasional glimpses of a better nature.[6] But when prosperity came he allowed him-

[1] Campbell, Chancellors iii 586 says—"His summing up in the Lady Ivy's case (1684) 10 S.T. 555 . . . is most masterly. The evidence was exceedingly complicated, and he gives a beautiful sketch of the whole, both documentary and parol."

[2] Lives of the Norths i 284-286.

[3] Burnet, History of My Time (Airy's ed.) Pt. I. vol ii 395, says "he was scandalously vicious, and was drunk every day; besides a drunkenness of fury in his temper, that looked like enthusiasm. He did not consider the decencies of his post, nor did he so much (as) affect to seem impartial . . .; but run out upon all occasions into declamations that did not become the bar, much less the Bench;" to this Onslow appends a note to the effect that Sir J. Jekyll, M.R., said that he "made a great chancellor in the business of that Court. In mere private matters he was thought an able and an upright judge wherever he sat;" but, as Onslow justly remarks, when the crown or his party were concerned, his behaviour was generally as described by Burnet; Roger North's testimony agrees; he says, Lives of the Norths i 288, "When he was in temper, and matters of indifference came before him, he became his seat of justice better than any other I ever saw in his place;" but, "No one that had any expectations from him was safe from his public contempt and derision. Those above or those that could hurt or benefit him, and none else, might depend on fair quarter at his hands;" and, "He seemed to lay nothing of his business to heart nor care what he did or left undone; and spent in the Chancery Court what time he thought fit to spare. Many times on days of causes at his house, the company have waited five hours in a morning, and after eleven, he hath come out inflamed and staring like one distracted. And that visage he put on when he animadverted on such as he took offence at, which made him a terror to real offenders; whom also he terrified with his face and voice, as if the thunder of the day of judgment broke over their heads;" cp. Foss, Judges vii 237-238.

[4] Ibid vii 228-229.

[5] Lives of the Norths iii 97.

[6] Foss, Judges vii 242—he saved Sir W. Clayton, who had helped him to preferment in the City of London, from being hanged; "and even when in the midst of his bloodiest commission, he listened with calmness to the remonstrances of a clergyman of Taunton against his proceedings, and . . . presented him on his return to London to a canonry in Bristol Cathedral."

self more and more licence. "He hath," wrote Charles Hatton in 1679, "the three chief qualifications of a lawyer: Boldness, Boldness, Boldness."[1] His manners grew more overbearing and his behaviour more coarse. Occasionally, indeed, he was made to suffer for his behaviour. When at the bar he was publicly rebuked by baron Weston,[2] and when chief justice he was obliged to apologize to the justices of Middlesex.[3] But generally his licence was unrestrained; with the result that he was more universally hated than any judge before or since, both by the public at large, and by his fellow lawyers, whom he delighted to hold up to ridicule both in[4] and out[5] of court.

Throughout his life he cared only for his own advancement, and was wholly unscrupulous as to the means by which it was secured. His first preferments came from the City of London, where he filled the posts of common serjeant (1671), and recorder (1678). But the City was Whig; and he soon saw that the easiest path of advance was through the royal favour. He made friends with the notorious Chiffinch;[6] the Crown soon found him useful; and he earned the censure of Parliament in 1680. Through the influence of the Duchess of Portsmouth, he was made chief justice of Chester in the same year, in which post he began to show the qualities which have made his name infamous.[7]

After the dissolution of the Oxford Parliament his fortune was made. A man of his parts was exactly the man required to manage the various trials which arose out of the Ryehouse Plot; and, after Monmouth's rebellion, he was exactly fitted to put in force the policy of "Frightfulness" upon which James was resolved. Even before Charles's death his boldness and ready wit had enabled him to undermine the influence of North; and, as a reward for his services in the western counties, he was made lord chancellor.[8] As lord chancellor he was absolutely unscrupulous

[1] Hatton Correspondence (C.S.) i 199.

[2] Foss, Judges vii 191.

[3] Memoirs of Sir John Reresby 294-295.

[4] "Scarce a day passed that he did not chide some one or other of the bar when he sat in Chancery; and it was commonly a lecture of a quarter of an hour long," Lives of the Norths i 288.

[5] Reresby tells us, Memoirs 355, that, after a dinner with Jeffreys on Jan. 18, 1686, "the Chancellor, having drunk smartly at the table (which was his custom) called for one Montfort, a gentleman of his that had been a comedian . . . and made him give us a cause, that is, plead before him in a feigned action, when he acted all the principal lawyers of the age, in their tone of voice, and action or gesture of body; and thus ridiculed not only the lawyers, but the law itself;" Evelyn, Diary, Oct. 31, 1685, pronounced him to be "of nature cruel and a slave of the Court."

[6] Lives of the Norths i 273-274.

[7] Foss, Judges vii 231-232; see Hist. MSS. Com. 14th Rep. App. Pt. vi 308 for an account of the Earl of Pembroke's Amendment of Records Bill (1693), in which it is alleged that he amended records in order to favour his own interests.

[8] Bramston, Autobiography (C.S.) 207—"At the tyme when the Lord Keeper North dyed, the Judges were in the West . . . executing Commissions of Oyer and Terminer, tryinge the rebells; and his Majestie, designinge the Lord Jefferies to

in his appointments to the Bench. Even before he was chancellor, he had induced Charles to appoint Robert Wright to a judgeship in the King's Bench, in spite of the fact that he was guilty of perjury and fraud.[1] Naturally he raised no objection to the manner in which James II. appointed and dismissed judges merely to serve his political ends, with the result that, by his own confession, the bench was never more degraded.[2] His elevation, by diminishing the necessity for self-control, changed his manners, if any thing, for the worse. Reresby relates that in February, 1686, "My Lord Chancellor had like to have died of a fit of the stone which he brought upon himself by a great debauch of wine at alderman Duncomb's where he and My lord Treasurer, with others, drank to that height that t'was whispered that they stripped into their shirts, and had not an accident prevented, would have got upon a signpost to drink the King's health."[3] Though he was still as keen as ever to discover abuses;[4] though his strong common sense, and the nebulous condition of many of the doctrines of equity, enabled him to dispense a certain measure of justice, both counsel and suitors continued to suffer under his tongue.[5] When the crash came, it was this failing that led to his discovery and hastened his end. He had so frightened a scrivener of Wapping, who was a suitor before him in the court of Chancery, that the man recognized him through his disguise, and set the mob on him. He was with difficulty rescued from their clutches, and died shortly afterwards in the Tower.[6]

Secondly, we have the type of chancellors—represented in this period by North and Somers—who were both politicians and good lawyers.

To the Whig historians of the last century it would have seemed almost sacrilegious to put these two men into one category; and yet North, though not so big a man as Somers, though neither

succeed the Keeper, caused several instruments and charters to be sealed in his presence, and kept the seale untill the business was over there, and on the 27 day of September, 1685, delivered the seale to the Lord Jefferies; . . . and on the 3rd of October I was at Windsor, and did see all the Westerne judges come together to the Kinge, and kissed his hand and had his Majesties Thancks;" this seems to bear out Jeffreys' assertion that he had acted on this commission by the king's express commands, Foss, Judges vii 236.

[1] Lives of the Norths i 324-327.

[2] Clarendon relates in his diary (ii 179) that on one occasion Jeffreys had said that most of the judges were rogues; and on another (ii 185) he called the judges a Thousand Fools and Knaves and said that Chief Justice Wright was a beast.

[3] Memoirs 357.

[4] "The lord chancellour hath fell foul upon several practices in the chancery; he committed a register, two or three clerks in chancery, and a lawyer or two, to the Fleet, and suspended a master in chancery from his place," Luttrell's Diary i 363.

[5] Above 528 n. 3, 529 n. 4.

[6] Lives of the Norths i 289-290; Luttrell i 486; Bramston's Autobiography (C.S.) 339.

so skilful nor so successful a politician, was, with the exception of Nottingham, perhaps the most enlightened of the Tories, just as Somers was amongst the most far sighted of the Whigs. Moreover, from the point of view of the history of equity, they stand very much upon the same plane. Neither can be said to have done anything considerable for the organization or procedure of the court; and it is not clear that either contributed very materially to the advancement of the system of equity. Both were sound lawyers and good judges. Both had intellectual interests outside the law.[1] Both were interested in the collection of historical records.[2] Both were firmly and honestly convinced of the truth of their political creeds.

North[3] is perhaps more intimately known to us than any of the other lawyers of this period. He was the hero of his brother Roger, who, by writing his biography, has erected to his memory an imperishable monument. We cannot indeed accept as literally true the almost faultless character which he has pictured for us. But Evelyn described him as "a most knowing, learned, and ingenious man, and besides an excellent person, of ingenious and sweet disposition, very skilful in music, painting, the new philosophy, and political studies."[4] It is, I think, safe to say that there is a good deal more truth in the picture which his brother has drawn, than in the pictures drawn by his political opponents in the seventeenth and in the nineteenth centuries. His rise in his profession was due largely to his industry and capacity, but more especially to the happy chance that he was a convinced Tory of a moderate type, at a time when an able lawyer, who was also a Tory, was a phenomenon rarely seen.

The great constitutional lawyers of the earlier part of the seventeenth century had been, for the most part, on the side of the Parliament;[5] and in the latter part of this century most of the ablest lawyers of the day were on the same side.[6] North, though justly diffident as to his capacity as a courtier and a politician,[7] was a really learned lawyer, well versed in constitutional law and

[1] For North see Lives of the Norths i 373-374, 383-393, 434; for Somers see Foss, Judges vii 362-363—he was president of the Royal Society 1698-1703, and was a friend of Newton, Locke, Addison, and Bayle.

[2] For North see below 532; for Somers see Foss, Judges vii 363—he collected 60 quarto vols. of MSS., most of which were destroyed by fire in 1752, and many tracts, a selection of which were published as the Somers' Tracts in 1795 and 1809.

[3] North's Life in the Lives of the Norths is the primary authority; see also Dict. Nat. Biog.; and Foss, Judges vii 260-270.

[4] Diary Jan. 23rd, 1683.

[5] Vol. v 402-412, 421-422, 435-436.

[6] Above 502.

[7] Lives of the Norths i 118—"Nothing was difficult but his attendance upon and dealing with the court. His modesty, and diffidence, and infinite cares not to slip or commit any absurdities in that captious nation made him uneasy sleeping and waking;" below 533-535.

history. His researches had led him to see, what most historians admit to-day, that medieval precedents were not by any means conclusively in favour of all the claims of Parliament.[1] As soon as he had sufficient leisure, he made a more extensive study of records; and had transcripts made for him with a view to the composition of a history of Parliaments.[2] This study only confirmed him in the belief that "a public view of all the records of state and parliament would be for the advantage of the monarchy."[3] We may call this political bias if we please; but it is at least arguable that it is evidence of considerable historical insight.

From the time when he made his name by arguing before the House of Lords against the writ of error in the case of Holles, his rise had been rapid.[4] He had been made solicitor-general in 1671, and attorney-general in 1673. In 1674, on the death of Vaughan, he was made chief justice of the Common Pleas. As chief justice he was active in reforming the abuses of the court, and in restoring its jurisdiction, which had been much encroached upon by the court of King's Bench.[5] He countered the "latitats" and "ac etiams" of the King's Bench by fitting up the writ of quare clausum fregit with a similar "ac etiam."[6] He was also an advocate of reforms in the law. We have seen that he had a hand in drafting the Statute of Frauds;[7] and he was in favour of establishing a register of titles to land[8]—a proposal which, ever since the Commonwealth period, had excited attention.[9] He was always tenacious of his

[1] Lives of the Norths i 353-355. [2] Ibid 354.

[3] "He found that the factious lawyers . . . were very busy in ferreting the musty old repositories, with design to produce in parliament what they thought fit, to the prejudice of the crown and its just prerogatives. And they accordingly did so; for they conferred with the bell-wethers of the party in the House of Commons, and frequently alleged passages in the records of Parliament and certain exotic cases, extracted chiefly from those in irregular times, when the crown had been distressed and imposed upon; and done not only partially but often untruly, and always defective. By which means they sustained their antimonarchic insinuations and pamphlets. The other party were not so well able to deal with them at these weapons, because they were not so industrious. His Lordship . . . was clearly of opinion that a public view of all the records of state and Parliament would be for the advantage of the monarchy; for what these gentlemen produced was partial and misstated; and the same set entirely in open view, would have another tenor and effect. Therefore he was clearly of opinion that the whole should be made public in print," ibid 354-355.

[4] Ibid 49, 50. [5] Ibid 128-132, 135-137.

[6] Ibid 128-130; vol. i 200, 221-222.

[7] Above 381-384; Lives of the Norths i 141.

[8] Ibid 141-142; North tells us, ibid 142, that, after his brother's death, "he found among his papers several drafts of Acts of Parliament which he had prepared to put forward as opportunity offered."

[9] The House of Commons were considering a Bill on this subject in 1677-1678, Marvel's Works ii 579; another bill was before the House in 1685; this bill, Roger North tells us, was open to objections, but he favoured the principle, and prepared another bill to give effect to it; but it fell through because "it had been insinuated that the king must name the officers who would be popishly affected at heart and so the Papists would have an account of all the estates in England," Lives of the Norths iii 186-187; another bill on this subject was considered by the House of Commons in

personal dignity, as he showed by the manner in which he asserted his right, when made king's counsel, to be called to the bench of his Inn;[1] and, as we have seen, he dealt very effectually with the serjeants, who engineered a strike to protest against some favours which he had shown to his brother.[2] In legal ability he was more than a match for the counsel who practised before him;[3] nor is there any evidence that his brother's account of his careful and expeditious manner of trying cases[4] is incorrect. In the witch trials with which he was concerned he showed an enlightenment beyond that of many of his contemporaries.[5]

As a politician, and as a judge in political cases, he was less successful. He was not indeed afraid to assume responsibility for measures which he considered lawful and necessary. Thus in 1679 he took the responsibility for the issue of a proclamation against tumultuous petitions, for which, in the following year, Parliament ordered him to be impeached.[6] But he was timid in the face of political passion; and this timidity made him a bad judge in political cases. Like many other stronger men than himself, he was swept off his feet by the Popish Plot. It is true that he did not play a conspicuous part in the cases which he assisted to try as commissioner of oyer and terminer.[7] But his brother's assertion that, from the first, he disbelieved in the plot,[8] is contradicted by North's own statement, reported by his brother, to the effect that "the plot was as clear as the sun," and by the evidence of the reported trials.[9] After the dissolution of the Oxford Parliament, the tide turned against the Whigs; and the series of trials against Whig plotters began with the trial of Colledge at Oxford in 1681.[10] At this trial North showed great unfairness to the prisoner, firstly by allowing the papers he had prepared for his defence to be examined by the prosecution, and refusing to allow all of them to be restored;[11] and secondly by

1697, Luttrell's Diary iv 279-280; the scheme was advocated by Sir W. Petty, Economic Writings (Ed. Hull) i 26, 264-265; see also a letter to Williamson in 1675-1676, S.P. Dom. 1675-1676 384; and a pamphlet in its favour by N. Philpot (1671) Harl. Miscell. iii 316, and another by W. Pierrepoint on the opposite side, ibid 330; for Hales' views on this question see below 594 and n. 2.

[1] Above 479-480. [2] Above 478.

[3] Lives of the Norths i 146.

[4] Ibid 144-147. [5] Ibid 166-169.

[6] Examen 551, 554; Lives of the Norths i 229, 230.

[7] Ibid 201. [8] Ibid 201.

[9] "In the rest of the trials, as they are printed, his lordship scarce spoke, but Chief Justice Scroggs led the van. I find in one of them his lordship took occasion to say 'As for the plot that is as clear as the sun': *which shining irony might have been spared*," ibid 203; as Mr. John Pollock justly says, The Popish Plot 307 n. 2, the statement that North never believed in the Popish Plot "is belied by every action and word of his on the Bench."

[10] 8 S.T. 550.

[11] As Stephen points out, H.C.L. i 406, the counsel for the crown were thus "enabled to manage their case accordingly, not calling certain witnesses whom Colledge

making no attempt in his summing up to state the prisoner's case fairly to the jury.[1] It is fortunate for his reputation that, on Nottingham's death in the following year, his appointment to the post of lord keeper relieved him from the necessity of trying such cases. In 1683 he was raised to the peerage with the title of Baron Guildford.

His appointment was expected. Nottingham had always thought highly of him. He had recommended him for the post of attorney-general,[2] and obviously wished that he should succeed him.[3] Moreover he was well fitted for the judicial duties of the office. Whilst at the bar he had had a considerable Chancery practice.[4] He was very sensible of the need for reforms in the organization and procedure of the court;[5] and he effected some changes designed to prevent delays in its procedure.[6] But, during his short tenure of office, he failed to accomplish much, partly because he feared to offend the officers of the court,[7] and partly because his hold upon office soon became very precarious.

We have seen that, while attorney-general, he was justly distrustful of his abilities as a courtier and a politician;[8] and we have seen that, as chief justice, he had shown himself to be a timid politician.[9] It was a bad time for a man of this kind. The triumph of the Court had caused the proposal of measures which he foresaw would produce a Whig reaction.[10] Jeffreys, who stuck at nothing which could secure his own advancement, made himself the mouthpiece of the party which favoured these measures, and rapidly undermined North's influence. The extent to which Jeffreys had succeeded in supplanting him was shown by the fact that he secured a judicial appointment for the infamous Robert Wright in spite of North's opposition.[11] North continued to hold office after the death of Charles II.; but, as his brother says, "he was not relied upon in anything, but was truly a seal keeper rather than a

contradicted or cross-examined"; as he says the whole episode, "was one of the most wholly inexcusable transactions that ever occurred in an English Court."

[1] H.C.L. i 407.
[2] Lives of the Norths i 116.
[3] Ibid 242, 252.
[4] Ibid 117, 257.
[5] Ibid 258, 259.
[6] Ibid 260, 261, 262-264.
[7] "In all his designs he showed no disposition to retrench officers or the just profits of their places," ibid 264; apparently he had the same consideration for the profits of his own place—after deliberation he continued the practice of selling the office of master, ibid 297-298.
[8] Above 531.
[9] Above 206.
[10] "Not only the Papists but vain projectors of change and flatterers of power, esteeming the king's authority then safe and inexpugnable, began a new game by endeavouring to bring the king off from the sound measures of his faithful ministry," Lives of the Norths i 319.
[11] Ibid 324-327—North told Charles II. that he knew personally that Wright was "a dunce and no lawyer; not worth a groat, having spent his estate by debauched living; of no truth or honesty, but guilty of wilful perjury to gain the borrowing of a sum of money."

minister of state."[1] He desired to resign;[2] and his resignation would probably soon have been accepted. But vexation at his treatment, and apprehension of the consequences of the policy which the Court was pursuing,[3] hastened his end. He died in 1685. His character was not strong enough to make him a successful politician at such a period. But he gave wise counsel; and it is safe to say that if, after the dissolution of the Oxford Parliament and the defeat of the Whigs, the Stuarts had accepted his counsels, there would have been no Revolution in 1688.

It is not surprising that Addison at the beginning of the eighteenth century,[4] and the Whig historians of the nineteenth century, pictured Somers as the embodiment of the perfect Whig. He stood for exactly the set of principles which triumphed at the Revolution; and his whole career, with the possible exception of his conduct in sealing the Partition Treaties, was in accordance with the straightest canons of that old Whig orthodoxy,[5] to which Burke appealed against the charges made against him by the new Whigs who favoured the French Revolution.

Somers was called to the bar in 1676;[6] and he soon acquired a comfortable practice. Four political tracts which he published in 1681,[7] and the debate in the Temple, in the same year, on the question of sending up an address of thanks to the king for dissolving the Oxford Parliament, shows that he had identified himself with the Whig party.[8] He made his name as a barrister and as a Whig by his short concluding speech for the defence in the trial of the Seven Bishops. The terse and effective manner in which he presented their case—well known from Macaulay's description—showed that he was not only a master of legal principles, but also a master of the art of presenting them in a lucid form.[9] He took

[1] Lives of the Norths i 355; for illustrations of the way in which his advice was put aside, and he himself slighted see ibid 334, 338.

[2] Ibid 346.

[3] North says that his brother warned James II. of the consequences of this policy, ibid 358-359; and, if his report of his advice is correct, it was prophetic.

[4] The Freeholder no. 39.

[5] "His character was uniform and consistent with itself, and his whole conduct of a piece," Addison, op. cit.; "The Lord Somers may very deservedly be reputed the head and oracle of that party . . . he has constantly, and with great steadiness, cultivated those principles under which he grew," Swift, History of the Last Years of the Queen.

[6] For some account of his early life, and the conditions under which he lived with his aunt at White Ladies, see Cooksey's Essay on the Life and Character of Lord Somers; see generally Foss, Judges vii 348-363; Dict. Nat. Biog.; Life by H. Roscoe in Eminent British Lawyers.

[7] The case of Denzil Onslow, Esq., touching his election at Haslemere, Somers' Tracts viii 270; A brief history of the succession of the Crown of England; A just and modest vindication of the proceedings of the two last Parliaments; The Security of Englishmen's Lives, or the trust, power, and duty of the grand juries of England.

[8] Luttrell, Diary i 99-100—"the addressers called out for Mr. Montague to take the chair; those against it called for Mr. Somers."

[9] (1688) 12 S.T. at pp. 396-397.

some part in framing the Bill of Rights;[1] and was made by William first solicitor and then attorney-general. In 1693 he became lord keeper. He was driven out of office in 1700 by the attacks of his political opponents, who then had the majority in Parliament. In the following year he was impeached, chiefly for his conduct in relation to the Partition Treaties;[2] but, as the Commons did not appear to support their accusations, the impeachment was dismissed. The recognition of the Pretender's title to the throne produced a Whig reaction, and Somers might have returned to power if William had lived. But William's death confirmed the Tories in power for some years longer; and Somers remained without office. But he promoted legal reforms,[3] helped to secure the passing of the Regency Bill which was designed to facilitate the Hanoverian succession,[4] and took an active part in carrying the Act of Union with Scotland. From 1708-1710 he was Lord President of the Council; and, on the accession of George I., he became a member of the Cabinet without office. He died in 1716.

Of his ability as a lawyer there can be no question. Both the Acts which he promoted for the reform of the law, and the universal opinion of contemporary lawyers, are conclusive. Unfortunately, we have only one trustworthy specimen of his powers as a judge—the famous judgment in the *Bankers' Case*.[5] It is the most elaborate judgment ever delivered in Westminster Hall, being in fact an historical treatise on the obscure topic of the legal remedies available against the Crown. It is perhaps arguable that Somers, following the prevailing habit of his own day and of many days to come, gave too definite a meaning to mediæval precedents, and was too quick to see, in the miscellaneous petitions of an earlier age, the petition of right of his own day.[6] However that may be, it can hardly be denied that his efforts have been of permanent service to the continuous development of this branch of the law. It is due to them that the law acquired one clear and authoritative precedent in favour of taking a large view of the scope of the petition of right, without which it would have been much more difficult for the judges of the nineteenth century to make of it a remedy in some measure adequate to the needs of the modern state.[7] Somers also was present when the

[1] Above 230-231.

[2] He was also charged with obtaining grants for his own benefit, with aiding and abetting the piratical exploits of Captain Kidd, and with mal-administration in his court, see 14 S.T. 234.

[3] Those, for instance, which were enacted by 4 Anne c. 16.

[4] 4 Anne c. 8.

[5] (1700) 14 S.T. 1.

[6] Clode, Petition of Right 120-131; cp. Robertson, Civil Proceedings by and against the Crown 338-339; see Pt. II. c. 6 § 1.

[7] The reasoning of Somers in the Bankers' Case helped the court to come to the conclusion in Thomas v. the Queen (1874) L.R. 10 Q.B. 31 that a petition of right

House of Lords reversed the decision of the Court of Queen's Bench in 1703-1704 in the case of *Ashby* v. *White*,[1] and upheld the correct view contained in Holt's dissenting judgment. As chancellor he asserted his right to nominate the judges—a right which had been assumed both by James II.,[2] and exercised by William III. while the great seal had been in commission;[3] and he issued a few short orders as to procedure.[4] But there are no very full reports of the cases which he decided; and we cannot gather from these cases that he left any very great mark on the development of equity. It is rather as a constitutional lawyer, a statesman, and a man of letters, than as a great chancellor, that he lives in history.

Thirdly, we have the type of chancellor, represented by the two lord keepers Bridgman and Nathan Wright, who owed their appointments to a lucky accident.

Bridgman[5] succeeded Clarendon in 1667, and held the seal as keeper till he was superseded by Shaftesbury in 1672. He had made his name as a conveyancer during the Commonwealth period; and his book of precedents in conveyancing, which was published after his death, passed through many editions.[6] At the Restoration he was made, first, chief baron of the Exchequer, in which capacity he presided at the trial of the Regicides, and a few months later chief justice of the Common Pleas. As chief justice he won applause. He impressed Pepys, who saw him at a meeting of the Council, as "a mighty able man";[7] Lord Nottingham spoke of him as "eminent both for learning and integrity;[8] and we shall see that he performed one considerable service to legal doctrine by his important contribution as counsel, conveyancer, and judge to the establishment of the modern rule against perpetuities.[9] As chancellor he appears

lay for breach of contract; as Robertson, loc. cit. says, "if the decision had been to the contrary, clearly a remedy for such cases must have been made by legislation, as it would be outrageous that the subject should have no means of redress where there had been a breach of contract by the Crown or a Government Department."

[1] 14 S.T. 695; Lords' Journals xvii 369; see ibid 527-534 for a statement of the Lords' reasons; above 271.

[2] Bramston's autobiography (C.S.) 207.

[3] Foss, Judges vii 387; in his letter to the king Somers said, "The lawyers being spread over every part of the kingdom, and having a great influence among the people, the method used to unite them in their service to the Crown, had been obliging them to a dependence upon the Great Seal for their promotion where they merited. This has always given a weight to that office in public affairs, and, if I understand your majesty right, the making the Great Seal thus considerable was one of the effects you expected from placing it in a single hand," cited Campbell, Chancellors iv 120.

[4] Sanders, Chancery Orders 397, 401-406, 408-410, 411-412, 414.

[5] Foss, Judges vii 59-64.

[6] Below 605.

[7] Diary vii 98.

[8] Howard v. Duke of Norfolk (1681) 2 Swanst. at p. 468.

[9] Pt. II. c. 1 § 6.

to have taken some interest in foreign politics.[1] It would seem that his appointment was popular, and that great things were expected from him.[2] But these expectations were not realized. Since his mind was that of a lawyer of a somewhat strict and technical type,[3] it was not likely that he would make a good administrator of equity. He hardly seemed to understand what equity was, says Burnet,[4] with the result that he could never come to a conclusion. "In his time the Court of Chancery ran out of order into delays and endless motions in causes."[5] As we have seen, the new political necessities of the day caused his removal.[6] Both in religion and politics he belonged to much the same school as Clarendon. The scruples of such men were irksome alike to the king and to the new opposition which was growing up in Parliament. Somewhat to his own surprise he was dismissed with a pension in 1672.[7]

Wright[8] was called to the bar in 1677. He was junior counsel for the prosecution in the case of the Seven Bishops; and acquired a considerable practice in William III.'s reign. After the dismissal of Somers in 1700, in consequence of the advent of the Tories to power, it was found to be difficult to induce any lawyer to take the seals. The chief justices declined to give up their positions for so insecure an office; and so, after a short interval, in which the seal was in commission, it was given to Wright, who held it till 1705. Though it is said that he had a manual of the practice and rules of the Court composed for him,[9] he never made himself really competent to perform his judicial duties in the court of Chancery. As under Bridgman, business got into arrear; and though there is no reason to suppose that his administration of justice was not pure, there were rumours that he accepted money for the disposal of offices and livings. In 1705 the Whigs were gaining ground; and, as Wright was despised even by his own party, his fall was inevitable.

[1] See his letters to Williamson in S.P. Dom. 1667-1668 494, 500, 503-504.

[2] Foxcroft, Life of Halifax i 54.

[3] An illustration of this is the well-known tale told by North, Lives of the Norths i 126, that he objected to a small alteration in Westminster Hall, which would have moved the court of Common Pleas out of the draught of the door, because Magna Carta having said that it must be held in certo loco, to move it at all would be illegal, "and all the pleas would be coram non judice"—which, says North, makes me think of Erasmus's saying that the lawyers were doctissimum genus indoctissimorum hominum.

[4] History of My Own Time Pt. I. vol. i 454.

[5] North, op. cit. 115; at p. 259 he says—"The Lord Bridgman, who was a very good common law judge, made a very bad chancellor. For his timidious manner of creating and judging abundance of points some on one side and some on another, and, if possible, contriving that each should have a competent share, made work for registers, solicitors, and counsel who dressed up cases to fit his humour.

[6] Above 525-526.

[7] Hatton Correspondence (C.S.) 101.

[8] Foss, Judges vii 408-412.

[9] Campbell, Chancellors iv 244.

Lastly, I must give some account of the one really great chancellor of this period—Heneage Finch, earl of Nottingham.[1]

Of the family of Finches and their legal eminence I have already spoken.[2] We have seen that the future earl of Nottingham was the grandson of Sir Moyle Finch, and the son of Heneage Finch, the recorder of London in 1621 and the Speaker in Charles I.'s first Parliament. He was born in December, 1621, and was called to the bar by the Inner Temple in 1645. He got into a good practice under the Commonwealth, and soon acquired a reputation both as a lawyer[3] and as an orator.[4] At the Restoration he was made solicitor-general, and conducted the trials of the Regicides. In 1661 he was made Treasurer and Reader of his Inn, and the king was present at his Reader's feast. In 1670 he became attorney-general, and in 1673 lord keeper. In 1675 he was made lord chancellor, and in 1681 earl of Nottingham. He died in 1682.

As a politician, Finch belonged to that school of learned lawyers of the royalist type, to which his friend and protegé North belonged. He believed in an extensive royal prerogative; and he was not prepared to allow a very extensive liberty to the subject, if that liberty seemed to fetter unduly the free action of the executive government. In *Jenkes' Case*[5]—the case which contributed materially to the passing of the Habeas Corpus Act of 1679[6]—he held that the Chancery could not issue the writ in vacation.[7] In the debate in the House of Commons in 1673 on the king's Declaration of Indulgence, he maintained the king's right to suspend statutes;[8] but in this very debate we can see the difficulties in which the king's supporters were placed by the conflict between their constitutional and their religious opinions. Finch was a strong churchman; and, when he became chancellor, showed himself specially careful in the exercise of his ecclesiastical patronage.[9] Though, on this occasion, he defended the king's right to issue a Declaration of Indulgence, he concluded his defence with the motion that the king should be petitioned not to exercise

[1] Foss, Judges vii 87-97; Dict. Nat. Biog.

[2] Vol. v 343-344.

[3] Roger North notes that his brother in 1657-1658, "contrived to stay in London to be present at famous pleadings, as particularly that of Heneage Finch," Lives of the Norths i 29.

[4] Ibid 198; Burnet, History of My Own Time Pt. I. vol. ii 42-43; and see the opinions of Evelyn and Pepys, cited Foss, Judges vii 89.

[5] (1676) 6 S.T. 1190; Crowley's Case (1818) 2 Swanst. at pp. 12-14.

[6] Pt. II. c. 6 § 3.

[7] See Crowley's Case where Lord Nottingham's MSS. are cited and his decision to this effect is overruled.

[8] Dict. Nat. Biog.

[9] Burnet, op. cit. ii 43; for his support of the non-resisting test, which would have shut out dissenters from the House of Commons, see ibid ii 62 and notes, 81.

it again.[1] In the controversies as to the extent of the appellate jurisdiction of the House of Lords, he maintained that the House had no right to hear appeals, either from the court of Chancery,[2] or from the ecclesiastical courts;[3] and that in both cases such appeals ought to be made to delegates appointed by the king. His views prevailed as to appeals from the ecclesiastical courts—Henry VIII.'s statute[4] was quite clear; but not as to appeals from the court of Chancery, although it is most probable that his opinion was right.[5] On the other hand, he could assert on occasion the rights and privileges of the House of Commons—in 1671 he upheld successfully their objections to the Lords' interference with their money bills;[6] and he refused to seal the pardon which Danby procured to shelter himself from impeachment.[7] In an age in which, only too frequently, judges displayed on the bench the prejudices of the political party which they favoured, Finch brought into politics something of the impartiality which should characterize the judge. Though he believed in the Popish Plot, he was conspicuous for his fairness when, as Lord High Steward, he presided at the trial of Lord Stafford.[8] He was almost the only politician of the period who retained, throughout his career, the confidence of both king and Parliament.

As a lawyer, he was distinguished by the fact that his technical mastery of English law had in no wise narrowed his intellectual outlook. He was the patron and friend of learned and literary men of many different shades of political opinion;[9] and he took a conspicuous part in the promotion of some of the legislative reforms of the period—while solicitor-general he introduced the bill for the abolition of the military tenures;[10] and as chancellor he drew and took a leading part in passing the Statute of Frauds.[11] The breadth of his intellectual outlook made him, not only an able lawyer and a distinguished judge, but also, if I may coin an expression, a legal statesman. He was a lawyer who had

[1] Dict. Nat. Biog.; in 1663 he was chairman of a committee which addressed the king to withdraw the Declaration of Indulgence which he had lately issued, ibid.

[2] Vol. i 374; Hale, Jurisdiction of the House of Lords, Hargrave's Pref. clii n. *n.*, citing the first chapter of Nottingham's Prolegomena; for this work see below 542-543.

[3] Vol. i 604; (1678) 2 Swanst. 326-330.

[4] Vol. i 375, 604.

[5] Ibid 374.

[6] Dict. Nat. Biog.

[7] Burnet, History of My Own Time (Airy's Ed.) ii 205-206; the king took the seal and sealed the pardon himself, and then gave it back to Nottingham, see Foss, Judges vii 94.

[8] See Foss, Judges vii 92; similarly Foss says that his conduct, as solicitor-general, of the trials of the Regicides was characterized by "exemplary fairness and judgment."

[9] Ibid vii 96-97; Burnet, History of the Reformation ii Pref. p. 4, acknowledges assistance both pecuniary and literary.

[10] Dict. Nat. Biog.

[11] Above 380-384.

mastered the technical learning of the law without being mastered by it; and a statesman who was in close touch with the political conditions and the intellectual ideas of his age. Hence he was able so to mould the technical development of scattered and nebulous equitable rules and conceptions, that they gained a precise meaning and a definite place in our legal system; and so to fashion their contents, that they harmonized with these political conditions and intellectual ideas. He was always anxious that his decisions should be not only technically sound, but also that they should commend themselves to the common sense of laymen at home or abroad;[1] and that, on questions of public law, they should harmonize with existing political conditions. It is because he was so keenly sensible to the necessity of thus harmonizing legal rules with the public opinion of the day, that, in so many of his decisions, familiar rules of modern law take for the first time their modern shape. This characteristic can be also illustrated from some of his rulings upon points of international or constitutional law, which came before him as chancellor. Thus, the rules which he laid down as to the effect to be given by English courts to a foreign judgment, and as to the recognition which these courts should give to rights conferred by foreign law,[2] contain the germs of some of the principles of our modern private international law. Similarly, he was one of the first, if not the first of English lawyers, to recognize clearly the distinction between the rights given to a state by treaty, which fall wholly outside the sphere of municipal law and municipal courts, and the rights conferred upon individuals by municipal law, with which municipal courts can deal.[3]

But it is in the sphere of equity that these powers were most conspicuously displayed, because equity had reached a stage of development at which it badly needed a legal statesman of this type. It is his work as a great equity judge that has given him his distinguished position in our legal history.

It is a happy accident that Lord Nottingham is the first of our great chancellors to leave some written memorials of his work. Of these I shall, in the first place, give some account. I shall

[1] Thus, even in considering such a question as the construction of a devise, he has an eye to the opinion of the laymen—"this kind of rigorous construction is against natural and universal justice, and would be laughed at in any other part of the world," Nurse v. Yerworth (1674) 3 Swanst. at p. 620.

[2] "It is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherever they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences," 2 Swanst. at p. 326.

[3] Blad v. Bamfield (1674) 3 Swanst. 605.

then say something of his qualities as a judge of the court of Chancery, of the nature of his contribution to the development of the principles of equity, and of the effects of his work upon the character of the equity administered by court of Chancery.

(i) *Lord Nottingham's writings.*

Lord Nottingham has left several MSS., but the only parts of these MSS. which have as yet been printed, are some selections from his reports of the cases which he decided as chancellor.[1] These selected cases were printed by Swanston, to illustrate the three volumes of Chancery reports which he published between 1821 and 1827; and, to any one who has read them, it is obvious that, both from the point of view of the modern law, and from the point of view of legal history, all these cases should be published. It is desirable from the point of view of the modern law, because the accounts of Lord Nottingham's decisions in the printed equity reports of the period are very inadequate;[2] and, as it may be necessary, even now, to go back to some of his decisions for a ruling upon a question of equity, it is clearly advisable that we should know what his opinion really was, and what were the reasons he gave for it. It is desirable from the point of view of legal history, because the legal historian cannot otherwise come to any certain conclusions as to the character of the man or the effect of his work.

The other MSS., no part of which has yet been printed, contain a treatise upon equity, and a treatise upon equity practice. Both Hargrave[3] and Lord Campbell[4] give us some account of a treatise upon the principles of equity styled "Prolegomena." But this treatise is not in the Hargrave MSS.; and presumably it is in the possession of the representative of Lord Nottingham. It would

[1] The reports begin from the time when he was made lord keeper to within a month and four or five days of his death, Hargrave, Pref. to Hale's Jurisdiction of the House of Lords clii n. *n.*

[2] See below 616-619 for the equity reports; we get some of Lord Nottingham's decisions in Vernon, Nelson, Freeman, Modern, Dickens, Reports of Cases in Chancery, Cases argued and discussed in Chancery; the set of reports devoted to his decisions—Reports tempore Finch—is very inadequate, below 617.

[3] Preface to Hale's Jurisdiction of the House of Lords cliii; it is also referred to by Sir W. Grant in the Bishop of Winchester v. Paine (1801) 11 Ves. at p. 200.

[4] Lives of the Chancellors (ed. 1846) iii 396; Lord Campbell says—"This, written in the piebald style then usual among lawyers, a mixture of bad Latin, bad French, and bad English,—contains under methodical divisions, all that was then known of equity, as contra-distinguished from common law. The reader may be amused with some of the titles: Cap. 6 "Equity versus purchasor ne sera." 7 "Equity relieves en plusors cases l'ou les printed livres deny it." 12 "Of trusts in general quid sint." 30 "De Anomilies." 31 "L'ou les juges del common ley, ont agreed to alter sans act de parlement, et l'ou nemy;" if this account is correct, it would seem that the "Prolegomena" is a common-place book of equity, and that the subject matter is arranged under titles, somewhat after the style of Equity Cases Abridged; for this work see below 619.

obviously be a most valuable historical document, as it would give an account of equity just at the time when it was beginning to assume its modern shape, written by the man who was mainly responsible for the shape which it was assuming. The treatise on equity practice is, Sir F. Pollock thinks, a draft prepared by the some officers of the court with a view to the issue of a revised code of rules.[1] The rules are critically annotated, probably by Lord Nottingham. If published it would shed some light upon the equity practice of this period; but clearly it would not be so historically valuable as the publication of the entire MSS. of the reports and of the Prolegomena, since it would not give us what we chiefly want, namely, some exact information as to the state of the development of the substantive rules of equity.

(ii) *His qualities as a judge of the court of Chancery.*

A very cursory reading of Lord Nottingham's decisions proves that he had all the qualities of a great judge. His analyses of complicated facts are masterly, both for their minuteness, and for the clearness with which the results of the analysis are stated.[2] He can enunciate a principle, and reason from it closely and logically; and this power enables him to distinguish between different principles, and to define the spheres of their application. Two very good illustrations of these qualities are to be found in the *Duke of Norfolk's Case*,[3] and the case of *Cook* v. *Fountain*.[4] In the first case he settled the true principle which should govern the law against remoteness of limitation; and, as we shall see,[5] this enabled him to enunciate a rule which not only settled what limitations were illegal because they infringed the rule, but also what limitations were permissible. In the second case he analysed the various kinds of trust; and, as we shall see,[6] his statements of the conditions under which the court should permit the existence of constructive trusts is in substance that adopted by our modern law. These powers enabled him to deal successfully with cases which involved the consideration of the limits of equitable interference with legal rules. A good illustration will be found in the case of *Nurse* v. *Yerworth*[7] in which he considers the manner in which equity should treat the legal doctrine of merger, and regulate the use of attendant terms.

[1] Sir F. Pollock tells me that a copy of this treatise, from the Hon. Henry Legge's copy, is in Lincoln's Inn Library; that it is among C. P. Cooper's collections; and that a note in C. P. Cooper's hand suggests that the original is "The autograph of Ld. Notts. which is supposed to be in the possession of the Earl of Winchelsea."

[2] See e.g. Salsbury v. Bagott (1677) 2 Swanst. 603; Cook v. Fountain (1672) 3 Swanst. 586.

[3] Howard v. Duke of Norfolk (1681) 2 Swanst. 454.

[4] (1672) 3 Swanst. 586.

[5] Pt. II. c. 1 § 6.

[6] Below 545, 627, 666.

[7] (1674) 3 Swanst. 608.

He sometimes found it necessary to draw fine distinctions. He reports a case in which he, Shaftesbury, and Bridgeman had all come to somewhat different conclusions;[1] and it was cases of this kind that gave some point to Roger North's gibe that he distinguished for the sake of distinguishing.[2] But, to judge from the reasoning of his own reports, it was only a second rate lawyer who could hold this opinion.[3] His distinctions are fine and technical, when the facts of the case and the existing rules of law and equity made fine and technical distinctions necessary; but they are always explained in the clearest language; and they are justified, not merely as the logical consequences of technical principles, but as being, in the circumstances, the rules most likely to do justice to the parties.[4] In fact, Nottingham, like all really great judges, never lost sight of the practical consequences of the rules which he laid down. With all his mastery of legal principle and power of analysis, he had a concrete mind. This led him to sift with the utmost patience the facts of the case before him, and, when reasoning upon the legal consequences of those facts, to keep them always in his mind.

The close touch which he maintained with the facts of the case helped him to enliven his judgments with picturesque or pithy phrases, which illumined the principle under discussion. "If a term be limited to one for life, with twenty several remainders for lives to other persons successively, who are all alive and in being, so that all the candles are lighted together, this is good enough;"[5] "Chancery mends no man's bargain, though it sometimes mends his assurance."[6] And his decisions were pronounced with the eloquence, which seems to have been an hereditary gift of the Finch family.[7] North indeed insinuates that his eloquence ran away with him,[8] and Burnet says that it was laboured and

[1] Parker v. Dee (1674) 3 Swanst. 550.

[2] "During his time the business, I cannot say the justice, of the court flourished exceedingly. For he was a formalist, and took pleasure in hearing and deciding; and gave way to all kinds of motions the counsel would offer; supposing that if he split the hair and with his gold scales determined reasonably on one side of the motion, justice was nicely done. Not imagining what torment the people endured who were drawn through the law, and there tossed in a blanket," Lives of the Norths i 259.

[3] Thus Wharton, True Briton no. 69, says, "he was a great refiner, but never made use of nice distinctions to prejudice truth."

[4] See e.g. Parker v. Dee (1678) 3 Swanst. 550.

[5] Howard v. Duke of Norfolk (1681) 2 Swanst. at p. 458; probably the metaphor of the candles originated with Twysden, J.; it was current at that time in the profession, see Pt. II. c. 1 § 6.

[6] Maynard v. Moseley (1676) 3 Swanst. at p. 655.

[7] Above 539; Pepys, Diary iv 126, wrote, after hearing Finch plead before the House of Lords, "I do really think that he is truly a man of as great eloquence as ever I heard, or ever hope to hear in all my life;" cp. ibid viii 302.

[8] "This instance we had in the Chancellor Nottingham, who had so great a talent in speaking and expression, that however exquisite his judgment otherwise was, it had not force to contain the other within bounds; but a handsome turn of expression

affected.[1] Possibly he may sometimes have applied to the exposition of a technical doctrine an amount of eloquence which seemed incongruous;[2] but North's and Burnet's insinuations are contradicted by all the contemporary evidence,[3] and indeed by the style in which the reports of his decisions are drawn up.

He was one of the few judges of this period whose extraordinary abilities impressed the laymen of his own day. Burnet cannot deny his eminence as a judge, though he cannot forbear to insinuate his distrust of his character and politics;[4] but the author of the second part of Dryden's Absalom and Achitophel points to the true cause of his greatness when he emphasizes his sincerity, his uprightness, his mastery of legal principles, and his eloquence.[5] Such a man could not but produce a great and lasting effect upon the doctrines administered by his court.

(iii) *His contribution to the development of the principles of equity.*

Of Lord Nottingham's work upon the doctrines of equity I shall speak when I describe the condition of equity at the close of this period.[6] Here it will be sufficient to enumerate some of the most important of the topics with which his decisions deal. The most important of all is the *Duke of Norfolk's Case*, in which he originated the modern rule against perpetuities.[7] Then we have *Cook* v. *Fountain*,[8] in which he classified trusts; *Grey* v. *Grey*,[9] in which the question of whether a purchase by a father in his son's name must, in the absence of evidence, be presumed to be a trust

must out whether material or not, which gave him the character of a trifler that he did not so much deserve," Lives of the Norths iii 198.

[1] History of My Own Time (Airy's Ed.) ii 43.

[2] Thus in Grey v. Grey (1677) 2 Swanst. at pp. 598-599, he says, "As land can never lineally ascend, so neither shall the trust of land lineally ascend, when it is left to the construction of law, for the reason . . . is not, as my Lord Coke says, from natural philosophy, *quia gravia deorsum*, but from moral philosophy *quia amor descendit non ascendit*, and from divinity, because fathers are bound to provide for their children."

[3] Above 539, 544.

[4] History of My Own Time (Airy's Ed.) ii 42-43—"He was a man of probity and well versed in the law: but very ill bred and both vain and haughty. . . . He thought he was bound to justify the court in all debates in the House of Lords, which he did with the vehemence of a pleader rather than with the solemnity of a senator. He was an incorrupt judge, and in his court could resist the strongest applications even from the king, though he did it nowhere else;" that "he did it nowhere else" is not true, as the episode of Danby's pardon shows, above 540.

[5] "Sincere was Omri, and not only knew,
But Israel's sanctions into practice drew,
Our laws, that did a boundless ocean seem,
Were coasted all, and fathom'd all by him.
No rabbin speaks, like him, with mystic sense,
So just, and with such charm of eloquence."

[6] Below 640-671.

[7] Howard v. Duke of Norfolk (1681) 2 Swanst. 454; Pt. II. c. 1 § 6.

[8] (1672) 3 Swanst. 585; below 643.

[9] (1677) 2 Swanst. 594; below 644.

for the father or an advancement to the son, was settled in favour of the latter view; *Salsbury* v. *Bagott*,[1] in which the doctrine of notice was explained; *Coulston* v. *Gardiner*[2] in which he discusses the effect of a sequestration upon purchasers of the property sequestered; *Nurse* v. *Yerworth*,[3] in which the equitable treatment of the legal doctrine of merger is discussed; *Thornborough* v. *Baker*,[4] in which it was decided that the executor, and not the heir of the mortgagee, is entitled to the money secured by the mortgage. In all these cases important doctrines of modern equity appeared in their modern shape. And Lord Nottingham was conscious that he was laying down the law for the future. In *Tabor* v. *Tabor*,[5] speaking of the doctrine laid down in *Thornborough* v. *Baker*, he says, "This has long been a controverted point, and was never fully settled till my time. . . . Therefore it is not fit to look too far backwards, or to give occasion for multiplying suits; for God forbid that men should search the register's files to find out how many decrees have been made for payment of mortgage money to the heir, and then stir up the executors or administrators to sue the heir for it again." As we shall now see, he was doing more than settle the doctrines of equity. He was also settling on a new basis the character of the equity which the court of Chancery was for the future to administer.

(iv) *The effect of his work upon the character of the equity administered by the court of Chancery.*

Throughout the seventeenth century, and especially since the Restoration, equity had been developing into a regular system. But the process had been proceeding so silently that lawyers still sometimes spoke of equity as if it depended on the conscience of the chancellor, in the same way as it depended upon his conscience in the earlier part of the sixteenth century.[6] And to some extent it still did depend on his conscience. Lord Nottingham, differing in the *Duke of Norfolk's Case* from the opinions of some of the judges, could say, "I must be saved by my own faith, and must not decree against my own conscience and reason;"[7] and that case showed that the elasticity still retained by equity, in consequence of the survival of the older ideas, sometimes gave a great chancellor

[1] (1677) 2 Swanst. 603; below 667.
[2] (1680-1681) 3 Swanst. 311.
[3] (1674) 3 Swanst. 608.
[4] (1675) 3 Swanst. 628.
[5] (1679) 3 Swanst. at p. 638.
[6] Vol. i 467-468; vol. v 336-338.
[7] The Duke of Norfolk's Case (1681) 3 Ch. Cases at p. 47; or as it is reported in 2 Swanst. at p. 457—"I am in a very great straight by the advice which hath been given me; for as on one side I may concur with the three Chief Justices, since, if I should err in so doing, I should err very excusably, because I should *errare cum patribus*, so on the other side, where the decree must be mine and I alone am to answer for it, I dare not (notwithstanding the reverence I have for their advice) pronounce a decree in any case where I cannot concur with it myself;" cp. Reports in Chancery, Pref.

larger opportunities of moulding the rules of his court to meet modern needs, than were open to the common law judges. In Hale's opinion a much slighter technical equipment fitted a man to practise in the Chancery than was necessary to enable him to practise in the common law courts.[1]

But the conventional language used about equity was becoming more and more untrue. Lord Nottingham said of Hale that, "He did look upon equity as a part of the common law, and one of the grounds of it; and therefore as near as could, he did always reduce it to certain rules and principles, that men might study it as a science, and not think the administration of it had anything arbitrary in it."[2] And he himself laid it down that, "With such a conscience as is only *naturalis et interna*, this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures; and it is infinitely better for the public that a trust security or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor."[3]

This change in the character of equity was a consequence of the change in the relations between law and equity which marked the latter part of the seventeenth century.[4] We have seen that the chancellors had often served as chief justices in the common law courts. We shall see that now, as in the past, there was no hard and fast separation between the Chancery and the common law bars.[5] Hence the ideas and modes of thought of the common law made themselves more and more felt in the court of Chancery. And, of all these ideas, the one which had the greatest effect in changing the character of equity was, as we shall see,[6] the final acceptance by the Chancery of the common law view as to the binding force of precedents. It was not, indeed, till the end of the eighteenth century that the doctrines of equity became completely fixed.[7] But it is in Lord Nottingham's time that the decisive step in this direction was taken; for it was he who first clearly defined the sort of conscience by which, in the future, the chancellor must guide himself; and it was the acceptance of this definition which made this development possible.

This summary of the career of Lord Nottingham, and of the various aspects of his work upon equity, shows us that he deserves

[1] Runnington in his Life of Hale (prefixed to Hale's History of the Common Law p. x) tells us that Hale is reported to have said, "A little law, a good tongue, and a good memory, would fit a man for the Chancery;" and cp. below 550 n. 6, 668-670.

[2] Burnet, Life and Death of Sir Matthew Hale 176.

[3] Cook v. Fountain (1672) 3 Swanst. at p. 600.

[4] On this matter see below 670.

[5] Vol. iv 271; vol. v 220-224; below 550-551.

[6] Below 614, 670-671.

[7] Vol. i 468-469.

a place by the side of such chancellors as Ellesmere and Bacon. His work was different from, and yet a continuation of theirs. They had organized and systematized the court of Chancery, its practice, and its procedure.[1] He began the work of organizing and systematizing the principles upon which the court acted; and, as a result of his work, equity began to assume its final form. His success was due partly to his own industry and genius,[2] partly to the fact that the time was ripe for the beginning of such a settlement.[3] The man and the opportunity happily coincided; and so, whether we look at his influence upon the principles of equity, or upon the character of equity itself, we must admit that he deserves his traditional title of the Father of Modern Equity.

We must now turn to the officials of the court of Chancery, and the Chancery Bar.

Amongst the officials of the court of Chancery there are but few notable names. The only two who call for notice are two masters of the Rolls—Sir Harbottle Grimston and Sir John Trevor.

They are curiously opposite characters. Grimston[4] belonged to the school of Parliamentary lawyers of the early part of the seventeenth century. He was a broad churchman with strong Protestant leanings,[5] and a supporter of constitutional monarchy.[6] His constitutional opinions were strengthened, and perhaps formed, by his marriage with the daughter of Sir George Croke, whose reports he translated and edited.[7] Like many other lawyers, he favoured the Restoration; and he served as Speaker in the Convention Parliament. In 1660 he was made master of the Rolls at the age of sixty-six, and held that office with credit for twenty-three years.[8] As a large number of the rules and orders of the court issued during that period bear his name as well as that of the chancellor, it is probable that succeeding chancellors found his experience useful. He was the patron and protector of Burnet,

[1] Vol. v 232-234, 236-238, 251-254.

[2] "He was endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity," Bl. Comm. iii 55.

[3] "The reason and necessities of mankind, arising from the great changes in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations," ibid.

[4] Foss, Judges vii 99-105.

[5] "He was much sharpened against popery, but had always a tenderness to dissenters," Burnet, History of My Own Time Pt. ii 77.

[6] "He was much troubled when preachers asserted a divine right of regal government," ibid 76.

[7] Vol. v 368-369.

[8] "He was a just judge; very slow, and ready to hear everything that was offered, without passion or partiality," Burnet, op. cit. 77.

whom he made the preacher at the Rolls. Charles tried to get Grimston to dismiss him;[1] but it was not till quite the end of his life (Dec., 1684) that an anti-catholic sermon, which Burnet preached at Grimston's request on the fifth of November, caused the king to take matters into his own hands and order his dismissal.[2] Grimston died in the succeeding January.

Trevor[3] was a courtier, a relation of Jeffreys, and his imitator in his political immorality and capacity for abusive speech. "He was bred," says North,[4] "a sort of clerk in old Arthur Trevor's chamber—an eminent and worthy professor of the law in the Inner Temple. A gentleman that visited Mr. Arthur Trevor at his going out, observed a strange looking boy in his clerk's seat (for no person ever had a worse squint than he had) and asked, who that youth was? "A kinsman of mine," said Arthur Trevor, that I have allowed to sit here to learn the knavish part of the law." It is clear, however, that he studied the law diligently and with success. He became Reader and Treasurer of his Inn in 1674-1675; and a member of Parliament in 1679 and 1681. He soon saw that he could best make his fortune by ingratiating himself with his kinsman Jeffreys. He was the only person who defended him in the Parliament of 1681; and he was soon rewarded. He became king's counsel in 1683, Speaker of James II.'s Parliament in 1685—an office in which he did not shine[5]—and master of the Rolls in the same year. Some said that, if James had reigned longer, he might have supplanted Jeffreys.[6] He ceased to be master of the Rolls at the Revolution; but, being a competent lawyer,[7] and an adept in all the arts of political corruption, he was soon after made a commissioner of the Great Seal, and Speaker.[8] But his skill in these arts was the cause of his retirement from political life. It was discovered that he had taken a bribe; and in 1695 he was obliged, as Speaker, to preside over the debate upon his own conduct, to put the motion that he was guilty of a high crime and misdemeanour, and to declare that "the ayes had it."[9] He was expelled the House, but was allowed to retain the mastership of the Rolls to which he had been reappointed in 1693—"to the great encouragement," says North, "of prudent bribery for ever after." But, though he still retained on the bench the brutal manners of the pre-Revolution

[1] Burnet, op. cit. Pt. ii 75.
[2] Ibid 441-442.
[3] Foss, Judges viii 64-71.
[4] Lives of the Norths i 286.
[5] Bramston, Autobiography (C.S.) 197-198.
[6] Lives of the Norths i 286—"He was advanced so far with him as to vilify and scold with him publicly in Whitehall."
[7] Foss, Judges viii 70.
[8] See the Spencer House Journals, printed by Foxcroft, Life of Halifax ii 228, 234, 236, and notes.
[9] Lives of the Norths i 287; Bramston, Autobiography (C.S.) 386-387.

days,[1] there is no evidence that he was a corrupt judge, and some evidence that his decisions were approved.[2] He retained his office till his death in 1717.

During this period a separate Chancery bar was beginning to spring up; and it is clear that the leaders made large incomes. The scale of fees seems to have been high;[3] and, to some extent, the bar profited from the long arrears of causes, and the frequent re-hearings of cases, which even then were becoming scandalous.[4] "I have heard," North tells us, "Sir John Churchill, a famous Chancery practiser, say, that in his walk from Lincoln's Inn down to the Temple Hall, where, in Lord Keeper Bridgman's time causes and motions out of term were heard, he had taken £28 with breviates, only for motions and defences for hastening and retarding hearings."[5] Also it would seem that, in the somewhat unformed condition in which the principles of equity still were, the Chancery barrister did not require so much learning as the barrister who practised before the common law courts;[6] and that the chancellor could materially affect, by his favour or disfavour, the reputation and the popularity of the counsel who practised before him. Roger North made his fortune at the Chancery bar while his brother was chancellor;[7] and, though he held the office of queen's attorney, the disfavour of Jeffreys caused his practice almost to disappear.[8] But, though a separate Chancery bar was growing up, it was never wholly separate from the common law bar. The leaders of the common law bar often appeared in Chancery, just as the chief justices sometimes became

[1] Foss, Judges viii 70.

[2] He was frequently, says Foss, appealed to as an authority by lord chancellor Harcourt.

[3] When Roger North first began to practice in Chancery he tells us that, "not being acquainted with such great fees as are ordinarily given, I was so silly at first to scruple them, lest they might be understood as bribes; but my fellow practisers' conversation soon cured me of that nicety," Lives of the Norths iii 167.

[4] "I must confess the beginning of my practise was very surprising, because the multitude of old and opulent causes came to be reheard, for *dernier* experiment. . . . And this brought in retainers and breviates extraordinarily thick, so that in one year I believe I was a clear gainer of above £4000, and the next year as much, but the third year less, because the business of the court was well dispatched," ibid iii 166.

[5] Ibid i 260.

[6] Evelyn, Diary, December 8, 1700, says, "The Chancery requiring so little skill in deep law learning, if the practiser can talk eloquently in that court"; and see above 547 n. 1 for a similar opinion expressed by Hale.

[7] "But it was an happiness to me, who took the station of his friend in the Court of Chancery, and was immediately filled with retainers, and came into capital business with great increase (indeed the opportunity of getting the small estate I am master of) in the time he sat in Chancery," Lives of the Norths iii 164.

[8] "I had a post of honour in the Court, Queen's Attorney, which would hold me above contempt, and in sequel I found my practice much better than I expected which continued tolerably well for divers years. At length he began to bear so hard upon me, that it declined so much as to be scarce worth my attendance," ibid iii 195.

chancellors. But with the effect of the growth of these links between the two jurisdictions upon the relations of law and equity, I cannot deal fully, until I have described the literature and the condition of law and equity at the close of this period.

III

The Literature of the Law

Some of the legal literature of this period has already been described—the leading works upon pleading,[1] the chief abridgments of the statutes,[2] the controversial books as to the relations between law and equity,[3] some of the books upon practice,[4] and the two reprints of the Register of Writs[5] and the Year Books[6] which have become the standard editions of those works. Here I shall deal with the rest of the printed legal literature of this period.[7] In the first place, I shall say something of the literature of the common law, and in the second place of the literature of equity. Lastly I shall say something of Roger North and his literary works. These works demand and deserve special treatment in a history of English law. They are literature, and not merely legal literature; and the greater part of them is devoted to a description of the legal life of the period by an acute and critical observer who had seen it on all its sides. There are many problems in our legal history which would be elucidated if every century had produced a Roger North.

The Literature of the Common Law

This literature falls under two heads: (1) the Reports; and (2) the Law Books.

(1) The Reports.

In the first place, I shall, as in the preceding period,[8] give in tabular form a list of the reports which contain cases decided during this period, and some of the most important facts concerning them. In the second place, I shall say something of the reporters themselves, and of the characteristics of their reports.

[1] Vol. v 385-387.
[2] Vol. iv 313; above 312-313.
[3] Above 516; vol. v 271.
[4] Vol. v 381-382.
[5] Vol. ii 513 n. 1; vol. v 380.
[6] Vol. ii 528-530.
[7] There are a good many MSS. of this period still unprinted; for instance, in Hist. MSS. Com. 7th Rep. App. Pt. i at p. 517 there is an account of some legal MSS. in the possession of G. H. Finch, Esq.
[8] Vol. v 358-363.

TABLE SHOWING THE REPORTS OF THE LATTER HALF OF THE SEVENTEENTH CENTURY.

Name.	Date of First Publication.	Date of Author.	Period over which Reports Extend.	Courts in which Cases are Reported.	By whom First Published and Edited.	Origin of MS.	Language in which First Published.
Sir Orlando Bridgman	1823	1606?-1674	1660-1667	C.P.	Bannister.	Author's MS. in the possession of Hargrave.	English.
Sir T. Raymond . .	1696	1627-1683	1653-1684	K.B., C.P., Exch.	Anonymous.	Author's MS.	English.
Levinz . . .	1702	1627-1701	1660-1697	K.B., C.P.	Anonymous. The 2nd Ed. of 1722 in French and English is by Salkeld.	Author's MS.	French.
Keble	1685	1632-1710	1661-1679	K.B.	The author.	Author's MS.	English.
J. Kelyng . . .	1708	Died 1671	1662-1669	K.B., Pleas of the Crown.	Holt, C.J., who, it is said, reported the last three cases in the volume.	Author's MS.	English.
Carter	1688	—	1664-1673	C.P.	The author.	Author's MS.	English.
Vaughan . . .	1677	1603-1674	1665-1674	C.P.	The reporter's son, Edward Vaughan.	Author's MS.	English.
Saunders . . .	1686	Died 1683	1666-1673	K.B.	Anonymous.	Author's MS.	French, with the Records in Latin.
T. Jones . . .	1695	Died 1692	1667-1685	K.B., C.P.	Anonymous.	Author's MS.	French.
Ventris . . .	1696	1645-1691	Pt. I. 1668-1684 „ II. 1669-1691	Pt. I. K.B. „ II. C.P., Ch.	Anonymous.	Author's MS.	English.
Pollexfen . . .	1702	1631-1691	1669-1685 and a few earlier cases.	K.B., C.P., Exch., Ch.	Anonymous.	Author's MS. revised and corrected by him.	English.

Freeman . . .	1742	Died 1710	1670-1704 and a few earlier.	K.B., C.P.	Thomas Dixon.	Author's MS.	English.
Shower, K.B. . .	Vol. i, 1708 ,, ii, 1720	1658-1701	1678-1695	K.B.	Anonymous.	Author's notes.	English.
Skinner . . .	1728	—	1681-1698	K.B.	The author's son, Matthew Skinner.	Author's MS.	English.
E. Lutwyche . .	1704	Died 1709	1682-1704	C.P.	The author.	Author's MS.	French, with Records in Latin.
Comberbach . .	1724	—	1685-1699	K.B. and two notes of Ch. cases.	Author's son, Roger Comberbach.	Author's MS.	English.
Carthew . . .	1728	1657-1704	1686-1701	K.B.	The author's son, Thomas Carthew.	Author's MS.	English.
Cases Tempore Holt .	1738	—	1688-1711	K.B., also some cases in C.P. and Exch. Chamber.	Jacob (?)	Various reports and MSS., some by Th. Farresly.	English.
Salkeld . . .	Vols. i and ii, 1717 Vol iii, 1743	1671-1715	1689-1712, and a few cases earlier and later than these dates.	K.B., C.P., Exch., Ch.	Vols. i and ii under the supervision of Ld. Hardwicke; vol. iii anonymous.	Author's MS.	English.
Shower, P.C. . .	1698	1658-1701	1694-1699	H. of L.	Anonymous but almost certainly by the author.	Author's MS.	English.
Lord Raymond . .	1743	1672-1733	1694-1732	K.B., C.P.,	Serjt. Wilson.	Notes taken or collected by the author.	English.
Fortescue . . .	1748	1670-1746	1695-1738	K.B., C.P., Exch., Ch.	Edited by the author.	Author's MS.	English.
Comyns . . .	1744	Died 1740	1695-1741	K.B., C.P., Exch., Ch. Delegates.	Published and translated by J. Comyns, the author's nephew.	Author's MS.	English.
Colles	1789	—	1697-1713	H. of L.	Colles.	Various sources.	English.

THE MODERN REPORTS.

Name.	Date of First Publication.	Period over which Reports Extend.	Courts in which Cases are Reported.	By whom First Published and Edited.	Language in which first Published.
A. The Separate Volumes of the Series.					
Vol. i, by Colquit or J. Washington . . .	1682	1669-1678	K.B., C.P., one case in Ch.	The author (?)	English.
Vol. ii, (?) J. Washington	1698	1674-1683	Chiefly C.P., also Exch. and K.B.	The author (?)	English.
Vol. iii, anonymous	1700	1682-1691	K.B., C.P., Exch., Ch.	Anonymous.	English.
Vol. iv, anonymous	1703	1691-1696	K.B.	Anonymous.	English.
Vol. v, Nelson	1711	1693-1700	K.B., C.P., Exch., Ch.	Nelson.	English.
Modern cases, incorporated with vol. vi, anonymous	1713	1703-1705	Q.B., C.P., Exch., Ch.	Anonymous.	English.
Modern cases, incorporated into vol. vii, Th. Farresley	1716	1733-1746	K.B., C.P., Exch., Ch.	Farresley.	English.
Modern cases in Law and Equity, incorporated with additions into vols. viii and ix, anonymous .	1730. Much improved Ed. 1769.	1722-1755	viii, K.B. ix, Ch.	Anonymous.	English.
Cases Tempore Macclesfield, incorporated into vol. x, Lucas	1736	1709-1721	K.B., C.P., Exch., Ch.	Lucas.	English.
Reports Tempore Queen Anne, incorporated into vol. xi, anonymous	1737. Improved Ed. 1781 with additions from the Lutwyche MSS.	1702-1710	Q.B., and a few cases in C.P.	Anonymous.	English.
Cases in the King's Bench Tempore King William III., incorporated into vol. xii, anonymous, but probably by a Judge, (?) Sir S. Eyre, or Sir R. Eyre, C.J.	1738	1690-1692	K.B.	Anonymous.	English.
B. The Collected Editions.					
6 Vols.	1741	1669-1703	K.B., C.P., Exch., Ch.	Anonymous.	English.
7 Vols., with new references	1757	1669-1746	K.B., C.P., Exch., Ch.	Danby Pickering	English.
Vols. viii, ix, x, xi, xii	1769	1722-1755	K.B., C.P., Exch., Ch.	Anonymous.	English.
Dublin Ed. of Vols. i-xii with new references .	1794	1669-1755	K.B., C.P., Exch., Ch.	Anonymous.	English.
Leach's Ed. in xii vols. with new notes and references; but not embodying the new matter in the 1781 Ed. of Reports Tempore Queen Anne (vol. xi)	1793-6	1669-1755	K.B., C.P., Exch., Ch.	Leach.	English.

Some of these reports still retain the characteristics which marked the reports of the preceding period.[1] But generally they tend to approach more nearly to the modern style of law reporting. On the whole they are less discursive, and attain a much higher level of accuracy. In the first place, I shall say something of the older characteristics retained by some of these reports, and, in the second place, I shall point out the respects in which they are more satisfactory than the older series.

(i) *The older characteristics.*

Firstly, some of these reports still continue to be quite as much books of precedents in pleading as reports. This characteristic comes out very strongly in Lutwyche's reports. They are entitled, "Un livre des Entries: contenant aussi un Report des Resolutions del Court sur diverse Exceptions Prises as Pleadings, et sur auters matters en Ley. . . . Et ascuns Observations sur diverse des les Presidents." The third volume of Lord Raymond's reports contains the pleadings in the cases. Similarly we shall see that Saunders' reports are essentially a pleader's book; and that this characteristic has been emphasized by the work done upon them by serjeant Williams and by subsequent editors.[2]

Secondly, the subject matter of some of these reports is arranged under alphabetical heads after the manner of an abridgment. Instances are Salkeld, Lutwyche, and Cases tempore Holt. It is, as we have seen, a plan which was foreshadowed in some of the very early MSS. of the Year Books.[3] Its recrudescence at this period is no doubt due to the fact that no first rate abridgment of the common law had been written since Rolle,[4] and that therefore the lawyers felt the need for books which grouped the newer cases in this convenient manner.

Thirdly, we still get some unsatisfactory reports of the old pattern.[5] Some of them are anonymous; others, which are not anonymous, are inaccurate; others, which bear well-known names, have been posthumously published from MSS., which were probably never prepared by their authors for the press. Let us take one or two examples of these defective reports.

The two series of anonymous reports are Cases tempore Holt, and the miscellaneous set of reports grouped together under the comprehensive title "Modern."

Of the first of these series, "Giles Jacob—immortalized by Pope as the 'blunderbuss of law,' and the author of the Lives and Characters of the English poets, Essays on Human Nature

[1] For these reports see vol. v 355-378.
[2] Below 567 571.
[3] Vol. ii 537.
[4] Vol. v 375-377.
[5] Ibid 366-369.

and Human Happiness, the Law Dictionary, and a vast number of other books—is reputed to be the collector."[1] The preface tells us that the cases not published before had been procured at considerable expense, and that some of them had been reported by Farresley, who, as we shall now see, was one of the contributors to the Modern Reports.

The history of the Modern Reports[2] is very curious. The series, as will be seen from the Table, is made up of numbers of detached, and, for the most part, anonymous volumes, which, in the course of the eighteenth century, were gradually collected, edited, and published in the form in which we know them. The first volume is assigned by some to one Anthony Colquit, and by others to Joseph Washington[3]—a friend of Lord Somers and the author of several other works.[4] The second has been assigned with some reason to the same Joseph Washington.[5] The third, fourth, and fifth are anonymous; but the fifth was edited by Nelson, who appears to claim, without warrant as it would seem, that he had also collected the other four parts.[6] The sixth volume is anonymous. The seventh is collected and edited by Thomas Farresley.[7] The eighth and ninth are anonymous;[8] and the tenth is by Lucas—a barrister who quitted the profession of the law for that of the church.[9] The eleventh is anonymous;[10] and the twelfth has been conjectured, on somewhat slender grounds, to be the work of some judge—possibly Sir Robert

[1] Wallace, the Reporters 398; see W. R. Bridgman, Legal Bibliography 165-173, for a list of his numerous works, the most famous of which was his Law Dictionary.

[2] Wallace, op. cit. 347-390, from which the following account is taken.

[3] "The authorship of this volume is not clearly discovered. Bridgman (Legal Bibliography 216) states that the author is said to be Anthony Colquit, by whose name it is sometimes cited . . . . Thoresby's History of Leeds attributes the authorship to Joseph Washington [who wrote an Abridgment of the statutes of William and Mary, Term Catalogues ii 523, 590], a collateral ancestor of the General, while Mr. Nelson, the editor of 5th Modern, seems to claim for himself all the merit which the publication confers," Wallace, op. cit. 356-357.

[4] Ibid 356 n. 3.

[5] "Second Modern is prepared by some one who signs himself J. W., and who appears, from a fine, bold, and dignified epistle to Lord Somers, to have been an advocate of constitutional liberty, and on terms of more than mere personal acquaintance with Lord Somers himself"; it is therefore suggested that it is this volume that belongs to Washington, ibid 365. But it appears from the Term Catalogues ii 523, 590 that he must have died between 1694 and 1696; and, as the volume did not appear till 1698, it is possible that it may have been finally edited by Nelson, see next note.

[6] Ibid 380; however, Mr. Wallace thinks, ibid, that possibly Nelson, though not the reporter of any of the five volumes, except possibly the fifth, "may have had an editorial supervision over all these volumes of Modern, giving to some more and to some less of his own labour and stupidity."

[7] Ibid 382; to this volume Leach added 155 cases, part taken by a Mr. Wright, part by a barrister named Luke Benne, ibid.

[8] "Mr. Leach's edition of 9th Modern contains ninety cases in Chancery, from the 10th to the 28th of George II., not found in any other edition, fifty-two of them particularized by Mr. Leach as never before printed," ibid 385.

[9] Ibid 386.

[10] Ibid 387.

Eyre, C.J.[1] It will be seen from the Table that various collected editions of these volumes were published from time to time. The standard edition is by Leach, who also edited Croke and Shower. His services were considerable. They are thus summarized by Mr. Wallace:[2] "He corrected the abstracts; so defective, in some cases, as to require entirely new ones. He gave at the commencement of each term the names of the Judges, Solicitors and Attorneys-General; modernized the references, changing them from the old titles of Modern Cases in Law and Equity, Cases temp. Mac., Cases temp. Queen Anne, and Cases temp. Will. III., into the more convenient references to his own series, 8th, 9th, 10th, 11th, 12th Modern. He added many notes and references to the same cases elsewhere. To the 7th, 9th, and 11th volumes he made large supplementary additions of Reports, giving in all three hundred and eighty-one MS. cases, of which he states that one hundred and thirty-seven had never before appeared in print. He separated into better and chronological divisions some of the reports in old Modern. . . . To the first seven volumes and to the eleventh he added new indexes, and in the other volumes corrected the old ones." The only volume in which he failed to incorporate all that had appeared in previous editions is the eleventh. The Dublin edition of that volume, published in 1794, contains new cases, and improved reports of old cases not incorporated in Leach's edition,[3] which are attributed to Thomas Lutwyche, the son of the judge and reporter.[4] Naturally the reports contained in this miscellaneous series vary in merit. The first, second, sixth, ninth, tenth, and twelfth volumes are good. The third, fourth, fifth, and seventh are indifferent. The eighth and eleventh are bad.[5]

Of the named reports, which are second rate in character, the most conspicuous examples are those of Keble, Carter, and Comberbach. The main defect of Keble's reports is that he merely jotted down what he heard from day to day in court, without attempting to collect into a single narrative the history of any one case.[6]

[1] Wallace, op. cit. 389; Hardwicke in Middleton v. Crofts (1736) Ridgway t. Hardwicke at p. 126, refers to a MS. report taken by Eyre, C.J.; but it is not clear that he was referring to 12 Modern; and, if it was, it would not follow that Eyre, C.J., wrote the rest of the volume; Mr. Wallace seems to think that it is clear that 12 Modern was written by a judge, citing p. 145, where a judgment is reported in the first person; but this is not conclusive, as the words are put into the mouth of Holt, C.J.

[2] Op. cit. 353.

[3] Ibid 387-388.

[4] The additions consist of a number of cases in Anne's reign, and accurately reported and improved versions of some of the older reports, ibid 387-388.

[5] Ibid 355-356.

[6] "As to the cases I chose rather to present them as rudely as taken, with the particular times of debate and such number rolls thereof as I then had; than by a more methodical digestion to obscure the truth and certainty of the matter. And on consideration of the various accidents that happen from the beginning to the end of a case

Hence it is necessary to look into several places for cases which extend over several days. He gives us, as Mr. Wallace says, materials for a report rather than a report.[1] His industry was great; but he is essentially a reporter of the old discursive type, who contents himself with merely noting down the doings of the court.[2] Hence it has been said that, though inaccurate, he is "a tolerable historian of the law."[3] Carter's reports were discredited by the judges of his own day. Holt disowned, and Treby questioned, their authority.[4] Comberbach, a recorder of Chester and one of the judges of North Wales,[5] is generally regarded as inaccurate;[6] but this is probably due to the fact that his son published these reports from notes of his father's, which were never intended by their author for the press.[7]

It is probable that other sets of reports owe their indifferent reputation to the same cause. Thus the third volume of Salkeld has never had the authority of the first two volumes, because it consists of scattered notes, made indeed by Salkeld, but not prepared by him for publication.[8] It is possible that some of the cases in Vaughan were published from the loose notes of the late chief justice.[9] The MS. of Freeman's reports was stolen by a servant, and published without the consent of the author's family.[10] It is probable that Shower's King's Bench Reports are printed from a defective MS.[11]

Thus we can still trace in the reports of this period some of the same defects which are apparent in the reports of the preceding period. Moreover, there is some evidence that the operations of the licenser may occasionally have effected alterations in a report.[12]

I knew no better way to express it," Keble's reports, Pref.; cp. Wallace, op. cit. 315-326 for some account of Keble and his other works, legal and otherwise; he was an ancestor of Keble of the Christian Year, and left in MS. reports of some four thousand sermons; besides, he produced editions of the statutes and many other law books.

[1] Op. cit. 316.

[2] Thus in 1 Keble 562-563 we have a report of Clarendon's speech to Sir R. Hyde when he was made chief justice of the King's Bench, and of Hyde's reply.

[3] *Per* Burnet, J., Batchelor v. Bigg (1772) 3 Wils. at p. 330.

[4] Wallace, op. cit. 328-329; Carter also wrote the Lex Custumaria.

[5] See the Pref. to his reports.

[6] Wallace, op. cit. 396.

[7] See Preface.

[8] Ibid; Wallace, op. cit. 399-400.

[9] The Preface states that no directions were left for publication, but that, as the MS. had been lent and copied, it was thought best to publish it; cp. ibid 334-335.

[10] Ibid 390.

[11] Wallace, ibid at pp. 392-393, cites Umfreville who, speaking of a MS. in the Lansdown Collection, says, "This MS. greatly controls the printed Shower, and contains many good cases not printed, and seems to be his regulated collection of cases, prepared, as I conceive by himself, and methodized from his note-book, with a view to the press. But his papers after his death, falling into the hands of a book-seller, he, *causa lucri*, at different times printed his general collection, without due consideration had of those selected cases, which were the only cases, I conceive, Sir Bartholemew ever intended for the press."

[12] Burnet, Life of Hale (ed. 1682) 185-187, says that one reason why Hale refused to allow his MSS. to be published was that the licenser had interfered with the text of

But the errors in these reports are not so serious as the errors in the older reports. In the first place, as we approach more closely to our modern law, the errors are more easily detected. In the second place, many of these reports have been edited with some care. Mr. Wallace, in a passage already cited,[1] has described the services which Leach did for the series of Modern Reports. As we have seen, Leach also edited Croke's reports, and Shower's King's Bench Reports.[2] Similarly Freeman's Common Law Reports were edited in 1826 by Smirke, and his Chancery Cases in 1823 by Hovendon.[3] In the third place, the errors in these reports can often be corrected by the more accurate versions of the same case contained in one or more of the better reports of this period.

(ii) *The improved character of the reports of this period.*

The majority of the reports of this period are free from the serious defects which marked the reports of the preceding period. They are accurate reports taken by competent, and, in many cases, distinguished men; and the same process of editing, which has improved some of the inferior reports of this period, has added very considerably to their value. It is true that some of them were not prepared by their authors for the press. But they often seem to have been printed from full and accurate notes; and, in many cases, these reports were both prepared by their authors for the press, and published by them. These characteristics of the majority of the reporters will appear from a rapid survey of the list. Firstly, I shall deal with the reporters who were judges of some one of the common law courts; secondly, with those who were not; and thirdly, with the most famous of all the reports of this period—those made by Saunders.

(1) Bridgman's reports were written by a man who had held the offices of chief baron of the Exchequer (1660), chief justice of the Common Pleas (1660), and lord keeper (1667-1672);[4] and, though not published till 1823, the MS. was known to the profession, and approved by such authorities as Hale and Holt.[5] Sir Thomas Raymond held the office of baron of the Exchequer in 1679, judge of the Common Pleas in 1680, and judge of the

some reports published by a friend of his; but naturally, there is more reason to suspect this influence in reports of trials with a political interest than in reports of cases which turned solely on points of law; Arber, the Term Catologues, Pref. ii.

[1] Above 557.

[2] Ibid.

[3] Wallace, op. cit. 391.

[4] For Bridgman see above 537-538.

[5] Wallace, op. cit. 301-302; it would appear that he took reports in the K.B. and Exch. in the reign of Charles I., which have not been published, ibid 302; Holt, C.J., in Gidley v. Williams (1701) 1 Ld. Raym. at p. 636, alludes to other MS. reports in his possession.

King's Bench in 1680-1683.[1] His more famous son, Lord Raymond, held the posts of solicitor-general (1710), and attorney-general (1720), and rose to be chief justice of the King's Bench (1725-1733). Both sets of reports have always had a good reputation.[2] Lord Raymond, it is true, did not profess to have taken all the reports in his collection; and he acknowledges the receipt of cases taken by many other persons.[3] But no doubt he satisfied himself of their accuracy before he used them. The larger number of his reports were taken while Holt was on the bench,[4] and in them will be found the best accounts of Holt's judicial achievements. Levinz was attorney-general in 1679, and was made a judge of the Common Pleas in 1681. Though inclined to royalist views, he was too timid to be altogether satisfactory to his employers. He refused to accept responsibility for the proclamation against tumultuous petitions, and named Francis North to the House of Commons as its author,[5] for which Roger North blames him—perhaps too severely.[6] But he was too good a lawyer to be able to please James; and he was dismissed, because his views upon the dispensing powers and the enforcement of martial law were not to the king's liking.[7] He returned to the bar and his practice as a pleader, for which he was eminently well fitted.[8] He left a book of entries as well as his reports; and the latter were thought so well of that they were translated by Salkeld, and published by him in French and English.[9]

Kelyng[10] was essentially a criminal lawyer and an ardent royalist. We have seen that, as chief justice of the King's Bench, he got into trouble with the House of Commons for fining and imprisoning jurors; but he was praised by Sir Thomas Raymond, and Holt thought it worth while to publish his reports, and to add to them three other reports taken by himself.[11] The book did not contain all the cases in Kelyng's MS. These were not published

[1] Foss, Judges vii 158-159; the only tale to his discredit is told by North, Lives i 167-168, and is to the effect that by his "passive behaviour" he allowed two women to be convicted of witchcraft on the usual ridiculous evidence.

[2] Wallace, op. cit. 304, 401-402.

[3] The title of the book is "Reports of Cases taken and collected by Lord Raymond"; and "he acknowledges cases taken by Mr. Place, Mr. Nott, Mr. Mather, Mr. Daly (or Doyley), Mr. Salkheld, Mr Jacob, Mr. Shelley, Mr. Northey, Mr. Lutwyche, Mr. Cheshyre, Mr. Thornhill, Mr. Peire Williams, Baron Bury, and Mr. Pengelly," Wallace, op. cit. 402-403.

[4] Ibid 403.

[5] Lives of the Norths i 229 and n. 1.

[6] Foss, Judges vii 252.

[7] Ibid 252-253.

[8] "Sir Creswell Leuins came not to the bar the next day (after his dismissal), which was the last day of the tearme, but he came and practised the day after at Nisi Prius in Westminster Hall, and is not likely, 'tis thought, to loose by the change," Bramston's Autobiography (C.S.) 221; he notes his own dismissal in his reports, 3 Lev. 257.

[9] Wallace, op. cit. 314-315.

[10] Foss, Judges vii 137-140.

[11] Wallace, op. cit. 326-328.

till 1873.[1] Of Vaughan I have already spoken—he belonged essentially to the constitutional party.[2] Sir Thomas Jones is said by North to have been a student of records.[3] He was a judge of the King's Bench (1676-1683), and chief justice of the Common Pleas (1683-1686). He was also a Tory; and North characterizes him as "a very reverend and learned judge, a gentleman and impartial, but being of Welsh extraction, was apt to be warm."[4] But, like many others, he could not see eye to eye with James on the question of the dispensing power, and so "he had his quietus."[5] The reputation of his reports is good—Hargrave thought it worth while to translate them.[6] Ventris was a judge of the Court of Common Pleas 1689-1691.[7] His reports, which were published after his death, have generally been considered to be of good authority. In 1726 they had reached a fourth edition.[8] Pollexfen[9] was a Whig. He argued on the constitutional side in all the great cases of the day—the trials of College, Fitz-Harris, and the Seven Bishops, the Quo Warranto proceedings against the City of London, and many others.[10] It caused considerable surprise that he acted for the crown when Jeffreys went his infamous circuit in the West; and it is probable that he only so acted because he was the leader of that circuit.[11] He had his reward after the Revolution, becoming successively attorney-general (1689), and chief justice of the Common Pleas (1689-1691). Naturally North has nothing good to say either of his character[12] or of his reports.[13]

[1] Edited by Mr. Loveland Loveland. [2] Above 501-502.

[3] "The learning of records is speculative, and tends to the accomplishment of a lawyer more than his direct profit. But it is a most reasonable ambition and was first seen in Mr. Noy. The Lord Coke took a little that way; but his skill was more pedantic than penetrant. Afterwards a set of men grew up who addicted themselves to that study with less ostentation; as Rolls, Windham, Jones, Glinn, and Hales; more especially the latter," Lives of the Norths i 353.

[4] Examen 563.

[5] It is of Jones that the tale is told that on the king's informing him that he would have twelve judges of his opinion, he replied that his majesty might possibly find twelve judges of his opinion but scarcely twelve lawyers; Reresby, Memoirs 361, says that Jones's son told him that the king had said that "it was necessary his judges should be of one mind," but he had evidently heard nothing of the judge's reply—which makes one doubt its authenticity; it is a tale quite likely to have been invented after the Revolution.

[6] Wallace, op. cit. 343. [7] Foss, Judges vii 367-369.

[8] Ibid 368; Wallace, op. cit. 345-346.

[9] Foss, Judges vii 334-337. [10] Ibid 335.

[11] Ibid 335, says, "From the reports of the trials he does not appear to have done more than his usual duty of stating the case for the prosecution."

[12] "This Pollexfen was deep in all the desperate designs against the crown. He was the adviser and advocate of all those who were afterwards found traitors. . . . A fanatic and (in the country) a frequenter of conventicles. . . . Upon the Revolution he was made a judge, and, from a whiner for favour to criminals he proved the veriest butcher of a judge that hath been known," Lives of the Norths i 283-284.

[13] He describes them as "consisting chiefly of his factious arguments"—which is true; and relates how Holt, C.J., had deleted a passage which reflected upon the conduct of Francis North, ibid 75.

Equally naturally he is praised by Burnet as an honest man and learned lawyer. But even Burnet characterizes his intellect as "perplexed"—a bad fault in a lawyer;[1] and his reports have less value than one would expect, because they tell us very much more of the reporter's arguments than of the decision of the court. It is therefore not very surprising that they still remain in the original very imperfect edition in which they were first published.[2]

Freeman was lord chancellor of Ireland 1707-1710. His reports were approved by judges of the eighteenth century, and were considered to be worth re-editing in the early part of the nineteenth century.[3] Lutwyche[4] was a judge of the Common Pleas 1686-1689; but he was one of the judges who supported James's views of his dispensing power, and so lost his place at the revolution. He continued to practice till 1704. Like Levinz, he was essentially a pleader; and his reports are drawn up in the old style—the record in Latin and the report of argument and decision in French. They were valuable to the pleaders of this period; but the less necessary to them because of the merits of Saunders' reports.[5] Nelson issued an edition, or rather an abridgment of them in 1718, which is quite valueless. Fortescue,[6] a descendant of the famous Fortescue,[7] was a baron of the Exchequer (1717-1718), a judge of the King's Bench (1718-1727), and a judge of the Common Pleas (1729-1746). In 1714 he published for the first time his ancestor's famous tract,[8] De Monarchia, or "the difference between an absolute and a limited monarchy";[9] and he probably had a hand in the edition of the De Laudibus which was published in 1741.[10] His reports are, for the most part, short summaries of cases; and some are notes of the briefest description. In one case he gives at length one of his own arguments as counsel;[11] and at the end of his book he inserts notes on the precedence of the judges,[12] Aurum Reginae,[13] and the "grand opinion for the prerogative concerning the royal family."[14] His reports never got beyond the first edition. Comyn's

[1] History of My Own Time (ed. 1724) i 460.

[2] Wallace, op. cit. 346-347.

[3] Ibid 390-391; for some account of him see J. R. O'Flanagan, Lives of the Lord Chancellors of Ireland i 531-535; it appears that Freeman was born about 1646, and became a member of the Middle Temple; he was a friend of Somers, who made him baron of the Exchequer in Ireland in 1706; he became chief baron in the same year, and chancellor the year after; he lost his reason in 1710, and shortly afterwards died.

[4] Foss, Judges vii 254; Wallace, op. cit. 395-396.

[5] Below 567-571.

[6] Foss, Judges viii 98-101; Wallace, op. cit. 408-412.

[7] Vol. ii 566-571.

[8] Ibid 570-571.

[9] The Preface to this book is somewhat inappropriately, as Wallace says, transferred to the reports.

[10] Vol. ii 569-570.

[11] Serle v. Blackmore (1708) Fortescue 256.

[12] Ibid 382.

[13] Ibid 398.

[14] Ibid 401.

reports are far fuller and more illuminating. Their author was baron of the Exchequer (1726-1736), judge of the Common Pleas (1736-1738), chief baron of the Exchequer (1738-1740), and the author of the famous Digest. Both the reports and the Digest were published posthumously.[1] The former have been twice re-edited. The latest edition is by Rose, and was published in 1792.[2]

(2) It will thus be seen that the majority of those who reported cases of this period attained to the Bench. As we shall now see, the better reporters of this period, even though they did not attain to the bench of one of the common law courts, sometimes held minor judicial posts, and had always attained some eminence in their profession. Sir Bartholomew Shower[3] was recorder of London in the worst period of James II.'s reign, one of the counsel against the Seven Bishops, and, after the Revolution, one of the leaders of the Tory Party, and counsel for many of the Jacobite conspirators. Both his character and his learning have been furiously assailed by the great Whig historians of the last century; and there is no doubt that his decision that soldiers who deserted could be capitally punished was thoroughly bad law. His reports have often been criticized; but it is fair to remember that they were printed from a rough MS. never intended to be printed as it stood;[4] and that, even in this imperfect form, they have passed through three editions. Skinner was a judge of the court of Marshalsea. His reports are good; but most of them had appeared before, so that they never gained much vogue.[5] Carthew was a bencher of the Inner Temple; and, in the days when readings were few and far between, gave an elementary reading at New Inn on the Statute of Uses.[6] His reports have a good reputation for accuracy, and have reached a second edition.[7] Perhaps the best of this series of reports is that written by Salkeld. He was chief justice of the Great Sessions for Carmarthen, Cardigan, and Pembroke, and helped to translate Levinz. His first two volumes, by which he must be judged, were published under supervision of Lord Hardwicke, and have reached a sixth edition.[8]

(3) Saunders' reports stand in a class by themselves. They are, by a long way, the most famous reports of this period; and,

[1] Foss, Judges viii 112-114; Wallace, op. cit. 412.
[2] It is stated in the Preface that its publication was demanded by the legal profession.
[3] Dict. Nat. Biog.
[4] Above 558 n. 11.
[5] Wallace, op. cit. 394.
[6] Collect. Jurid. i 369—the date of the reading was 1692.
[7] Wallace, op. cit. 397-398; Dict. Nat. Biog.
[8] Ibid; Wallace, op. cit. 399-400; above 558.

both in matter and form, can be classed with the best of the reports of the preceding period—even with the reports of Plowden and Coke. I shall, in the first place, relate the extraordinary career of their author; and, in the second place, give some account of the history and characteristics of his reports.

Fortunately Saunders' career and character have been sketched by a contemporary who was also an artist in characterization. Roger North's account is one of his happiest efforts;[1] and, as Saunders was a lawyer and a pleader, who kept aloof as far as possible from politics, it is not spoiled by political bias. I cannot do better than copy, with some rearrangement, the account which he has left us.

Saunders' origin and parentage were of the humblest. He was born in the parish of Barnwood near Gloucester, and, when a boy, found his way to London. There he lived the life of "a poor beggar boy without known parents or relations."[2] Somehow or other, "he had found a way to live by obsequiousness (in Clement's Inn, as I remember) and courting the attorneys' clerks for scraps. The extraordinary observance and diligence of the boy made the society willing to do him good. He appeared very ambitious to learn to write; and one of the attorneys got a board knocked up at a window on the top of a staircase; and that was his desk where he sat and wrote copies of court and other hands the clerks gave him. He made himself so expert a writer that he took in business and earned some pence by hackney writing. And thus by degrees he pushed his faculties and fell to forms, and, by books that were lent him, became an exquisite entering clerk; and by the same course of improvement with himself, an able counsel, first in special pleading then at large."[3] He was admitted at the Middle Temple in 1660, and was called to the bar in 1664. Two years later he began to compile his reports; and, after another two years, his name occurs frequently in other sets of reports.[4] Nor is this surprising. His talents, his industry, and his curious education, had combined to make him the first pleader of the day. Of his skill at this art his reports, which as we shall see are wholly concerned with points of pleading, are the best evidence. "None came so near as he to be a match for Serjeant Maynard. His great dexterity was in the art of special pleading, and he would

[1] Lives of the Norths i 293-296; and there are further particulars in his autobiography, ibid iii 90-93.

[2] Ibid 293; that he had parents and relations his will shows, Foss, Judges vii 160; but no doubt North spoke perfectly truly—no one did or could have known his relations; North does not assert that he had none.

[3] Lives of the Norths i 293-294.

[4] Foss, Judges vii 161—"As he was himself in most of the cases in his work, and Sir T. Raymond mentions his name frequently from January, 1668, it is clear that he got into early practice."

lay snares that often caught his superiors who were not aware of his traps."[1] He was equally able in maintaining his pleadings in court. "Wit and repartee in an affected rusticity were natural to him."[2] He thought clearly, and "his judgment was profound."[3] He always worked his hardest for his clients—whether his fees were single or double. He never betrayed a client to court a judge—as was too frequently the custom in those days.[4] In fact, "if he had any fault it was playing tricks to serve his clients," which sometimes brought down upon his head a reprimand from the court.[5] "As to his ordinary dealing he was as honest as the driven snow was white."[6]

He was severely handicapped by his bodily defects and his manner of life. "He was a fetid mass that offended his neighbours at the bar in the sharpest degree. Those whose ill fortune it was to stand near him were confessors, and, in the summer time, almost martyrs. This hateful decay of his carcase came upon him by continual sottishness; for, to say nothing of brandy, he was seldom without a pot of ale at his nose or near him. That exercise was all he used; the rest of his life was sitting at his desk or piping at home."[7] When prosperity came, he never attempted to alter his mode of life. "His home was a tailor's house in Butcher Row called his lodging, and the man's wife was his nurse or worse."[8] He never moved till he was compelled to take a better house by his promotion to the post of chief justice of the King's Bench; and then the tailor and his wife moved with him. There he pursued a more luxurious, but otherwise similar manner of life, adding gardening to his musical recreations.[9]

We can see from this account of his manner of life that he was a genuine simple creature; and this, joined to a ready wit and

[1] Lives of the Norths i 294-295. [2] Ibid. [3] Ibid iii 91.

[4] "He was cordate in his practice, and I believe never in all his life betrayed a client to court a judge, as most eminent men do. . . . He had no regard to fees, but did all the service he could whether fee'd double or single," ibid.

[5] Ibid; cp. ibid i 295—"He was so fond of success for his clients, that, rather than fail, he would set the court hard with a trick; for which he met sometimes with a reprimand which he would wittily ward off, so that no one was much offended with him."

[6] Ibid i 295.

[7] Ibid 294; North, ibid iii 93, tells a tale of his fondness for brandy—a case was being tried as to whether brandy made by a new process was excisable at a higher or lower rate; "The specimens were handed about, and the judges tasted, the jury tasted, and Saunders, seeing the phials moving, took one, and set it to his mouth and drank it all off. The court observing a pause and some merriment at the bar about Mr. Saunders, called to Jeffries to go on with his evidence. My Lord, said he, we are at a full stop and can go no further. What's the matter? said the Chief. Jeffries replied, Mr. Saunders has drunk up all our evidence."

[8] Ibid i 294.

[9] "He took a house at Parson's Green, where he bestowed much on the gardens and fruits. He would stamp the name of every plant in lead and make it fast to the stem. And in short he had as active a soul in as unactive a body as ever met," ibid iii 92.

cheerful manner, reconciled his contemporaries to the inconvenience of his neighbourhood, and made him the idol of the students.[1] "He was a very Silenus to the boys, as in this place I may term the students of the law, to make them merry whenever they had a mind to it. . . . I have seen him for hours and half hours together, before the court sat, stand at the bar with an audience of students over against him, putting of cases and debating so as suited their capacities and encouraged their industry. And so in the Temple, he seldom moved without a parcel of youths hanging about him, and he merry and jesting with them."[2] North was perfectly right when he said of this skilful pleader and great lawyer that he was "born but not bred a gentleman."[3] He himself would have desired no higher praise.

As we might expect, he shunned politics.[4] But the government naturally made use of so eminent a pleader and so faithful an advocate. He was very frequently employed on government work at the end of Charles II.'s reign;[5] and naturally he was called in to settle the pleadings in the Quo Warranto cases, and especially in the great Quo Warranto case against the City of London.[6] It was a case which needed the most skilful pleading and advocacy; and, politically, it was, with some reason, regarded as by far the most important case of the day. For success meant nothing less than the destruction of the greatest stronghold of the Whig opposition in the country.[7] Charles II., with his usual acuteness, had perceived the native honesty of Saunders's disposition, and the honourable manner in which he did his duty to his clients. It occurred to him that, if he appointed him to the post of chief justice of the King's Bench, he could be trusted to be as faithful to him as a judge, as he had been when he was one of his clients at the bar. And so, in spite of the obvious irregularity of entrusting a counsel, who had got up the case for the crown, with the duty of deciding it,[8] Saunders was made chief justice.[9] But

[1] "And how touchy soever we were that stood in the very great stench of his carcase at the bar, we could not be heartily angry, because he would so ply the jests and droll upon us and himself that reconciled us to patience," Lives of the Norths iii 92.

[2] Ibid i 295; cp. ibid iii 91. [3] Ibid 91.

[4] "In no time did he lean to faction, but did his business without offence to any. He put off officious talk of government and politics with jests, and so made his wit a catholicon or shield to cover all his weak places and infirmities," ibid i 295.

[5] Foss, Judges vii 163.

[6] "When the court fell into a steady course of using the law against all kinds of offenders, this man was taken into the king's business; and had the part of drawing and perusal of almost all indictments and informations that were then to be prosecuted, with the pleadings thereon if any were special; and he had the settling of the large pleadings in the *quo warranto* against London," Lives of the Norths i 295.

[7] Above 190, 210.

[8] As to this matter and North's defence of it see next note.

[9] "The king, observing him to be of a free disposition, loyal, friendly, and without greediness or guile, thought of him to be Chief Justice of the King's Bench at that nice

the promotion was fatal to him. The change in his habits caused his health to give way.[1] "It was pity to see a mind conscious of its own strength labour under the load of a disease, and strive with an unapt instrument—a broken body—to act its part with but sorry success compared with the former passages of his life. *Quantum mutatus ab illo.*"[2] He broke down in court,[3] and was on his death-bed when the judgment in the Quo Warranto Case was given. He could only send a message that his judgment was for the king.[4]

His reports[5] have had a history which is almost as remarkable as that of their author.

There are many instances in which commentaries upon an ancient statute or an old leading case, have gradually become a good deal more important than the original text of the statute or case. Saunders' reports are the only one of our series of reports which have undergone this process. They were first published in 1686—the records in Latin, the reports in French; and in 1722 an English edition of the reports appeared. In 1799 appeared the third edition—the first edited by serjeant Williams. He translated and annotated the Latin pleadings, and made each case a peg, on which he hung an elaborate disquisition upon the rule or rules of pleading laid down in it. In this way he made "Williams Saunders" a book in which the pleaders of his day could find all the authorities upon the technical rules of their art. His edition was successful, and he published a fourth edition in 1809. In 1824 a fifth edition, edited by his son Edward Vaughan Williams and Mr. Justice Patterson, added a second layer of notes. A sixth edition by Edward Vaughan Williams appeared in 1845; and the incorporation in it of the effects of the great legislative reforms, which had taken place since 1824, added still further to the dimensions of the commentary. The reforms of the latter half of

time. And the ministry could not but approve of it. So great a weight was then at stake as could not be trusted to men of doubtful principles or such as anything might tempt to desert them," Lives of the Norths i 296; Charles II. had evidently had his eye on him for some time; "This (his work for the crown) he performed with so much zeal (for he was ever very earnest for his client) and slight of reward, that King Charles II. was much pleased with him, and often sent him good round fees out of his own cabinet," ibid iii 92.

[1] "But the preferement was an honour fatal to him; for from great labour, sweat, toil, and vulgar diet, he came to ease plenty, and of the best, which he could not forbear, being luxurious in his eating and drinking. So in a short time . . . he fell into a sort of apoplexy, ibid iii 92.

[2] Ibid; cp. ibid i 296.

[3] "The 22nd (May 22nd 1683), being the last sitting in Middlesex after the term, the lord chief justice Sanders, as he was sitting upon the bench and trying of causes, was taken very ill, and was forced to go off the bench," Luttrell, Diary i 259.

[4] Lives of the Norths i 296.

[5] His reports are of course his principal work; he also wrote some observations on 22 Charles II. c. 1 against seditious conventicles, which were published in 1685.

the nineteenth century, which destroyed the old system of pleading, necessarily destroyed much of the usefulness of the original text. It came to have about as much or as little bearing upon the law of pleading actually used, as the Year Books had upon the law of Saunders' own day. But the notes had kept pace with the times. Hence in the next edition, published by Sir Edward Vaughan Williams in 1871, the notes did what they had long been threatening to do—they swallowed up the text. The greater part of the text was omitted as obsolete, and the cases were only printed in an abridged form.[1]

The remarkable career of this book is due, firstly, to the qualities of the book itself; and, secondly, to the circumstances of the time at which it was published, and the manner of the development of the common law during the succeeding century and a half.

Firstly, as we might expect, the reports partake of the transition character of the period. In many respects they resemble the reports of the preceding period. The pleadings are set out at length in the original Latin, and the report itself is in French. The French, too, is remarkably good. It is much more like the French of the Year Books of the reigns of Edward IV. or Henry VII. than the doggerel that passed for French, which is to be found in many of the reports of the late sixteenth and early seventeenth centuries.[2] Then, too, the reporter sometimes permits his personality to appear. He recalls the events in court on the day he argued the case which he is reporting. Thus he tells us that, while arguing strenuously, "Twysden Justice interrupted," and said to him, "what makes you labour so? The Court is of your opinion and the matter clear."[3] He criticises the rulings of the court, and the conduct of the judges. Thus, in one case, he blames the court for having been led away by his argument.[4] In another case, which was compromised, he tells us that, in his opinion, the opposite party had the better case.[5] His skill in pleading sometimes led to differences of opinion with judges who wished to do substantial justice. An action had been brought on a covenant for non-repair of a house. As a matter of fact the house had been repaired before action brought—but by the plaintiff. The pleadings had ended in a demurrer. Saunders had given four reasons for his contention that, on the pleadings as they

[1] See Wallace, op. cit. 342-343; and the Prefaces to the third and subsequent editions of the reports.

[2] Vol. ii 481.

[3] Birks v. Trippit (1666) 1 Saunders 33.

[4] Hayman v. Gerrad (1667) 1 Saunders 103.

[5] Dean and Chapter of Bristol v. Guyse (1667) 1 Saunders 112; cp. Dean and Chapter of Windsor v. Gover (1671) 2 Saunders 306—judgment had been given against the defendant, for whom Saunders appeared, by the court, "Qui disent le plea en cest point fuit tout ousterment insensible. Mes jeo croy lour principall reason fuit pur ceo qu'ils ne voile determine le matter en ley."

stood, the fact that the plaintiff had done the repairs did not properly appear, and could not be regarded. "But Hale Chief Justice would not hear those reasons; but the other side alleging that the plaintiff himself had repaired the dwelling-house, and could have no proportion of the expenses of it, he said that the plaintiff having showed the aforesaid cause of his demurrer specially, and the defendant refusing to amend his plea as he ought before the demurrer was joined, but had pleaded so on purpose to trick the plaintiff, he gave judgment for the plaintiff immediately (*quasi* in a passion); . . . but in my opinion, without any consideration of the matter in law, whether the plea was sufficient or not."[1] In another case he tells us that he was reprehended by the court for pleading so subtly that justice was defeated; but defends himself by showing that, if all the facts were known, the justice of the case was the contrary to what the court supposed, and that his subtle plea really made for justice, as was proved by subsequent proceedings on the equity side of the Exchequer.[2] In most respects, however, these reports are very good specimens of reports of a more modern type. The facts are stated, and the arguments are reported, clearly and tersely; the point at issue is put with a conciseness and a precision of which only a special pleader, who was a master of his subject, was capable; and apposite authorities only are cited. They are much less discussive than Coke or Plowden's reports, and confine themselves rigidly to the point or points at issue. This is due to what perhaps is their most striking characteristic—their exclusive concern with the law of pleading. The cases reported travel over most of the branches of the common law, but all of them are regarded from this one point of view—a fact which is sufficiently explained by the history of the career of their author.

Secondly, the circumstances of the time at which they were published helped to give the reports of the most eminent pleader of the day a unique position; and the course of the development of the law in the succeeding century gave them their unique history.

[1] Walton v. Waterhouse (1672) 2 Saunders 422; North tells us, Lives of the Norths i 295, that, "Hale could not bear his irregularity of life; and for that, and suspicion of his tricks, used to bear hard upon him in the court"—but, "no ill usage from the bench was too hard for his hold of business being such as scarce any could do but himself."

[2] Veale v. Warner (1669) 1 Saunders 327—the Court, "ne voile doner judgment pur le defendant pur ceo qu'ils conceivent que ceo fuit un tricke de pleading. Mes ils doneront liberty al plaintiff sur payment del costs a discontinuer, et Keeling Chief Justice reprehend Saunders pur pleader cy subtilment en proposito a tricer le plaintiff. . . . Mes il fuit case de grand extremity sur le defendant. . . . Et puis le defendant exhibite un Anglois bill in Scaccario . . . et avoit relief"; with some professional pride he notes that the counsel for the plaintiff, "ne espiont le defect del pleader de lour parti devant qu'il fuit object en Court."

At all periods points of pleading have bulked large in the reports. We have seen that the reporters, who made the earliest Year Books, wrote rather to instruct pleaders than to fix points of substantive law;[1] and throughout our legal history the needs of the pleaders have been regarded as of paramount importance. Good pleading, Coke said, is the "touchstone of the true sense of the law."[2] But, in the days when there were many different forms of action, each subject to its peculiar rules, the peculiar rules as to the management of these distinct forms were as important as the rules of pleading.[3] Moreover, in the days of oral pleading, the rules were in practice less strict, because there were more opportunities for amendment before a fatal mistake had been made.[4] But, when Saunders wrote, many of those different forms of action were practically obsolete. The adaptation of Trespass and its offshoots to new needs were causing these actions on the case to cover the whole field of the common law.[5] Less attention need therefore be paid to the intricacies of process; and the new system of written pleadings[6] demanded that more attention should be paid to the rules of pleading.

Under the new system, which had superseded the old in the course of the sixteenth century,[7] the pleadings did not come before the court till they were complete. There was therefore much less chance of avoiding a fatal error before it was too late. At the same time the numerous cases decided upon points of pleading had tended to increase the minuteness, strictness, and precision of the rules of pleading. Practising lawyers, therefore, were laying an increasing stress upon the importance of these rules—a fact which is illustrated by the very large number of books of all kinds which were being published upon this topic at this period.[8] And these lawyers had some reason; for this growth in minuteness and strictness and precision, made the manner in which the issue was reached and formulated of more importance than the substantial merits of the case. It made it more and more possible for a skillful pleader to snatch a decision, in spite of a total absence of any substantial merit; and, conversely, it made it quite impossible to win the strongest case unless it was properly placed before the court.[9] Saunders' reports

[1] Vol. ii 538, 554-555.
[2] Coke, Entries, Pref.
[3] Vol. ii 520-521; vol. iii 623-627.
[4] Ibid 635-637, 655.
[5] Vol. ii 456; vol. iii 626-627; vol. v 416-418; below 625-627; "the variety of these kinds of actions are almost as infinite as they are numerous, daily increasing and continually receiving new forms, according to the growing deceits and fraudulent inventions of wicked men," the Compleat Soliciter (1683) 191.
[6] Vol. iii 648-653; below 600, 633; Pt. II. c. 7 § 2.
[7] Vol. iii 648-653.
[8] Vol. v 385-387; below 600; App. IV. (1).
[9] The instances given above 568-569 make this quite clear; cp. vol. i 645.

summed up the ascertained rules of this increasingly exact science. They contained a selection of leading cases in which the modern rules were clearly, concisely, and authoritatively laid down. In fact, these reports did for the modern rules of pleading what Coke's reports did for many branches of the common law[1]—they provided a selection of authorities behind which it was rarely necessary to go.

The strictness of the rules of pleading, and the consequent tendency to exalt them unduly, increased in force during the eighteenth and the earlier part of the nineteenth centuries. Naturally, the book which laid down the modern rules of the art in a clear and authoritative form came to possess an enormous influence. Naturally, too, the lawyers, who were constantly using it, considered that the best method of keeping the book up to date, was to add to each of the cases contained in it, the new cases in which the rule laid down by the original case had been expanded and applied. Thus the original text gradually came to be buried under successive layers of notes. The book which resulted is hardly a model of legal arrangement. The rules are collected haphazard round cases reported in chronological order. But the rules were there. Practising lawyers knew the key to the labyrinth; and so the book grew and prospered.

The history of Saunders' reports, and the rise and progress of "Williams' Saunders," tell us something of the new type of legal literature which was arising, and of some dominant tendencies in the development of the common law. But of these matters I must speak later.[2] In the meantime we must return to the reports of this period, and note briefly two other new features which they present.

The first of these features is the greatly increased number of reports written in English. The use of Latin and law French had been temporarily abolished during the Commonwealth period. They had, of course, been restored with the monarchy; and their continued use was almost taken to be a sign and a token of loyalty.[3] North, as we have seen, defended their restoration and their continued use;[4] and there was considerable weight in his

[1] Vol. v. 490.

[2] Below 598, 613, 626-627.

[3] "During the English times, as they are called, when the Rump abolished Latin and French, divers books were translated, as the great work of Coke's Reports, etc.; but upon the revival of the law, those all died and are now but waste paper," Discourse on the Study of the Law 12.

[4] Vol. ii 481; in other respects North held somewhat archaic views on the question of reports; thus he says in his Examen, cited 8 S.T. 1062, that "the arguing of the judges in giving judgment is for the pure sake of learning, for the benefit of the bar and the students of the law . . . and not for any authority to the judgment"; though there is a sense in which this is still true, it expresses a view as to the authority of decided cases, which was much truer in the sixteenth century and earlier than at the end of the seventeenth century and later.

arguments. It was true that the greater part of the authorities then used in the courts were written in Latin and French;[1] so that he could contend that "a man may be a wrangler but never a lawyer without the knowledge of the authentic books of the law in their genuine language."[2] It was true that the abbreviated French used by the lawyers was a serviceable and accurate shorthand;[3] and it was true that the precedents of pleading, and technical rules and doctrines of pleading, could be most easily expressed in the original tongues.[4] But, as the seventeenth century progressed, these arguments were gradually ceasing to carry so much weight. New branches of law were arising which were governed by principles not so easily expressed in French. For instance, we get the rise of many new branches of commercial law; and many new developments in the land law had been introduced by equity, the language of which had always been English. Then, too, an increasing number of the older authorities were being translated into English, so that a lawyer who knew only English might yet make himself fairly competent. It is clear, if we look only at the list of reports, that the lawyers were demanding English books. The majority of them were originally written in English; and, even if they had been originally written in French, they were translated, either before being published or shortly afterwards.

The second of these new features is the first appearance of reports of cases decided by the House of Lords. The result of the constitutional controversies of this period had been to settle the position of the House of Lords as the final court of appeal from courts of law and equity.[5] Naturally practitioners wanted some information as to its decisions. The first person who ventured to publish this information was Bartholomew Shower,

[1] "Even the modern Reports mostly are in French, and, as I said, all the ancient as well as divers authentic tracts, as Fitzherbert's Natura Brevium, Staunford's Pleas of the Crown, Crompton's Jurisdiction of Courts, etc., are only to be had in French," Discourse on the Study of the Law 12.

[2] Ibid 13; vol. ii 481; cp. Lives of the Norths i 398 for a tale illustrating the importance attached by Francis North to this study.

[3] "It is a language so religiously embraced by all good lawyers that it is the custom for such to write their notes, or reports taken at the bar, as the shortest, and it is in reality the most apt way for expressing the law," Discourse on the Study of the Law 13; Lives of the Norths i 29.

[4] "All moots and exercises, nay, many practices of the law, must be in French, at the bar of the courts of justice; as when Assizes or Appeals are arraigned, the Array, that is, Pannels of Juries challenged or excepted to, it must be done in French; so Counts, Bars, and such transactions as reach no farther than the Bench and Counsel, with the officers, and not to the Country . . . are to be done in Law French; also replications at the Common Pleas Bar in real actions," Discourse on the Study of the Law 13; cp. Foss, Judges viii 77-78 for the objection raised by eminent lawyers to the Act of 4 George II. c. 26, which provided that the proceedings of the courts should be in English.

[5] Vol. i 366-368, 371-375.

the author of a series of King's Bench Reports.[1] His reports of "Cases in Parliament resolved and adjudged upon petitions and writs of error" were published anonymously in 1698. For the most part they are simply accounts of the arguments used on each side, and a bare statement of the result of the appeal. In the preface to the book this new departure in law reporting is justified, upon the grounds that the cases reported were interesting to the lawyers and statesmen, and instructive to the nobility before whom these cases came.[2] But it soon appeared that the nobility did not appreciate this desire to instruct them. The House voted their publication a breach of privilege;[3] and the maintenance of this attitude seems to have stopped the publication of such reports during the greater part of the eighteenth century.[4] No more reports of House of Lords Cases appeared till 1784;[5] and no more cases of this period appeared till Colles, in 1789, collected and edited from different sources a selection of cases of the last years of the seventeenth and the early years of the eighteenth centuries.[6]

It was not till about the same period that we get reports of cases decided in the ecclesiastical courts and the court of Admiralty; and it was not till the beginning of the nineteenth century that we get reports of cases decided by the Privy Council. On the other hand, we have seen that the practitioners in the court of Chancery had already begun to follow the example of their brethren in the common law courts, and to report cases there decided.[7] We shall see that these Chancery reports increase in number and improve in quality during this period.[8] But before

[1] Above 563.

[2] "It may be hoped that these reports may probably convince the young nobles of this realm, and all who are employed in and about their education, that some general knowledge of the laws of England, and some acquaintance with history and other learning, cannot be unworthy the ambition of every nobleman's son, who has any hopes to sit as judge in that august assembly."

[3] In 1698-1699 Luttrell notes that "The lord chancellor reprimanded the bookseller that printed the book of cases adjudged by the lords in parliament, as being imperfectly taken; and ordered that no person presume to print or publish the proceedings of their house," Diary iv 488.

[4] Campbell, Chancellors iv 136; Campbell says, ibid n., that "Lord Hardwicke, so recently as the year 1762, threatened to put this rule in force against Sir Michael Foster, who, in his admirable work on crown law, introduced some cases decided by the House of Lords," citing Life of Sir M. Foster 45.

[5] Brown, Reports of Cases upon Appeals and Writs of Error determined in the High Court of Parliament; see Wallace, op. cit. 413-414.

[6] Cases heard and determined upon Appeals and Writs of Error from 1697-1713. The Preface tells us that some of the cases came from a MS. of Sir Lucius O'Brien of the Irish Bar, which contained also cases reported by Shower and Brown; others from a printed collection of W. Harwood. "The volume," says Colles, "fills up in a very great measure the chasm between Shower and Brown. It however appears from the journals, and from our books of reports, that a great number of other cases have received the final judgment of the Lords in that period, which have not yet been published."

[7] Vol. v 276-278.

[8] Below 616-618.

describing them I must give some account of the rest of the legal literature of the common law.

(2) The Law Books.

If we look at the law books of this period as a whole they can be described as considerable in quantity but very ordinary in quality. But to this description two exceptions must be made. Hale produced works upon criminal law, constitutional law and legal history which have become legal classics; and Dugdale produced a work upon the origins of the Inns of Court and the legal profession, a chronological list of the series of judges, law officers, and king's serjeants, and some notes upon legal history and legal literature, which are still valuable. I shall therefore deal in the first place with these two men and their books, and, in the second place, with the rest of the legal literature of the period. Of the two Hale is by far the more important. Indeed his peculiar combination of qualities makes him one of the most interesting characters to be found in our legal history.

Hale[1] (1609-1676) was the son of a barrister who abandoned the law because he had scruples as to the morality of the practice of "giving colour" in pleading; and his son inherited something of his moral sensitiveness. He was educated in Puritan principles; but, as sometimes happens in such cases, the severity of these principles caused a reaction. At Oxford he developed, like many others both before and since his time, a taste for amusements and athletics. But, unlike most others, these tastes were short-lived. Serjeant Glanville persuaded him to study the law; and he is said to have taken to the study with so much ardour that he read sixteen hours a day. He was a pupil of Noy;[2] and he soon became acquainted with Selden, who encouraged him to pursue other studies besides law.[3] In fact he not only studied subjects

[1] The best life of Hale is Burnet's Life and Death of Sir Matthew Hale, published in 1682, and based largely on information supplied by Robert Gibbon of the Middle Temple, a confidential servant of Hale's and one his of executors (p. 161); it is the more valuable because Burnet prints at pp. 172-181 an opinion of "one of the greatest men of the profession of the law," who, it appears was also a nobleman (pp. 171-172); in all probability this was Lord Nottingham who had a great admiration for Hale; Sollom Emlyn, who edited the History of the Pleas of the Crown (Pref. vii n. *h*) says that this was the current opinion. We get also valuable sidelights in Baxter's Additional Notes on the Life and Death of Sir M. Hale, published in the same year as Burnet's work, but written two years before; see also Dict. Nat. Biog.; and the life prefaced by Runnington to his editions of Hale's History of the Common Law. The Memoirs of Sir M. Hale by J. B. Williams (1835) are rendered tedious by lengthy citations from Hale's theological writings, and add very little to our knowledge of the man.

[2] "Noy . . . took early notice of him . . . and grew to have such friendship for him that he came to be called young Noy," Burnet, op. cit. 19, 20.

[3] "He was soon found out by that great and learned Antiquary Mr. Selden, who though much superior to him in years, yet came to have such a liking of him, and of

akin to law, such as Roman law and English history, but also mathematics, natural science, and philosophy; and the depth and sincerity of his religious beliefs led him also to the study of theology.[1] He soon made a name for himself at the bar. He probably advised Strafford on the occasion of his impeachment; and he certainly advised Bramston, Laud, and other persons accused by the Long Parliament. It is said that he advised Charles I. to plead to the jurisdiction of the High Court of Justice.[2] However, in 1649 he took the engagement to be faithful to the Commonwealth; and in 1654, by the advice of his royalist friends,[3] he accepted the offer of judge of the Common Pleas, and sat for the Parliament which was summoned in that year. He continued to hold his place as judge till the death of Cromwell, and won universal praise by his demeanour.[4] He refused to take a new commission from Richard Cromwell, and was very active in forwarding the Restoration. But his wise advice, that a treaty should be made with the king on the lines of the Treaty of Newport, was rejected.[5] He was on the commission for the trial of the Regicides (1660); and in the same year was made chief baron of the Exchequer. When the City was rebuilt after the fire of London, he acted on the commission which sat to adjudicate upon the rights of the landlords and tenants of the properties which had been burnt.[6] In 1671 he was made chief justice of the King's Bench, a position which he filled to the satisfaction of both king and people. In 1676 failing health compelled him to insist upon resigning. The king accepted his resignation with great unwillingness;[7] and he continued his salary during his life, though Hale asked him only to give it during pleasure.[8] Hale died on Christmas day of the same year; and, on some dispute appearing likely to

Mr. Vaughan, who was afterwards Lord Chief Justice of the Common Pleas, that as he continued in a close friendship with them while he lived, so he left them at his death, two of his four executors. It was this acquaintance that first set Mr. Hale on a more enlarged pursuit of learning, which he had before confined to his own profession," Burnet, op. cit. 22-23.

[1] Ibid 24-29.

[2] Ibid 33-34; Dict. Nat. Biog.

[3] Burnet, op. cit. 37.

[4] Dict. Nat. Biog.

[5] Ibid; Burnet, History of My Own Time (Airy's Ed.) i 160.

[6] "Without detracting from the labours of the other judges, it must be acknowledged that he was the most instrumental in that great work; for he first by way of scheme contrived the rules upon which he and the rest proceeded afterwards; in which his readiness at Arithmetick, and his skill in Architecture were of great use to him," Burnet, op. cit. 56-57.

[7] "Such was the general satisfaction which all the kingdom received by his excellent administration of justice, that the king, though he could not well deny his request, yet he deferred the granting of it as long as was possible; nor could the lord chancellor be prevailed with to move the king to hasten his discharge. . . . (The king) parted from him with great grace, wishing him most heartily the return of his health, and assuring him that he would still look on him as one of his judges, and have recourse to his advice when his health would permit, and in the meantime would continue his pension during his life," ibid 99, 100, 103.

[8] Ibid 103.

arise as to whether the last quarterly instalment of his salary was payable, Charles settled the matter by paying it at once to his executor.[1]

It may at first sight seem strange that a man of Hale's puritanically sensitive conscience[2] and genuine piety should have been able to attract the admiration of Charles. It is not strange if we look a little more closely at his character. The almost unanimous opinion of his contemporaries makes it quite clear that his deep religious convictions had so directed his great natural abilities, that they had produced a really beautiful character, comparable, among English judges, only to that of Sir Thomas More. His abilities excited universal admiration, and the manner in which he used them disarmed all envy. Even when he was at the bar "one good word of his was of more advantage to a young man than all the favour of the court could be."[3] Fortunately Burnet has done for him something of the service that Roper did for More. Burnet's life enables us to realize the extraordinary combination of moral qualities, which made him universally beloved in his lifetime, with intellectual qualities, which enabled him to write the books that have left an enduring mark upon our legal history.

The qualities that strike us most forcibly when we read his life are his honesty and his sincerity. It was an age in which the standard of professional honour, even among the leaders of the Bar, was not high. Counsel thought it no shame to play tricks upon the court to win a case, or even to let down their clients to advantage themselves. Francis North, appearing in an action for treble damages for subtraction of tithes, got off his client with judgment for the single value and costs only, by a deliberate invention of a story as to the existence of a title to a discharge of of tithes, which he knew to be false;[4] and we have seen that Maynard is said sometimes deliberately to have given way to a judge's mistake, and so let down his client in a small fee'd case, that he might increase his reputation with that judge in future cases in which he was better fee'd.[5] Of Hale on the other hand we are told that, "in his pleading he abhorred those two common faults of misreciting evidences, quoting presidents or books falsely, or asserting things confidently; by which ignorant juries or weak judges are too often wrought on. He pleaded with the same sincerity that he used in the other parts of his life, and used to say that it was as great a dishonour as a man was capable of that for a little money he was to be hired to say or do otherwise than as he thought."[6] It is no wonder that he was sometimes roused

[1] Burnet, op. cit. 104.
[2] Below 578.
[3] Burnet, op. cit. 181.
[4] Lives of the Norths i 64.
[5] Above 513.
[6] Burnet, op. cit. 144-145.

to anger by the tricks played by a man like Saunders.[1] He would often persuade parties to allow him to arbitrate instead of going to law, and would never take any money for such services, because he was acting as judge; and if people suggested that he in consequence lost much time, he said, "can I spend my time better than to make people friends?"[2] If he saw clearly that a cause was unjust he refused to meddle with it.[3] "If a young gentleman happened to be retain'd to argue a point in law, where he was on the contrary side, he would very often mend the objections when he came to repeat them, and always commend the gentleman if there was room for it."[4]

It is thus obvious that mere pecuniary gain was the last thing he thought of; and he left but a small estate, considering the practice which he had had at the bar, and the high judicial posts which he had filled.[5] This was partly due to his extraordinary generosity. Burnet tells us[6] that "he laid aside the tenth penny of all he got for the poor, and took great care to be informed of proper objects for his charities; and after he was a judge many of the perquisities of his place, as his dividend of the Rule and Box money, was sent by him to the Jayls to discharge poor prisoners, who never knew from whose hands the relief came." In fact he was charitable in the widest sense of the word—"I never knew any man," says Baxter, "more free from speaking evil of others behind their backs."[7] He knew how to suppress irrelevant speech in his court;[8] but listened with the most careful attention to all that the parties could urge, and was always ready to be corrected if, in his summing up, he omitted or misstated anything.[9] In an age which was to experience such judges as Scroggs and Jeffreys, he was distinguished for his humanity, and scrupulous fairness to prisoners.[10] A contemporary diarist, cited by Foss, tells a characteristic tale of how, with some difficulty, he persuaded a jury to acquit a starving man who had taken a loaf to save his life.[11]

[1] Above 569.
[2] Burnet, op. cit. 145.
[3] Ibid 143.
[4] Ibid 180-181.
[5] Baxter, Additional Notes on the Life and Death of Sir M. Hale, Pref., "I wondered when he told me how small his estate was, after such ways of getting as were before him."
[6] Op. cit. 147.
[7] Op. cit. 36.
[8] "He pleaded himself always in few words, and home to the point; and when he was a judge, he held those that pleaded before him, to the main hinge of the business, and cut them short when they made excursions about circumstances of no moment," Burnet, op. cit. 125.
[9] "In summing up of an evidence to a jury, he would always require the Barre to interrupt him if he did mistake, and to put him in mind of it, if he did forget the least circumstance; some judges have been disturbed at this as a rudeness, which he always looked upon as a service and respect done to him," ibid 177.
[10] Ibid 162-163.
[11] Foss, Judges vii 112. The sequel is dramatic; sometime after on the Northern circuit, he was extravagantly entertained by a sheriff, whom he rebuked for setting a

His "mercifulness extended even to his beasts."[1] "He was scarce ever seen more angry than with one of his servants for neglecting a bird that he kept, so that it died for want of food."[2] He was sincerely religious, and he thought and wrote much upon theological questions; but there was no sign of intolerance in his disposition. He befriended royalists in the days of the Commonwealth,[3] and protestant dissenters in the days of Charles II.;[4] he tried in vain to secure from Parliament a larger measure of toleration for the latter;[5] and some of the most broadminded and learned churchmen of the day were his friends.[6]

It is true that he had the defects of some of his qualities. He himself found that his fixed rule, to take no brief in a cause which appeared unjust, led him unwittingly to do injustice, if he acted upon it without very careful enquiry into all the facts and circumstances of each case.[7] His charity, in spite of remonstrances, was apt to be indiscriminate;[8] and he sometimes pushed his fear of influencing his judgment by taking gifts to absurd lengths.[9] His dread of ostentation and vanity led him to go so shabbily clothed that even Baxter remonstrated with him.[10] It is probable, too, that his sincere religious beliefs led him to see no harm in the act which posterity, and more especially the unhistorically minded Whig historians of the last century,[11] have most condemned—the sentencing of two witches to death, at a time when the rationalizing and sceptical spirit of the day was beginning to cause the

bad example; the sheriff replied that he could not do enough for Hale, as he had saved his life; and it turned out that the sheriff was the starving man, who had since come into a large estate.

[1] Burnet, op. cit. 164.

[2] Ibid 165.

[3] Ibid 35.

[4] Baxter, op. cit. 19-20, 25-26.

[5] Ibid 19 seqq. At a meeting of divines of both parties held at the invitation of Bridgman, L.K., terms were agreed on, and Hale was asked to draw a bill; he did so, but the House of Commons refused to allow it to be introduced.

[6] Burnet, op. cit. 73-75, mentions Ward bishop of Salisbury, Barlow bishop of Lincoln, Barrow Master of Trinity, Tillotson dean of Canterbury, Stillingfleet dean of St. Pauls, Usher Primate of Ireland; and he says that he was specially intimate with Wilkins.

[7] "He abandoned much of the scrupulosity he had about causes that appeared at first view unjust, upon this occasion: there were two causes brought to him, which by the ignorance of the party or their attorney, were so ill represented to him, that they seemed to be very bad, but he enquiring more narrowly into them, found they were really very good and just," ibid 143-144.

[8] Ibid 149-150.

[9] Thus he insisted on paying for some venison sent to him as a present while on circuit, though he was informed that this was a mere customary courtesy, ibid 62; and, "after he was made a judge, he would needs pay more for every purchase he made than it was worth . . . and when some represented to him that he made ill bargains he said, it became judges to pay more for what they bought, than the true value; that those with whom they dealt might not think they had any right to their favour, by having sold things to them at an easie rate," ibid 153.

[10] Baxter, op. cit. Pref.—"His habit was so coarse and plain that I, who am thought to be guilty of a culpable neglect therein, have been bold to desire him to lay by some things that seemed too homely."

[11] See Campbell, Lives of the Chief Justices i 561-567.

more enlightened to doubt the existence of witchcraft.[1] But we should remember that the sentence was in accordance with the law, and that the existence of witches was vouched for by the Bible. Therefore a man of Hale's mind and temper could hardly be expected to doubt.[2] And these are, after all, small matters. When all deductions have been made, there is no doubt that Hale was a man of a really saintly character, who, by his genuine goodness, attracted the affection of all those with whom he came into merely passing contact. Burnet[3] tells us that he had seen him often, but had had no further communication with him; and, "in my life I never saw so much gravity tempered with that sweetness, and set off with so much vivacity as appeared in his looks and behaviour, which disposed me to a veneration for him, which I never had for any with whom I was not acquainted." He was, says Baxter, a man "who would not have done an unjust act for any worldly price or motive."[4]

The only discordant note in the view held of Hale's character by his contemporaries is struck by Roger North,[5] and by his own confession his testimony is biased.[6] Even he can only ridicule his scientific studies; and attribute to him a liking for flattery, a shortness of temper, and a greater readiness to accept presents in his declining years, for which there is no other evidence whatever.[7] And, in spite of all that he can allege, he is forced to praise him

[1] North acted on the modern view, Lives of the Norths i 166-169; but Raymond allowed witches to be convicted, ibid iii 130, 131; no doubt it was a difficult position for judges; as North says, ibid i 166, "It is seldom that a poor old wretch is brought to trial upon that account, but there is, at the heels of her, a popular rage that does little less than demand her to be put to death; and, if the judge is so clear and open as to declare against that impious vulgar opinion . . . the country men (the triers) cry, this judge hath no religion, for he doth not believe witches; and so, to show they have some, hang the poor wretches."

[2] In his summing up. 6 S.T. 700 he said, "that there were such creatures as witches he made no doubt at all; for first the scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime. And such hath been the judgment of this kingdom, as appears by that Act of Parliament which hath provided punishments proportionable to the quality of the offences."

[3] Op. cit. Pref. [4] Op. cit. 44.

[5] Lives of the Norths i 79-91; iii 93-102; cp. Hargrave's remarks about North's account of Hale in his Pref. to the Law Tracts.

[6] "And I must not part without subjoining my solemn protestation, that nothing is here set down for any such invidious purposes but merely for the sake of truth; first, in general, for all truth is profitable; and secondly, in particular, for justice to the character I write of (i.e. his brother) against whom never anything was urged so peremptorily as the authority of Hales, as if one must of necessity be in the wrong because another was presumed to be in the right," Lives, i 90; further, ibid iii 102, he spitefully and quite untruly says of Burnet that he "wanted both information and understanding" for the writing of his life.

[7] He even alleges, untruly, that his second wife was his serving maid, ibid iii 95; she may not have been quite his equal in social status, but Baxter says, op. cit. Pref., "As far as I could discern he chose one very suitable to his ends; one of his own judgment and temper, prudent and loving, and fit to please him; and that would not draw on him the trouble of much acquaintance and relations."

as a judge and as a man, and to confess that he could only wish that he might be happy enough to live to see such another.[1]

Lord chancellor Finch could hold him up as an example to his successor;[2] Charles II. parted from him with real regret;[3] and yet North thought it necessary, in order to justify his brother's political career, to pick what holes he could in his character. This fact tells us much of the growth of bitterness between political parties at the end of Charles II.'s reign. Hale was a consummate constitutional lawyer who was, even by North's own confession, quite ready to give the crown its due, and equally ready (too ready North thought) to uphold the constitutional rights of the people.[4] His character had made him universally respected; and his legal pre-eminence was so universally admitted that his rulings were generally accepted as final.[5] If Charles had entrusted himself to the guidance of men like Hale, there was, as we have seen, at least a possibility that the constitutional law of the state might have been gradually adapted to the constitutional situation as it existed after the Restoration.[6]

Hale's unique legal reputation was thus due partly to his character, which led him to apply his great talents to anything he undertook with all his strength—"all his hours," says Baxter,[7] "were precious to him;" partly to his opportunities and environment, of which he took the fullest advantage. His character

[1] Thus he says, Lives i 80, "He became the cushion exceedingly well; his manner of hearing patient, his directions pertinent, and his discourses copious and, although he hesitated often, fluent. His stop for a word by the produce always paid for the delay; and on some occasions he would utter sentences heroic;" "in the main he was a most excellent person, and in the way of English justice an incomparable magistrate. So I leave the discourse of this great man, wishing I may be so happy to live to see such another, with all his faults," ibid iii 101-102.

[2] Addressing his successor on his appointment, he said, "Onerosum est succedere bono Principi, was the saying of him in the Panegyrick; and you will find it so too that are to succeed such a chief justice, of so indefatigable an industry, so invincible a patience, so exemplary an integrity, and so magnanimous a contempt of worldly things, without which no man can be truly great; and to all this a man who was so absolute a master of the science of the law, and even of the most abstruse and hidden parts of it," cited Burnet, op. cit. 214-215.

[3] Above 575-576.

[4] "I have heard him (Lord Keeper Guildford) say that, while Hales was chief baron of the Exchequer, by means of his great learning even against his inclination, he did the crown more justice in that court than any others in his place had done with all their good will and less knowledge. But his lordship knew also his foible which was leaning towards the popular; yet when he knew the law was for the king (as well he might being acquainted with all the records of the court to which men of the law are commonly strangers), he failed not to judge accordingly," Lives i 79, 80; cp. ibid iii 101. If Pepys had realized the character of Hale, he would hardly have taken the trouble to interview him upon a case of false imprisonment pending in his court, in which Pepys was officially implicated, Diary, Nov. 25, 1662, and references in the index to Wheatley's Ed. *sub voc. Field.*

[5] Below 581.

[6] For Hale's general constitutional position see above 204-205.

[7] Op. cit. Pref.

and talents made him easily the greatest English lawyer of his day. His association with the school of historical jurists, of whom Selden was the chief,[1] made him, with the exception of Francis Bacon, the most scientific jurist that England had yet seen. At the same time his active life as a barrister and a judge, during the troubled period of the Rebellion and the Commonwealth, made him an acute political thinker. Let us look at him under these three aspects.

(i) He was a consummate master of English law on all sides. As a barrister no one was his superior—"he might have had what practice he pleased."[2] Nor is this surprising if we consider the thoroughness of his legal studies. Like most of the barristers of that date, he compiled a large commonplace book which is, with many of his other manuscripts, in Lincoln's Inn library.[3] This book was once borrowed by a judge of the King's Bench, when Hale had become chief baron; and "the judge having perused it said, that though it was composed by him so early, he did not think that any lawyer in England could do it better, except he himself would again set about it."[4] Of his excellence as a judge contemporary testimony is unanimous. An eminent lawyer—probably Lord Nottingham[5]—who knew him well, sent Burnet an account of his character as a man, as a lawyer, and a judge.[6] He says, "He hath sat as a judge in all the courts of law, and in two of them as Chief, but still wherever he sat, all business of consequence followed him, and no man was content to sit down by the judgment of any other court, till the case were brought before him, to see whether he were of the same mind. And his opinion being once known, men did readily acquiesce in it." As chief baron of the Exchequer he had an equitable jurisdiction;[7] and as a judge in equity, his authority was equally great. He was often called in to advise the chancellor; and his thorough mastery both of common law and equity, his power of clear and logical thought, and his absolute impartiality,[8] made him an ideal assistant in an age in which it was still necessary for equity to mitigate the strictness of the law, in an age in which the principles of equity

[1] Vol. v 407-412.

[2] Burnet, op. cit. 179.

[3] It is written in law French, and entitled by Hale "The Black Book of the New Law." It consists of 502 folios, twenty of which are blank. The cases under each head are numbered; but, as is the case with the printed abridgments of the Y.BB., there is no attempt at classification. Interspersed throughout the book are additional leaves, containing fresh cases collected after the original book had been completed.

[4] Burnet, op. cit. 22.

[5] Above 574 n. 1.

[6] Burnet, op. cit. 172-181.

[7] Vol. i 240-242.

[8] "If the cause were of difficult examination, or intricated or entangled with variety of settlements, no man ever shewed a more clear and discerning judgment, if it were of great value, and great persons interested in it, no man ever shewed greater courage and integrity in laying aside all respect of persons," Burnet, op. cit. 175.

were still very far from fixed. "As great a lawyer as he was, he would never suffer the strictness of law to prevail against conscience, as great a chancellor as he was, he would make use of all the niceties and subtleties in law, when it tended to support right and equity." Indeed he has some claims to be considered the teacher of Lord Nottingham, the father of our modern system of equity.[1] He gave reasoned and critical judgments, reviewing the practice of the court, and commenting upon its expediency; "and from his observations and discourses, the Chancery hath taken occasion to establish many of those rules by which it governs itself at this day." Even North was obliged to admit that the court of King's Bench was under his presidency a veritable school of law.[2]

(ii) There is no doubt that Hale's undisputed pre-eminence as a lawyer was due to the fact that he had made himself something very much more than a mere common lawyer—something more even than a mere English lawyer. The wide range of his studies and interests had made him a scientific jurist.

The impulse to give a larger range to his studies came from Selden, and from his intercourse with the members of his school.[3] And those studies were of wide range—"he used to say no man could be absolutely a master in any profession, without having some skill in other sciences."[4] Thus, as we have seen,[5] he studied mathematics, natural science, medicine, ancient history, and especially philosophy, and divinity—"he got," says Baxter,[6] "all new or old books of philosophy that he could meet with as eagerly as if he had been a boy at the University." Though these studies no doubt broadened his outlook, it cannot be said that he attained any particular eminence in them.[7] Studies which were much more important, because they bore directly on the study of the law, were his researches into Roman law and English legal and constitutional history.

With respect to the first of these subjects of study, Burnet tells us that "he set himself much to the study of Roman law, and though he liked the way of judicature in England by juries, much better than that of the civil law, where so much was trusted to the judge; yet he often said, that the true grounds and reasons of law were so well delivered in the Digest, that a man could never understand law as a science so well as by seeking it there,

[1] Above 545-548.
[2] Discourse on the Study of the Laws 32-33, cited above 496-497.
[3] Above 574 n. 3.
[4] Burnet, op. cit. 26.
[5] Above 574-575.
[6] Op. cit. 5.
[7] See Dict. Nat. Biog.; on the other hand even North said, Lives, iii 99, that "according to the precise way he sequestered Sunday to pious meditation and writing. And there is a volume or two published of his meditations which are very good in their kind."

and therefore lamented much that it was so little studied in England."[1]

In his methods of studying legal and constitutional history he showed himself a true disciple of Selden. He spent, as he says in his will, forty years in gathering a magnificent collection of manuscripts bearing upon many different sides of legal and constitutional history; and he left many MSS. treatises upon topics connected therewith in a more or less complete condition.[2] These treatises show that he knew well how to make use of the store of learning which he had gathered to explain the law of his own day. By his will he prohibited the publication of any of those treatises, other than those which he had expressly permitted to be published in his lifetime; and, in the part of his will in which he left the largest part of his manuscripts to Lincoln's Inn, he specially enjoined the Inn not to print them. They were, he truly said, "a treasure that are not fit for every man's view, nor is every man capable of making use of them." Roger North, with some reason, criticized this injunction,[3] which Burnet endeavours to explain by saying that he feared that they might, if published, be mutilated by the censor.[4] This is an explanation which might account for his injunction against publishing his own treatises. It can hardly explain his injunction against publishing the records which he had collected. Probably we may see in both these injunctions a proof of the scholarly spirit in which he pursued his studies in law and history. He was content to gather his authorities at the fountain-head, and assimilate them, before he used them as the foundation of his books. He did not, like Coke,[5] at once insert bodily into his books any piece of undigested information from the records which he had acquired. He did not wish any books to appear under his name until they had received his final revision. "Such works," he truly said, "rarely come out to the due advantage of the author.[6] As for his collection of records, he wished them to be used only by men who, like himself, were intent on extracting the truth from them, and not by men who would search them to prove some particular thesis which they were

[1] Op. cit. 24.

[2] The greater part of his MSS. he left to Lincoln's Inn; for a description of these see the account given by Hunter in the general report of the Commissioners of the Public Records (1837) 353-375; for account of other MSS. see Dict. Nat. Biog.

[3] "He was so bizarre in his dispositions that he almost suppressed his collections and writings of the law, which were a treasure, and, being published, would have been a monument of him beyond the power of marble. But instead of that he ordered them to be locked up in Lincoln's Inn library," Lives, i 81.

[4] Op. cit. 185-187—"which he had observed not without some indignation had been done to a part of the Reports of one whom he had much esteemed. This in matters of law, he said, might prove to be of such mischievous consequence, that he thereupon resolved none of his writings should be at the mercy of the licensers."

[5] Vol. v 475-476.

[6] Pref. to Rolle's Abridgment, Collect. Jurid. i 266.

interested in maintaining.[1] He could not but know that this was the use which, then and earlier, had been made of records; and he did not wish his collection to be used in that spirit and with that object. He wished them to be used in the true historical spirit which illumined his own works. His prohibition against publication was perhaps in that age the best way to effect this result.

Hale's studies in Roman law gave him a grasp of the rationale of legal principles; and his studies in legal history gave him a thorough knowledge of the evolution of the rules of English law. As we have seen, they made him so thoroughly a master of the technicalities of the common law, and they gave him so just a perception of the equitable restrictions that should be placed upon those technicalities, that he could on occasion use them for the purpose of securing justice.[2] It is obvious that a man who had so thoroughly mastered the law would be capable, not only of expounding and applying its rules, but also of viewing it as a whole, of setting it out in an orderly form, and of criticizing its rules. Burnet tells us[3] that some persons once said to him that "they looked on the common law as a study that could not be brought into a scheme, nor formed into a rational science, by reason of the indigestedness of it, and the multiplicity of the cases in it." But Hale replied that "he was not of their mind, and so, quickly after, he drew with his own hand a scheme of the whole order and parts of it in a large sheet of paper, to the great satisfaction of those to whom he sent it."[4]

Hale's attainments as a jurist thus explain the reasons for the excellencies of his legal treatises. They also explain why the most important of these treatises deal with the two topics of public law for which a sound knowledge of legal history was absolutely essential — constitutional law and criminal law; and why they include also works of an analytical kind, designed to show the relations of different parts of English law. It is fortunate for succeeding generations of English lawyers and historians that his injunction against printing his treatises has been to some extent disregarded. Many, as we shall see, have been printed; and naturally they cover a wide field. But in fairness to their author we must remember that no one of them was completely and finally revised by him.

[1] "I would have nothing of these books printed, but entirely preserved together for the use of the industrious learned members of that Society."

[2] Above 582.

[3] Op. cit. 120, 121.

[4] At the same time he was fully conscious of the difficulty of producing a systematic code: "Some pressed him to compile a body of the English law. . . . But he said, as it was a great and noble design, which would be of vast advantage to the nation; so it was too much for a private man to undertake; it was not to be entered upon, but by the command of a prince, and with the communicated endeavours of some of the most eminent of the profession," Burnet, op. cit. 121.

(iii) The fact that Hale's active life as a barrister and a judge had made him an acute political thinker is most strikingly illustrated by the second part of his reply to Hobbes' Dialogue of the Common Law. We have seen that it contains an able analysis of the political and constitutional theory of the English state in the latter half of the seventeenth century, which was substantially accepted as true by all parties after the Revolution.[1] The same qualities of accurate and impartial analysis, which enabled him to write this tract, are also displayed in his tract on "The Amendment or Alteration of the Lawes."[2] His experiences of the attempted law reforms of the Commonwealth had led him to reflect on the shortcomings of English law. We shall see that these experiences suggested some very practical proposals for their reform.

Hale's printed works fall into five main groups; (1) One purely historical work—the History of the Common Law; (2) his works on constitutional or public law; (3) his works on the criminal law; (4) his scientific and critical works; and (5) his works on the civil part of the law.

(1) Hale's one purely historical work is his History of the Common Law. It was first published anonymously in 1713, and reprinted with Hale's name attached in 1716. A third edition appeared in 1739. The fourth to the sixth editions were edited by serjeant Runnington (1779-1820), who prefixed a life of Hale, and added very extensive notes. This work—the first history of the common law ever written—is an able sketch, but only a sketch; and it is clear that the author did not mean it to be published. It consists of twelve chapters, the titles of which indicate the contents of the book, and illustrate its fragmentary character.[3] But, in spite of its fragmentary character, it has very considerable merits. It gives us a clear statement of the development of the most important external features of the common law—the difference between common and statute law; the relation of the common law

[1] Above 204-207, 258-262. [2] Below 592-594.

[3] I. Concerning the distribution of the laws of England into Common and Statute law. And first, concerning the Statute law, or Acts of Parliament. II. Concerning the *Lex non Scripta*, i.e. the Common or Municipal Laws of this Kingdom. III. Concerning the Common Law of *England*, its use, excellence, and the reason of its denomination. IV. Touching the original of the Common Law of *England*. V. How the Common Law of *England* stood at and for some time after the coming of King *William I*. VI. Concerning the parity or similitude of the Laws of *England* and *Normandy*, and the reasons thereof. VII. Concerning the progress of the Laws of *England* after the time of King *William I*. until the time of King *Edward II*. VIII. A brief continuation of the progress of the laws, from the time of King *Edward II*. inclusive, down to these times. IX. Concerning the settling of the Common Law of *England* in *Ireland* and *Wales* and some observations touching the Isles of *Mann*, *Jersey*, and *Guernsey*, etc. X. Concerning the communication of the laws of *England* into the Kingdom of *Scotland*. XI. Touching the course of descents in *England*. XII. Touching trials by jury.

to other bodies of law recognized by it, such as ecclesiastical law, the law merchant, maritime law, and martial law; the characteristics and advantages of a trial by jury; the main features of the system of pleading recognized by the common law at different periods; the relations of English Law to Welsh, Irish, and Scotch law, and to the law observed in the Channel Islands and the Isle of Man. The author throughout bases his text on the best authorities accessible to him. That its weakest part is that which deals with the pre-Conquest period is no fault of his. From the Conquest onwards he shows that he is a master of the principal original authorities and authors. In his chapters on Norman law, and in other parts of his book,[1] he shows acquaintance with foreign bodies of law; and a capacity to compare the development of English with foreign law, without which, as Maitland has said, no complete or critical legal history is possible. No doubt current controversies have caused him to give an unduly long space to a question which, in our eyes, is a purely academic discussion—the question in what sense, if at all, William I. could be said to be a conqueror.[2] Then too there is a very meagre account of the history of legal doctrine—the history of the law of inheritance is the only body of legal doctrine adequately treated; and the treatment of the period from Edward II. to his own day is so sketchy that it is hardly even an outline. The book is really a series of essays, some of which are united to others by a chronological thread. But, when all deductions have been made, it is, in my opinion, the ablest introductory sketch of a history of English law that appeared till the publication of Pollock and Maitland's volumes in 1895.

My reasons for an opinion, which is more favourable to Hale's work than that expressed by Maitland,[3] are as follows: in the first place, Hale shows a very wide knowledge of both the legal and the historical literature of his subject—a good deal wider knowledge than that shown by Reeves, who confines himself for the most part to the strictly legal authorities. In the second place, his wide reading gave him a sense of historical perspective which enables him to map out the important epochs, and to stress the important topics and tendencies in those epochs. In the third place, his complete mastery of the law of his own day enables him to detect the remote origins of the important doctrines of

[1] E.g. at various points in chapters ix-xii.

[2] Chap. v; Maitland, Materials for English Legal History, Collected Works ii 5, says, "Unfortunately he was induced to spend his strength upon problems which in his day could not permanently be solved, such as the relation of English to Norman law, and the vexed question of the Scottish homage; and just when one expects the book to become interesting, it finishes off with protracted panegyrics upon our law of inheritance and trial by jury."

[3] See last note.

later law, to give to the history of those doctrines their due weight, and thus, even when dealing with remote periods, to avoid unprofitable antiquarianism. Sketch as it is, Hale's history is a living history because the author had a clear view of the whole of its course. Maitland once said that in the hands of a master there might be made of the history of English law one of the great books of the world.[1] To my mind Hale's sketch shows that, if he had devoted to it all his powers, he might have produced such a book.[2] And this opinion is, it seems to me, borne out by the evidence of his other works. Thus, the scantiness of his history in its later periods is supplemented by his preface to Rolle's Abridgment. That preface is not, it is true, purely historical—it contains a good account of some of the salient characteristics of the English law of Hale's day; but its main value is historical.[3] We shall see that it gives us a valuable summary of the leading differences between the common law of Hale's own day and that of the Year Books—of the differences, that is, between the modern and the mediæval common law.[4] But the strongest evidence in favour of this view is afforded by the characteristics of his works on constitutional and public law, and on criminal law.

(2) The most important of Hale's published works dealing with constitutional and public law is his book on "The Jurisdiction of the Lords' House," published with an elaborate preface by Hargrave in 1796.[5] This topic comprised some of the most controverted political questions of the day; and Hale had written much upon it in the early days of the Long Parliament, during the Commonwealth, and after the Restoration. This essay—the last of three written after the Restoration—represents his final judgment on the matter; and he himself tells us that the MS. was complete, and only needed his final revision.[6] Upon certain

[1] Collected Works ii 59.

[2] Maitland said, ibid 5, "No man of his age was better qualified or better equipped for the task than Sir Matthew Hale; none had a wider or deeper knowledge of the materials; he was perhaps the last great English lawyer who habitually studied records; he studied them pen in hand and to good purpose. Add to this that, besides being the most eminent lawyer and judge of his time, he was a student of general history, found relaxation in the pages of Hoveden and Matthew Paris, read Roman law, did not despise continental literature, felt an impulse towards scientific arrangement, took wide and liberal views of the object and method of law."

[3] As North, Lives iii 101 says, it is "most worth reading because it gives a history of the changes of the law."

[4] Below 624-626.

[5] "The Jurisdiction of the Lords' House, or Parliament, considered according to Antient Records."

[6] Before the Restoration Hale had written three tracts bearing on the subject—(1) Incepta de Juribus Coronæ, or De Jure Regio—an outline written soon after 1641, in which he maintains that the jurisdiction of the House of Lords was exercised as part of the consilium ordinarium, and that therefore the judges and other members of the consilium had a voice, Hargrave, Pref. ccxi-ccxii; (2) Preparatory Notes Touching the

points his views have not prevailed—e.g. his view of the inability of the House to hear appeals from the courts of equity,[1] and his view that its jurisdiction to hear cases in error depends rather upon a commission from the king than upon inherent right.[2] But generally he lays down the law which has prevailed. And it is interesting to note that he made a suggestion as to the exercise by the House of its jurisdiction through a judicial committee, which substantially represents the modern practice, though the result has been obtained by a road different from that which he proposed.[3] The whole book is a striking testimony to Hale's mastery of records, to his impartiality, and to his statesmanlike qualities.

Another considerable treatise, which touches constitutional law at many points, was published in the Hargrave Law Tracts. It is in three parts. The first part deals with the right of the king and private persons to the rivers and foreshore, the second with sea ports, and the third and longest with the custom of goods imported and exported.[4] It is the first systematic treatise upon all these topics; and Hale was especially well fitted to deal with them, by reason both of his mastery of records, and of his practical knowledge of the law upon these topics, which he had acquired as chief baron of the Exchequer. The third part of this treatise is especially interesting. The question of the king's imposing power had not long been settled. An impartial account of this branch of the law, by a man who had lived during the

Rights of the Crown, in which a similar view is taken, ibid ccxii-ccxiii; (3) Prærogativa Regis, which, in so far as it relates to the House of Lords, is a transcript of the foregoing, ibid ccxiii-ccxiv. After the Restoration he wrote (1) A Discourse or History Concerning the Power of Jurisdiction in the King's Council and in Parliament, in eleven chapters, mainly concerned with the claims of the Lords to exercise original jurisdiction, ibid ccxv-ccxvi; (2) Preparatory Notes Touching Parliamentary Proceedings, in twenty-seven chapters, mainly concerned with the question of the appellate jurisdiction from Chancery, ibid ccxvii-ccxviii; (3) This Treatise; Hargrave says, at p. ccxviii, that "it is probably Hale's latest performance on the jurisdiction exercised by the lords in parliament"; for, in chap. 28, he cites a King's Bench case of 1673; "under the title there is written by Lord Hale, *this book is perfected, but I have not yet revised it after it was written. M.H.*"

[1] Jurisdiction of the Lords' House 201; below 670.

[2] Ibid 145, 147, 153-154; vol. i 370-371.

[3] "That the appointment of tryers of petitions, which is always done by the king the first day of a session, may not be a piece only of name and formality, as it is now used; but that a select number of the most judicious lords spiritual and temporal, and that not too excessive a number, together with the judges, be appointed, and these to be commissionated under the great seal for that purpose, to whom as occasion requires petitions for reversals of decrees may be referred. And the like commission for examining of judgments in writs of error," ibid 202.

[4] "A treatise in three parts: Pars Prima—De Juri Maris et Brachiorum ejusdem. Pars Secunda—De Portibus Maris. Pars Tertia—Concerning the custom of goods imported and exported," Hargrave Law Tracts 1-248; the first part contains seven chapters, the second twelve, and the third twenty-eight; the MS. is not in Hale's hand, but Hargrave had no doubt as to the authorship—in fact, the internal evidence of style and treatment is conclusive.

time when the right to impose customs duties had been one of the most fiercely controverted political questions of the day, is invaluable.[1] In his short work on "Sheriffs' Accounts,"[2] written for the Lord Treasurer and the chancellor of the Exchequer, he deals with another branch of the revenue. It shows Hale's mastery of the early history of the Exchequer, and of the history and seventeenth century practice of the financial relations of the sheriffs and the crown; and it contains some valuable suggestions for improvements in the existing practice.

Another paper published in the Hargrave Law Tracts deals with the rivalry of the courts of King's Bench and Common Pleas.[3] It gives us an interesting account of the process, organization, and jurisdiction of the King's Bench, and of the devices used by the Common Pleas to compete with the King's Bench. It concludes with making five proposals for a settlement of the question of jurisdiction similar to those contained in Chapter VIII.[4] of the tract on the Amendment of the laws. In his "Discourse touching Provision for the Poor" he makes some interesting suggestions as to the reforms needed in the law and administration of poor relief.[5] Some of his suggestions as to the organization of several parishes for the erection of a workhouse, where the poor could be profitably employed, anticipate the measures carried out at the beginning of the nineteenth century.

All these treatises illustrate Hale's wide historical and legal knowledge, and his political wisdom. It is to be regretted that his "Preparatory Notes touching the Rights of the Crown" are still in MS.[6] It is a work on the various branches of the prerogative; and it is obvious that a work on such a subject, written at this period by a man of Hale's talents and impartiality, possesses a very great historical importance for the constitutional history of this and later periods.

(3) Hale's most important work upon criminal law is his unfinished "History of the Pleas of the Crown." The author had designed a work in three books. The subject of the first was to be capital offences—treasons and felonies; and it was to be divided into two parts—the kinds of treasons and felonies, and the method of procedure upon them. The subject of the second was to

[1] Above 42-48. [2] A short treatise touching Sheriffs' Accounts.

[3] A Discourse concerning the Courts of King's Bench and Common Pleas, Hargrave Law Tracts 359-376; on this subject see vol. i 200, 221-222.

[4] At pp. 372-376.

[5] A Discourse touching Provision for the Poor; as Miss Leonard says, Early History of Poor Relief 276, the tract shows that the administration of the poor law had decayed owing to the absence of the strong control exercised by the Council in the earlier part of the century; see above 349-351.

[6] See Dict. Nat. Biog. for an account of this MS. which is in Lincoln's Inn Library; and for Hale's views on this matter see above 205 and vol. v App. III.

be non-capital crimes; and of the third, franchises and liberties. Only the first book was completed. But it was left in the most perfect state of any of his works. The whole had been transcribed; and a large part of it had received the author's final revision.[1] In 1680 the House of Commons ordered it to be printed; but the first edition was not published till 1736. It was edited with some care by Sollom Emlyn. The subject had been carefully studied by Hale all through his professional career; and we shall see that he had summarized it at an earlier period.[2] This book, so far as it extends, gives a complete presentment of this branch of the law, both in its development and in its condition at Hale's own time. It was a branch of the law which could not then be adequately described without a very complete knowledge of the history of the law; and, partly because it contained very ancient ideas and rules, partly because it had been added to, and in many details modified, by a variety of statutes, it greatly needed systematic treatment. Coke,[3] Staunford,[4] and Pulton,[4] had summarized it, in a somewhat unsystematic form. Hale, because he was a competent historian, jurist, and lawyer, did the work which they endeavoured to do infinitely better.[5] Ever since its first publication it has been regarded as a book of the highest authority.

(4) All these works show that Hale was essentially a scientific lawyer. He could view English law as a whole and appreciate the relationship of its various parts. These qualities are perhaps most strikingly brought out in the group of scientific and critical works which we must now consider.

(i) Hale was able to suggest a methodical arrangement of English law, which was at once scientific and practical. He himself said very truly that, "for the most part the most methodical distributors of any science rarely appear subtle or acute in the sciences themselves, because, while they principally study the former, they are less studious and advertent of the latter."[6] English lawyers had been and are still too much engaged in acquiring the mastery of their science to care much about method. Hale, being a master of English law and a student of other sciences, was able to methodize to some practical effect. His

[1] See Emlyn's Pref.; and the Pref. to Foster's Discourse of Crown Law.

[2] Below 591.

[3] Vol. v 469-470. [4] Ibid 392-393.

[5] Stephen, H.C.L. ii 211 says, "It is not only of the highest authority, but shows a depth of thought and a comprehensiveness of design which puts it in quite a different category from Coke's Institutes. It is written on an excellent plan, and is far more of a treatise and far less of an index or mere work of practice than any book on the subject known to me."

[6] The Analysis of the Civil Part of the Law, Pref.; it was first published in 1713, with the Hale's History of the Common Law.

"Analysis of the Civil Part of the Law," though only a preliminary sketch, was said by Blackstone to be the most scientific and comprehensive that had yet appeared; and he adopted it as the basis of the arrangement of his Commentaries.[1] Hale seems to have originated the idea—which he had no doubt adapted from the Institutes—of grouping the law round the rights of persons, the rights of things, wrongs, and remedies. Whatever may be alleged against the scientific character of this arrangement, it does introduce into the treatment of the law some method; and Blackstone proved that it was a method round which the law of his day could be grouped. We should always remember that a method must accommodate itself to the material; and that, if the material is not wholly logical, too logical a method will merely introduce an additional element of confusion. The Analysis dealt only with the civil part of the law. In his "Summary of the Pleas of the Crown"[2] Hale attempted to methodize the criminal law. The first edition of this work was printed from a surreptitious and very faulty copy;[3] and the book itself was written while he was quite a young man, and for his own use only. He made, it is said, occasional additions to it, and carried it with him on circuit.[4] It is not surprising, therefore, to find that it is not always accurate.[5] But it was a useful summary and it passed through seven editions.[6] Historically it is interesting as the first attempt to introduce some order into this branch of the law. Offences are divided into (1) those immediately against God, such as heresy and witchcraft; and (2) those immediately against man. Of the latter some are capital, and some are not. Capital offences are either treasons or felonies. Felonies are offences either against the life of a man, against his goods, or against his habitation. Non-capital offences are either at common law—such as various kinds of misprision, bribery, extortion, breach of peace, deceit, nuisance; or they are created by statute. Having thus discussed the substantive part of the law he deals with the adjective part, and describes the competence of the courts having criminal jurisdiction, modes of trial, process, pleas, trial, judgment, and execution. We have seen that his "History of the Pleas of the Crown" shows that he was as capable of producing a finished picture as a preliminary study.

[1] See An Analysis of the Laws of England, Pref. vii—"Of all the schemes hitherto made public for digesting the laws of England the most natural and scientifical of any, as well as the most comprehensive, appears to be that of Sir Matthew Hale . . . this distribution therefore hath been principally followed."

[2] It was first published in 1678, see App. IV. (4) iii.

[3] See the Preface to the ed. of 1694; the edition of 1694 claims to be edited by a friend of the author, "whose care the author desired in the publication of his writings after his death."

[4] Ibid. [5] See Foster, Crown Law 32. [6] The last was published in 1773.

(ii) A man who could introduce some order and method into the unmethodical mass of the rules and principles of English law, who could produce a readable sketch of English legal history, necessarily had a considerable critical faculty. We can see specimens of it in the manner in which, in his "History of the Common Law," he deals with the history of pleading and evidence.[1] And, indeed, a man, who had taken some part in the government under the Commonwealth, must have been well acquainted with the many far-reaching projects of law reform then put forward.[2] Thus we are not surprised to find that Hale wrote a tract upon "The Amendment or Alteration of the Lawes."[3] This tract was printed by Hargrave in his collection of Law Tracts. It is incomplete; but the introductory part, in which the author lays down the general principles which should guide the law reformer, is complete; and it is safe to say that no wiser tract on this topic has ever been written in the whole course of the history of English law.

Hale, like Bentham, recognized that the reformer should always be prepared to show what are the inconveniences to be remedied, to explain what is the remedy proposed, and to prove, on a balance of convenience and inconvenience, that the remedy is better than the disease.[4] On the other hand, as he was an historian, he escaped many of Bentham's fallacies. He had known the reformers who wished to reform the law by the standard of the law of Moses;[5] and we have seen from his criticism of Hobbes[6] that he knew too much history to pin his faith to any set of a priori principles. "Antient laws, especially, that have a common concern, are not the issues of the prudence of this or that council or senate, but they are the production of the various experiences and applications of the wisest thing in

[1] Thus he gives at pp. 213-214 (6th ed.) a useful account of the main defects of the law of pleading as it existed at his day; at p. 345 he makes some very true remarks upon the superiority of the oral evidence at common law to the written evidence in courts of equity—"that it is *ore tenus*, personally, and not in writing; wherein often time, yea too often, a crafty clerk, commissioner or examiner, will make a witness speak what he truly never meant by dressing of it up in his own terms, phrases, and expressions. Whereas on the other hand, many times the very *manner* of delivering testimony, will give a probable indication, whether the witness speaks truly or falsely. And by this means also he has an opportunity to correct, amend or explain his testimony, upon further questioning with him; which he can never have, after a deposition is set down in writing."

[2] Above 412-423.

[3] Considerations touching the Amendment or Alteration of Lawes, Harg. Law Tracts 253-289; as to the MS. see Introd. note at p. 249—it appears that it was copied from Hale's original MS. in 1690 by Sir R. Southwell; it is divided into eight chapters.

[4] "I shall upon every particular show, 1. The inconveniences. 2. The remedy. 3. The debate of the conveniences or inconveniences of the remedies propounded. I shall as near as I can hold to this method," p. 276.

[5] See pp. 258-260 for an exposure of the fallacies of reformers of this school.

[6] Vol. v 482-485.

the inferior world—to wit, Time."[1] He knew, too, the weaknesses of uninformed agitators for change. Sometimes, as he truly says, they are inspired by a personal grievance. Sometimes they think the law is foolish merely because they do not undersand it[2]—"and upon this account they will become Solons . . . and frame a law that they themselves may know and approve because they make it; and, as the Israelites in the wilderness, they would have Gods that they may see."[3] Sometimes they press some new expedient which they have invented, without any consideration of the resulting inconveniences.[4] On the other hand, he could appreciate the faults of an unintelligent conservatism, which leads men, "especially those that are aged and have been long educated in the profession and practice of the law," to attach a superstitious veneration to old forms.[5] His knowledge of history taught him that law must change with the times. "The matter changeth the custom; the contracts the commerce; the dispositions educations tempers of men and societies change in a long tract of time; and so must their lawes in some measure be changed, or they will not be usefull for their state and condition."[6] He has some useful suggestions as to the advantages of the co-operation of the judges with Parliament in affecting law reforms, which, if they had been followed, might, in our own days, have saved suitors much in costs.[7]

The practical suggestions for reform which he made have, for the most part, been carried out in the last century. They comprise reforms in the method of collecting the revenue,[8] the establishment of an efficient system of county courts,[9] several reforms in the offices of the court of Common Pleas, such as the abolition of the monopoly of the serjeants in that court, and the removal of useless pieces of procedure, which only served the purpose of putting money into the pockets of the officers of the court.[10] Unfortunately we have not got Hale's suggestions for reforms in the law of procedure, the land law, the criminal law,

[1] At p. 254.
[2] At p. 257.
[3] At p. 261.
[4] At p. 262.
[5] At p. 264.
[6] At pp. 269, 270.
[7] "When such bills are twice read and committed and have been once or twice particularly debated at the committee, it may be very fit to call the judges to a solemn debate at the committee of the house of commons, where they may give the reasons, why they go so far, and why no further; and that their opinions be asked touching any alterations or amendments offered, and the reasons in relation thereunto; for it many times falls out, that a very good and profitable bill is suddenly spoiled with a word inserted or a word exchanged, which would be prevented, if the contrivers of the bill were first heard to it. . . . When the bill comes to the lords and is twice read and committed, it were fit, that all the judges attend the committee for the reasons above given. Bills thus prepared and hammered would have fewer flawes, and necessity of supplemental or explanatory lawes, than hath of late times happened," p. 273.
[8] At pp. 276-278.
[9] At pp. 280-284.
[10] At pp. 285-289.

the state of the statute book, and the literature of the law.[1] If, however, the tract advocating the enrolling and registering of all conveyances of lands, which is printed in the Somers' Tracts, is by Hale, we have the substance of some of his proposals for the amendment of the land law.[2] But, though this tract on the amendment of the laws is imperfect, it is perhaps the most striking testimony to the almost prophetic character of the criticism which a combined knowledge of legal history, legal theory, and modern law can inspire. If in the chapter on the "over tenacious holding of laws," we are quick to see the mote in the eye of the eighteenth century, in the chapter on the "over hastiness and forwardness to alteration in laws," we ought not to refuse to see the beam in the eye of the period in which we now live.

(5) Hale's published writings upon the civil as opposed to the criminal part of the law are not nearly so important. They are confined to two sets of annotations upon two classical treatises. The first and most important set of these notes is upon Fitzherbert's new Natura Brevium.[3] It was published in 1730; and to Hale's commentary was added some references to Year Books and reports collected by Sir Wadham Windham, a judge of the court of King's Bench who was Hale's contemporary, and, like him, of the school of Selden.[4] The second set of these notes is upon Coke's First Institute, which, by divers mesne conveyances, passed to Butler, and was by him incorporated with his and Hargrave's classical edition of that work.[5]

This review of Hale's life and works shows that he was the greatest common lawyer who had arisen since Coke; and, that, though his influence has not been so great as that of Coke, he was as a lawyer, Coke's superior. The position which they respectively occupy in our legal history is as different as their character and mental outlook. Coke, as we have seen, stands midway between the mediæval and the modern law. Hale is the first of our great

[1] See p. 275, where the plan of the work is sketched out; Hargrave says that there is another MS. of the tract, "which seems to have been his first essay on the subject," in which there is a chapter on the books of the statute and common law with a view to the creation of a digest.

[2] Somers' Tracts xi 81-90; it is a careful discussion stating clearly the advantages, disadvantages, and difficulties; it may well have been written by Hale, who seems to have been very uncertain as to the expediency of the project; North, Lives i 142, says, "Hale had turned that matter in his thoughts, and composed a treatise not so much against the thing (for he wishes it could be) as against the manner of establishing of it; of which he is not satisfied, but fears more holes may be made than mended by it." This is a good description of the point of view taken in this tract.

[3] Vol. ii 522; vol. v 380.

[4] See the Pref.; the editor says that Hale's notes relate chiefly to the church and churchmen, to the royal state and government, to real rights or estates in lands or offices, to personal rights in goods and chattels, and to the method of processes and proceedings; North, Lives i 60 describes Windham as a learned judge.

[5] See the Pref. xxiv; the notes are chiefly on the first 126 §§.

modern common lawyers. Coke was essentially a fighter both in the legal and political arena: when Hale was on the bench the legal contests about the jurisdiction of courts had been settled, and there was a lull in political strife. He was what Coke never was—a true historian; and, like Bacon, he had studied other things besides law, and other bodies of law besides the English common law. He possessed what Coke never possessed, a judicial impartiality, even when he was dealing with matters of public law.

Both his writings and his decisions exhibit an essentially modern point of view. This was due mainly to two causes. Firstly, it was due to the spirit of the age. The Great Rebellion had produced the same effect upon the mental outlook of the common lawyers as it had produced upon the constitution—it had introduced into both the modern atmosphere and the modern conditions.[1] It is true that the political controversies of the period immediately succeeding Hale's death prevented these influences from exercising their full effect. But we shall see that, in spite of these retarding influences, modern doctrines, especially upon points of private law, stated in a modern way, were beginning to appear in the reports; and, that after the Revolution this tendency was much accentuated. Secondly, it was due to Hale's first-hand knowledge of legal and constitutional history. This knowledge enabled him to attain an impartiality which was impossible to most lawyers who had lived through the Great Rebellion and the Revolution. The post-Revolution lawyers naturally adopted without criticism the legal and historical views upon controverted points of public law which the Revolution had caused to prevail. It is not till almost our own day that, our growing appreciation of the historical value of the public records, has enabled us to reach anything like the standard of knowledge which Hale applied to the elucidation of the public law of the seventeenth century; and that the cessation of the practical influence of seventeenth century politics has enabled us to attain anything like his standard of impartiality. Hence until quite modern times, it has been impossible to appreciate fully his true greatness as an historian and a lawyer.

Dugdale[2] (1605-1686), too, belonged to that band of students of records and historical scholars which flourished in the first half of the seventeenth century.[3] His father studied the civil law at St. John's College, Oxford, and became bursar and steward of the

[1] Above 161-162, 203-208; below 640.

[2] Dict. Nat. Biog.; W. H. Hamper, Autobiography, Diary, and Correspondence of Dugdale.

[3] Vol. v 402-412.

College. He intended that his son should become an English lawyer. But the son preferred historical research. He attracted the notice of Spelman and Hatton; and they got him his first post in the Heralds' College. There he prospered, and became eventually Garter king-of-arms. His chief works—the Antiquities of Warwickshire and the Monasticon[1]—are historical rather than legal. But the understanding and the use of the records upon which both these works were based involved a knowledge of early legal history. For his own purposes Dugdale had gradually put together much information upon certain topics connected with legal history. Those who had seen his notes persuaded him to publish them;[2] and the two works (usually bound together) which resulted, have given him his place in English legal history. The two works are the "Origines Juridicales," and the "Chronica Series."

The Origines Juridicales[3] give us, in somewhat scattered form, some information about the origins of English law and English legal institutions, and a catalogue of law writers and law books. The book is chiefly valuable for the information which it gives us as to the history of the legal profession and of the Inns of Court. Dugdale tells us much of the forms and ceremonies of the legal life of the past and of his own day—of the creation of serjeants; of the origins, officers, social customs, educational and disciplinary arrangements, of the Inns of Court and Chancery; of the manner in which the Inns were controlled by the judges and the government. Till the publication by the Inns of Court of their records in the latter half of the last century, his book was the chief authority for the history of the Inns; and it is by no means superseded even at the present day. Because he carries down his history to his own day, and can speak of matters which he has himself observed, his book has, for the seventeenth century, a value somewhat like that which Fortescue's De Laudibus has for the fifteenth century.[4]

[1] For this Dodsworth had collected much of the material of vols i and ii; but Dugdale edited them and published them; the third volume was wholly Dugdale's.

[2] "And, having in my long searches, for the better informing myself in the Historical knowledge of our Laws; Courts of Justice; Conveyance of Estates; Manner and Forms of Tryall; Punishment in Cases Criminall, etc. made some short observations, which I never deemed fit for, or worthy of being made publique to the world; much less intended for that purpose; yet such hath been the importunity of some, to whose judgments I rather submit, than my own; as that, I have also adventured them to the press, as an introduction to these Tables; for which I crave pardon from the skilfull in this profession: Hoping, that as I meddle not therein further than an historian, my forwardness in so doing, may the more tolerably be dispensed with," Orig. Jurid. Pref.

[3] "Origines Juridicales, or Historical Memorials of the English Laws, Courts of Justice, Forms of Tryall, Punishment in Cases Criminall, Law Writers, Law Books, Grants and Settlements of Estates, Degree of Serjeant, Innes of Court and Chancery;" it was published in 1666, but nearly the whole of this edition was destroyed in the fire of London; a second edition was published in 1671, and a third in 1680.

[4] Vol. ii 570.

The Chronica Series[1] is a chronological table of the chancellors, treasurers, judges, law officers, and king's serjeants, from the Conquest till his own day. It is constructed from the records to which reference is always made; and the references are usually correct. It is a very valuable piece of work, which, for all time, will be useful to legal historians.

Hale was essentially a lawyer. Dugdale was essentially an historian. But Hale has illumined many dark places in our constitutional history, just as Dugdale has helped to elucidate the history of some of our legal institutions. Both worthily carried on the work of the school which had, in the earlier part of the century, formed a partnership between law and history from which both had profited. They perpetuated its traditions in an age in which legal literature had begun to decline somewhat from the standards which the founders of that school had set. That this decline in quality, though not in quantity, had begun, we shall see when we have examined the different types of law books published during this period.

But for the edition of the Term Catalogues[2] edited by Edward Arber, it would be very difficult to get any clear ideas as to the number and kind of law books published during this period. These Catalogues are an almost complete series from 1668-1709;[3] and they give us a unique view of the important books published in all subjects during this period. We can see from these Catalogues that the number of law books published was large. Indeed it would seem that, at the end of the century, the booksellers found it difficult to get rid of their surplus stock, since, in 1698, they advertised a lottery (in which there were to be no blanks) to dispose of about 2,900 volumes of Reports, books of Entries, and other valuable law books.[4] We can see too that the publication of law books—like the publication of

[1] "A Chronologie of the Lord Chancellors and Keepers of the Great Seal, Lord Treasurers, Justices Itinerant, Justices of the King's Bench and Common Pleas, Barons of the Exchequer, Masters of the Rolls, King's Attorneys and Sollicitors, and Serjeants at law."

[2] The Term Catalogues, 1668-1709 A.D. with a number for Easter Term 1711 A.D. A Contemporary Bibliography of English literature in the reigns of Charles II., James II., William and Mary, and Anne. Edited from the very rare Quarterly Lists of New Books and Reprints of Divinity, History, Science, Law, Medicine, Music, Trade, Finance, Poetry, Plays, etc.; with Maps, Engravings, Playing Cards, etc.; issued by the Booksellers, etc. of London, by Professor Edward Arber, F.S.A., in three volumes; see the prefaces to these volumes for an account of the series.

[3] The only number missing is that for the Michaelmas Term, 1695, see Term Catalogues ii 565.

[4] "Every person that puts in a guinea, is sure of a book or books at least worth his money; and 'tis not two to one but he gets what is worth twice his money; nor four to one but gets what is worth four times his money; besides the first and last lot, each of which are at least of £20 value, besides the lot drawn," ibid iii 70, 104.

books upon other special topics—was, for the most part, in the hands of a syndicate of publishers.[1]

It would be as impossible as it is unnecessary to describe, or even to enumerate, this mass of literature. The course which I propose to adopt is as follows:—In order to give some idea of the mass of legal literature which issued from the press, and the comparative popularity of the legal topics dealt with by it, I have extracted from the Term Catalogues and printed in the Appendix[2] a list of the books issued during this period grouped under certain heads. These heads are (i) Practice and Pleading; (ii) Students' Books; (iii) Conveyancing and the Land Law; (iv) Criminal Law; (v) Commercial Law; (vi) Special Branches of the Common Law; (vii) Ecclesiastical Law; (viii) Local Government; (ix) Central Government; (x) Political Tracts; (xi) Legal History; (xii) General. I shall take each of these heads separately and say something about the character of the books contained in it. It is obviously unnecessary to notice each book individually. Many have been already described; many are almost identical specimens of a particular type of book; and the descriptions of most of them in the Catalogues are so full that no other is necessary. Thus the enumeration of the books in the Appendix, and the account of the general character of each of these heads in the text, will give us a fairly accurate idea of the general characteristics of the legal literature of the period. We shall see that, these characteristics will tell us something of the main features of the development of the law.

(i) *Practice and Pleading.*—A reference to the Appendix will show that the books on this topic are far more numerous than those upon any other topic. We have seen that the old book of practice—the Natura Brevium—was still found useful;[3] and that the Register with Theloall's Digest was reprinted.[4] But it is clear that books of the newer type, introduced by the Attorney's Academy,[5] were becoming very much more popular. Of these books we get a very great variety. Some, e.g. Style's "Practical Register,"[6] group the rules of practice, together with a little information as to the substantive law, under alphabetical heads. Others, e.g. the "Compleat Solicitor,"[7] or the "Practick part of

[1] "There never was, in those times, an entire trade edition of a book; but a certain set of the publishing booksellers would combine together into a syndicate for the production of a particular work; and such syndicates usually worked together in sets, and produced books of the same general type and character. Thus, a law syndicate would produce law books; a nonconformist syndicate, nonconformist books; and the like," Term Catalogues iii Pref. ix.

[2] App. IV.

[3] Vol. v 380; App. IV. (1) xxi.

[4] Vol. v 380-381; App. IV. (1) xxxix, xl.

[5] Vol. v 381-382.

[6] Term Catalogues i 45, 53; ii 485; App. IV. (1) ii.

[7] Ibid ii 46, iii 164; App. IV. (1) xxxiii; another book with a somewhat similar title had been published in 1671, ibid i 93; App. IV. (1) ix.

the law,"[1] describe the various courts of common law and equity at Westminster, and give an account of the practice of each separately. The former work gives also some information as to the practice of the Marshalsea and Palace Court; and the latter tells us something of the practice of the court of Admiralty, and the ecclesiastical courts. Both books deal with the practice of the various courts held in the city of London; and state the fees payable on taking different steps in an action or suit. Others deal only with the practice of some particular court. Thus we have treatises upon the courts in Wales,[2] the court of Common Pleas,[3] the courts held by judges of assize,[4] and the court of Exchequer.[5] Others deal with a particular topic connected with procedure. Thus we have treatises devoted to judicial writs,[6] to trials by jury,[7] to personal actions and writs of error,[8] to the Filacer's office,[9] to fines, recoveries, statutes, judgments, and bargains and sales.[10] The last-mentioned book will remind us that some aspects of procedure were closely connected with some aspects of conveyancing. But books on practice or pleading in the common law courts, and books on conveyancing, are never, so far as I have observed, combined. We shall see that this combination was more usual in the case of the books which dealt with Chancery procedure and pleading.[11]

Most of these books set out the orders made from time to time by the courts. The Praxis Utriusque Banci[12] consists mainly of a collection of the orders of the King's Bench, and of the Common Pleas from 35 Henry VI. onwards; another set of the rules and orders of the Common Pleas, made since the Restoration, was published in 1683:[13] and in 1698, a set of the rules and orders of the Exchequer, together with the rules and orders of the Chancery.[14] But it cannot be said that these books of practice have as yet taken the form they will finally assume—the form of a commentary on the rules and orders of the court.

[1] Term Catalogues i 242, 434, ii 531; App. IV. (1) xix; a third edition was issued in 1702.

[2] Practica Walliae, or the proceedings in the Great Sessions of Wales, Term Catalogues, i 124; App. IV. (1) xii.

[3] The Course and Practice of the Court of Common Pleas at Westminster, ibid i 124; App. IV. (1) xiii.

[4] The Office of the Clerk of Assize, ibid i 242, ii 496; App. iv (1) xx.

[5] A Compendium of the several Branches of Practice in the Court of Exchequer at Westminster, ibid ii 231, 274; App. IV. (1) xliii.

[6] Officina Brevium, Select and Approved Forms of Judicial Writs ibid i 359; App. IV. (1) xxvi.

[7] Tryals per Pais, ibid i 498; App. IV. (1) xxx.

[8] The Common Law Epitomized, ibid i 338; App. IV. (1) xxv.

[9] Jus Filizarii, ibid ii 72; App. IV. (1) xxxvii.

[10] The Practical Counsellor in the Law, ibid i 58-59; App. IV. (1) iv.

[11] Below 616.

[12] Term Catalogues i 165; App. IV (1) xv.

[13] Ibid ii 15; App. IV. (1) xxxi.

[14] Ibid iii 54; App. IV. (1) xlix.

I have already given some account of the most important collections of precedents of pleading published during this period.[1] The Appendix shows that they were very numerous and of all sizes. We should here notice that we also get books which give, in addition to precedents of pleading, some information about the art of pleading—"The Method of Pleading by Rule and President" published in 1697[2] is an illustration. Other books are wholly devoted to the art of pleading. I have already described the "Doctrina Placitandi," which was, perhaps, the most notable of these books.[3] A shorter book is one entitled "Regula Placitandi" published in 1691;[4] and, to William Brown's collection of precedents, published in 1699 under the title of "Methodus Novissima Intrandi Placita Generalia," a short tabular analysis of the art is prefixed by the author.[5] The number and variety of these collections of precedents and books on the art of pleading is a true index of the great and growing importance of this topic at this period.

(ii) *Students' Books.*—Even in the preceding period, the beginnings of the decay of the educational system of the Inns of Court had caused the production of many law books specially written for students;[6] and we have seen that, during this period, some of the lectures given by the Readers of the Inns of Court got into print.[7] We have seen, too, that the students' literature of the preceding period was on the whole of a good quality. But it deteriorated during this period. The older books, such as Littleton,[8] Coke,[9] and the Doctor and Student,[10] were reprinted; but no book of this period comes anywhere near the standard attained by them. This literature reflects, on the one hand, the rapid decay of the old educational system, and, on the other, the absorption of the legal profession in practice and pleading.

We have seen that spasmodic endeavours were made from time to time to revive the old moots.[11] Perhaps it was these endeavours which called forth "Hughes' Queries, or Choice Queries for Moots."[12] But we have seen that, for the most part,

[1] Vol. v 385-386.

[2] Term Catalogues ii 601; App. IV. (1) xlviii; it contains "particular cases, notes and arguments, relating to the advantage and method in pleading," and it is designed for the clerks and attorneys of the King's Bench and Common Pleas.

[3] Vol. v 386-387.

[4] Term Catalogues ii 368, 485, iii 147; App. IV. (1) xlv.

[5] Ibid iii 137; App. IV. (1) l; cp. also Hansard's Entries, ibid ii 145; App. IV. (1) xxxviii.

[6] Vol. v 396-401.

[7] Ibid 393-396; see Putnam, Justices of the Peace 177-181.

[8] Term Catalogues i 77; App. IV. (2) vi.

[9] Ibid i 3, 53, 467, ii 76; App. IV. (2) i.

[10] Ibid i 159, ii 196, 263; App. IV. (2) ix.

[11] Above 488-489.

[12] Term Catalogues i 206; App. IV. (2) xiii.

the student was thrown upon his own resources; and that consequently the method of getting and assimilating a knowledge of law, which was universally recommended and generally followed, was the making of a commonplace book under alphabetical heads. Hence we are not surprised to find that the publishers in 1680 and 1681 issued "An Alphabetical Disposition of all the Heads necessary for a Perfect Commonplace."[1] The first issued was by Samuel Brewster of Lincoln's Inn. It is an elaborate scheme for the arrangement of the law under 1622 numbered heads and subheads.[2] The Bodleian Library contains an interleaved and much annotated copy.

As in the preceding period, there was a demand for short books giving to the student elementary information as to the best modes of study, a few general ideas as to law in general, and as to English law in particular.[3] The "Studii legalis Ratio" of W. Philipps[4] is a book on the same lines as those written in the preceding period by Fulbecke and Dodderidge. It tells the student something of the kinds of knowledge essential to him—he must know Latin and French, and must be able to write these languages grammatically. It gives him a little elementary information as to the various kinds and species of laws, such as the law of nature, the law of God, and Roman law; and then it goes on to discourse of the main features of the common law and its position in the state. It concludes by giving a list of the chief books on English law which he must study. Two books introductory to the study of English law are Brydall's "Speculum Juris Anglicani,"[5] and the "Enchiridion Legum."[6] The first gives an account of some of the salient features of English law under the heads of written or statutory law, and unwritten or customary law. The second discusses the varieties of law—the law of nature, of nations, and civil or municipal law, and the differences between English and Roman law; it advises the student as to his reading; and makes some very practical suggestions as to reforms needed in English law. In the opinion of the author salient defects in the administration of the law are the impanelling of jurors of insufficient intelligence, the fact that many counsel are allowed to practise

[1] Term Catalogues i 405, 450; App. IV. (2) xv, xvi.
[2] Its method can be illustrated from the first entry:—
"Abatement del Bref; per act de Dieu—1
per act des parties—2
per act del ley—3
per act de Estranger—4
per act del Court; Vid.
Office de Court, en Officers."
[3] Vol. v 23-24. 397-398.
[4] Term Catalogues i 201; App. IV. (2) xii.
[5] Ibid i 130; App. IV. (2) viii. [6] Ibid i 159; App. IV. (2) x.

without sufficient legal education, the amount of their fees, the number of attornies, the expenses of the officers of the courts, the partiality of the judges to favoured counsel, and the uncertainty of the rules and orders of the courts. Both books are clearly written; and they were doubtless useful to the students for whom they were intended. Another book of somewhat the same class, but more in the nature of a "cram" book, is "The Young Lawyer's Recreation."[1] It contains a few legal anecdotes, discusses shortly a number of miscellaneous topics, and illustrates them by a few cases shortly stated.

Some of the text-books upon special topics, such as conveyancing, criminal law, and local and central government, were adapted to the use of students, if they were not written expressly for them. But the most numerous class of books written expressly for their use are those dealing with pleading and practice. Thus in 1674 William Brown composed for their benefit a book entitled. "Modus intrandi Placita Generalia," designed to teach them "the rudiments of clerkship, and such general pleadings and process as are used at this day in the courts of record at Westminster;"[2] and in 1675 George Townsend, the second prothonotary of the Common Pleas, issued "A Preparative to Pleading," designed to instruct the young clerks of that court.[3] Both books reached a second edition in this period. A comprehensive work, designed to instruct young clerks in the elements of their art, both as clerks and as practitioners, was published in 1693, under the title of "Instructor Clericalis";[4] and reached a third edition in 1700. It starts from the very beginning—"The first thing requisite for a young clerk is to learn to write well," are its opening words. It then proceeds to explain the usual abbreviations found in legal documents, the law terms, the essoin and return days, and various writs connected with process; it gives simple specimens of declarations and other pleadings, and rules as to their delivery; and, at the end, notes on various topics connected with practice and pleading arranged under alphabetical heads. Another very successful book, devoted to the conveyancing rather than to the pleading side of the clerk's work, was "The Young Clerk's Tutor Enlarged," which, in 1689, attained to a twelfth edition.[5] This edition is described as being, "A collection of the best presidents of recognizances, obligations, conditions, acquittances, bills of sale, warrants of attorney,[6] etc. Also the names of men and women

[1] Term Catalogues ii 478; App. IV. (2) xx.
[2] Ibid i 165, ii 202; App. IV. (2) xi.
[3] Ibid i 222, ii 120; App. IV. (2) xiv.
[4] Ibid ii 454; App. IV. (2) xix.
[5] Ibid i 68, 201, 263, 389, 516, ii 160, 294-295; App. IV. (2) v.
[6] Ibid ii 294-295; an obvious misprint in this notice has been corrected by the notice of the same book, ibid ii 160.

in Latin, with the days of the date, sums of money, and trades, in their proper cases; with many other things necessary. To which is annexed several of the best copies both of Court and Chancery Hand."

The number of these books of practice and pleading shows that books upon these topics had the readiest sale among students at the end of this period. This was the natural consequence of the condition of legal education. We have seen that the public teaching of the law had ceased; and that the leading lawyers, immersed in practice, had ceased to occupy themselves with the needs of students. If these lawyers wrote at all, they wrote for practitioners. The only teaching which the student got, he got in chambers or in an office. The character of that teaching is naturally reflected in the character of the books which were most popular during this period.

(iii) *Conveyancing and the land law.*—No work on the land law as a whole appeared during this period. No doubt Coke upon Littleton, noted up, sufficed for most needs. We have only some books of a semi-popular character, meant to meet the needs of farmers and landowners, as well as lawyers,[1] and two books on special topics. Of these two books the first was a new and enlarged edition of Coke's Copyholder,[2] the second, a special treatise on the law of commons.[3] In this, as in other branches of the law, the practical side of the law tended to oust the theoretical; with the result that by far the largest number of books upon this branch of the law deal with it from the point of view of the conveyancer.

The books upon conveyancing possess, as a whole, much the same characteristics as the books published at the beginning of the century.[4] We still see survivals from the days when books

[1] Landlords' Law. A Treatise very fit for the perusal of most men, Term Catalogues i 15, 447; App. IV. (3) i; The Tenants' Law. A Treatise of great use for Tenants and Farmers of all kinds, ibid i 45, 53, 183, ii 56; App. IV. (3) ii.

[2] Ibid i 159; App. IV. (3) iii; vol. v 460.

[3] Term Catalogues iii 76; App. IV. (3) xvii; the full title is as follows: "The laws of commons and commoners, or a treatise showing the original and nature of common, and the several kinds thereof, viz. Common Appendant, Appurtenant, Estovers, Turbary, Pischary, and pur Cause of Vicinage; of Commons in Gross and Sans Number; with the pleadings in reference to every of them. As also the powers and privileges of commoners in reference to the soil, to the lord, to strangers; and of the remedies and actions they may have; of declarations, pleadings in and to actions brought by and against commoners, approvement, apportionment, suspension, and extinguishment of common; of grants of common, and by what words common shall pass; together with the learning of prescriptions in general; the forms and manner of pleading prescription in reference to common in several rules; of prescription and pleading of a copyholder in reference to common; of evidence to prove prescription for common; the several customs of commoners and of enclosures; with several forms of presidents adapted to every sort of common."

[4] Vol. v 388-392.

of precedents in conveyancing were compiled as much for laymen as for lawyers, and contained a very miscellaneous mass of various kinds of documents. Thus in 1700 there was published in two parts a reprint of a book entitled "The Experienced Secretary, or The Citizen and Countryman's Companion."[1] The first part contains postal directions, a short dictionary, and "the art of inditing letters relating to trade, friendship, or other occasions." The second part contains precedents of bonds, bills, letters of attorney, releases, acquittances, warrants of attorney, assignments, bills of sale, letters of licence, indentures, bills of exchange. But books of this popular kind tended to fall apart from professional works; and among the professional works we see certain lines of cleavage. Thus precedents of mercantile documents tend to fall apart from precedents in conveyancing.[2] Collections of precedents in conveyancing tend to fall apart from books dealing with the theory of conveyancing.[3] And, among precedents in conveyancing, we must distinguish between the shorter tracts which were designed for clerks and attorneys,[4] and the more serious works intended for the more experienced practitioners;[5] and between books which set out to give precedents in all branches of conveyancing, and those which dealt only with some special branch, such as fines and recoveries.[6]

Most of these books are anonymous—probably none of them were the work of very eminent men. In fact, the eminent barrister, who had accumulated a store of such precedents, considered them much too valuable to publish.[7] The only book of precedents which bears a distinguished name is Bridgman's collection,[8] which was published after his death by his clerk, Thomas

[1] Term Catalogues iii 179.

[2] Thus ibid i 405; App. IV. (5) v; and ii 558; App. IV. (5) viii, we have books of precedents specially devoted to mercantile documents; on the other hand, the two are still combined in Arcana Clericalia, ibid i 173; App. IV. (3) iv; and it may also be noted that in the Additions to Bridgman's Conveyances there is a deed of partnership; that in vol. i of the Modern Conveyancer (3rd ed., 1706) there is a precedent of an assignment of the moiety of a patent (p. 72), a mortgage of a government annuity (p. 466), of tallies (p. 470), and of bank stock (p. 473); and that, ibid vol. ii (1725) at pp. 97-118 there are several precedents connected with bankruptcy proceedings.

[3] Such as Ars Clericalis, ibid ii 335; App. IV. (3) xiii; the Modern Conveyancer, ibid ii 523; App. IV. (3) xiv; Ars Transferendi Dominium, ibid iii 25, 147; App. IV. (3) xv, by J. Brydall, for whom see below 605.

[4] Such as The Young Clerk's Guide, ibid i 477, ii 294, 342; App. IV. (3) ix; The Clerk's Grammar, ibid ii 61, iii 147; App. IV. (3) xi; Ars Transferendi Dominium App. IV. (3) xv, by John Brydall.

[5] Such as the works mentioned in the next note.

[6] Such as Modus Transferendi Status, ibid i 258; App. IV. (3) vi; A Compendious and Accurate Treatise upon Recoveries, ibid i 303, ii 432; App. IV. (3) viii; Modus transferendi status per recorde, iii 76; App. IV. (3) xvi.

[7] Roger North tells us how valuable he found the gift which his brother made to him of "all his draughts, such as he himself had corrected, and after which conveyances had been ingrossed," Lives i 95; iii 124.

[8] Term Catalogues i 507, ii 300; App. IV. (3) x.

Page Johnson. We have seen that, during the Commonwealth period, Bridgman devoted himself to conveyancing, and, as a conveyancer, gave very considerable assistance to his royalist friends.[1] It was during this period that most of the precedents contained in this collection were drawn by him.[2] It is the first book of precedents in conveyancing of the modern type; and for that reason he has been rightly called the father of modern conveyancers.[3]

(iv) *Criminal Law.*—The only writer, besides Hale, who produced much upon the criminal law was John Brydall, of Queen's College, Oxford, and Lincoln's Inn, and secretary to Sir Harbottle Grimston.[4] He was a prolific writer of small books, chiefly upon legal topics.[5] In one of his books, entitled "Decus et Tutamen,"[6] he summarized the law of treason, as it existed before the statute of Edward III., under that statute, and under other statutes creating new treasons. In another of his books, "Jus Criminum," he summarized the law as to felony and treason; and to it he added a second part, "Judicium Criminis," which dealt with punishments and procedure. He knew some Roman law; and his books, though short, are clearly arranged, and based on the leading authorities. There are also other similar summaries written by Brydall and others.[7] Some books on this topic were written with a political object, such as Babington's book of "Advice to Grand Jurors in Cases of Blood."[8] Its object was to show that, if homicide is proved, the grand jury ought always to find a true bill, and not ignore it merely because they think that in the circumstances no murder has been committed.[9] Apparently this was a frequent habit, especially in cases of homicide arising out of duels.[10] The greater part of the book consists of

[1] Above 537.

[2] "Then it was, that these precedents were framed and advised by him; they being for the most part settlements between persons of the greatest honour in the kingdom. And that they were really his, no man can better attest than myself, who was then his clerk, and a witness to the execution, if not of all, yet of the more considerable part of them," Preface.

[3] *Per* Serjeant Hill *arg.* in Goodtitle v. Funucan (1781) 2 Dougl. at p. 568; Davidson, Precedents in Conveyancing (3rd ed.) Introd. 12, says that "no one holds a more conspicuous station in the annals of conveyancing."

[4] Dict. Nat. Biog.

[5] It is said that he published thirty-six books, the names of seventeen of which are given in the Dict. Nat. Biog.; and that he left thirty others in MS.

[6] Term Catalogues i 342, 383; App. IV. (4) v.

[7] Ibid i 303, 334; App. IV. (4) ii, iv.

[8] Ibid i 268, 394; App. IV. (4) i.

[9] See pp. 15, 16.

[10] See the Preface; though he praises the jury as an institution, he had a very poor opinion of the juries summoned to try cases on circuit—"the jurors of England (especially in the circuits) with their unequal yokefellows the talesmen are (for the most part) the very scandal of the laws practical of England, who seldom serve but to

a discursive account of various topics connected with criminal procedure. Several others were written to explain the laws against Roman Catholics[1] and Protestant Nonconformists.[2] One dealt with the laws against profaneness, immorality, and debauchery.[3] Another semi-popular book, which went through three editions, called itself the "Travellers' Guide and Countries Safety," and dealt with the laws against highwaymen, and steps to be taken by the victim to get damages.[4]

(v) *Commercial Law.*—The common lawyers had hardly as yet begun to write on this topic. Some books on the law of bankruptcy are the only contribution that can clearly be ascribed to them.[5] The important literature was still in the hands of merchants and civilians, like Malynes,[6] Marius,[7] and Molloy.[8] It was in this period that the standard edition of Malynes, supplemented by many other tracts both legal and commercial, was published.[9] Besides these books, there are only three others—one upon the customs duties,[10] and two sets of precedents of mercantile documents.[11]

(vi) *Special branches of the Common Law.*—Very few books upon special branches of the common law have as yet made their appearance. Two published by Shepherd, one on actions on the case for slander,[12] and the other on actions on the case for "contracts, assumpsits, deceipts, nuisances, trover and conversion, delivery of goods, and other malefeasances and misfeaseance,"[13] illustrate the growth of the modern law of contract and tort round the actions on the case. Both books had some success, as they went through more than one edition. A third book was published on the law of obligations and conditions.[14] There is also a book on the law of husband and wife[15]—a subject

serve a turn, to obey a superiour, or to pleasure a friend, or to help away (in a hurry) a quick dispatch of practice. This fault is not in the laws of England, but the male execution of them," p. 12.

[1] Term Catalogues i 405, 450; App. IV. (4) vi, vii.
[2] Ibid i 487, ii 113; App. IV. (4) ix, xii.
[3] Ibid iii 76; App. IV. (4) xiii.
[4] Ibid ii 7, 57, 413; App. IV. (4) xi.
[5] Ibid i 35, 263, ii 478, 549, 558; App. IV. (5) i, vii, ix.
[6] Vol. v 131-134.
[7] Ibid 131; App. IV. (5) ii.
[8] Term Catalogues i 227, iii 220; App. IV. (5) iv; vol. v 131.
[9] Ibid ii 184; App. IV. (5) vi.
[10] Ibid i 72-73; App. IV. (5) iii.
[11] Ibid i 405, ii 558; App. IV. (5) v, viii.
[12] Ibid i 175; App. IV. (6) ii.
[13] Ibid i 193; App. IV. (6) iii.
[14] Ibid ii 439; App. IV. (6) iv.
[15] Ibid iii 198; App. IV. (6) v; from the description the book seems to have been exhaustive; it runs: "Baron and Feme. A treatise of the common law concerning husbands and wives: wherein is contained the nature of a feme covert, and of marriages, bastards; the privileges of feme coverts; what alterations are made by marriage as to estates, leases, goods, and actions; what things accrue to the husband by the intermarriage or not; what acts, charges, forfeitures by the husband shall bind the wife after his death or not; of jointures, and pleading, fines and recovery, conveyances and

which had been treated of in the book on Women's Laws published in the preceding period;[1] and books by Brydall on the law as to persons of unsound mind,[2] and on the law of bastardy.[3]

(vii) *Ecclesiastical Law.*—The books on ecclesiastical law deal with the chief topics which fell within the jurisdiction of the ecclesiastical courts, and with the practice of those courts. Thus we have books on such topics as tithes, advowsons, wills, legacies, executors and administrators, marriage, and excommunication.[4] Some of these books I have already noticed.[5] Of others I shall say something more when, in the following Book, I deal with the history of those branches of law administered by the ecclesiastical courts of which I have not as yet treated.

(viii) *Local Government.*—Of the general character of the books on local government I have already spoken.[6] They present the same general character in this period; and cover the ground very adequately. All the county officials, from the sheriff and the justices of the peace to the constable and the scavenger, all the courts, from the quarter sessions to the leet and hundred court, are dealt with, either in long treatises written for lawyers who advised the amateur officials, or in short tracts written for the amateurs themselves.[7] Many of the older books, such as Lambard's, Kitchin's, and Dalton's, reappeared; and many new books covering the same ground were published. And, besides the books dealing with what we may call the ordinary machinery of local government, we get tracts upon special sides of that machinery, and upon special authorities created for special purposes. Thus, we have seen that Hale wrote upon Sheriffs' accounts and the Poor Law;[8] and we have books upon the Laws and Custom of Romney Marsh,[9]

other law; titles relating to Baron and Feme. Of wills, and feme covert being executrix. Of the wife's separate dispositions and maintenances. What amounts to the disposition of the wife's term by the husband. Of actions brought by and against baron and feme. What actions done or contracts made by the wife shall bind her husband. Of indictments and informations against them. Of baron and femes joinder in action. Of a feme sole merchant. Declarations and Pleas etc. Of divorces etc. With many other matters relating to the said subject."

[1] Vol. v 396-397.

[2] Non compos mentis, or the Law relating to natural Fools, mad folks, or lunatick persons, 1700; at the end are a few remarks on drunken persons.

[3] Lex Spuriorum, or the Law relating to Bastardy collected from the common, civil and ecclesiastical laws, 1703; the last chapter deals with the remedies for the right heir against supposititious births.

[4] See the list in App. IV. (7).

[5] Vol. v 12-15.

[6] Vol. iv 112-121.

[7] See the list of books App. IV. (8).

[8] Term Catalogues i 507, ii 6; App. IV. (8) xvii, xix; above 589.

[9] Ibid ii 160, 342; App. IV. (8) xxi.

upon the commissioners of sewers,[1] and upon the laws and customs of the miners in the Forest of Dean.[2] The only town which attracted any special literature was the City of London. On this topic two books were published.[3] The chief impression which we carry away after looking at this list is the fact that the local government is still carried on through courts and judicial forms of a very mediæval type.

(ix) *Central Government.*—The contrast between the large quantity of literature upon local government and the poverty of the literature on the central government is remarkable. But we must remember that it was a period in which the censorship was severe; and that literature on this topic would naturally be scrutinized with vigilance. In one respect, however, this literature faithfully reflects the political position. As a result of the Great Rebellion, Parliament had become a permanent and, in the last resort, the most powerful body in the state. It is not therefore surprising to find that almost all this literature is concerned with the position and practice of Parliament. The best book on Parliamentary procedure is Elsynge's book entitled "The Method and Manner of Holding Parliaments."[4] The MS. was written by the father of the Henry Elsynge, who was clerk to the House of Commons in Charles II.'s reign. It is a very clearly written book; and it has always been regarded as authoritative. It will be seen from the Appendix that several similar books on this topic appeared at this time.[5] Other books dealt with the constitution and privileges of Parliament;[6] and Selden's tract on the judicature of Parliaments was, as might be expected, much in demand.[7] Other books dealt with both the Prerogative and Parliament,[8] others with the king and his Prerogative,[9] others with the nobility. John Brydall wrote a book on the Jura Coronæ very much from the high prerogative point of view, a book on the nobility which he called "Jus Imaginis,"[10] and a little tract on the use of the king's four

[1] Term Catalogues ii 160, 342; App. IV. (8) xxii.
[2] Ibid ii 199; App. IV. (8) xxiii.
[3] Ibid i 63, 417; App. IV. (8) iv, xv; there is also a semi-popular book by John Brydall, entitled "Camera Regis," App. IV. (8) x, which gives topographical and descriptive information, besides information as to courts, customs, franchises, and liberties.
[4] It went through several editions; the best edition is that of 1768; an account of the book is given by the editor in the preface to that edition; Term Catalogues i 206; App. IV. (9) iii.
[5] Ibid ii 138, 252, 280, 321; App. IV. (9) xi, xii, xiii, xiv.
[6] Ibid i 373, 408; App. IV. (9) iv, vii, xii, xv.
[7] Ibid i 443, ii 251; App. IV. (9) viii.
[8] Ibid i 477, ii 50; App. IV. (9) ix, x.
[9] Ibid i 397; App. IV. (9) vi.
[10] Ibid i 199; App. IV. (9) ii.

principal seals[1]—the great seal, the privy seal, the Exchequer seal, and the signet. But none of these books have attained any reputation. Most of them were probably compilations. Perhaps their authors adopted the ingenuous view of Brydall, who, in the preface to his "Jus Imaginis," excuses himself for his want of originality by saying that, "for any person to expect new matter from the press were to put an affront on the wisest of men, who tell us that there is nothing new under the sun." At any rate most of them seem to act on his conclusion that, "It's sufficient if what was before be so methodized as that it proves more ready for the reader's use and benefit."

(x) *Political Tracts.*—It is particularly difficult in this period to separate books on the central government, from political tracts on the one hand, and from constitutional history on the other. In this period, as in the last, the question of the relative weight of Parliament and Prerogative in the constitution, was argued as if it were a case in the law courts, by adducing precedents from very early periods in constitutional history, and by interpreting them in accordance with the views of the writer. Hence such matters as the question whether William I. could be said to be a conqueror, and the manner in which the assemblies of John's and Henry III.'s reigns were constituted, were elaborately and sometimes learnedly discussed, in order to prove the particular thesis of the writer.[2] In fact, nothing could illustrate better the legal form into which all the political controversies of this century were cast, than the list of the political tracts of this period. It would be no exaggeration to say that all the political questions of the day find a place, and all are discussed from the lawyers' standpoint. The advantages of the jury system,[3] and the right of grand jurors to ignore bills;[4] the dispensing power;[5] various points connected with the jurisdiction of the House of Lords—the position of the Lord High Steward,[6] the appellate jurisdiction,[7] and the right of the bishops to vote in capital cases;[8] various ecclesiastical questions—the right to tithes,[9] the legality of ecclesiastical jurisdiction,[10] and the revived court of High Commission;[11] the question of election

[1] Jus Sigilli, Term Catalogues i 144, ii 573, 595; App. IV. (9) i.
[2] Ibid i 375, App. IV. (10) xi; i 408, App. IV. (10) xvi; i 429, App. IV. (10) xix; ii 83, App. IV. (10) xxx; ii 87, App. IV. (10) xxxii.
[3] Ibid i 407, 424; App. IV. (10) xv.
[4] Ibid i 417, 475, 476; App. IV. (10) xvii, xxiii, xxiv.
[5] Ibid ii 251-252; App. IV. (10) xxxv.
[6] Ibid i 383; App. IV. (10) xiii.
[7] Ibid i 383; App. IV. (10) xii.
[8] Ibid i 364, 372, 374, 398; App. IV. (10) vii, viii, ix, x.
[9] Ibid i 397; App. IV. (10) xiv.
[10] Ibid i 429, 441, 452, ii 252; App. IV. (10) xviii, xxi, xxii.
[11] Ibid ii 278; App. IV. (10) xxxvii.

of sheriffs in the City of London;[1] the Quo Warranto proceedings;[2]—are all represented by numerous books and pamphlets.

There are also many tracts on questions partly legal, partly political. That sturdy loyalist and student of records,[3] Fabian Philipps, wrote, among many other books, one styled "Tenenda non Tollenda,"[4] to protest against the abolition of the military tenures—an astonishing thesis in support of which he found no less than seventy-two reasons. What is perhaps more astonishing is that it was apparently a thesis to which Francis North was prepared to assent.[5] Another question connected with the land law, about which much was written, and to which many able men advocated an affirmative answer, was, as we have seen,[6] the question of establishing a compulsory system of registration of conveyances.[7] The project of abolishing arrest for debt on mesne process was the occasion of several pamphlets by Fabian Philipps and others in the earlier part of this period.[8] And, at the end of the period, even the old controversies between the Chancery and the common law courts, and the right of the House of Lords to hear appeals from Chancery, were revived by Sir R. Atkyns.[9] All these writers used legal history to support their views. Their legal history was of course, as history, worthless; nor did it convince their opponents—historical facts are as malleable as statistics in the hands of a controversialist. But, though this use of legal history was a futile method of controversy, it was fashionable; and, to the detriment of historical knowledge, it long remained fashionable. But, after all, even historians will admit that this is a small price to pay for the continuity of our constitutional and legal development.

(xi) *Legal History.*—The books written by Dugdale[10] and Hale[11] exhaust the important works on this topic produced during this period. The rest of this literature chiefly consists,

[1] Term Catalogues i 517; App. IV. (10) xxix; North, Examen 601 seqq.

[2] Term Catalogues i 487, 495, 517, ii 29; App. IV. (10) xxvi-xxviii.

[3] In S.P. Dom. 1676-1677 344-345 there is a warrant to the master of the Rolls to allow him to study records in the Tower.

[4] "Tenenda non Tollenda, or the necessity of preserving tenures in capite and by knight service, which according to their first institution were, and are yet, a great part of the *Salus Populi*, and the safety and defence of the King, as well as of his people. Together with a prospect of the many *mischiefs* and *inconveniences* which, by reason of the taking away or altering of those tenures, will inevitably happen to the king and his kingdomes" (1660).

[5] Lives of the Norths i 317—"He thought the taking away of the Tenures a desperate wound to the liberties of the people of England, and must by easy consequence procure the establishment of an army. For when the legal dependance of the monarchy and the country upon each other is dissolved, what must succeed but force?"

[6] Above 532 and n. 9, 594.

[7] Term Catalogues i 73, 321; ii 604; iii 57; App. IV. (10) i, iii, vi, xxxix, xl.

[8] Ibid i 73, 268; App. IV. (10) ii, v.

[9] Vol. i 375 n. 1, 465; above 516.

[10] Above 596-597.

[11] Above 585-590.

either of reprints of the mediæval books and documents, such as Glanvil,[1] the De Laudibus,[2] the Modus Tenendi Parliamentum,[3] and editions of Magna Carta[4] and the Charter of the Forest[5] with Coke's comments; or of publications or reprints of some of the books of that school of historical lawyers who flourished in the preceding period, such as D'Ewes' journals,[6] Cotton's records,[7] Spelman's book on the law terms[8] and some of his posthumous works,[9] and two editions by Dugdale of Selden's tract on the office of the Lord Chancellor.[10] The only really original book is Thomas Blount's little work on "Ancient Tenures of Land."[11] Blount was a barrister of the Inner Temple; but, partly because he had considerable private means, partly because he was a Roman Catholic, he never practised.[12] He devoted himself to literary pursuits, and wrote many works, some upon legal, others upon historical, and others upon miscellaneous topics. It was chiefly the historical side of law which interested him. This book gives, under the heads of the different places in which the land was situate, various curious tenures, and customs of manors, which he had come across in his study of records. It was meant both to amuse and instruct;[13] and it does instruct, because it is a painstaking piece of work, taken from the original authorities, which preserved the memory of many old customs which were rapidly decaying when the book was written.[14] The only other book that need be mentioned is the history of the penal laws against Roman Catholics and Protestant Nonconformists from Richard II. to Charles II.'s reign, by S. Blackerly.[15] The text of the chief laws is given, and they are connected by a descriptive historical narrative. It is a very ordinary piece of work.

[1] Term Catalogues i 144; App. IV. (11) v; vol. ii 189-192.
[2] Ibid i 124; App. IV. (11) iv; vol. ii 569-570.
[3] Ibid i 69; App. IV. (11) i; vol. ii 424-425.
[4] Ibid i 405, 479; App. IV. (11) ix.
[5] Ibid i 394; App. IV. (11) vii.
[6] Ibid i 486, ii 431; App. IV. (11) x; vol. v 405.
[7] Ibid ii 262; App. IV. (11) xiv; vol. v 406.
[8] Ibid ii 45; App. IV. (11) xi.
[9] Ibid iii 56, 110; App. IV. (11) xvi.
[10] Ibid i 81, 286; App. IV. (11) ii; vol. v 409.
[11] Ibid i 342; App. IV. (11) vi.
[12] Dict. Nat. Biog.; for his law dictionary see below 612.
[13] "Whilst I was perusing many of our both public and private records for other ends, I thought a small collection of some remarkable tenures of land and unusual customs of some manors might not be unacceptable to the studious, who, when weary of looking upon Littleton's Tenures and his learned commentator, might *relaxare fibulam* by recurring to these," Pref.
[14] Though, as he said, many had decayed, many still survived, "as not long since I had the curiosity to ask an old officer in the Exchequer whether he ever remembered any herring pies paid to the king from the manor of Carleton in Norfolk? Yes, very well, answered he, for we had some in court among us here last term," Pref.
[15] Term Catalogues ii 273; App. IV. (11) xv.

(xii) *General.*—Among the books which I have classified as "general" the most important are perhaps the Law Dictionaries. The old "Terms of the Law" was reissued in a corrected and augmented form;[1] but it was superseded by the more elaborate works of Blount[2] and Spelman.[3] Cowell's "Interpreter" also was revised and reissued by Thomas Manley.[4] The least satisfactory of these books are those dealing with the theory of the law. Most of them are the short books for the use of students beginning law of which I have already spoken.[5] The only considerable book of this kind is a work in seven books, entitled "Origo Legum," the author of which—George Dawson—was not a common lawyer.[6] The growing importance of international law is illustrated by a translation of Grotius's great work;[7] and of commercial and maritime law by the appearance of Molloy's work "De Jure Maritimo et Navali."[8] The beginning of modern problems and conditions is illustrated, firstly by the earliest work on Military Law, which was published in 1682;[9] and secondly by three works on colonial constitutional law. The first of the latter works was a revised reprint of "The General Laws and Liberties of the Massachusetts Colony in New England";[10] the second was an edition of the laws of Jamaica, with some account of its present state and government by Sir Thomas Lynch;[11] and the third was "A Compendium of the Laws and Government" of Great Britain, and of "The Dominions, Plantations, and Territories thereunto belonging."[12] In a book entitled "The Grandeur of the Law,"[13] by H. Philipps, we have the first attempt to collect a few biographical details as to distinguished members of the legal profession. They are grouped under the heads of the Nobility,

[1] Term Catalogues i 77; App. IV. (12) ii.
[2] Ibid i 58, ii 351; App. IV. (12) i; see the Juridical Rev. xxxvi 168-169.
[3] Term Catalogues ii 189, 280; App. IV. (12) xi.
[4] Ibid i 90; App. VI. (12) iii; vol. v 21-22, 401-402.
[5] Above 601-602.
[6] App. IV. (12) xii. The titles of the seven books show the scope of the treatise:—(i) Law in general and its origin; of the divers kinds of laws and the law eternal. (ii) What laws man is to act by, *Fωον κοσμικον*, *Fωον πολιτικον*, *Fωον αθανατον*. (iii) Of jus gentium civile or the law of nations as civilly related to one another. (iv) Of the jus gentium militare or the law of arms and war. (v) Of the jus gentium ecclesiasticum or the laws and government of the Church Catholic. (vi) Of the laws and government of the Church of England. (vii) Why some laws are immutable and some not, but may be changed or cease, be suspended or abrogated; the book was dedicated to William and Mary; it is a very fair introduction to an academic study of law; see Term Catalogues ii 478.
[7] Term Catalogues i 476; App. IV. (12) vi; vol. v 55-58.
[8] Above 606.
[9] An Abridgment of the English Military Discipline, reprinted by his Majesties special command, Term Catalogues i 510; App. IV. (12) viii.
[10] Ibid i 206; App. IV. (12) iv.
[11] Ibid ii 101; App. IV. (12) x.
[12] Ibid iii 123; App. IV. (12) xiii.
[13] Ibid ii 71, 120; App. IV. (12) ix.

Baronets, Knights, and Esquires; and particulars are given of their names, parentage, and offices held by them.

From this literature we can draw one or two conclusions as to the main characteristics of the legal development of this period. In the first place it is a transition period. There is still a demand for the great books of the mediæval common law, such as the Year Books and the Register of Writs. Still more is there a demand for the important books of the sixteenth and early seventeenth centuries—Fitzherbert's "Natura Brevium," the "Doctor and Student," and Coke's books. At the same time we can see modern types of books emerging in the books of practice, in the books of conveyancing, in the books on commercial law, and in books on special topics of the common law. In the second place, we can see that, to the practising common lawyer, books about procedure and pleading are easily the most important. The law is still grouped round the forms of action. The rules as to the procedure of the different courts still differ; and the rules of pleading are growing more strict and more detailed. No doubt it is for this reason that the list of books upon special topics in the common law is so scanty, and that the books upon legal theory are few and poor. The lawyers still thought in the terms of adjective rather than of substantive law, and ignored legal speculation, because their training and practice emphasized the practical and procedural point of view to the exclusion of any other. It is not till the complexity of the law of procedure and pleading is diminished, it is not till the lawyers begin to get an education which is theoretical as well as practical, that they will begin to think in terms of substantive law, to appreciate the educational value of legal theory, and to produce good books upon special topics in the common law. This as yet is in the far future. In the third place, the mass of literature upon the different sides of the common law, and the comparative scantiness of the literature of other parts of English law, illustrate the commanding position which, as a result of the Great Rebellion, the common law has attained. But this we shall see more clearly when we have looked at the literature of this period which is devoted to the chancellor's equitable jurisdiction.

The Literature of Equity

The literature of the common law, if on the whole inferior in quality, is considerable in quantity. The literature of equity, on the other hand, is very scanty. If we except the somewhat belated tracts on the relationship between law and equity,[1] it

[1] Vol. v 271.

consists of the orders of the Court, and some books on practice and pleading, one book upon a special topic—Duke's book upon Charitable Uses, and two sets of reports. It is true than many of the cases decided during this period were embodied in some of the common law reports, and in sets of Chancery reports published early in the eighteenth century. But the only reports devoted exclusively to equity, which were published before 1700, are these two sets.

The reason both for the scantiness and the form of the literature of equity during this period is to be found in the fact that equity was passing through a transition stage. We have seen that it had ceased to depend wholly on the conscience of the chancellor; and that it had not yet become an entirely regular system.[1] On the one hand, it was acquiring a number of principles which were being developed by the practice of the court. It was necessary for the lawyers to know what that practice was, and so books of practice and reports were printed. On the other hand, though the chancellors of this period had a good deal less discretion than the chancellors of the preceding period, they had a good deal more discretion in the creation of new and the application of established rules, than the judges of the common law courts. Thus the conditions were favourable for the production of books of practice and reports; but the time was as yet hardly ripe for the production of a systematic treatise upon equity. In 1732 the author of the first volume of Equity Cases Abridged seems to have considered the plan of writing a "regular institute" of equity. But he decided, on the whole wisely, that an abridgment of decided cases would be more useful and more satisfactory.[2]

Here I shall describe, in the first place, the orders of the court and the books on practice and pleading; in the second place, Duke's book upon Charitable Uses; and, in the third place, the reports published during this period, or devoted mainly to cases decided during this period. In the fourth place, I must just mention some other later reports in which cases of this period occur.

(1) The only comprehensive set of orders issued during this period were those issued in 1661 by Clarendon and Grimston.[3]

[1] Vol. v 336-338.

[2] The earliest systematic work upon modern equity seems to be an anonymous "Treatise of Equity" published in 1737, and attributed to Henry Ballow, who had been called to the bar in 1728, Black Books of Lincoln's Inn iii 288; Fonblanque, Treatise of Equity, Pref.; Fonblanque's Treatise was an edition of Ballow's Treatise; references were inserted, and the information was brought up to date by voluminous notes.

[3] Saunders, Orders i 296-313—"A collection of such of the orders heretofore used in Chancery, with such alterations and additions thereunto as the Right Honourable

Another far more complete set was projected by Shaftesbury;[1] but apparently they never came into force.[2] They are a complete code of procedure; and they show that Shaftesbury was quite able to appreciate the principles which should underlie the procedure of the court, and the main evils against which it was necessary to guard. For the rest, we have simply isolated orders upon detached topics.[3] As in the preceding period, troubles and jealousies in the office of the Six Clerks bulk very large.[4] Their control of their under clerks was very lax—thus, in 1687,[5] we learn that divers complaints had been made to the master of the Rolls, "of the outragious, rude and indecent demeanours of diverse of the younger clerks, servants and writers to and for the sworne clerks in the six clerks office . . . which hath beene most notorious by their throwing dirt, filth, inck and many other things to the damage and prejudice of the suitors of this court and Masters in the said office, and at other times by a rude and violent clapping their desks, and making many loud outcryes and noises, and by evill treateing their masters in the said office with opprobrious languages." We may conclude that these officers of the court sometimes combined with their accustomed dilatoriness, "a certain liveliness," which must have been very surprising to any unprofessional person who happened to intrude upon one of those scenes.

The books on practice are of the same general character as the common law books which appeared upon this subject.[6] Sometimes, as in the case of the "Compleat Solicitor," information is given both about equity and common law practice. But there are a certain number of books which deal only with the former subject. One of the earliest is the account of the practice of the court prefixed to the Choice Cases in Chancery, published in 1652.[7] But neither books on practice, nor books upon pleading, attain the bulk of the common law books on these topics; and this is natural if we consider how much more highly developed the common law was as compared with equity. Thus

Edward Earle of Clarendon, Lord Chancellor of England, by and with the advice and assistance of the Honourable Sir Harbottle Grimston, baronet, Master of the Rolls, have thought fit at present to ordaine and publish, for reforming of several abuses in the said Court, preventing multiplicity of suits, motions, and unnecessary charge to the suitors, and for the more expeditious and certain course for relief."

[1] Saunders, Orders ii 1050-1077. [2] Ibid i 344 n. *a*.

[3] E.g. the liability of counsel for a scandalous bill, ibid i 292-294; frivolous exceptions to reports, ibid i 335, 367, 387; insufficient answers, ibid i 349, 421-422; rehearings, ibid i 367, 419-421; interrogatories, ibid i 374-375, 416; process of contempt, ibid i 401-402; fees, ibid i 418.

[4] Ibid i 318-320, 320-321, 322-323, 328-332, 360-363, 377-381.

[5] Ibid i 377; and there are similar complaints in 1693, ibid i 398-399.

[6] Above 598-599.

[7] The Practice of the Court of Chancery Unfolded, vol. v 274.

books of practice were sometimes combined with books of pleading. Illustrations are the "Clerks Tutor in Chancery"[1] published in 1687, the "Praxis Almæ Curiæ Cancellariæ"[2] published in 1694, and a much more considerable work, the Practical Register in Chancery published in 1714, which was alphabetically arranged.[3] Similarly, information about pleading is sometimes combined with information about conveyancing. Illustrations are "The Compleat Clerk published in 1671,[4] and the "Clerk's Guide" published in 1672.[5]

(2) Duke's Charitable Uses, published in 1676, is a treatise upon Elizabeth's statute upon this topic.[6] It sets out the statute, the commission thereunder, the procedings to call the parties, the inquisition, the decree, and cases decided upon the statute. It also gives specimens of pleadings and decrees. The most useful parts of the book are the fifth and sixth chapters which contain the selection of cases upon the statute.[7]

(3) There are, as I have said, only two sets of reports, devoted exclusively to Chancery cases, published before 1700. The first was published in 1693. Its full title is "Reports of cases taken and adjudged in the Court of Chancery, in the reign of King Charles I., and to the twentieth year of King Charles II.; being special cases and most of them decreed with the assistance of the judges, and all of them referring to the register's Books, wherein are settled several points of Equity, Law, and Practice. To which are added learned Arguments relating to the Antiquity of the said Court, its Dignity, Power, and Jurisdiction."[8] It was a successful book. A second part appeared in 1694, which contains cases from 20 Charles II. to 1 William and Mary, and the "late great case between the Duchess of Albemarle and the earl of Bathe,"[9] A second edition of both parts appeared in 1715, to which a version of the Earl of Oxford's Case was prefixed; and, in 1716, the third part of these reports was published, containing cases from the beginning of Charles II.'s to Anne's reign. All three parts were published together in 1736.[10] The second

[1] Term Catalogues ii 206, 514; App. IV (1) xlii.
[2] Ibid ii 504, iii 172; App. IV (1) xlvii.
[3] It claims to be "A compleat collection of the standing orders and rules of practice in Chancery, together with the ruled points of practice there: Collected from the printed Chancery cases reports and practical books and from observation and experience. As also the alterations made in practice by all the statutes to this time, and by usage and custom. The whole is interspersed with rules and observations touching the drawing of bills answers and other pleadings"; It appears from the preface that the work was drawn up in the first instance for the private use of the compiler.
[4] Term Catalogues i 77, 286, ii 20; App. IV. (1) v.
[5] Ibid i 124; App. IV. (1) xi. [6] For this statute see vol. iv 398-399.
[7] Added to it is Moore's Reading on this topic, vol. v 395.
[8] Wallace, The Reporters 478. [9] Ibid. [10] Ibid 478-479.

set of reports bears a title somewhat similar to that of the first, and has had a somewhat similar history. It was published in 1697, and was entitled "Cases Argued and Decreed in the High Court of Chancery."[1] It contains cases from 1660-1678-79. A second part appeared at some date between May, 1700, and March, 1701-1702,[2] and contains cases from 30 Charles II. to 3 James II., together with cases omitted from the former part from 26-30, 31 Charles II. To these two parts there was added in 1745 a third, under the title of "Select Cases in the High Court of Chancery solemnly argued and decreed by the late Lord Chancellor."[3] This part consists of three cases, the *Duke of Norfolk's Case* first published in 1685, the *Earl of Bathe's Case* first published in 1693, and the case of *Bertie* v. *Faulkland* decided in 1698.

Of the reports which were published after 1700, but which were devoted mainly to cases decided during this period, there are five series.

The first in order of publication is a small volume of reports published by Nelson in 1717. It claims to be a report of cases from the MS. of a late attorney-general, never before printed, or, if before printed, to be reports of points previously not noticed[4] —"a statement," says Mr. Wallace, "not true to the letter, since several of them had been printed *in totidem verbis* in Chancery Cases and in 3 Chancery Reports."[5] The second collection is the volume of reports *tempore* Finch. It is a collection of cases, edited by Nelson and decided by Lord Nottingham, between 1673 and 1681.[6] It claims on the title page to have been made by a counsel who was present in court and appeared in the cases;[7] and it is peculiar in that, throughout the book, there are constant notes comparing the rules laid down by the court with the rules laid down by the civil law. The book is not of very high authority.[8] The third collection consists of the posthumous volumes of Thomas Vernon—an eminent practitioner in the court of Chancery.[9] It contains cases decided between the years 1681 and 1720. The MS. was found in his study after his death, and was the subject of a suit in Chancery.[10] "The widow," says Mr. Wallace, "claimed them as included in the bequest of household goods and furniture; the trustees of the residuary estate regarded

[1] Wallace, The Reporters 481 n. 4. [2] Ibid. [3] Ibid 482 n.
[4] Pref. [5] Wallace, The Reporters 480. [6] Ibid 488-489.
[7] All we are told of this counsel is in the following sentence in the Pref: "The MS. from which the following cases were printed is in the hands of the publisher of this report, and both the writing and the cases show that the person by whom they were collected was a man of years and experience."
[8] Wallace, op. cit. 488-489. [9] Ibid 493.
[10] Atcherly v. Vernon (1725) 10 Mod. 518.

them as embraced by the expression, 'the residue of my personal estate'; while the heir contended that, as the guardian of the reputation of his ancestor, the MS. belonged to him, in the same way as would a right of action for the defacing of his ancestor's tomb."[1] Eventually it was decided that the cases should be printed under the direction of the court, and in 1726-1728 two volumes appeared, edited by Peere Williams and Melmoth. But it is probable that the author did not intend his MS. to be printed; and the editors performed their work carelessly. It was not till 1806-1807 that a satisfactory edition, in which the reports were elucidated or corrected by reference to the Registrar's books, was published by Raithly. The fourth collection is an anonymous book entitled "Precedents in Chancery." It was published in 1733, and contains cases from 1687-1722. The MS. was in the possession of Chief Baron Gilbert; but it was stolen after his death, and clandestinely printed. There is a tradition that the cases, down to the year 1708, were reported by Mr. Pooley who, it is said, was the author of the first volume of Equity Cases Abridged.[2] The last of these collections is a volume of Chancery cases from 1660-1706 made by Richard Freeman, whose reports of cases in the King's Bench and Common Pleas I have already noticed.[3] This volume was published in 1742, together with the volume containing his common law reports. It contains also certain miscellaneous cases, which were probably not reported by Freeman, but were taken from the MS. of his father-in-law Keck.[4] A second edition of these Chancery reports was published in 1823.

There is no evidence as to the origin of many of these reports. Probably, as in the case of the common law reports of this and the preceding period,[5] copies of cases were circulating amongst the profession, and were procured by publishers, who were not very particular as to the authorship or the ownership of the MS.[6] A MS. compiled by Anthony Keck, one of the commissioners of the great seal in 1689 and a man of "a polite merry genius,"[7] is supposed to have been used for some parts of the Chancery Reports[8] and the Chancery Cases[9]; for the reports of his son-in-law

[1] Wallace, op. cit. 494.
[2] Ibid 497-498.
[3] Above 562; Wallace, op. cit. 391-392.
[4] Ibid 485-486.
[5] Vol. v 365-367; above 558.
[6] Thus, the publisher's advertisement to Precedents in Chancery puts the best face on a doubtful transaction by the following advertisement: "The following cases coming to my hands, and being informed that they were of that value as to be handed about in manuscript, and that several gentlemen had been at great charge to clerks and transcribers in procuring copies of them; I thought it proper not only on account of my own particular benefit, but as a matter that would be of general advantage to all gentlemen of the profession of the law, to make them thus publick."
[7] Lives of the Norths iii 169.
[8] Wallace, The Reporters 479.
[9] Ibid 484-485.

Freeman,[1] and possibly for the reports of his other son-in-law Vernon.[2] As we have seen, when the author is known, his MS. was in some cases stolen, and published without the assent of the owners, and without proper editing. It is not till the following period that there is a substantial improvement in the production and the editing of the Chancery reports.

(4) Of the later reports, which contain cases of this period, we should mention Dickens,[3] and more especially the authentic version of many of Lord Nottingham's judgments, published by Swanston in the three volumes of his reports (1821-1827). The Abridgment of Equity, contained in Equity Cases Abridged,[4] though it belongs to the following period, is an excellent index and guide to the reports of this period.

Roger North and his Literary Works

Roger North[5] was the youngest brother of Francis North, who, as we have seen,[6] became lord keeper Guildford. He was born in 1653, and owed his rapid rise in his profession largely to the patronage of his brother. "I own," he said,[7] "that all my portion of knowledge and fortunes are owing to him." In 1678 he was made steward to the See of Canterbury; in 1682 king's counsel and bencher of the Middle Temple; in 1684 solicitor-general to the duke of York; and in 1686 attorney-general to the queen. His brother had taught him habits of industry; and, though somewhat diffident as to his own capabilities,[8] he succeeded in getting and keeping a lucrative practice at the Chancery bar.[9] He was a member of James II.'s first Parliament; and though, like the rest of the family, a strong royalist, he voted against an unlimited dispensing power.[10] His strict orthodoxy prevented his advancement at the court of James II.; and his refusal to take the oath of allegiance to the new dynasty prevented his return to public life after the Revolution. He married, and retired to Rougham, where he busied himself with pursuing the literary,

[1] Wallace, The Reporters 485-486. [2] Ibid 497 n. 1.
[3] Ibid 476-477. [4] Ibid 490-492.
[5] See his Autobiography in the third volume of the Lives of the Norths, and the lives of his brothers in the first two volumes, edited by Augustus Jessopp; and Jessopp's article in the Dict. Nat. Biog.
[6] Above 531-535.
[7] Lives of the Norths i 13. [8] Ibid iii 103-104.
[9] Ibid 166-167—he made £4000 a year, though the greatest fee he had was twenty guineas, above 550.
[10] "In that Parliament, as much a courtier as I was, I joined with the Church of England, partly to maintain the laws and religion established. I voted with those who were against the court in the article of the dispensing power. But in the matter of money. . . . I was tooth and nail for the King. And I was altogether against the affronting set of men who had not much power there, but aimed to overturn the Crown," ibid 179-180.

musical and scientific topics which had always interested him.[1] His knowledge of law was used by his neighbours;[2] but his political principles prevented him from taking any part in the government of the county. He lived till 1734; and, as a letter of advice to a student of the law, written a few days before his death, shows, he retained his vigorous intellect to the end.[3] Of the books which have made his name famous none was published during his life, and some remained in manuscript till the last century.

The complete list of Roger North's works will be found in the note at the foot of this page.[4] Those which have made his name famous in legal history are the Examen, the lives of his brothers Francis and Dudley, his Autobiography, and his Discourse on the Study of the Laws. Of the last named of these books I have already spoken;[5] and of the others much use has necessarily been made in the preceding pages. Here I must say a few words of the characteristics of the man and his books, which give him and them their unique place in the legal literature of this period.

Roger North had not the commanding talents of his brothers Francis and Dudley, which enabled the first to take a leading place in the legal, and the second in the commercial, life of the age.[6] He was a man of good average ability, but, being a younger brother with two eminent elder brothers, he was naturally inclined to be somewhat diffident; and, being a man of many interests, he was inclined to be somewhat dilletante. But he had three qualities which enabled him to use the peculiar opportunities afforded by his career to gain a more lasting fame than either of his two eminent seniors. He had a keen memory for picturesque incidents; a power of relating them in a telling conversational style; and a reverence for the persons, institutions and causes with which he had been associated, which impelled him to spare no pains to relate what he conceived to be their true history. He

[1] Lives of the Norths iii 301-310. [2] Ibid iii 305-306. [3] Ibid 279-280.

[4] A Discourse on Fish and Fish Ponds (1683)—the only one of his works published in his life-time. Examen, or an enquiry into the credit and veracity of a pretended complete history; showing the wicked and perverse design of it, and the many fallacies and abuses of truth contained in it. Together with some memoirs occasionally inserted, all tending to vindicate the honour of the late king Charles the Second and his happy reign from the intended aspersions of that foul pen (1740). The Life of Lord Keeper North (1742). The Lives of Sir Dudley North and Dr. John North (1744). A Discourse on the Study of the Laws (1824). Memoirs of Musick (1846). His Autobiography (1890).

[5] Above 494-497.

[6] Of Dudley North Dr. Jessopp says, Dict. Nat. Biog., "Macaulay, though entertaining a fierce bias against the Norths, cannot withhold the tribute of admiration for Sir Dudley's genius, and pronounces him 'one of the ablest men of his time.' The tract on the 'Currency,' which he printed only a few months before his death, anticipated the views of Locke and Adam Smith, and he was one of the earliest economists who advocated free trade"; as to this see above 339-340.

was essentially a biographer, with all the faults and virtues of his class—a biographer of persons and of causes.

In form the Examen is a detailed criticism of vol. iii of Kennet's complete history; and the form is unfortunate, as it makes the book both diffuse and disjointed. But it abounds in the happy descriptions and picturesque touches which the author's vivid memory could always command.[1] It is historically interesting, both because it presents us with a remarkable view of the ideas and feelings of the great royalist party at the end of the century; and because it is perhaps the ablest statement of the set of legal and political ideas which were decisively defeated by the Revolution, and finally succumbed at the accession of the Hanoverian dynasty. Obviously its preparation was a labour of love to the honest old non-juror, whose active days had been spent in close contact with the leaders of the vanquished party.

It is his biographies of his brothers and himself which have given to Roger North his greatest title to literary fame. It was a form of literature exactly suited to his peculiar gifts; and his strong family affection led him to spare no pains to make his narrative worthy of the heroic virtue which he attributed to his brothers. Like the Examen, the Lives justify the political faith of the family, and contain many of those details which help us to see the inner life of the period. In addition, the life of his brother Francis, his own autobiography, and, to a lesser degree, the life of his brother Dudley, give us a number of unique side lights upon the political, and more especially upon the legal, life of the period. They give us much information which all lawyers in active practice knew, and would hardly have thought it worth while to set down. This information is given by a lawyer who knew the legal world of his day from top to bottom; and, as he had the leisure to reflect upon the changes which he had seen and remembered, it is accompanied by much acute criticism which would never have occurred to a lawyer in active practice. From this point of view these biographies, like the Discourse on the Study of the Laws,[2] resemble Fortescue's De Laudibus;[3] and in one respect they are even more valuable. Fortescue simply criticizes the defects of the mediæval common law, and suggests remedies. North, on the other hand, had lived at a time when the last survivals of the institutions of the mediæval common law were giving place to the institutions of our modern law. He can therefore tell us much of the process of transition as he had heard of it or seen it. His political standpoint, and his historical bent,

[1] For some illustrations see below 622-623.

[2] Above 494.

[3] Vol. ii 570.

made him able to sympathize with the old institutions, and to estimate the strong and the weak points of the new developments.[1] Thus his books enable us to pick up a good deal of the detail of the process of change, which it would be difficult to recover from any other source. Let us take one or two illustrations.

We have already seen what a striking light his books shed upon the changes in the legal profession,[2] and in the system of legal education.[3] Similarly, we see the last survivals of the old system of oral pleadings,[4] in his account of the forms of words "mumbled" unintelligibly by the sergeants at the bar, when they were called upon to conduct a real action.[5] The rivalries of the courts of common law and the way they poached upon one anothor's jurisdiction,[6] the abuses in the offices of the courts,[7] and more especially in the offices of the Chancery,[8] are described with he first-hand knowledge of one who had lived on the most intimate terms with a chief justice of the Common Pleas and a lord keeper. The humours of the circuit-assize sermons, the riding from town to town, the balls, and the county feuds,[9] Shaftesbury's whim of riding to Westminster Hall on the first day of term to the great discomfiture of some of the judges who were not horsemen,[10] the mysteries of the court of Exchequer,[11] the bad reputation of underwriters,[12] the growing scepticism as to charges of witchcraft,[13] the scene in Serjeants' Inn Hall when the judgments in the writ of error in the case of *Barnardiston* v. *Soame* were being delivered,[14]—are all touched on with the light hand of the

[1] See e.g. his treatment of the old law French, above 494-495; and the old educational organization of the Inns of Court, above 492 and n. 8.

[2] Above 432 seqq.

[3] Above 494-498.

[4] Vol. iii 634-637.

[5] Cited ibid 655 n. 4.

[6] Lives i 128-131; vol. i 200, 221-222.

[7] Lives i 131-132.

[8] Ibid. 257-268.

[9] Ibid i 181-183; iii 134-136.

[10] "When they came to straights and interruptions for want of gravity in the beasts, and too much in the riders, there happened some curvetting, which made no little disorder. Judge Twisden, to his great affright, and the consternation of his grave brethren, was laid along in the dirt," Examen 57.

[11] He tells us, Lives iii 140, that the fact that his brother Dudley became a commissioner of customs brought him into the court of Exchequer—"and that court is so mysterious that a man must be not only a practiser but an officer, or of an industry and curiosity equivalent, to obtain the true knowledge of it, but that was too profound for me"; cp. Burke's account of the procedure of the Exchequer—a procedure in which "rigour and formalism" were brought "to their ultimate perfection"—in his speech on Economical Reform, Works (Bohn's Ed.) ii 93-94.

[12] "Insurers of ships have a sort of obloquy . . . and they come not to the law without prejudice, such as extortioners, usurers, or pawnbrokers usually meet with," Lives iii 140.

[13] Ibid i 166-169.

[14] Examen 521-522, the adherents of "the Faction," i.e. the country party, turned out in great force—"a strange sort of people, whose faces I never saw anywhere else, odd stiff figures, whose errand was partly to see if their friend was likely to get his money, and partly to observe the behaviour of the judges. For it was early resolved that, if this judgment were reversed, to make it a matter of accusation against the chief justice in the House of Commons."

eye-witness who can skilfully narrate what he has seen. And similarly he lets us see the inside of the political life of the day—the scant justice given to those accused of complicity with the Popish plot,[1] the circumspection needed by anyone in authority who had come in his heart to disbelieve in that plot,[2] the seditious and treasonable discourse of the coffee-houses,[3] the manner in which the Green Ribbon Club organized the opposition to the court,[4] the shifts used by the country party to retard and by the court party to advance money bills,[5] the manner in which members of Parliament promoted bills in which they were pecuniarily interested.[6]

Roger North was a high Tory and a non-juror; and the Examen and, occasionally, the Lives reflect the prejudices and the heat of the time amidst which his active life had been passed. But, as I have said,[7] the political opinions both of his brother and himself were founded upon reasoned convictions derived from a study of law and history. And so these opinions did not blind them to the existence of defects in the law, and abuses in the conduct of the executive government. As we have seen, the opinions of Francis North would not have seemed to future historians to be so far removed from those of Hale, if the political passions of the time had not divided the nation into two hostile camps.[8] These political passions died down after the accession of the Hanoverian dynasty; and Roger North lived long enough to experience the beginnings of the calm of the eighteenth century. From the manner in which, in the Lives, he speaks of the old conflicts, and of the many changes which he had seen in the political and legal world, we can see that his mind was not unaffected by that large minded rationalism which, while he was writing, was gradually and peacefully settling the institutions and the law of England on the lines indicated or necessitated by the Bill of Rights and the Act of Settlement. It

[1] "I cannot altogether excuse some men of law from being guilty of errors of this kind, in places where they ought to have considered better; for when men stood at the bar to be tried for their lives, upon indictments of special facts, and nothing was or could be therefore material against them, but what moved from or terminated in them; yet we could hear from some of the long robe offers to prove that there was a plot, in general, of that party which the prisoners at the bar professed," Examen 130; cp. Lives i 201.

[2] Lives i 201-202; cf. ibid. 157-163.

[3] Examen 138-139; Lives i 197-198.

[4] Examen 572-574.

[5] Ibid 460-461.

[6] "And really it appeared strange to me that the most indifferent of English Gentry were perpetually hunting projects to make their estates richer to themselves without regard to others; some to have wool dear, others corn and the like. One cannot without the very thing imagine the business that was in all their faces," Lives iii 181; Reresby, Memoirs 90, points out that the protection from creditors given by Parliamentary privilege, and presents from the court, helped to make a seat coveted; cp. Marvell, Works (Ed. Grosart) ii 394, 636; Pepys, Diary vii 180.

[7] Above 205-206, 531-532, 621.

[8] Above 205-206, 502-503, 580.

is not inappropriate that the mind of the man, whose books tell us so much of the final stages of the transition of our law from mediæval to modern, should itself exhibit a transition from the political passions of the seventeenth to the critical tolerance and broad common-sense of the eighteenth century.

IV

The Condition of Common Law and Equity

It is during this period that English law, like the English constitution, assumes its modern aspect. The common law sheds many of its mediæval rules, and much of its mediæval machinery. These rules and this machinery are either directly abolished, or gradually become obsolete; and, in their place, new rules and machinery are introduced either to do the work of the old more efficiently, or to regulate new political, social and commercial needs and activities. Similarly modern equitable doctrines begin to emerge, and Equity begins to attain fixity and system. It still corrects and supplements the common law; but it does so upon certain definite lines, and according to certain definite rules. As a result, we begin to see the beginnings of the modern settled relations between law and equity. With the detailed history of some of these legal and equitable doctrines I shall deal in the second Part of this and the following Book of this History. Here I shall only attempt to give a short sketch, firstly of the condition of the common law at the close of this period, and secondly of the condition of equity and of its relations to the common law.

The Common Law

During this period many formerly important branches of the mediæval common law were either abolished or became obsolete; other branches show mainly a development upon the lines already indicated; in other branches very important new developments took place. If we look at the different branches of the common law from these three points of view, we shall get a good general idea of its condition at the close of the seventeenth century.

(1) *Branches of the common law which have been either abolished or become obsolete.*

Hale, in his introduction to Rolle's Abridgment,[1] has so satisfactorily described the changes in the law and the machinery of the law, which had been taking place during the preceding century, that I need only summarize his description.

[1] For Rolle and his Abridgment see vol. v 375-377.

The changes in the substantive rules of law principally concern the land law. The following are the most important: (i) Changes connected with the abolition of the military tenures and their incidents. "Tenures by knight service and their appendix, wardship, value and forfeiture of marriage of the ward, escuage relief, *aide pur file marier et faire fitz chevalier*, *primer seisin*, *livery*, *offices post mortem*, *traverses*, *interpleader*, and monstrans of right in relation thereunto; the several writs of right, of ward, ravishment of ward, *valore maritagii*, *duplici valore maritagii*, and some other appendixes of this nature, made several great titles in the law, and took up much of the business of the old and latter law books; all, or the greater part whereof is now pared off, and become unuseful, by the late Act for Alteration of Tenures."[1] (ii) Villeinage was obsolete; and with it the law and writs relating to the seizure and enfranchisement of villeins.[2] (iii) Changes in the methods of conveyancing had made much of the old learning useless. Thus, "The title of Atturnement was a difficult, and yet great title, with its appendixes *quid juris clamat*, *quem redditum*, *reddit*, *per quæ servitia;* but it is much out of use and new expedients substituted in room thereof, *viz.* by fines to uses, by bargain and sale for a term and release, and by deeds inrolled according to the statute of 27 H. 8; and by these also the difficulties in execution of estates by livery and seisin, yea and many ofthe curiosities of some kind of releases, and confirmations are commonly supplied."[3] (iv) Many of the old doctrines connected with seisin and estates, such as descents to take away entries and continual claim, discontinuance and remitter, had been deprived of much of their importance by the legislation of this and the preceding century.[4] (v) The learning as to dower, though not wholly abrogated, was hardly ever applicable to the greater estates, owing to the extensive use made of jointures, which either created a legal bar under the statute of uses, or an equitable bar by the rules of equity.[5] (vi) The Reformation had rendered obsolete much law relating to "persons professed," and topics connected with marriage and other subjects of ecclesiastical cognizance.

The changes in the machinery of the law affected both the real and the personal actions. The assizes, and the most important of the real actions, had given place to the action of ejectment;[6]

[1] For these tenures and their incidents see vol. iii 34-73.

[2] Ibid 20, 496-499.

[3] Ibid 219 seqq.; Pt. II. c. 1 § 10; cp. vol. ii 588 for the important part played by the releases and confirmations in the mediæval land law.

[4] Vol. ii 585-587; vol. iii 91-92; vol. iv 483-484.

[5] Vol. iii 196-197.

[6] See ibid 3-29 for the real actions; for the action of ejectment and its development see Pt. II. c. 1 § 1.

and other real actions, had given place to actions of trespass, and actions on the case. This meant that a very large number of the older rules of law had become obsolete. Hale says: "The remedy by assizes, and several forms and proceedings relating thereunto, were great titles in the Year Books, and although the law is not altered in relation to them, yet use and common practice hath in a great measure antiquated the use of them in recovering possessions, and the remedy by ejectione firmæ used instead thereof; so that rarely is any assize brought unless for recovering possession of offices. Real actions, as writs of right, writs of entry etc. and their several appendixes, as *grande cape*, *petit cape*, *saver default*, *resceit*, *view*, *aide prayer*, *voucher*, *counterplea of voucher*, *counterplea of warranty*, *recovery in value*, were several great titles in the Year Books, but now much out of use; for in most cases at this day the entry of him that hath right, being lawful, men choose to recover their possessions by *ejectione firmæ*, only in common recoveries[1] the form of such real actions is preserved. . . . *Quod permittat* and assizes for commons ways etc., *secta ad molendinum*, assizes of nuisance, are much turned into trespasses and action upon the case."[2] Similarly, in the case of the personal actions, actions on the case, such as assumpsit and trover, had superseded the old actions of debt and detinue, and had rendered obsolete much law which centred round them.[3] Thus wager of law[4]—a great title, as Hale says, in the Year Books—was practically abolished. The action of account had been superseded by the superior remedy given by the court of Chancery.[5] The old action of replevin had been effectually reformed by statute.[6]

All these changes involved great simplifications in the intricate rules of procedure. The practical disappearance of many of the older forms of action, and the substitution for them of some form of trespass or case, got rid of many minute and diverse rules applicable to each of these older forms of action,[7] and to some extent generalized rules of procedure. It was less possible for a good case to be lost through a mistake in the form of action chosen, or through a mistake in the procedural rules by which it

[1] Cf. Bl. Comm. iii 197—"The forms are indeed preserved in the practice of common recoveries; but they are forms and nothing else; for which the very clerks that pass them are seldom capable to assign the reason."

[2] For the beginnings of this process see vol. iii 27-28.

[3] Vol. iii 350-351, 428-453. [4] Vol. i 305-308.

[5] Ibid 458-459; vol. ii 367; vol. iii 426-428; vol. v 288, 315; below 650-652.

[6] Hale says, "The learning of Avowries (is) in a great measure abridged by the Stat. of 21 H. 8. and the intricacies of process in replevin *returno habendo*, withernam, etc., much remedied in cases of distresses for rents by the late Act of this present Parliament"; for these statutes see vol. iv 487; for replevin generally see vol. iii 283-287.

[7] Vol. iii 624-625; Pt. II. c. 1 § 1.

was governed. It was therefore more possible for the judges to look at the substantial merits of the case. Unfortunately these advantages were, to some extent, counterbalanced by the growing strictness in the rules of pleading. Of this I have already said something, and I shall refer to it in some more detail later.[1]

(2) *Branches of the common law which show mainly a development upon lines already indicated.*

The branches of the common law which fall under this head are the land law, the criminal law, the law of contract, the law of persons, the law of succession to chattels, and the law of pleading and evidence.

The Land Law developed upon the same lines as it had been developing since the passing of the statute of uses.[2] The power to create future estates, and the power to devise, gave opportunities to the conveyancers of which they made full use. Many cases in the courts are taken up with the interpretation of devises and settlements. The result was that the complexity of the land law so increased that many advocated some kind of system of registration of estates, or of conveyances of estates.[3] The most noteworthy event in the history of legal doctrine in this branch of the law is the settlement in 1683, by *The Duke of Norfolk's Case*,[4] of the ground work of the modern rule against perpetuities.[5] The rule applies to other proprietary interests besides land; and the decision was a decision of the court of Chancery, confirmed two years later by the House of Lords.[6] But at this time its most important application was to the land law; and it settled both the common law and equitable principles applicable to this topic.[7] It closed the struggle which the courts both of law and equity had waged, ever since the middle of the sixteenth century, against the attempts of landowners to use their wide powers of disposition to destroy those powers. The only other point which need here be noted, is the final improvement in the action of ejectment, made by Rolle, C.J., during the Commonwealth,[8] of cutting through all the preliminary steps in the action, by compelling the tenant to admit lease, entry, and ouster.[9] The action thus became more easily adapted to the

[1] Above 570-571; Pt. II. c. 7 § 2.
[2] Vol. iv 473-477; vol. v 415-416.
[3] Above 532, 594, 610.
[4] 3 Ch. Cas. 1; Pollexf. 223; *sub nom.* Howard v. Norfolk 2 Ch. Rep. 229; 2 Swanst. 454.
[5] For the history of this rule see Pt. II. c. 1 § 6.
[6] 3 Ch. Cas. 53.
[7] "From that time to the present every judge has acquiesced in that decision," *per* Lord Kenyon, Long v. Blackall (1797) 7 T.R. at p. 102, cited Gray, Perpetuities (2nd Ed.) 135 n. 5.
[8] Bl. Comm. iii 202.
[9] Pt. II. c. 1 § 1.

purpose of the trial of title to the freehold, with the result that the decay of the real actions, which Coke had lamented,[1] proceeded more rapidly than ever. At the same time its anomalous character made it possible to use it for fraudulent purposes, as an interesting case, reported by Kelyng,[2] records.

We have seen that the *Criminal Law* had been extended and altered by statute.[3] It was extended also by the fact that the common lawyers took over and adapted a good many of the principles which had originated in the Star Chamber.[4] Just as the abolition of that jurisdiction had increased the control which the King's Bench exercised over the justices of the peace and the other subordinate jurisdictions in the country,[5] so it gave that court an opportunity, of which it made full use, of enlarging its criminal jurisdiction. Thus, in the substantive part of the criminal law, we see the beginnings of the modern law of conspiracy;[6] and there are several cases of a political kind which illustrate the completeness with which the common law had adopted the principles laid down by the Star Chamber for the treatment of criminal libels.[7] But the law on the latter topic hardly assumes its modern form till after the disappearance of the licensing Acts,[8] and the growth of ideas as to the limits of freedom of discussion different from those which prevailed during this period.[9]

In the adjective part of the law the criminal information was finally adopted as a form of criminal procedure[10]—a step which, as we shall see, was partly due to the influence of the Star Chamber.[11] We have seen that the power to punish jurors for their verdicts, which the King's Bench attempted to borrow from the same source, was finally declared to be illegal by *Bushell's Case* in 1670.[12] Apart from these changes, we see for the most part an elaboration of old principles, and a growing definiteness in the rules deducible from them, as they were applied to the

[1] Vol. v 479 n. 2.

[2] Rex v. Farre and Chadwick (1665) Kelyng 43-44.

[3] Vol. iv 492-532. [4] Vol. v 197-214. [5] Above 162, 215-216.

[6] Rex v. Tymberly (1662) 1 Keb. 254; Rex v. Starling (1664) 1 Keb. 675; cp. Rex v. Best (1705) 1 Salk. 174; Pt. II. c. 5 § 3.

[7] Stephen, H. C. L. ii 310-316; and cp. Rex v. Beare (1699) 1 Ld. Raym. 414; Pt. II. c. 5 § 2; it was decided in 1697 that slander is not a criminal offence, Rex v. Penny, 1 Ld. Raym. 153.

[8] Above 377-378. [9] Pt. II. c. 5 § 2.

[10] Stephen, H. C. L. i 294-296; Pt. II. c. 7 § 2.

[11] Ibid.

[12] Vol. i 344-347; and the courts, at any rate after the Revolution, set their faces against any attempt to put any sort of constraint on a jury; thus in Dawson v. Howard (1697) 1 Ld. Raym. 129, Ward, C.B., while acting as judge of assize in Cumberland, with the consent of the parties, adjourned the case to the bench, and ordered the jurors to appear there, sub pœna £50, to give their verdict; the court discharged this order, "because the judge could not adjourn the jury after they were sworn and charged with the evidence, nor could inflict a penalty upon the jurors."

concrete facts of individual cases. Special verdicts given by jurors in doubtful cases made a general discussion and settlement of the principles of the law by all the judges possible;[1] and the same result was also secured by the objectionable practice, which prevailed before the Revolution, of settling, in conjunction with the king's counsel, the principles to be applied to a pending case of political interest.[2] By such discussions the doctrine of constructive treason was developed;[3] the line was drawn more clearly between murder and manslaughter;[4] new illustrations were afforded of the narrowness of the crime of larceny at common law;[5] the scope of burglary[6] and robbery[7] was more clearly explained; and the necessary ingredients of such crimes as riot,[8] perjury,[9] and bigamy[10] were illustrated. It was a reckless age—politically and morally, so that crimes of violence were common. Also it was an age of commercial expansion, so that various new forms of fraudulent dealing needed suppression.[11] For these reasons the criminal law developed with some rapidity.

Its orderly development was materially assisted by the publication, at the beginning of the following period, of Hale's great work on the history of the pleas of the crown;[12] for it was a branch of the law which especially needed to be treated historically. Though many additions had been made by recent statutes, its underlying principles were very mediæval; and this characteristic was particularly striking in the criminal procedure of the period. The rules of process and pleading were as strict as ever—the statutes of jeofail, which modified their stringency in civil cases,[13] did not apply to criminal cases.[14] Thus the omission of the words "contra ligeantiæ suæ debitum" in an indictment for treason,[15] the misnomer of the accused,[16] even bad grammar,[17]

[1] For instances see Kelyng 59, 64, 66, 72-73; it was only in really doubtful cases that such verdicts were given—thus we find Kelyng saying in 1664 at pp. 29-30, "it would be dishonourable for the court in so plain a case as this to suffer the jury to find a special verdict."

[2] For instances see ibid 7—meeting of judges, law officers, and king's counsel to determine points which might arise on the trial of the regicides; ibid 54—a meeting of judges, "to consider of such things as might in point of law fall out in the trial of the Lord Morly, who was on Monday to be tried by his peers for a murder."

[3] Kelyng 7-24, 69-79; Pt. II. c. 5 § 1.

[4] Kelyng, 40, 41, 50, 51, 55-56, 60-62; Rex v. Keite (1698) 1 Ld. Raym. 138; Rex v. Plummer (1702) Kelyng 109.

[5] Raven's Case (1662) Kelyng 24, 29, 30; cp. ibid 81-83.

[6] Ibid 42-43, 83-85. [7] Ibid 67-70.

[8] Rex v. Sudbury (1700) 1 Ld. Raym. 484.

[9] Rex v. Griepe (1698) 1 Ld. Raym. 256. [10] Kelyng 27, 79, 80.

[11] See e.g. ibid 39—frauds in connection with the manufacture of plate. See generally Pt. II. c. 5 introd.

[12] Above 589-590. [13] Vol. iii 650; vol. iv 535-536. [14] Vol. iii 618.

[15] Rex v. Tucker (1695) 1 Ld. Raym. 1.

[16] Rex v. Knollys (1695) 1 Ld. Raym. 10.

[17] Rex v. Lamb (1701) 1 Ld. Raym. 609-610—"An indictment for having said maliciously, 'magistrat*os* civitatis Lichfield fore societatem asinorum,' was removed

were fatal. And this strictness made the application of the law very arbitrary. If it sometimes operated in favour of the prisoner, it sometimes operated to his disadvantage. Thus, if a person pleaded not guilty, and he was found guilty, the fact that he had a pardon would not help him, because, by his plea, he was taken to have waived the benefit of his pardon.[1] Then, too, other elements of uncertainty were caused by the rules of clergy and the mass of statute law relating thereto;[2] and survivals from the very earliest period in the history of the law, such as appeals[3] and deodands,[4] gave rise to difficulty and discussion. It is obvious that the management of so complicated a system of procedure tended to give a good deal of arbitrary power to the judges. According to their views on any particular case, they might elect to stand upon the letter of the law, or to waive this or that technicality in order to do substantial justice.[5] And if they could not override a particular rule, they could always, if they liked, appeal to the king to exercise his power to pardon.[6] We have seen that, in political cases before the Revolution, the control exercised by the crown over the judges enabled it to use these advantages very effectively in its own interests.[7] But in ordinary cases the impression that can be gathered from the reports is that the judges generally used their powers fairly, and sometimes even mercifully;[8] and we have

by certiorari into the king's Bench. And motion was made to quash it, because it was insensible, for there is no such word as magistrat*os*. And for this reason it was quashed"; on this matter generally see vol. iii 616-618.

[1] Kelyng 25. [2] Vol. iii 294-302.

[3] Vol. ii 361-364; for illustrations in this period see Lisle's Case (1697) Kelyng 89; Rex v. Toler (1701) 1 Ld. Raym. 555; Luttrell's Diary i 403; ii 214, 498; iii 30, 308; iv 255, 641, 650.

[4] Vol. ii 47; see the Case of the Lord of the Manor of Hampstead (n.d.) 1 Salk. 220.

[5] Kelyng, at p. 51, tells us a curious story of what he did at the assizes at Winchester; an old thief had pleaded his clergy, and the clerk was about to give him the book to see if he could read; "I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked upon the book at all, and yet the bishop's clerk . . . answered *legit;* and thereupon I wished him to consider . . . and he answered again somewhat angrily *legit;* then I bid the clerk of the assizes not to record it, and I told the parson he was not the judge whether he read or no, but a ministerial officer to make a true report to the court. And so I caused the prisoner to be brought near, and delivered him the book, and then the prisoner confessed he could not read; whereupon I told the parson he had reproached his function, and unpreached more that day than he could preach up again in many daies; and . . . I fined him 5 marks."

[6] Cp. Kelyng at p. 25; ibid at p. 79. [7] Above 213-215, 509-511.

[8] See e.g. Kelyng 30—Case of James and William Turner; and cp. ibid 45; at pp. 59-62 he records a difference of judicial opinion as to whether a case of homicide, while rescuing a man impressed, was murder or manslaughter, and then tells us that, "After this difference (of opinion) I granted a certiorari to remove the cause into the King's Bench . . . and altho' all the judges of the court were clearly of the opinion that it was murder, yet it being in case of life, we did not think it prudent to give him judgment of death, but admitted him to his clergy."

seen that, after the Revolution, trials, even in political cases, were conspicuously fair.[1]

The settlement of the main principles of the doctrine of consideration in the preceding period had fixed the most distinctive feature of the English *Law of Contract.*[2] In this period we see the growth of some other principles of the modern law. Thus such subjects as impossibility of performance,[3] warranty of title in a contract of sale of goods,[4] payment,[5] accord and satisfaction,[6] are discussed; and some of the existing rules of law on these topics are laid down. Decisions upon wagering contracts, and upon Charles II.'s statute relating thereto,[7] and decisions upon § 4 of the Statute of Frauds,[8] illustrate the first appearance of some of the familiar features of the modern law. We shall see that the settlement of the main principles underlying the law of contract led to some appreciation of the differences between contract, tort, and quasi-contract;[9] that it continued to help the growth of the commercial jurisdiction of the common law courts; and that it led to the growth of rules governing particular kinds of contract.[10] But these topics fall more properly under the head of the new developments made during this period. One particular kind of contract may, however, be mentioned here. It was finally decided in 1699 that an action for breach of promise of marriage lies, not only for the woman, but also for the man, and that it does not fall within § 4 of the Statute of Frauds.[11] Apparently counsel had been darkened upon the former of those topics by a supposed analogy to the old writ of entry *causa matrimonii prælocuti*;[12] and by the idea that, as marriage was of ecclesiastical cognizance, promises to marry must fall under the same jurisdiction.[13] Holt clearly pointed out that a contract to marry (as distinct from marriage) is simply an executory contract as much enforceable at common law as any other contract.[14]

[1] Above 518-519.
[2] Pt. II. c. 3 § 1.
[3] Hulbert v. Watts (1697) 1 Ld. Raym. 112.
[4] Medina v. Stoughton (1701) 1 Ld. Raym. 593.
[5] Canter v. Shepheard (1699) 1 Ld. Raym. 330.
[6] Allen v. Harris (1697) 1 Ld. Raym. 122.
[7] Above 404.
[8] Above 390-393.
[9] Below 637-640; Pt. II. c. 3 § 3.
[10] Pt. II. c. 4.
[11] Harrison v. Cage (1699) 1 Ld. Raym. 386; above 392 n. 3.
[12] Vol. iii 22; really there was no analogy; as Holt, C.J., said, "The case upon the writ de causa matrimonii prælocuti is ancient law, and stands upon its own bottom."
[13] In Holcroft v. Dickenson (1671) Carter at p. 255 Vaughan, C.J., dissenting from the other judges, took this view.
[14] "There is the same consideration in the case of the promise of a woman as in that of a man; for the ground of the action where the woman brings the action, is the promise of the woman; for the action being founded upon mutual promises, if the woman's promise be void, the man's promise will be nudum pactum," 1 Ld. Raym. at p. 387.

In the department of the *Law of Persons* decided cases define more precisely the status of the married woman, the infant, and the lunatic; but the scope and contents of the rules laid down follow very closely the principles ascertained in the Middle Ages. Thus, in the case of the married woman, the leading case of *Manby* v. *Scott*[1] on the husband's liability for his wife's contracts, follows mediæval principles very closely.[2] Other cases define more clearly the position of a married woman divorced or separated from her husband.[3] In the case of infants and lunatics we get discussions on the question as to which of their acts are void or voidable.[4] Thus, in the case of the infant, it was ruled that contracts for necessaries are valid, and that money lent to buy necessaries, which has been actually so employed, is recoverable.[5] On the other hand, it was decided that, as infants' contracts were voidable, they could not give rise to a debt, upon which bankruptcy proceedings could be founded.[6] But for important developments in the law of persons we must look, not to common law, but to equity. The law as to the proprietary position of married women, the management of the property of lunatics, and the control of the guardianship of infants was, as we shall see, developed by the chancellor.[7]

The same remark applies to that part of the *Law of Succession to Chattels* which is concerned with the administration of assets. The common law rules, which regulated actions brought by or against executors or administrators, were elaborated. Thus we get decisions as to the legal priorities of certain sorts of debt,[8] as to the nature of an executor's liability upon covenants in a lease,[9] and as to the personal liability of the executors upon a devastavit and an admission of assets.[10] It was recognized that jurisdiction to make grants of probate and administration belonged exclusively to the ecclesiastical courts.[11] But certain points connected with such grants were considered by the common law courts—e.g. the period at which a grant of administration durante minore ætate determined,[12] and the effect of the revocation

[1] (1663) 1 Sid. 109.
[2] Vol. iii 529-530.
[3] Chamberlain v. Hewitson (1696) 1 Ld. Raym. at p. 74; Derry v. Ducissam Mazarine (1698) 1 Ld. Raym. 147.
[4] Thompson v. Leach (1698) 1 Ld. Raym. 313.
[5] Ellis v. Ellis (1699) 1 Ld. Raym. 344.
[6] Rex v. Cole (1700) 1 Ld. Raym. 443.
[7] Below 644-650; for the jurisdiction of the court over lunatics, see vol. i 473-476.
[8] Cage v. Acton (1700) 1 Ld. Raym. at pp. 515, 516.
[9] Tilney v. Norris (1700) 1 Ld. Raym. 553.
[10] Rock v. Layton (1701) 1 Ld. Raym. 589; Parker v. Atfield (1702) 1 Ld. Raym. at p. 679.
[11] Sir Richard Raine's Case (1698) 1 Ld. Raym. 262.
[12] Atkinson v. Cornish (1699) 1 Ld. Raym. 338; Freke v. Thomas (1702) 1 Ld. Raym. 667.

of an administration upon acts done under its authority.[1] The interpretation of the statutes of Distribution was also considered by these courts, and their decisions during this period are the ground work of our modern law on this topic.[2] That interpretation was sometimes somewhat restrictive, e.g. it was decided that personal representatives were not compelled to distribute estates pur autre vie,[3] and that the ecclesiastical courts could not compel an executor to distribute undisposed of residue.[4] In this period, as in the Middle Ages, this branch of the law suffered from the fact that it came at the meeting-place of the rival jurisdictions of the common law courts and the ecclesiastical courts. But, during this period, this defect was to some extent remedied by the expansion of the third of the jurisdictions which has shaped the law on this topic. We shall see that the court of Chancery took over from the ecclesiastical courts their jurisdiction over the administration of assets, and intervened in order to prevent the harsh results which followed from some of the rules of the common law. We shall see also that it was able to bridge the chasm which separated the exclusively ecclesiastical jurisdiction over the succession to chattels, from the exclusively common law jurisdiction over inheritance to, and devises of, real property; and that, without materially infringing on the province of the latter jurisdiction, it was beginning to evolve a set of general rules for the administration of estates.[5] It is because it succeeded in evolving these general rules that the bulk of the modern law on this topic is the product neither of the common law courts nor of the ecclesiastical courts, but of the court of Chancery.

Of the development of the *Law of Pleading* I have already spoken.[6] The rules of pleading tended to become more and more rigid; and, as we have seen, this rigidity tended to counteract some of the beneficial effects of the simplification of process which came with the disuse of the older forms of action, and the spread of the offshoots of trespass.[7] The judges seem sometimes to struggle with this tendency;[8] but, as we have seen, without much effect. The *Law of Evidence* was developing. In the pre-Revolution criminal cases, in which political passions were aroused, not very much attention was paid to rules of evidence which made

[1] Blackborough v. Davies (1702) 1 Ld. Raym. at p. 685.
[2] See e.g. Rex v. Raines (1701) 1 Ld. Raym. 571; Blackborough v. Davies (1702) 1 Ld. Raym. 684; vol. iii 561-562.
[3] Olderoon v. Pickering (1697) 1 Ld. Raym. 96—a decision corrected by 14 George II. c. 20 § 9.
[4] Petit v. Smith (1696) 1 Ld. Raym. 86; but this was partially corrected by the court of Chancery, see below 654.
[5] Below 652-657.
[6] Above 570-571.
[7] Above 626-627.
[8] Above 569.

in favour of the accused.[1] But in other criminal cases, and in civil cases, we can see the beginnings of some of our modern rules. A person could not be compelled to incriminate himself.[2] The question what sorts of interest in a case incapacitated a person from giving evidence;[3] how handwriting could be proved;[4] when secondary evidence could be given;[5] when the evidence of declarations by deceased persons,[6] and when declarations against a person's interest[7] would be admitted—were some of the questions as to which the courts gave decisions. The accumulation of such decisions upon the admissibility of evidence will gradually give rise to an ascertained body of law; but for this result we must wait till the following period.[8]

(3) *The new developments of the common law.*

Of the leading position in the state which the common law had secured, as a result of the Great Rebellion, I have already spoken.[9] In its principles were to be found the public law of the state, and it had vindicated its claim to supremacy over all other rival jurisdictions. Thus, as we have seen, new questions of public law were fought out and decided in the common law courts;[10] and all disputed questions as to the conduct of the local government of the country (which, as we have seen, still continued to be administered under judicial forms) could be brought ultimately before the same tribunals.[11] Not less important were the new developments in private law. We can group them under three heads. In the first place, there is a remarkable expansion of mercantile law; in the second place, a corresponding, and to some extent, a consequential development in the law of contract and tort; and, in the third place, a growing consciousness of the difference between the essential ideas underlying the conceptions of contract, tort, implied contract, and quasi-contract.

(i) The expansion of mercantile law was, as we have seen, a direct consequence of the victory which the common law courts

[1] Above 213-215.

[2] Rex v. Worsenham (1702) 1 Ld. Raym. 705; it was ruled by Holt, C.J., in 1694 that a man could not give in evidence that which it would be a breach of confidence to depose, ibid 733; see below 661.

[3] Tiley v. Cowling (1701) 1 Ld. Raym. 744; Smith v. Blackham (1699) 1 Salk. 283.

[4] Rex v. Crosby (1696) 1 Ld. Raym. at p. 40.

[5] Tilley's Case (1704) 1 Salk. 286; cp. Anon. (1699) 1 Ld. Raym. 731.

[6] Rex v. Payne (n.d.) 1 Ld. Raym. 729-730.

[7] Anon. (1699) 1 Ld. Raym. 729; cp. ibid 745, citing a resolution of 1695 that, "a shop book is not evidence for a tradesman, but is good evidence against him or for a stranger. The same law of a scrivener's book for money paid by him, or received to the use of a stranger, or the book of a bursar of a college."

[8] See Pt. II. c. 7 § 1.

[9] Above 162.

[10] Above 262-272.

[11] Above 55-65, 215-216.

had won over the court of Admiralty.[1] Questions of prize,[2] jurisdiction over seaman's wages,[3] hypothecation of the ship for necesssaries in the course of a voyage,[4] disputes between part owners as to undertaking a voyage,[5] proceedings against a ship on a ransom contract[6]—were admitted to fall within the Admiralty jurisdiction. But over all such questions as charter parties,[7] salvage,[8] affreightment,[9] and bills of lading,[10] the common law had assumed jurisdiction. That the merchants in many cases preferred to take their cases to arbitration, we can gather from the statute of 1697-1698, which gave facilities for the enforcements of awards so obtained.[11] But, if it was desired to get the opinion of the courts, it was to the courts of common law that litigants most frequently went. It was laid down by Holt, C.J., that the common law possessed jurisdiction in all matters of mercantile and maritime law; and that the jurisdiction of the Admiralty was strictly limited and subordinate. "The common law," he said, "is the overruling jurisdiction in this realm; and you ought to entitle yourselves well, to draw a thing out of the jurisdiction of it." [12]

Under these circumstances we are not surprised to see, during this period, a remarkable development of many departments of mercantile law. Thus a long step was made towards the settlement of the law as to negotiable instruments. The customs of the merchants, which regulated bills of exchange and promissory notes, were incorporated into the common law, and their incidents and consequences were technically expressed in its terms.[13] Similarly we see the beginnings of another closely allied branch of the law—the law of banking.[14] One or two cases of insurance contracts make their appearance;[15] and there are many cases dealing with the law of bankruptcy.[16] The law of bailment was put upon its modern basis by the case of *Coggs* v. *Bernard*.[17] It

[1] Vol. i 553-558; vol. v 140-148, 153-154.
[2] Shermoulin v. Sands (1697) 1 Ld. Raym. 271.
[3] Hook v. Moreton (1699) 1 Ld. Raym. 398; vol. i 557 n. 6.
[4] Benzen v. Jeffries (1697) 1 Ld. Raym. 152.
[5] Lambert v. Aeretree (1698) 1 Ld. Raym. 225; cp. Blacket v. Ansley, ibid. 235.
[6] Wilson v. Bird (1695) 1 Ld. Raym. 22.
[7] Vol. v 144; Pt. II. c. 4 II.
[8] Hartfort v. Jones (1699) 1 Ld. Raym. 393.
[9] Pt. II. c. 4 II.
[10] Evans v. Marlett (1697) 1 Ld. Raym. 271.
[11] 9 William III. c. 15; and this is not surprising considering the way in which cases were sometimes delayed by simultaneous and successive proceedings in the courts of law and equity; for an illustrative case see Shepheard v. Willkins and others (1691), Hist. MSS. Com. 13th Rep. App. Pt. v 339 no. 453.
[12] Shermoulin v. Sands (1697) 1 Ld. Raym. at p. 272.
[13] Pt. II. c. 4 I. § 2. [14] Ibid § 3.
[15] Ibid III.; see e.g. Anon. (1700) 1 Ld. Raym. 480—a case on a life policy.
[16] Pt. II. c. 4 I. § 6. [17] (1704) 2 Ld. Raym. 909.

is true that, as yet, this mercantile jurisdiction was shared by the court of Chancery. The machinery of that court was much better fitted to deal with cases which involved the taking of accounts. For this reason it assumed jurisdiction in partnership cases,[1] and in the administration of the law of bankruptcy;[2] and the later history of the law upon these topics must be looked for rather in the Chancery than in the common law reports. As we shall see, the court of Chancery heard cases which turned on bills of lading,[3] contribution and average,[4] bottomry,[5] insurance,[6] and charter parties.[7] It was not till the time of Lord Mansfield that the limits of the common law and equitable jurisdiction in commercial cases was defined with any degree of fixity.[8]

(ii) Some of the most important developments in the law of contract and tort are the direct consequence of this development of the mercantile jurisdiction of the common law courts.

In the law of contract it led directly to the growth of special rules dealing with particular contracts. Thus we get some definite rules as to the obligations of the parties to a contract of sale;[9] and, as we have seen, the various species of the contract of bailment were defined.[10] On the other hand, other developments of this branch of the law are not so directly due to this cause. Most of the cases on wagering contracts are due to Charles II.'s legislation; and § 4 of the statute of Frauds occasioned the need for a precise definition of the contracts to which it applied.

In the law of tort the most important developments are, firstly, changes in the principles of liability for tort, and, secondly, the growth of more detailed rules as to particular torts. The principal changes in the principles of liability for tort are the beginnings of the modern doctrine of the master's liability for the torts of his servant[11]; and a growing tendency to develop the principles of liability for tort, by differentiating between cases in which a man is liable for an illegal act which damages another, and cases in which he is liable for such an act only if it is accompanied by wrongful intention or negligence.[12] It is probable, as we shall see, that the first of these developments is technically related to the encroachments made by the common law courts

[1] Below 650. [2] Pt. II. c. 4 I. § 6.

[3] Wiseman v. Vandeput (1690) 2 Vern. 203—a case in which we can see the origins of the doctrine of stoppage in transitu; and see generally Pt. II. c. 4 II. and III.

[4] Anon. 1 Eq. Cas. Ab. 114-115.

[5] Goddart v. Garret (1692) 1 Eq. Cas. Abr. 371.

[6] Ibid.

[7] Edwin v. East India Company (1690) 2 Vern. 210; S.C. 1 Eq. Cas. Abr. 374.

[8] Vol. i 572-573; vol. v 147. [9] Vol. v 109-111; Pt. II. c. 3 § 2.

[10] Above 520. [11] Pt. II. c. 5 § 6. [12] Ibid.

upon the maritime and commercial jurisdiction of the Admiralty;[1] and it is quite clear that the expanding commerce and industry of the country made it a necessary protection to the general public. Probably also the second of these developments owed something to the same cause. But it also owed something to the growth of more detailed rules as to particular torts. Some of these torts begin to appear in their modern form. Thus we begin to see the growth of the distinction between the torts of libel and slander, and the growth of the distinction between the tort and the crime of libel;[2] malicious prosecution gets free from its early association with conspiracy, and emerges as an independent tort;[3] and we get interesting discussions upon many other topics connected with particular torts—e.g. as to the limits of the right of a person assaulted to defend himself,[4] as to the right of a person to sue in tort who is specially damaged by a public nuisance,[5] as to the right of a bailee to bring trover,[6] and as to liability for damage done by animals.[7]

(iii) The growth of the law of contract and tort, and topics connected therewith, began to make the lawyers conscious of the difference between contract and tort,[8] and even to perceive dimly the meaning of the phrase quasi-contract.

Bracton had talked of actions ex contractu vel quasi, and actions ex maleficio vel quasi.[9] But, as Maitland had shown, this classification could not be imposed upon the mediæval forms of action. Neither Bracton, Britton, nor Fleta make any use of it. "Throughout the Middle Ages the theory that personal actions may be arranged under these headings seems to remain a sterile, alien theory. It does not determine the arrangement of the practical books, of the Register, the Old Natura Brevium, Fitzherbert's Natura Brevium, the Novæ Narrationes. Even Hale, when in his analysis he mapped out the field of English law, did not make it an important outline."[10] In fact, as we have seen,[11] the English personal actions were often at once contractual, delictual, and proprietary in their nature. The important differences were those which existed between the forms of the different writs, between the mesne process upon them,

[1] Pt. II. c. 5 § 6.
[2] Ibid § 2; see vol. v 205-212 for its earlier development in the Star Chamber.
[3] Savile v. Roberts (1698) 1 Ld. Raym. 374; Pt. II. c. 5 § 3.
[4] Leward v. Basely (1696) 1 Ld. Raym. 62.
[5] Iveson v. Moore (1700) 1 Ld. Raym. 486.
[6] Arnold v. Jefferson (1698) 1 Ld. Raym. 275; Pt. II. c. 2 § 1.
[7] Jenkins v. Turner (1697) 1 Ld. Raym. 109; Mason v. Keeling (1701) ibid 606; Pt. II. c. 5 § 6.
[8] On this topic see Maitland's historical note on the classification of the forms of personal action, printed in Pollock's Torts App. A.
[9] At f. 99; vol. ii 277, 278.
[10] Maitland, op. cit. 536-537.
[11] Vol. ii 367-369; vol. iii 420, 425-426.

between the proper pleas to them, between the modes of proof, between the forms of the judgments and final process upon them.[1]

The growth and spread of the action of trespass and its offshoots, and statutory changes, made for the growth of uniformity. But uniformity was never attained completely; and it was still necessary, for certain purposes, to draw a line between different classes of personal action. Thus, firstly, the question arose, What forms of action could be joined? The answer turned largely upon the procedural differences between the actions. "Thus it was said that the actions to be joined must be such as have the same mesne process and the same general issue, also that an action in which (apart from statutes) the defendant was liable to fine could not be joined with one in which he could only be amerced."[2] But we also see that, during this period, it was beginning to be said that causes of action in contract could not be joined with causes of action in tort.[3] No doubt, as Maitland says, the rules on this topic could not be reduced to this simple principle. But, for all that, it is clear that this new distinction, based upon substantive law, was beginning to appear beside the old distinctions based upon adjective law.[4] Secondly, it was laid down that, while all joint contractors must be sued because their liability was joint, a failure to join all joint tort feasors was not fatal, as their liability was joint and several.[5] Here again, therefore the attention of the lawyers was turned to the distinction between tort and contract. Thirdly, its importance was beginning to be seen in connection with the maxim *Actio personalis moritur cum persona.*[6] The distinction between actions which survived and those which did not, to some extent, though not entirely, corresponded with the distinction between contract and tort. Thus, although the differences between the forms of action continued to have more practical importance so long as the forms of action survived, it is clear that the distinction between contract and tort, based upon the subject matter of the law, is beginning to emerge. When the forms of action were abolished, and when this distinction was adopted as a basis of classification by the legislature,

[1] Maitland, op. cit. 535.

[2] Ibid 539.

[3] Denison v. Ralphson (1682) 1 Vent. at p. 368—"Causes upon contract which are in the right, and causes upon a tort, cannot be joined"; cp. Dalston v. Janson (1696) 1 Ld. Raym. 58—"an action founded upon a contract cannot be joined with an action founded upon a tort, as a trover."

[4] We see this in the reason given for the statement in Denison v. Ralphson—"for they (i.e. these causes of action) do not only require several pleas, but there is several process, the one summons attachment etc., the other attachment etc."; cp. Courtney v. Collet (1698) 1 Ld. Raym. 272—trespass and case cannot be joined because the judgments are different.

[5] Boson v. Sandford (1689) 2 Salk. at p. 440; Rich v. Pilkington (1692) Carth. at p. 171; and see Cabell v. Vaughan (1669) 1 Wms. Saund. 291 and notes thereto.

[6] Vol. iii 576-582, 584-585.

it became a leading distinction. But, for some time, owing to the development of the law of contract and tort, by means of actions which were neither completely contractual nor completely delictual, it will require some judicial interpretation before it can be quite completely fitted to the existing rules of the common law.[1] But it is significant that at this period, when our modern common law is beginning to emerge clearly, this modern classification is beginning to attract some attention.

Similarly, we can see that the conceptions of an implied contract and a quasi-contract are beginning to emerge, by reason of further developments in the scope of the action of assumpsit.[2] We have seen that, at the beginning of the seventeenth century, *indebitatus assumpsit* could be brought for a debt, even though there had been no express promise to pay subsequently made; and that this extension of the sphere of assumpsit helped to familiarize the law with the idea of an implied promise.[3] We have seen that, in consequence, the idea was extended to cases where one person had performed services for another, without having made a definite bargain as to remuneration, or an express promise to pay; that in these cases the former could sue the latter in assumpsit on a quantum meruit;[4] and that this idea of an implied promise was extended to a large number of different cases, in order that the plaintiff might get the convenient remedy of assumpsit.[5] But so far all the cases were cases in which there was a true contract—there was consent, though only an implied consent. We shall see that the last extension of assumpsit was to cases where the action of debt lay for duties not arising from consent, e.g. for the breach of a statutory or customary duty.[6] We shall see that Holt was averse to this extension, because he saw that it was, logically, an illegitmate extension.[7] But, in spite of his opposition, assumpsit was extended to this new sphere; and the notion of promises implied in law, or quasi-contracts, became fixed in the law in its modern form.[8] It was gradually developed as a remedy in a large number of cases in which one person had unjustly enriched himself at the expense of another; and, as so developed, it in time rendered unnecessary much of that equitable interference with the common law which, at an earlier period, considerations of natural justice had necessitated.

Thus, as with the notion of contract and tort, so with the notion of contract and quasi-contract, English Law was gradually acquiring some definite notions of these fundamental distinctions in substantive law. Braction had tried to impose these notions

[1] Maitland, op. cit. 541-542.
[2] Vol. iii 446-451; Pt. II. c. 3 § 3.
[3] Vol. iii 441-448.
[4] Ibid 447.
[5] Ibid 447-448.
[6] Ibid 450-451; Pt. II. c. 3 § 3.
[7] Ibid.
[8] Ibid.

upon a body of law which was far too immature to receive them. But, when English Law, by a road of its own, had attained a mature body of rules upon these topics, these fundamental distinctions, which he had borrowed from Roman law, reappeared. They were brought to light and used to elucidate and develop English Law, just as his speculations on various aspects of the law of bailment were recalled by Holt, C.J., in the case of *Coggs* v. *Bernard*,[1] and used to meet the demand for a more elaborate and a more definite body of rules upon this topic.

This summary shows us that the two most striking features in the development of those parts of the common law which regulate the relations of private persons are, firstly, the decay of the real actions and the decline in importance of the mediæval land law; and, secondly, the growth of mercantile law and of the two branches of law most closely related thereto—the law of contract and the law of tort. These two features show us that the development of the common law faithfully reflected the fact that mediæval had finally given place to modern conditions. Nor is it surprising that it should thus faithfully reflect this change. Although the common law has been tenacious of mediæval doctrines and mediæval forms, its development by means of decided cases has always enabled it to keep in more or less close touch with the dominant needs and opinions of the day; and, at this period, its newly won supremacy in the state caused it to be peculiarly sensitive to these needs and opinions. And so, in a land law changed in its contents, and changed in its importance in relation to other parts of the legal system, and in the development of those branches of the law most needed by a commercial and industrial nation, we see the technical expression of the changes which were taking place on all sides of the national life.

But all the needs of this new age could not be satisfied by the common law. To satisfy them, these developments of the common law needed, as we shall now see, to be supplemented and seconded by the development of a system of equity.

Equity

It was during this period that some of the principles of equity, and the rules deducible from them, began to assume their modern form. Consequently equity made definite progress in that process of transformation which, when it is complete, will convert it into a system almost as fixed as that of the common law. Here I shall describe briefly the extent of the progress, which had

[1] Vol. ii 289; above 521.

been made in this direction at the close of the seventeenth century, under the following heads:—Trusts; Family Law; the Administrative Jurisdiction; Specific Relief; Relief against Rigidity of the Law; Mortgages; and the Law of Property. In conclusion, I shall say a few words as to the evolution of the relations between law and equity which resulted from those developments.

Trusts.

We have seen that, towards the end of the preceding period, there was a tendency to reconsider the question of the position of the second cestuique use, where a use had been limited on a use.[1] But we have seen that there is no evidence that equity was prepared to do more than give relief in a case where non-recognition would lead to fraud; and that it was unlikely that any further steps would be taken in this direction, because the universal recognition of the second use as a trust would be detrimental to the revenue which the king still got from the incidents of tenure.[2] After the Restoration this consideration ceased to be operative; and we find that such scanty evidence as there is all points to the conclusion that legal opinion was inclining to the recognition of the second use as a trust in all cases.

In the edition of Shepherd's Touchstone, which was published in 1651, it seems to be assumed that all uses not affected by the Statute of Uses, including a use upon a use, will be treated by the court of Chancery as trusts.[3] Other authorities, on the other hand, seem to consider that the validity of the second use as a trust depended on the question whether or not the first cestuique use had given value. If he had, the second use would be void; if he had not, it would be valid, and enforced as a trust.[4] This question of the validity of a second use was discussed in

[1] Vol. v 307-309. [2] Vol. iv 472-473; vol. v 309.

[3] "If one be seised of land in fee, and bargain and sell it, or make a lease of it to another in trust and for the benefit of a third person, this is but a Chancery trust . . . as was held clearly M. 8. Car. B.R. . . . and so in all such like cases and questions of trusts and uses that are not within the statute of uses, the law is now as it was before the same statute was made, and all these matters are determinable in Chancery; for as the questions of uses and trusts that are within the statute are to be decided and ruled by the judges of the common law, so are all other questions of uses and trusts, that are out of the statute, to be ruled and decided by the judges of the Chancery," p. 507; at p. 508 he points out that, in the case of a verbal agreement in consideration of money paid, where no use is raised in consequence of the statute of Inrollments, there may be relief in equity; it may be thought at first sight that at p. 570 he is stating the old law, but really he is only pointing out that, in the case of a bargain and sale where no money passes, no use at all arises; if it be true that this book was written by Dodderidge, it would be interesting to know if these passages are his; as, if they are, it would antedate by some years the recognition of the second use as a trust, for this question see vol. v 391-392.

[4] See the Compleat Attorney (1666) cited Ames, Lectures 246 n. 6.

Ash v. *Gallen* in 1668, but no decision was reached, as the case was compromised.[1] However, in 1670-1671, the lord keeper told a committee of the House of Lords that, "the trust is now the same that uses were before. One is tenant in law, the other the usufructuary";[2] and it is clear from the case of *Sympson* v. *Turner*, decided in 1700,[3] that it was then well settled that the second use would be enforced as a trust. It was said in that case that, notwithstanding the Statute of Uses, there were three ways of creating an equitable trust; "1st, when a man seised in fee raises a term of years, and limits it in trust for A, etc., for this the statute can not execute, the termor not being seised. *2dly, where lands are limited to the use of A in trust to permit B to receive the rents and profits; for the Statute can only execute the first use.* 3rdly, where lands are limited to trustees to receive and pay over the rents and profits to such and such persons; for here the lands must remain in them to answer these purposes."[4] It would seem therefore that, though the lawyers, out of regard for the older precedents, hesitated for a short time, they soon came to the conclusion that all uses which were not executed by the statute—uses of uses as well as uses of chattels and active uses—must be enforced as equitable trusts, and be governed by the rules which applied to those trusts.

I have already said something of the formalities required by the statute of Frauds for the creation of trusts. Apart from this statutory change, during the whole of this period the law of trusts was being developed on the lines already indicated.[5] Thus we get decisions upon the rights,[6] duties,[7] and liabilities[8] of trustees, and upon the nature of the interest of the cestuique trust,[9] which show us that the law upon these matters is be-

[1] 1 Ch. Cas. 114-115—"The private discourse of counsel," seems to adhere to the old law as to the invalidity of the second use.

[2] Hist. MSS. Com. 7th Rep. App. Pt. i 3 no. 16.

[3] 1 Eq. Cas. Ab. 383.

[4] On this matter too much reliance cannot be placed on the text books, since they often repeat obsolete law. Thus in a book called the "Practick Part of the law," 3rd Ed. 1702, at pp. 334-335, the old learning, based on cases of the early seventeenth century, is repeated as if it represented the law of that date, which, as the cases show, it does not; it states for instance that, "in all such cases where they are united (by the Statute of uses), and the use executed by the Statute, the Chancery doth not intermeddle, but leaves them to the law. . . . But there are some Uses and Trusts still that are not executed by the Statute, and those remain as they were before, and are in the conusance and order of the Chancery"—a good exposition of early seventeenth century law, but not law in 1702.

[5] Vol. v 304-309.

[6] E.g. Amand v. Bradbourne (1673) 2 Ch. Cas. 138—a trustee is allowed full costs.

[7] E.g. Ratcliffe v. Graves (1683) 1 Vern. at p. 196—liability of a trustee to pay interest on trust money employed by him in his business.

[8] E.g. Morley v. Morley (1678) 2 Ch. Cas. 2—standard of diligence; Palmer v. Jones (1682) 1 Vern. 144—extent of liability.

[9] See 1 Eq. Cas. Ab. 392-393.

ginning to assume its modern form. Of this development I shall say something in a subsequent Book of this History. Here we may note, firstly, that the differences, which were already apparent between the charitable trust and the private trust, were maintained and developed;[1] and, secondly, that during this period the modern classification of private trusts had been reached. In 1676, in the case of *Cook* v. *Fountain*,[2] Lord Nottingham said, "All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again, express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is when the court, upon consideration of all circumstances, presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant."

Judicial decision had already begun to define these various categories of private trusts. Firstly, the existence of what Lord Nottingham calls presumptive trusts naturally gave rise to the question, From what words and circumstances will the court presume a trust? This introduced the vexed question of the precatory trust. In *Cook* v. *Fountain*[3] Lord Nottingham, following the earlier decisions,[4] laid down the principle, to which, in the latter part of the last century, the courts have returned.[5] "The law," he said, "never implies, the Court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is open to the Lord Chancellor to construe or presume any man in England out of his estate." In spite of this warning, we can see that, just at the close of this period, the court was beginning to presume the existence of trusts from mere words of advice or recommendation, in cases in which it was obviously doubtful whether any trust was intended to be created.[6] Secondly, further definition of trusts "raised or created by act or construction of law," was necessitated by the provision of the statute of Frauds exempting them from the section which required

[1] Vol. v 305; cp. 1 Eq. Cas. Ab. 97-98; as to the meaning of the term "charitable" in this connection see vol. iv 398 and n. 7.

[2] 3 Swanst. at p. 591.

[3] (1676) 3 Swanst. at p. 592.

[4] Vol. v 305.

[5] As to the fluctuations of judicial opinion on this point in modern times see Maitland, Equity 66-67.

[6] Eeles v. England (1704) 2 Vern. 466; S.C. Prec. Ch. 200; Jones v. Nabbs (1718) Gilb. Rep. 146; S.C. 1 Eq. Cas. Ab. 405.

the creation of trusts to be evidenced by writing.[1] We can see also the beginnings of the doctrine that, though there is a presumption that, if a man purchases property in another's name and pays the money, there is a resulting trust for him who pays the money;[2] this presumption may be rebutted by proof that the purchase was made by a father, and intended as an advancement for his son.[3]

We have seen that, as the trust concept gradually developed, it exercised an increasing influence upon many branches of English Law public and private.[4] But in this period, as in the last, its main influence is as yet exerted in the sphere in which it originated—the sphere of Family Law.

Family Law.

The large additions which equity had made to this branch of the law at the end of this period, may be grouped under the following heads: The proprietary position of the married woman; topics connected with marriage; infancy and guardianship.

That the married woman could have property settled upon her to her separate use was now well recognized.[5] But, as in the preceding period, some consideration was paid to the legal rights of the husband.[6] Following the older precedents, the court laid it down that, as a general rule, such a settlement to be operative must be made with his consent and approval; and that any non-disclosure, and, a fortiori, any attempt to conceal such a settlement from him, would be fatal to its validity.[7] Equity might, it is true, under special circumstances hold such a settlement valid,

[1] 29 Charles II. c. 3 §§ 7 and 8; see e.g. Gascoigne v. Thwing (1685) 1 Vern. 366; Bellasis v. Compton (1693) 2 Vern. 294; as yet the law was not wholly clear as to when such a trust would arise—thus, in Lesly's Case (1680) Freeman Ch. 52, it was held that if a trustee of property, to which a third person had a title, bought in this title, he could hold it for his own benefit; but this was in principle contrary to Rushworth's Case (1676) ibid 13; and to the modern law as laid down in Keech v Sandford (1726) Sel. Cas. in Ch. 61.

[2] 1 Eq. Cas. Ab. 380; cp. Gascoigne v. Thwing (1685) 1 Vern. 366.

[3] Grey v. Grey (1677) 1 Ch. Cas. 296; 2 Swanst. 594; cp. 1 Eq. Cas. Ab. 381, 382.

[4] Vol. iv 473-480.

[5] We get a very clear statement as to this in Doyley v. Perful (1673) 1 Ch. Cas. 225—"The wife having assigned her term in trust for herself before marriage, and then the husband without joining with the trustees does mortgage the trust, and the husband being dead, the mortgagee being plaintiff, exhibits his bill to have the lands conveyed to him, or that they should redeem; and the Court dismissed the plaintiff's bill; for since Queen Elizabeth's time it hath been the constant course of this court to set aside and frustrate all incumbrances and acts of the husband upon the trust in the wife's term, and that he shall neither charge or grant it away; and 'tis the common way of proceeding for the jointures of women, to convey a term in trust for them upon marriage, that it may be out of the power and reach of the husband"; for the earlier history see vol. v 310-315.

[6] Ibid 311-312.

[7] Sir Edward Turner's Case (1681) 1 Vern. 7; Pitt v. Hunt (1681) ibid 18; Carleton v. Dayrill (1686) 2 Vern. 17.

e.g. when a widow on a second marriage settled property on her children by her first marriage.[1] But it is clear that the court was not as yet prepared to hold that, whenever property is given to a married woman for her separate use, she will always hold it free from her husband's control. Consent by the husband to such an arrangement still seems to be necessary.[2] Nevertheless, as in the preceding period,[3] the justice of securing a maintenance for the wife continued to be so apparent, that the court, acting on the principle that "he that comes to equity must do equity" continued to compel a husband, who resorted to equity to get his wife's portion, to make some sort of settlement upon her; and thus the doctrine of the wife's equity to a settlement, which was beginning to appear in the preceding period, made progress.[4] We can see a similar progress in the rules which resulted from this new proprietary capacity allowed to the wife. As in the preceding period,[5] the cases show that the wife, in respect of her separate property, is treated as having the capacity of a feme sole for the purposes both of disposition[6] and litigation.[7]

The evolution of these new rules as to the proprietary position of the married woman naturally involved, (i) the assumption of jurisdiction over marriage settlements in which the proprietary rights and powers of the parties were defined; (ii) The assumption of a like jurisdiction over the proprietary arrangements consequent upon a separation; and (iii) the growth of certain rules as to the marriage contract itself.

(i) Several equitable doctrines first make their appearance in relation to marriage settlements. We have seen that the court had already decided that a jointure settled upon the wife, which was not a legal bar to dower, might yet be an equitable bar.[8] It was also settled in this period that dower could be barred by a bequest of chattels, even though the bequest was not specifically stated to be in lieu of dower, if such intention could be clearly inferred from the will;[9] and many cases were decided as to the rights of the wife to a jointure covenanted to be settled upon her,[10]

[1] Hunt v. Matthews (1686) 1 Vern. 408.

[2] See Hillier v. Hillier (1689) 2 Freeman Ch. 110. [3] Vol. v 312-314.

[4] Earl of Salisbury v. Bennet (1691) Skin. at p. 288—"He concluded that the Lord Salisbury being plaintiff and seeking equity, ought to do equity, and therefore desired that my lord would be pleased to consider of a fitting settlement, suitable to what he had and should receive"; cp. Lupton v. Tempest (1708) 2 Vern. 626. In Scriven v. Tapley (1765) Amb. at p. 509 the lord chancellor said, "The compelling settlements at first arose upon the husband coming here for assistance."

[5] Vol. v 314-315.

[6] E.g. Gold v. Rutland (1719) 1 Eq. Cas. Ab. at p. 348.

[7] Dubois v. Hole (1708) 2 Vern. 613.

[8] Vol. iii 196-197; cp. Axtel v. Axtel (1679) 2 Ch. Cas. 24.

[9] Lawrence v. Lawrence (1699) 2 Vern. 265.

[10] 1 Eq. Cas. Ab. 220 pl. 1; ibid 221 pl. 3, 5, 6, 8; ibid 222 pl. 9.

and as to her powers over the property thus settled.[1] Similarly we get decisions as to the raising of portions for children of the marriage under powers contained in both settlements[2] and wills;[3] and upon the effects of the death of husband or wife upon their rights to property settled or agreed to be settled.[4] It is in connection, both with these settlements, and with the law as to the administration of assets, that we begin to hear of the doctrines of Satisfaction, Election, and Conversion.[5]

(ii) There are a number of decisions upon the effects of a separation, and upon the wife's rights to maintenance. Separation agreements, under which a maintenance was secured to the wife, were enforced by the court;[6] and, apart from agreement, the court would decree maintenance, if the wife left the husband through the husband's fault.[7] It seems to have been established in this period that the property thus coming to her was her separate property, of which she could dispose as she pleased;[8] but in such cases the husband was no longer liable either at law or in equity for her debts.[9] Further, if the husband offered to be reconciled, and the wife refused, the court would put pressure on her to consent by suspending the obligation to pay the sums due for maintenance.[10]

(iii) In the first half of the seventeenth century the court had laid down the general principle that the marriage contract ought to be the result of the free consent of the parties. It therefore held that a bond given by the plaintiff to the defendant, to pay a sum of money promised for effecting a marriage between the plaintiff and his wife, must be cancelled.[11] But it was for some time doubtful whether the court would hold these agreements void in the absence of fraud, coercion, or total failure of consideration.[12]

[1] 1 Eq. Cas. Ab. 222 pl. 11, 12, 13.

[2] Poulet v. Poulet (1683) 1 Vern. 204, 321; Powell v. Morgan (1688) 2 Vern. 90.

[3] Bartholemew v. Meredith (1684) 1 Vern. 276.

[4] 1 Eq. Cas. Ab. 68-70. [5] Below 657.

[6] "If a husband and wife agree to live separate, and that the wife shall have so much a year, such agreement will be decreed in equity," 1 Eq. Cas. Ab. 67 pl. 2; cp. Seeling v. Crawley (1700) 2 Vern. 386.

[7] Ashton v. Ashton (1650) 1 Ch. Rep. 164; Oxenden v. Oxenden (1705) 2 Vern. 493.

[8] See cases cited in Pridgeon v. Pridgeon (1668) 1 Ch. Cas. 117.

[9] Ferrars v. Ferrars (1682) 1 Vern. 71.

[10] Whorewood v. Whorewood (1675) 1 Ch. Cas. 250—The lord keeper said, "The wife shall return to her husband, who shall maintain and use her as a gentleman and a good husband ought to do; wherein if he fails, I will hear the wife's complaint with favour, and lay on the decree again, as cause shall be; but now suspend it saving to her the arrears."

[11] Arundel v. Trevillian (1635) 1 Ch. Rep. 87.

[12] Hermann v. Charlesworth [1905] 2 K.B. at p. 137 *per* Cozens-Hardy, L.J.; and see Drury v. Hooke (1686) 1 Vern. 412 (there cited), where a marriage brocage bond was ordered to be delivered up, because the marriage was brought about without the consent of the woman's parents—though it was also said that "such a bond was in no case to be countenanced."

It was not till the decision of the House of Lords in 1695, in the case of *Hall* v. *Potter*,[1] that it was finally established that all such agreements were void, on the ground that they tended to vitiate that freedom of consent which the policy of the law required in the formation of a marriage contract. The House of Lords, in that case, reversed a decision of Lord Somers, and restored the decision of Trevor, M.R.,[2] on the ground that "marriages ought to be procured and promoted by the mediation of friends and relations, and not of hirelings"; and that "the not vacating bonds, when questioned in a court of equity, would be of evil example to executors, trustees, guardians, servants, and other people having the care of children."[3] After this decision the principle was given a wide application by courts of equity. Any agreement to procure a marriage for a money or other valuable consideration,[4] or for payment of services in connection with, or preparatory to, such a marriage,[5] was held to be void, on the ground that it was contrary to public policy; and it was held further that, if money had been paid in pursuance of such an agreement, it could be recovered back, even after the marriage had been celebrated.[6] The attitude of the common law to bonds given in pursuance of these agreements was for some time more doubtful.[7] Probably this was due to the difficulty of pleading the illegality of the consideration as a defence to an action on a bond. But this difficulty was diminished after the decision in *Collins* v. *Blantern*;[8] and they came to be treated at law in the same way as they had long been treated in equity.[9] Both at law and in equity contracts imposing a general restraint on marriage were held to be illegal;[10] but a condition attached to a gift of

[1] Shower, P.C. 76.

[2] See note 1 to Law v. Law (1735) 3 P. Wms. 394; Roberts v. Roberts (1730) 3 P. Wms. at p. 76.

[3] Shower, P.C. at p. 78.

[4] Duke v. Hamilton v. Lord Mohun (1710) 1 P. Wms. 118; and see Roberts v. Roberts (1730) 3 P. Wms. at pp. 74, 76, *per* Jekyll, M.R.

[5] King v. Burr (1810) 3 Mer. 693; Hermann v. Charlesworth [1905] 2 K.B. 123.

[6] Smith v. Bruning (1700) 2 Vern. 392; in Roberts v. Roberts (1730) 3 P. Wms. at p. 74 Jekyll, M.R., said, "it is most true that equity does abhor all underhand agreements in cases of marriage, and perhaps, this may be the only instance in equity, where a person, though *particeps criminis*, shall yet be allowed to avoid his own acts."

[7] It was assumed by Talbot, L.C., in Law v. Law (1735) 3 P. Wms. at p. 394 that marriage brocage bonds were good at law.

[8] (1767) 2 Wils. 347.

[9] Hermann v. Charlesworth [1905] 2 K.B. at p. 133 *per* Collins, M.R.; it appears from the judgment of Wilmot, C.J., in Collins v. Blantern at pp. 351-352, that it was thought that the illegality of the consideration could not be pleaded to an action on a deed, but that the party aggrieved must go to equity for relief; he held that this was not so; and this probably helped the judges to revise their views as to the enforceability of these marriage brocage bonds.

[10] Fry v. Porter (1672) 1 Mod. at p. 308 *per* Hale, C.B.; cp. Baker v. White (1690) 2 Vern. 215; both these cases are cited in Low v. Peers (1770) Wilm. 364, which finally settled this question. Equity went considerable lengths in holding these

property, that the donee should not marry without the consent of a certain person, was valid, if it was accompanied by a gift over.[1] In several cases, contracts between one of the parties to the marriage and a third person, designed to deceive the other party to the marriage as to the extent of the property settled,[2] or to get control of the property settled contrary to the intent of the settlement,[3] were declared to be void.

The equitable control over infants, and the guardians of infants, arose in its modern form after the abolition of the military tenures, and the court of Wards and Liveries. The equitable jurisdiction was based, it is said, not on any inherent jurisdiction, but upon a special delegation by the crown of its prerogative right, as *parens patriæ*, of looking after their interests. In 1696, in the case of *Falkland* v. *Bertie*,[4] it was said, "In this court there were several things that belonged to the king as *pater patriæ*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, etc. Afterwards such of them as were of profit and advantage to the king were removed to the court of Wards by the statute; but upon the dissolution of that court, came back again to the Chancery." This view has generally been accepted as the origin of this jurisdiction of the court;[5] and it is true that, after the dissolution of the court of Wards, this jurisdiction of the Chancery developed. But it would be difficult to maintain that any such jurisdiction was ever exercised extensively by the Chancery before the court of Wards was created; nor is there any evidence that a specific grant of it to the Chancery was ever made. It might, indeed, have been possible, from the earliest period in the history of the court, to invoke its jurisdiction to control a guardian in socage; and this kind of jurisdiction was developing in the preceding period.[6] But, as we have seen,[7] in the case of the guardian of a child who held land by knight service, the very primitive notion that guardianship was the profitable right of the lord, lasted till the abolition of the military tenures, and effectually prevented the growth of modern ideas as to the guardian's duties.

agreements void—thus in Key v. Bradshaw (1689) 2 Vern. 102, a bond to marry a certain person or to pay a sum of money was held to be void, though an action at law could certainly have been brought on the contract to marry, above 631; cp. also Baker v. White (1690) 2 Vern. 215.

[1] Fry v. Porter (1672) 1 Mod. 300; Jarvis v. Duke (1681) 1 Vern. at p. 20; Stratton v. Grymes (1698) 2 Vern. 357.

[2] Gale v. Lindo (1687) 1 Vern. 475.

[3] Peyton v. Roberts (1684) 1 Vern. 240.

[4] 2 Vern. at p. 342; cp. vol. i 475; vol. v 315.

[5] In re Spence (1847) 2 Ph. 247 at p. 251 *per* Cottenham, L.C.; cp. the Queen v. Gyngall [1893] 2 Q.B. at p. 240 *per* Esher, M.R., and at pp. 246-247 *per* Kay, L.J.

[6] Vol. v 315.

[7] Vol. iii 61-66.

The court, in dealing with infants, started from the old idea which underlay the "demurrer of the parol"—the idea that, so far as possible, matters were to be left in statu quo till the infant came of age.[1] Thus, to take one example, it was ruled that an infant could not be foreclosed without being given a day to show cause after he came of age.[2] On the other hand, the court could by decree bind the infant's interest. Thus, though the infant could not be foreclosed while still an infant, the court could order a sale.[3] Similarly, the court adapted substantially the same view as that adopted by the common law courts, as to the incapacity of the infant to do acts which would bind him. He could not levy a fine or suffer a recovery—though, in the seventeenth century, he might suffer a recovery if he got a privy seal allowing him to do so.[4] He could not make a valid contract, nor could he be compelled to account;[5] but equity laid down the rule that, if the infant continued to take benefits under a contract of a continuous nature after he came of age, he lost the right to revoke it.[6] If he accepted property with a condition attached to it, he was bound by the condition.[7]

The incapacity of the infant was not supplemented to any very large extent by the powers of the guardian. The general principle seems to be that the guardian must preserve the property in statu quo, and strictly account. He could keep down the interest on incumbrances[8] and invest money.[9] Presumably he could let farms, and do other acts of estate management.[10] But as yet there is very little authority on this matter. If a guardian wished to act on behalf of the infant, he would be well advised to get the authority of the court, which could sanction the payment of money for maintenance[11] or other acts[12] for the infant's benefit. As yet the chief contribution which the court made to the law on this topic, was the strict control which it exercised over the

[1] Vol. iii 513-514.

[2] Booth v. Rich (1684) 1 Vern. 295; cp. Bertie v. Falkland (1696) 2 Vern. at p. 342—"no decree shall be made against an infant without having a day given him to show cause after he comes of age."

[3] Booth v. Rich (1684) 1 Vern. 295.

[4] See vol. iii 518; Mackworth's case (1687) 1 Vern. 416; 1 Eq. Cas. Ab. 283 pl. 11.

[5] Smally v. Smally (1700) 1 Eq. Cas. Ab. 6 pl. 3.

[6] Franklin v. Thornebury (1682) 1 Vern. 132; cp. 1 Eq. Cas. Ab. 282-283.

[7] Fry v. Porter (1670) 1 Mod. 300 at pp. 310-311; Scott v. Haughton (1706) 2 Vern. 560.

[8] 1 Eq. Cas. Ab. 261-262 pl. 2.

[9] Earl of Winchelsea v. Norcliffe (1686) 1 Vern. at p. 435.

[10] But it would appear that the sanction of the court was needed if the property was to be let on long lease; in Cecil v. Earl of Salisbury (1691) 2 Vern. at p. 225 it was said, "This court hath often decreed building leases for sixty years of infants' estates where for their benefit."

[11] Englefield v. Englefield (1691) 2 Vern. 236; above 632.

[12] Above n. 10.

guardians' dealings both with the property and the person of the child,[1] and the adequate machinery which it employed to overhaul his accounts—the analogy of the trustee was easily applied.[2] As we shall now see, it was this machinery which, in this period, as in the last, gave the court an increasing administrative jurisdiction, which embraced not only trusts and guardianships, but also a large variety of other subjects.

The administrative jurisdiction.

In the reports of this period we find a very large number of cases of very different kinds in which the plaintiff seeks, for one reason or another, to make the defendant account. I shall, in the first place, give one or two illustrations of these cases. It is clear from some of the decisions in them, that a certain number of rules were springing up as to the mode in which accounts should be taken; and therefore, in the second place, I shall mention a few of these rules. In this period, as in the last, the branch of this jurisdiction, which was most highly developed, was that concerned with the administration of the assets of a deceased person. During this period it made great progress; and, in connection with it, there were developed a number of important doctrines of equity. In the third place, therefore, I shall deal with this topic.

(1) We have seen that mercantile law supplied a large number of cases in which resort was had to equity, by reason of its effective machinery for dealing with matters of account.[3] Cases of bankruptcy,[4] cases between partners,[5] and part owners of ships,[6] cases between shipowners and charterers,[7] between merchants and their factors,[8]—all came before the court; and for the same reason we get cases between mortgagors and mortgagees,[9] and between principals and sureties.[10] The court acquired this business in spite of the fact that the merchants were as dissatisfied

[1] "Guardians at common law may be removed, or compelled to give security, if there appears any danger of their abusing either the infant's person or estate; and there are several instances of this kind . . . but there are none where a statute guardian (i.e. a guardian appointed under 12 Charles II. c. 24) has been totally removed. Some, where such terms have been imposed on the guardian, as effectually to prevent his doing anything to the prejudice of the infant; but *quaere* whether such causes may not arise, for which he may be totally removed, notwithstanding the statute," 1 Eq. Cas. Ab. 261.

[2] "A guardianship is not assignable neither shall it go to the executors or administrators, being a personal trust," 1 Eq. Cas. Ab. 261; cp. Bedall v. Constable (1668) Vaugh. at p. 181.

[3] Vol. v 139-140.

[4] 1 Eq. Cas. Ab. 52-56.

[5] Ibid 370, 371.

[6] Ibid 372-374.

[7] Edwin v. East India Company (1690) 2 Vern. 210.

[8] 1 Eq. Cas. Ab. 369-370; for details see Pt. II. c. 4 I. §§ 5 and 6, and II.

[9] 1 Eq. Cas. Ab. 12 pl. 6 and 7; below 663-665.

[10] Ibid 114 pl. 9 and 10; below 660.

with the court of Chancery,[1] as they were with the courts of common law.[2] In addition, there are one or two miscellaneous cases which do not fall under any of these heads. Thus, the arrangement which made a captain responsible for the payment of his company, is illustrated by a case in which the administratrix of a deceased captain got a decree against the colonel of the regiment, ordering him to account for the pay of the captain, of his servants, and of his company.[3] In another curious case[4] (which testifies to a serious family quarrel), an aunt, who had received money for her niece's use, attempted, when sued for an account, to charge against this money the cost of the niece's board and lodging. The cost of this she put down at £5 per week, "alleging that she was a person of quality and fortune, and being courted by divers noble persons, much was spent on entertainments; but it appearing by letters read in court that the plaintiff came to the defendant's house at her invitation and as a guest only, the defendant being her aunt, it was said by the Lord Chancellor that it was no honourable demand, and decreed she should account without having any allowance for diet deducted."

(2) The court had already begun to make certain rules as to the mode in which accounts should be taken. Thus it was laid down that "the defendent on account shall be discharged by his oath of sums under 40s., but a party shall not by way of charge charge another person so."[5] The court refused to allow any such items as "general expenses," or "sundries."[6] Lapse of time, especially as between merchants, would bar an equitable claim to an account. It was even said that, "amongst merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or a third post."[7] The question of the appropriation of a payment, when money was paid to a creditor by a debtor from whom several debts were due, and no appropriation was made

[1] In 1696 the commissioners for trade had been asked to report on the state of trade to the House of Commons; in the course of their report they say, "There is another thing which the complaints of the merchants have given us occasion carefully to employ our thoughts about; 'tis a clog to trade, arising within ourselves, from the difficulties which controversies between merchants, concerning accounts meet with in the ordinary way of decision; the easing of merchants in this part, by a shorter way of determination, would, we humbly conceive, be a great furtherance to trade," Commons Journals xi 696.

[2] Vol. v 150 nn. 8 and 9.

[3] Bellasis v. Churchhill (1711) 2 Vern. 682.

[4] Arundel v. Roll (1681) 1 Vern. 19.

[5] Everard v. Warren (1678) 2 Ch. Cas. 249; but cp. Whicherly v. Whicherly (1687) 1 Vern. 470, where the rule was disapproved; but it was apparently followed in Marshfield v. Weston (1690) 2 Vern. 176; and became the established practice, 1 Eq. Cas. Ab. 11 pl. 14.

[6] 1 Eq. Cas. Ab. 11 pl. 12.

[7] Sherman v. Sherman (1692) 2 Vern. 276.

by the debtor, was discussed in several cases; but the decisions were conflicting.[1] It was decided that a trustee was not entitled to be paid for his trouble in administering the trust; but that, if he employed agents, when to employ agents was usual, he could charge the cost in his accounts.[2] It is clear that some of these rulings upon points which arose in the course of the taking of accounts, contain the germs of equitable doctrines which have been elaborated in later times. This phenomenon, as we shall now see, is during this period most strikingly illustrated by the development of the law as to the administration of assets.

(3) By the end of this period the extent and nature of the jurisdiction of the court of Chancery over the administration of assets was fairly accurately defined. It may be described as extending over all matters which were not appropriated by the common law courts and the ecclesiastical courts. The common law courts had exclusive jurisdiction over the validity and interpretation of devises; and, shortly after the close of this period, it was settled that equity could not interfere even in a case of fraud or imposition.[3] They also had jurisdiction over actions brought by or against the heir or personal representative.[4] The ecclesiastical courts had exclusive jurisdiction over grants of probate and administration. It was settled that, so long as probate was in force, the court of Chancery must accept the probate as conclusive.[5] On the other hand, the court of Chancery had practically taken over the jurisdiction of the ecclesiastical courts over suits for legacies, and suits for the distribution of residue. In theory, it is true, the jurisdiction of the ecclesiastical courts over these matters lasted till 1857;[6] but it was generally ignored by the court of Chancery,[7] on the

[1] Cp. Heyward v. Lomax (1681) 1 Vern. 24, and Manning v. Westerne (1707) 2 Vern. 606; and see the note to the former case, where the relevant cases are collected; it was clear that the debtor could always appropriate his payment if he liked—quicquid solvitur, solvitur secundum modum solventis.

[2] Bonithon v. Hackmore (1685) 1 Vern. 316—the court said, "Where a mortgagee or trustee manage the estate themselves, there is no allowance to be made them for their care and pains; but if they employ a skilful bailiff and give him £20 *per ann.*, that must be allowed, for a man is not bound to be his own bailiff."

[3] In 1700, in the case of Welby v. Thomagh, 1 Eq. Cas. Ab. 133 pl. 18, "The Lord Chancellor was clear of opinion that a will may in equity be set aside for fraud or circumvention"; but in 1728, in the case of Bramsley v. Kerridge, ibid pl. 19, the House of Lords held that this could not be done, but that the question of fraud, "must first be tried at law on an issue *devisavit vel non*, being matter proper for a jury to inquire into."

[4] Vol. iii 574 seqq.

[5] Archer v. Mosse (1686) 2 Vern. 8; Nelson v. Oldfield (1688) ibid 76.

[6] 20, 21 Victoria c. 77 § 23; vol. i 629-630.

[7] See Matthews v. Newby (1682) 1 Vern. 133; and Bissell v. Axtell (1688) 2 Vern. 47, cited vol. i 629 n. 8; on the other hand, in Fielding v. Bound (1683) 1 Vern. 230-231 the lord keeper said that, "the civil law was the law by which legatory matters were to be determined, and that the spiritual court had unquestionably the proper jurisdiction thereof."

grounds, firstly, that the ecclesiastical courts could not do complete justice in these cases—they could not give any indemnity to an executor paying a legacy under an order of the court, they could not order the legatees to refund if other debts subsequently appeared, and they could not see that money left to infant legatees was properly invested for their benefit;[1] and, secondly, that the machinery of these courts for taking the accounts of the estate was inadequate.[2] Also the court had absorbed jurisdiction over all questions as to the construction of wills of personalty.[3] It had a concurrent jurisdiction with the courts of common law over the construction of wills of realty,[4] and a concurrent jurisdiction with the courts of common law and the ecclesiastical courts over questions involving the revocation of wills of realty and personalty.[5]

Thus the control exercised by the court of Chancery over all questions of testamentary and intestate succession, and over the administration of assets, was large. We have seen that, in exercising this control, it accepted as a basis the rules laid down by the common law courts and by the ecclesiastical courts respectively in the exercise of their jurisdiction; but that, when it considered it to be necessary in the interests of justice, it modified them.[6] Let us take one or two examples from cases decided in this period. Equity accepted the view of the common law as to the executor's position as the testator's representative.[7] It refused to relieve him from the legal consequences of his own carelessness;[8] but he could get the advice of the court as to the mode of administering the estate, and thus protect himself against any legal consequences that might ensue from the mode of administration adopted.[9] It acccepted the legal rules as to the priority of certain debts;[10] but it put decrees in equity upon

[1] Horrell v. Waldron (1681) 1 Vern. 26—a suit for a legacy to an infant, to which the defendant demurred "for that the matter was properly determinable in the consistory court where the matter depended"; the lord chancellor overruled the demurrer, saying, "that if the matter had proceeded to a sentence in the ecclesiastical court, it was proper to come here for the executor's indemnity, and that here legatees were to give security to refund but not there; and this court would see the money put out for the children"; cp. Jewon v. Grant (1677) 3 Swanst. 659; Noel v. Robinson (1682) 1 Vern. at pp. 93-94.

[2] Above 652 n. 7.

[3] See e.g. 1 Eq. Cas. Ab. 199, 200 pl. 1-5.

[4] Ibid 186-191.

[5] Ibid 407-413.

[6] Vol. v 316-319.

[7] Vol. iii 575.

[8] "Upon a motion made by Mr. Stedman, when three several actions at one time were brought against an executor, and he to each action pleaded *riens entre mains ultra* £100, and so upon each action there was a judgment for £100 and therefore prayed an injunction, but it was denied by the Lord Keeper. In cases proper for law a man must defend himself by legal pleadings; and every executor ought to be careful in the first place to cover all his assets with a judgment," Anon. (1682) 1 Vern. 119.

[9] See Sims v. Urry (1676) 2 Ch. Cas. 225; Buccle v. Atleo (1687) 2 Vern. 37.

[10] Vol. iii 586-587.

the same footing as judgments.[1] As in the preceding period, it protected the personal representative against the harsh rules of the common law which made him liable for a purely accidental loss of assets,[2] and for all the acts of a co-executor.[3] It could, as we have seen, compel a legatee, paid in ignorance of the existence of a debt, to refund.[4] Similarly, it protected both creditors and legatees against some of the harsh rules of the common law. Thus it made the executor of an executor liable for wasting the assets;[5] it in some cases allowed executors to pay statute barred debts;[6] it liberally construed any provision in a will which permitted realty to be used for the payment of debts;[7] it refused to allow that, if a creditor made his debtor his executor, the debt was for any purpose extinguished;[8] it considerably restricted the right of the executor to undisposed-of residue.[9] With the rules of the ecclesiastical courts as to grants of probate and administration it did not, as we have seen,[10] interfere. But, in absorbing their jurisdiction over legacies, it sometimes imported some of the rules laid down by those courts as to the construction of legacies.[11]

These interferences with the law were dictated by considerations of justice and equity. The fact that the court was able to come to a clear view as to what was just and equitable, was due, in the first place, to the excellence of its administrative machinery. This, as I have said,[12] enabled it to take a comprehensive view of the estate and the various claimants to it; and thus to pass a discriminating criticism on the working of the rules of the common law courts and the ecclesiastical courts. It enabled it to

[1] Harding v. Edge (1682) 1 Vern. 143 and n. 1.

[2] Executors of Lady Croft v. Lyndsey (1676) Freeman Ch. 1.

[3] Churchill v. Hopson (1713) 1 Salk. 318; vol. v 317.

[4] Above 653.

[5] Price v. Morgan (1676) 2 Ch. Cas. at p. 217—Lord Nottingham said, "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong; it is otherwise here, and the common law will come to it at last"; as Lord Hardwicke said in Garth v. Cotton (1753) Dick. at p. 216, Lord Nottingham was a true prophet, as the law was altered two years after by 30 Charles II. c. 7.

[6] Anon. (1707) 1 Salk. 154—"If one by will or deed subject his lands to the payment of his debts, debts barred by the statute of Limitations shall be paid; for they are debts in equity, and the duty remains."

[7] Cp. Hixon v. Wytham (1675) 1 Ch. Cas. 248; vol. v 318.

[8] Vol. v 317; Philips v. Philips (1676) 1 Ch. Cas. 292; cp. Ashburner, Equity 596-597; for the legal rule see vol. iii 589.

[9] Foster v. Munt (1687) 1 Vern. 473; cp. vol. v 317.

[10] Vol. v 320; above 652.

[11] See Fielding v. Bound (1683) 1 Vern. at p. 231 n.; thus certain rules as to when a legacy vests have been adopted from this source, Hanson v. Graham (1801) 6 Ves. 239; but sometimes the court refused to follow these rules, see Yate v. Fettyplace (1700) Prec. Ch. at p. 142; the courts of common law also sometimes took account of these rules, see Portman v. Willis (1595) Cro. Eliz. at p. 387 *per* Popham and Clench.

[12] Vol. iii 591, 594-595; vol. v 316.

adjust the relations between heirs, devisees, and personal representatives, between realty and personalty, between beneficiaries of all kinds and creditors of all kinds.[1] In the second place, the success of the court of Chancery was due to the application of some of the ideas derived from the law of trusts to the position of the personal representatives.[2] These ideas operated to the advantage of the personal representative, in so far as they modified some of the strict rules of liability laid down by the common law. They operated to the advantage of creditors and beneficiaries, in so far as they put some restrictions upon the absolute powers over the assets conferred upon the personal representative by the common law. Thus the court of Chancery, while modifying harsh legal rules, was able to construct new and better rules for the administration of estates, and, in the course of the construction of these rules, to originate several important doctrines of equity.

This method of developing the law on this subject, by modifying and supplementing old rules, has undoubtedly had the defect of making this branch of the law very complicated. At the same time the court of Chancery has succeeded in correcting the main defects of the old law, which flowed from the absence of adequate administrative machinery in the case of the common law courts, and from the weakness of the ecclesiastical courts; and it has given English law, what it never possessed before, an adequate set of rules for administering all assets real and personal, and an adequate supervision over the conduct of the personal representative. Of the origins and growth of these equitable rules for the administration of assets I shall speak more at length in a subsequent Book of the History. Here I can only give one or two illustrations of the manner in which some of them originated.

We have seen that the common law had already evolved certain rules as to the order in which various kinds of debts were payable out of the assets of a deceased person.[3] On the other hand, there were no rules as to the order in which different kinds

[1] See Lives of the Norths i 404-405 for a good tale illustrating the hardships of the common law rules, and the manner in which they might be guarded against, and the estate administered fairly, by filing a bill in Chancery.

[2] "The Lord Chancellor agreed . . . that this court had a jurisdiction to see that the executor, who was but a trustee, performed his trust, and that was the jurisdiction this court exercised in such cases," Nicholas v Nicholas (1720) Prec. Ch. at p. 547; "The whole jurisdiction of courts of equity in the administration of assets is founded on the principle that it is the duty of the court to enforce the execution of trusts, and that the executor or administrator who has the property in his hands, is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the will, or, in case of intestacy, according to the statute of distributions," Adair v. Shaw (1803) 1 Sch. and Lef. at p. 262 *per* Lord Redesdale; and see Ashburner, Equity 574-575, where this passage is cited.

[3] Vol. iii 586-587; above 632.

of assets were liable for debts, except the rule that real estate descended to the heir was only liable for specialty debts in which the heir was bound.[1] But in equity some such rules were necessary, because, in the first place, new forms of ownership and new forms of property were recognized in equity; because, in the second place, the liability of realty to the payment of debts was often effected by testamentary directions of different kinds which subjected it to the payment of debts;[2] and because, in the third place, further complications were sometimes introduced by similar directions making it liable to the payment of legacies. Thus we begin to get a number of rules as to the order in which assets are liable for debts and legacies.[3] Further, although equity accepted as its basis the legal rules as to the order in which debts were payable out of the assets, it occasionally interfered to correct these legal rules;[4] and, in the case of property which was not assets at law, it made considerable departures from these rules.[5] In the existence of this property we can see the beginnings of the conception of equitable as distinct from legal assets; and both the order in which debts were payable out of these equitable assets, and the manner in which creditors could make them available, were beginning to cause them to differ markedly from legal assets. As a result of these developments, we begin to get various equitable rules as to the marshalling of assets. Equity took the view that, so far as possible, all creditors and legatees should be paid; and so we find that it adopted the principle that, if there is a creditor or a legatee who has two funds to resort to, and a creditor or a legatee who has only one fund, and if the former exhausts the only fund available for the latter, the latter can come upon the fund which the former might have taken. In this period this principle was applied both in favour of legatees[6] and of creditors.[7] But as yet the order in

[1] Vol. iii 575-576. [2] Above 654.

[3] Armitage v. Metcalf (1616) 1 Ch. Cas. 74—an heir paying recovers from the executor; Cope v. Cope (n.d.) 2 Salk. 449—personal estate of a mortgagor is liable to exonerate the heir; Lord Grey v. Lady Grey (1677) 1 Ch. Cas. 296; Parker v. Dee (1674) 2 Ch. Cas. 200. [4] Vol. v 318-319.

[5] Thus it was said in Solley v. Gower (1688) 2 Vern. at pp. 61-62 that, "the equity of redemption of an inheritance is not assets at law because the estate is forfeited; but the heir having a right in equity, that ought in equity to be liable to satisfy a bond debt"; and that, "where creditors are plaintiffs the usual decree is that the debts shall be paid in course of administration; but that is to be intended of legal assets, and not of assets in equity that are not assets at law."

[6] Anon. (1679) 2 Ch. Cas. 5—in favour of a legatee; in Bullock v. Knight (1682) 2 Ch. Cas. at p. 117 it was said, "It is true that the land does not stand charged with the legacy originally, but there was enough of the personal estate to pay the legacy if it had been so employed; and therefore when that personal estate is employed for payment of debts in ease of the heir and lands, so much of the real estate as is eased by the personal estate shall be liable to the legacy."

[7] "There being a debt owing to the king, it was ordered that the king's debt

which the different kinds of assets are available for the payment of debts and legacies is by no means clearly worked out, so that the doctrines of marshalling are as yet rudimentary.

In the administration of an estate, very many of the questions arising out of the construction of testamentary instruments were questions between near relatives. They were therefore closely akin to those problems of family law, with which equity was already familiar through its jurisdiction over trusts. In solving these problems, equity made certain presumptions as to the intentions of the parties, which, in the following period, hardened into definite equitable rules. It is to these presumptions that we owe the doctrines of Satisfaction[1] and Election;[2] and it is partly to the presumption that that must be regarded as done which ought to be done, partly to the necessity, in administering estates, of adjusting the claims of those entitled to the realty and those entitled to the personalty, that we owe the beginnings of the doctrine of Conversion.[3] During this period all these doctrines have emerged, but they have not as yet been elaborated.

Thus, the conception of the trust, experience derived from attempts to solve many of the problems of family law, and an adequate machinery for the conduct of administrative work—have all combined to give equity a large control over the law as to the administration of assets; and the first and the last of these causes gave it a control over many other branches of the law, which needed a court with the power, both of supervising accounts, and of enforcing liability for fradulent or negligent conduct disclosed by those accounts. We must now turn to some other branches of the equitable jurisdiction which rest upon somewhat different grounds.

Specific relief.

One of the ideas upon which the doctrine of Conversion rests is similar to the idea which underlies the attempt of equity to give specific relief. This is the idea that, so far as possible, a person should be made to do the exact thing which he has

should be satisfied out of the real estate, that the other creditors might be let in to have satisfaction of their debts out of the personal assets," Sagitary v. Hyde (1687) 1 Vern. 455.

[1] See Smith v. Duffield (1690) 2 Vern. 177; Duffield v. Smith (1692), ibid 258; Brown v. Dawson (1705), ibid 498.

[2] Pile v. Pile (1661-1662) 1 Ch. Rep. 199; Herne v. Herne (1706) 2 Vern. 555.

[3] Prideux v. Gibben (1683) 2 Ch. Cas. 144; Annand v. Honeywood (1685) 1 Vern. 345—money given by a freeman of London to be laid out on land and settled on his eldest son is not an advancement; Randall v. Bookey (1701) 2 Vern. 425—rights of the heir in case of a conversion of land into money, where the purposes for which the conversion was directed did not exhaust the money; and cp. Lingen v. Souray (1715) 1 Eq. Cas. Ab. 175 pl. 5.

contracted to do, or which he ought legally to do.[1] In the case of the doctrine of Conversion, equity simply assumes that a legal obligation has been fulfilled and acts accordingly. In the various cases in which it gives specific relief it is obvious that legal duties, contractual or otherwise, have not been fulfilled; and equity attempts to secure their fulfilment. As in the preceding period,[2] we can divide these cases under the three heads of contract, property, and tort.

The various forms of specific relief given in relation to the law of contract were, as yet, hardly distinct. The court, as in the preceding period, both granted specific relief in the case of executed contracts, and decreed the specific performance of executory contracts.[3] There is some evidence that, till the time of Lord Somers, equity did not grant the specific performance of executory contracts, unless the plaintiff had first recovered damages at law.[4] There was clearly a tendency to adopt this principle;[5] but it was negatived by the House of Lords in 1728.[6] Obviously, if it had been adopted, the equitable doctrine of part performance, of which we see signs at the close of this period,[7] could never have arisen, because, for the breach of contracts which were unenforceable by reason of non-compliance with the statute of Frauds, no damages could have been recovered. At the same time, the existence of a tendency to adopt this principle emphasizes the discretionary character of the specific relief given by equity, and thus tends to hinder the growth of clear rules as to the kinds of contracts in which the court will give it.[8] On the other hand, the fact that the grant

[1] See Tailby v. Official Receiver (1888) 13 A.C. at p. 546 *per* Lord Macnaghten; Fry, Specific Performance (5th ed.) 33-34, points out that that doctrine may later have had some influence on the law on the subject of specific performance; dealing with the rule that both vendor and purchaser in a contract to buy land may enforce specific performance, he says, "The doctrine of Equity with respect to the conversion of the land into money, and of the money into land upon the execution of the contract, and the lien which the vendor has on the estate for the purchase money, and his right to enforce this by the aid of the court, are additional reasons for extending the remedy to both parties."

[2] Vol. v 321.

[3] For this distinction see Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co. (1873) L.R. 16 Eq. at p. 439 *per* Selborne, L.C.; cp. Tailby v. Official Receiver (1888) 13 A.C. at p. 527 *per* Lord Macnaghten.

[4] Dodsley v. Kinnersley (1761) 1 Amb. at p. 406 *per* Clarke, M.R.; cp. Ashburner, Equity 4 n. *n*.

[5] Two of the cases cited in support of it are Hollis v. Edwards (1683) 1 Vern. 159; Marquis of Normanby v. Duke of Devonshire (1697) Freeman Ch. 216; both are cases in which part performance was alleged to get out of the statute of Frauds; possibly the court thought that it was for the courts of common law to determine the enforceability of the contract by construing the statute; they seem to be quite contrary to Butcher v. Stapeley, below 659 n. 4; probably the practice was conflicting; but the principle was applied in Bettisworth v. Dean of St. Paul's (1726) Cases t. King 66 at p. 69.

[6] S.C. 1 Bro. P.C. 240.

[7] Above 393; below 659.

[8] Cp. Gardener v. Pullen (1700) 2 Vern. 394; Cud v. Rutter (1719) 1 P. Wms. 570.

of this relief was discretionary made it possible for equity to look closely at the conduct of the parties, and to insist that it should be fair and reasonable.[1] It was partly this insistence upon a high standard of honesty which was at the root of the equitable modification of the statute of Frauds, which developed into the doctrine of part performance; and partly the tendency of equity judges to restrict the operation of a statute which, being designed to meet defects in common law procedure, was much less useful when applied in courts of equity.[2] From the first, equity insisted that the statute must not be made a cloak for fraud;[3] and some of the earlier cases in which the plea of the statute was overruled on the ground of part performance, seem to proceed on the ground that, in the circumstances, it would be something very much like fraud on the part of the defendant not to carry out his contract.[4]

Generally the specific relief given in cases connected with the law of property was very similar to that given in the preceding period.[5] The practice of issuing injunctions to quiet possession, after the title to property had been in issue in several actions of ejectment, was finally sanctioned by the House of Lords in the case of *The Earl of Bath* v. *Sherwin*.[6] In that case there had been five trials at Bar, which had all ended in favour of the appellant. A perpetual injunction against further proceedings was granted; and thus equity helped to remove the chief remaining defect of the action of ejectment—its want of finality.[7] Agreements between lords and commoners as to inclosure,[8] or stinting[9] the common, were enforced. Underlessees were sometimes relieved from a forfeiture on terms.[10] In one case, in which a house had been taken by the Parliament

[1] 1 Eq. Cas. Ab. 17.

[2] Above 393.

[3] Above 393; see the remarks on the case of Mallet v. Halfpenny (1699) 2 Vern. 373 in Bawdes v. Amherst (1715) Prec. in Chy. at p. 404.

[4] Butcher v. Stapeley (1685) 1 Vern. 363—a parol agreement for purchase of land, of which possession had been delivered, was ordered to be executed as against Stapeley, a purchaser for value with notice; the lord chancellor said that, "as possession was delivered according to the agreement he took the bargain to be executed, and that Stapeley had notice of it, and that it was a contrivance between the defendants to avoid the bargain"; Lester v. Foxcroft (1700) Collis 108; but as yet the basis and limitations of the doctrine are by no means clear, above 658 n. 5; below 660-661.

[5] Vol. v 323-324.

[6] (1709) 4 Bro. P.C. 373; such an injunction would not be granted after one trial only, Fitton v. Macclesfield (1684) 1 Vern. at p. 293; it is referred to as an established practice in a letter to the Marquis of Halifax in 1680, Foxcroft, op. cit. i 229.

[7] Pt. II. c. 1 § 1.

[8] 1 Eq. Cas. Ab. 103 pl. 4 and 5.

[9] Delabeere v. Beddingfield (1689) 2 Vern. 103—the court would even override objectors, "It is a proper and natural equity to have a stint decreed; and though one or two humour-some tenants stand out and will not agree, yet the court will decree it; but it is otherwise as to an enclosure."

[10] Webber v. Smith (1689) 2 Vern. 103.

during the Great Rebellion and used as a hospital for the troops, the chancellor said that, if he could, he would relieve against the obligation to pay rent.[1] In the two well-known cases of *Pusey* v. *Pusey*[2] and the *Duke of Somerset* v. *Cookson*,[3] the court interfered to order the return in specie of a chattel of peculiar rarity.

The cases in which injunctions were applied for to stop the commission of torts do not materially differ from the cases which arose in the preceding period.[4] The most common cases are those in which an injunction was applied for to prevent the commission of waste.[5]

Relief against the rigidity of the law.

As in the preceding period, specific relief and relief against the rigidity of the law, shade off into one another. But some of the cases falling under the latter head in the preceding period, have begun, in this period, to develop into independent heads of equitable jurisdiction. Instances are the law as to mortgages, and the law as to choses in action. A good many cases were still left: but they were being systematized and reduced to rule. We can group these cases under the following heads: (i) The conduct of the parties; (ii) The law of evidence; (iii) The law of property; and (iv) The law of contract.

(i) The court relieved purchasers against accident and mistake. Thus an obligee of a bond accidentally lost was relieved in equity, and allowed to recover against the surety;[6] and, on similar grounds, it relieved against obvious clerical errors, e.g. where in a bond to pay £200, £40 was inserted as the penalty instead of £400.[7] It relieved also against fraud. Under the head of fraud it included both kinds of sharp practice, whether it took the form of *suppressio veri* or *suggestio falsi*,[8] and also undue influence.[9] The mere fact that a person had made a bad bargain would not

[1] Harrison v. Lord North (1667) 1 Ch. Cas. 83.

[2] (1684) 1 Vern. 273—decided partly on the ground that the horn was an heirloom —"if the land was held by the tenure of a horn . . . the heir would be well entitled to the horn at law."

[3] (1735) 3 P. Wms. 390.

[4] Vol. v 324-325.

[5] 1 Eq. Cas. Ab. 399-400.

[6] Underwood v. Staney (1666) 1 Ch. Cas. 77-78—"It was in the debate of this case said, that if a grantee in a voluntary deed, or an obligee in a voluntary bond, lose the deed or bond, they should have remedy against the grantor or obligor in equity. *Tamen quære.* But if so, no mistake in the principal case, where the bond was for money lent; and though the surety had no advantage, yet the obligee had parted with his money, and loss is as good a consideration for a promise as benefit or profit;" for a refusal to rectify an omission in a voluntary conveyance see Lee v. Henley (1681) 2 Vern. 37-38; below 662 and n. 6.

[7] Sims v. Urry (1676) 2 Ch. Cas. 225.

[8] Gee v. Spencer (1681) 1 Vern. 32 n. 1; Jarvis v. Duke (1681) 1 Vern. at p. 19.

[9] Vere Essex v. Muschamp (1684) 1 Vern. 237.

induce the court to interfere[1]—there must be circumstances of fraud or oppression.[2] But, in the cases in which equity interfered to set aside catching bargains made with expectant heirs, we can see the beginnings of the class of cases in which, from the circumstances of the parties, equity will presume against transactions entered into between them.[3]

(ii) In the law of evidence the court continued to develop its jurisdiction to grant discovery in aid of legal proceedings.[4] Discovery would not be granted if the applicant could not show that he was in some way entitled to it;[5] nor if the evidence discovered might expose the party, as against whom it was sought, to forfeiture of property,[6] or a penalty;[7] nor as against a purchaser for value without notice.[8] But it was granted in aid of an action in tort;[9] and it was often necessary to enable the court to exercise its jurisdiction over executors and trustees,[10] or to obtain the production of deeds under which the persons applying to the court were interested.[11] It is clear too that, upon an application for discovery, the court would sometimes retain the whole case and do complete justice.[12] As in the preceding period,[13] the court was prepared to examine witnesses to perpetuate testimony at the suit of a person who had a legal title to property, provided that that title was established.[14] A branch of this jurisdiction—the examination of witnesses *de bene esse* in aid of a suit in equity already begun—was emerging;[15] but it is not as yet very clearly distinguished from examination in aid of a legal title.[16] Owing to the provisions of the statute of Frauds, the question of the admission of parol evidence was brought into prominence. It

[1] Maynard v. Mosely (1676) 3 Swanst. 651; Batty v. Lloyd (1682) 1 Vern. 141.

[2] Wood v. Fenwick (1702) Prec. Ch. 206—the lord keeper said, "though the purchase was not a fair bargain, yet no such fraud appeared as to set it aside."

[3] Berney v. Pitt (1686) 2 Vern. 14; North v. Hill (1687) 2 Vern 27; Lamplugh v. Smith (1688) 2 Vern. 77; as Lord Nottingham pointed out in Berney v. Pitt (1680) 2 Swanst. 170, the Star Chamber used to exercise a concurrent jurisdiction in these cases.

[4] Vol. v 332.

[5] Blondell v. Pannett (1674) 1 Eq. Cas. Ab. 41 pl. 10; Micoe v. Powell (1682) 1 Vern. 39.

[6] Monnins v. Monnins (1672-1673) 1 Ch. Rep. 68.

[7] Bird v. Hardwicke (1682) 1 Vern. 109.

[8] Perrat v. Ballard (1681) 2 Ch. Cas. at p. 73.

[9] Heathcote v. Fleete (1702) 2 Vern. 442; Morse v. Buckworth (1703) ibid 443.

[10] Dulwich College v. Johnson (1688) 2 Vern. 49.

[11] 1 Eq. Cas. Ab. 168 pl. 6 and 7.

[12] Alexander v. Alexander (1669-1670) 2 Ch. Rep. 37; Parker v. Dee (1674) 2 Ch. Cas. 200; cf. Ashburner, Equity 57.

[13] Vol. v 332-333.

[14] See e.g. Beckinall v. Arnold (1685) 1 Vern. 354; Parry v. Rogers (1686) ibid 441.

[15] 1 Eq. Cas. Ab. 234—"After a bill filed in any cause, the court will, on affidavit, that any of the witnesses are aged or infirm, sick, or going beyond sea, so that the party is in danger of losing their testimony, order them to be examined *de bene esse*, which will make their deposition valid in that cause only, and against those who are parties to it."

[16] See Philips v. Carew (1709) 1 P. Wms. 117, and note to that case.

cannot be said that the equitable rules were either so clear or so satisfactory as those laid down by the courts of common law.[1] It would seem that, in some cases, the courts admitted parol evidence of intention, not only to rebut a presumption raised by equity,[2] and in a case of equivocation,[3] but also to prove that the author of the document meant something different from that which he had expressed.[4] It would seem that this course was justified on the ground that it was admitted to inform the conscience of the court;[5] and this idea may well have exercised a disturbing influence, which accounts for the unsatisfactory treatment of the problem by the court.

(iii) In the law of property equity, in favour of purchasers or creditors or children, would supply defects of form in conveyances e.g. the want of a surrender in a conveyance of copyhold;[6] and similarly, in favour of creditors or portioners or children, it would remedy the defective execution of a power.[7] It relieved also against the legal extinguishment of rights by merger or similar means, when such an extinguishment was clearly contrary to the intention of the parties.[8] Mergers it was said, were odious in equity;[9] and, on similar grounds, it relieved against the extinguishment of a right of common through an enfranchisement.[10] Similarly, it would relieve against the consequence of a breach of a condition subsequent on equitable terms. In *Popham* v. *Bampfield*[11] it was said, "Precedent conditions must be literally performed; and this court will never vest an estate where, by reason of a condition precedent, it will not vest in law. . . . But of conditions subsequent, which are to divest an estate, there it is otherwise; yet of subsequent conditions, there is this difference to be observed (for against all conditions subsequent, this court

[1] Pt. II. c. 7 § 1; cf. Falkland v. Bertie (1696) 2 Vern. at p. 337 *per* Treby, C.J., and 339 *per* Holt, C.J.

[2] Granvill v. Beaufort (1709) 2 Vern. 648.

[3] Pendleton v. Grant (1705) 2 Vern. 517.

[4] Ibid; cf. Dayrall v. Molesworth (1700) 1 Eq. Cas. Ab. 231 pl. 3.

[5] "The constant rule of law has been, to reject all parol proof brought to supply the words of a will, or to explain the intent of the testator . . . but this rule has received a distinction which has greatly prevailed of late, viz. between evidence offered to a court, and evidence offered to a jury; for in the last case no parol evidence is to be admitted, lest the jury might be inveigled by it; but in the first case it can do no hurt, being to inform the conscience of the court, who cannot be biassed or prejudiced by it," 1 Eq. Cas. Ab. 230; see vol. iv 278 n. 2, vol. v 183 for the idea of admitting evidence to inform the conscience of the court.

[6] Barker v. Hill (1681-1682) 2 Ch. Rep. 218; Bradley v. Bradley (1690) 2 Vern. 163; but not in favour of volunteers, Rafter v. Stock (1699) 1 Eq. Cas. Ab. 123 pl. 12.

[7] Pollard v. Greenvil (1660-1661) 1 Ch. Rep. 184; Smith v. Ashton (1675) 1 Ch. Cas. 264; 1 Eq. Cas. Ab. 342 pl. 1-3.

[8] Nurse v. Yerworth (1674) 3 Swanst. at pp. 618-619.

[9] Philips v. Philips (1701) 1 P. Wms. at p. 41.

[10] Styant v. Staker (1691) 2 Vern. 250.

[11] (1682) 1 Vern. at p. 83; cf. Falkland v. Bertie (1696) 2 Vern. at pp. 339, 340.

cannot, not ought to relieve), when the court can in any case compensate the party in damages for the non-precise performance of the condition, there it is just and equitable to relieve, as if a man's estate be upon condition to pay money at a certain day, and he fails of payment; but where the party cannot be compensated in damages, it would be against conscience to relieve."

(iv) Analogous to this relief against the consequences of the breach of conditions is the relief given to a party to a contract against a penalty, or against a failure to pay by a specific date.[1] But already equity had begun to limit the former relief to cases in which the sum promised was clearly out of proportion to the loss incurred;[2] and the latter relief to cases in which the time was clearly not of the essence of the contract.[3]

Mortgages.

We have seen that the relief given by equity to the mortgagor originally depended on principles similar to those which underlay the relief given in cases of the breach of a condition, and in cases of penalties; but that, the regularity with which this relief was given, had altered its basis, and caused it to depend, not upon the existence of any supposed hardship, but upon a right belonging as of course to a mortgagor.[4] The result had been to make the mortgagor's equity to redeem a right of property. He had an equitable estate in the land; and, subject to the legal rights of the mortgagee, was, in equity, regarded as its owner. It was during this period that the consequences of this new right of the mortgagor began to be worked out.

We start with the principle that in equity the mortgagee has only a right to his principal and interest, and that he holds his estate in the land merely as a security for that principal and interest.[5] From this principle equity had in this period deduced four leading rules. Firstly, the mortgagee, who entered into

[1] Vol. v 330.

[2] Tall v. Ryland (1670) 1 Ch. Cas. 183—The plaintiff and the defendant were fishmongers who had contiguous shops; differences arose, which were compromised on the terms that the plaintiff should give the defendant a bond with a penalty of £20 conditioned to behave himself civilly; the plaintiff, having incurred the penalty of the bond, and judgment having been given on it against him, applied to the court for relief. "The defendant demurred for that the bond was not conditional for payment of money or performance of covenants . . . nor was there any way to measure the damages but by the penalty"; the court allowed the demurrer, though without costs, and said that "this was not to be a precedent in the case of a bond of £100 or the like."

[3] Sewall v. Musson (1683) 1 Vern. 210—a creditor agreed to take less than his debt provided the money was paid at a certain day; the debtor will not be relieved against failure to pay on the day.

[4] Vol. v 330-332.

[5] "In natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money," *per* Lord Nottingham, Thornborough v. Baker (1675) 3 Swanst. at p. 630.

possession of the property, was liable to account for any advantage over and above his interest which he got thereby.[1] Secondly, if the mortgagee died, the money (for which the property was only a security) was payable to his executor,[2] and, conversely, if the mortgagor died, the mortgage debt was payable primarily out of the personal estate.[3] Thirdly, the mortgagor's equity of redemption was exercisable, not only against the mortgagee and his assigns, but also against all others who took the property thus mortgaged.[4] Fourthly, in order that these rights of the mortgagor might not be able to be diminished by terms imposed upon him by the mortgagee, this right of redemption could not be clogged or fettered in any way; and any agreement which had this effect was void.[5] Already the long line of cases as to what agreements were void under this rule was beginning to cause differences of judicial opinion.[6]

[1] Fulthorpe v. Foster (1687) 1 Vern. 476.

[2] Thornborough v. Baker (1675) 3 Swanst. 628.

[3] Cope v. Cope (n.d.) 2 Salk. 449; Pockley v. Pockley (1681) 1 Vern. 36.

[4] "Courts of Equity . . . have maintained the right of redemption not only against tenant in dower, and the persons that come under the feoffee, but even against tenant by the curtesy and the lord by escheat, that are in the *post;* because the payment of money doth, in consideration of equity, put the feoffor in *statu quo*, since the lands were originally only a pledge for the money lent," 1 Eq. Cas. Ab. 311 pl. 6.

[5] Howard v. Harris (1683) 1 Vern. 190.

[6] See Bonham v. Newcomb (1684) 1 Vern. 232—lord keeper North reversed a decree of Lord Nottingham (ibid 7) allowing redemption; and the reversal was upheld by the House of Lords; cf. North, L.K.'s, remarks in Howard v. Harris (1683) 1 Vern. at pp. 193-194, as to what agreements fettering redemption might be upheld. In Kreglinger v. New Patagonia Meat Co. [1914], A.C. at pp. 54-55 Lord Parker expressed the opinion that the rule preventing a mortgagee, who takes a mortgage as security for a loan of money, from stipulating for a collateral advantage, "depended on the existence of the statutes against usury"; for these statutes see Pt. II. c. 4 I. § 1. But there is little or no authority for this view. We have seen that usury is mentioned in a case noted in Tothill, vol. v 331 n. 3; but that the note is too short and vague to enable us to draw any inferences from it. The only case cited by Lord Parker is Chambers v. Goldwin (1804) 9 Ves. at p. 271; but all that Lord Eldon says there is that the court will not allow the taking of compound interest, "as tending to usury; though it is not usury." He does not say that the prohibition to covenant for a collateral advantage depended on the usury laws; nor are these laws mentioned in Howard v. Harris. It is true that in Scott v. Brest 2 T.R. 238 a contract by which the lender, on default, was made receiver of the rents at a salary, was held to be usurious; but in that case a payment beyond the interest was made by the mortgagor; and it should be noted that in the cases in which a similar rule was laid down in equity (Langstaffe v. Fenwick 10 Ves. 405; Davis v. Dendy 3 Madd. 190) no mention was made of the usury laws. Indeed it is obvious that a collateral advantage may not consist in payment of money by the mortgagor, so that the equitable prohibition is much wider than the disability created by those laws. In fact, if a covenant that, in the event of the money not being paid by a fixed date, the mortgagee should have such an advantage, was illegal, because contrary to these laws; it is difficult to see why a covenant that if the money was not paid by a fixed date the mortgagee's estate should be absolute at law, did not also infringe those laws. It clearly did not, as the common law courts always regarded this condition as legal—hence the need for the interposition of equity. In the Eyre of Kent in 1313-1314 (S.S. ii 27), to an argument that an action of debt based upon a penalty "savoured of usury," Staunton. J., replied, "Penalty and usury are only irrecoverable where they grow out of the sum in which the obligee is primarily bound." Obviously, if a covenant is made that a mortgagee shall have a collateral

This new conception of a mortgage, which gave the mortgagor new equitable rights in the mortgaged property, was already beginning to raise further problems. In the first place, it was possible for the mortgagor to mortgage his property more than once. What were the rights of the successive incumbrancers? There was no doubt that the mortgagee having the legal estate had the priority, and that, normally, as between the mortgagees of the equity of redemption, the maxim "prior est tempore potior est jure" applied. But what if a later equitable incumbrancer got in the legal estate? Could he hold it till his whole claim was satisfied? It was settled that he could; and thus the foundations of the doctrine of tacking were laid.[1] In the second place, though equity had given large privileges to the mortgagor, it did not forget its maxim that he who comes to equity must do equity. It would not allow a mortgagor, who had mortgaged two properties to a mortgagee, to redeem one, and leave the mortgagee an insufficient security for the other debt;[2] and this principle seems soon to have hardened into the fixed rule that the mortgagee in such a case could hold both the properties as security for his whole debt.[3] In other words, we have reached the doctrine of consolidation. But as yet these two doctrines of tacking and consolidation are only in their initial stages. They have not yet been elaborated into a series of fixed and detailed rules, which sometimes seem to lose sight of the equities on which they were originally based.

The Law of Property.

In the department of the land law the construction of the law of mortgage is perhaps the most considerable addition made by

advantage in the event of the mortgagor breaking a condition, it cannot be said that the advantage in any sense "grows out of the principal sum owed"; and see Roberts v. Tremayne (1617) Cro. Jac. 507, from which it would seem that it was only if the mortgage interest exceeded the statutory amount that the statutes applied. The true view as to the historical origin of the equitable prohibition of these collateral advantages would seem to be that stated in the text. It originated in the equitable idea that the mortgagor was the owner in equity of the land subject to the mortgage. Mortgagors were then, and often still are, needy persons; and to maintain their equitable ownership, they must be prevented from making bargains which would, in effect, have destroyed that ownership. In other words, without the rule, mortgagors would, in so many cases, have directly or indirectly contracted themselves out of their equities of redemption, that such equities would have been either of rare occurrence or of little value.

[1] Marsh v. Lee (1670) 1 Ch. Cas. 162; Edmunds v. Povey (1683) 1 Vern. 187.

[2] See 1 Eq. Cas. Ab. 324 pl. 1; in Purefoy v. Purefoy (1681) 1 Vern. 29 it was said, "where a bill is brought to redeem two mortgages, and there is more money lent upon one of them than the estate is worth, the plaintiff shall not elect to redeem one, and leave the heavier mortgage unredeemed, but shall be compelled to take both or none"; it should be noted that the principle is not laid down absolutely, but only if the mortgagor proposes to leave the mortgagee inadequately secured.

[3] Bovey v. Skipwith (1671) 1 Ch. Cas. 201; Shuttleworth v. Laycock (1684) 1 Vern. 245.

equity. The only other considerable change, affecting not only the land law, but also the law of property generally, was the final establishment in the *Duke of Norfolk's Case* of the modern rule against perpetuities.[1] The establishment of this rule was, as we have seen, rendered necessary by the fact that owners of property made use of their large powers of disposition to fetter freedom of alienation. Similarly, in other parts of the land law, equity made some small modifications, which were rendered necessary by the manner in which the new powers of disposition acquired by land-owners were being used by them. Thus we begin to get decisions upon such devices as the creations of long terms of years to secure charges, and the manipulation of these terms when they had been satisfied;[2] and upon the position of trustees to preserve contingent remainders.[3] Very many questions as to the construction of deeds and wills came before the court;[4] and some of these cases, then as now, exercised considerable influence upon the forms invented by the conveyancers to carry out the wishes of their clients. The desire of equity to carry out the intention of the parties led it, in many cases, to lean against construing co-ownership as joint tenancy, and to favour tenancy in common;[5] and the all-pervading influence of the trust concept induced the court to lay down some very rigid rules as to the liability of a purchaser to see to the application of the purchase money.[6]

During the whole of this period the court of Chancery, in combination with the courts of common law, the legislature, and the conveyancers, had, without abandoning the fundamental principles of the mediæval land law, been supplementing it and transforming it into the modern land law. At the end of this period this transformation had been effected; and we can see from these few illustrations the manner in which equity was beginning to shape the details, and to control the working, of this modern land law. It is this process of shaping and control that will mainly occupy the attention of the courts and the conveyancers during the following century.

In the law of personal property equity made great developments. This was partly due to the fact that, as a result of changes in commercial conditions, we get such things as stock and shares, which, being in their nature almost as permanent as land, admitted of being settled in a similar manner. Partly it was due to the fact

[1] Above 545, 627; Pt. II. c. 1 § 6.

[2] See e.g. Nurse v. Yerworth (1674) 3 Swanst. at p. 612; Chapman v. Bond (1683) 1 Vern. 188.

[3] Davies v. Weld (1683) 1 Vern. 181; Pye v. George (1710) 2 Salk. 680.

[4] See e.g. 1 Eq. Cas. Ab. 177 pl. 12, 15; 183 pl. 24—cases of devises; ibid 294-295—cases of legacies.

[5] Ibid 290-293.

[6] Ibid 358 pl. 1-3.

that the machinery of the trust enabled all kinds of chattels to be settled to go by way of succession as easily as land.[1] It is true that such chattels could not be entailed;[2] but they could be settled on a person for life, and then to successive owners, provided that the period allowed by the rule against perpetuities was not exceeded. Thus the law of personal property gradually emancipated itself from that dependence on law of tort, which was its most marked characteristic in the middle ages.[3] We have seen,[4] too, that the readiness with which equity recognized new forms of property, led it to treat as property, not only such things as the rights of the cestuique trust to the trust property, and rights to stock or shares, but also rights under a contract or covenant[5]— all of which things the law grouped under the compendious title of choses in action. Equity treated them as property and allowed them to be assigned as property; and it can hardly be doubted that this divergence between law on equity is the reason why it is so difficult to define a chose in action.[6] Anything which the common lawyers refused to treat as assignable property was grouped by them under this general description; and thus it included many diverse things for which equity was beginning to lay down different rules.[7] In particular, equity was beginning to lay down some definite rules for the assignment of rights under a contract. It would assist an assignee, provided he had given consideration;[8] but he took subject to equities;[9] and the debtor could safely pay the assignor till he had had notice of the assignment.[10] From the first the question whether a man had had notice was of vital importance in many different branches of equity. And it is natural that this should be so. Equity acted in personam, and interfered to make the person do what he conscientiously ought to do.[11] Hence it could not interfere with a person who had got a legal title for value and without notice of any equitable claim to the property.[12] Naturally the question what could be regarded as notice soon became important; and, by the end of this period, equity was elaborating rules as to constructive notice.[13] In the particular case of an assignment of a right under a contract, it was clearly impossible to expect a debtor to

[1] For a clear statement of this change see 1 Eq. Cas. Ab. 360-361 pl. 4.
[2] Ibid 362 pl. 11.
[3] Vol. iii 318.
[4] Vol. iv 430, 440, 476.
[5] 1 Eq. Cas. Ab. 44.
[6] Pt. II. c. 2 § 3.
[7] Ibid.
[8] Earl of Suffolk v. Greenvill (1641) 3 Ch. Rep. 89.
[9] Coles v. Jones (1715) 2 Vern. 692; Terton v. Benson (1718) 2 Vern. 764.
[10] Ashcomb's Case (1674) 1 Ch. Cas. 232.
[11] Vol. iv 279-282; cf. 1 Eq. Cas. Ab. 130 pl. 3.
[12] Vol. iv 432.
[13] Salsbury v. Bagott (1677) 2 Swanst. at pp. 607-608; 1 Eq. Cas. Ab. 330-331 pl. 1-4.

pay any other than the original creditor, unless he had had notice of the assignment. And thus, in this connection, notice becomes all important, not as a step in the title of the assignee, but as a necessary security that the thing he has got will not be destroyed by a payment made by the debtor to the assignor.

This summary of the progress made in the development of the principles of equity shows us that equity has, at the close of this period, assumed its final form. It has become in substance a body of rules, which either deals with matters wholly outside the common law, or exercises a jurisdiction concurrent with that of the courts of common law or other courts, or acts in aid of proceedings in the courts of common law or other courts. Its jurisdiction over trusts is an instance of its exclusive jurisdiction, its jurisdiction over the administration of assets is an instance of its concurrent jurisdiction, its jurisdiction to grant discovery is an instance of its auxiliary jurisdiction.[1] Equity still could and did, where it was necessary to the effective exercise of its jurisdiction, issue injunctions to restrain proceedings at common law or elsewhere; but, with the gradual settlement of the sphere of its jurisdiction, the occasions on which it would thus interfere with the law tended to become fixed. As we shall now see, the result was that law and equity at the close of this period were tending to become, not rivals, but partners, in the work of administering justice.

The relations between law and equity.

This change in the character of equity, which thus affected the relations between law and equity, is due to three main causes.

In the first place, the procedure of the court had developed into a fixed system. We have seen that in the preceding period its procedure had been the most highly developed part of the system of equity.[2] Both the books of practice and the reports show us that in this period it had attained almost its final form.[3]

In the second place, equity was fast becoming a system of case law. In 1663[4] Clarendon, though he was satisfied that a defendant ought in equity to be relieved, yet delayed his decree, and finally refused relief, because no precedent had been cited which covered the case before the court.[5] In 1670, when Vaughan,

[1] For this classification of the equitable jurisdiction and its later development see Ashburner, Equity 1-12.

[2] Vol. v 302. [3] Part II. c. 7 § 3.

[4] Roberts v. Wynn 1 Ch. Rep. 236.

[5] "His Lordship with the judges were of opinion that the said will was obtained by great fraud and circumvention of the defendant Wynn, but by reason the precedents did not fully reach to this case . . . therefore his Lordship and the judges held it not

C.J., expressed surprise that precedents should be cited in a court of equity, Bridgman, L.K., replied that they were both necessary and useful—"in them we may find the reasons of the equity to guide us; and besides the authority of those who made them is much to be regarded. . . . It would be very strange and very ill if we should distrust and set aside what has been the course for a long series of times and ages."[1] We have seen that Lord Nottingham laid it down that the conscience which should guide the chancellor was not *naturalis et interna*, but *civilis et politica*;[2] and in 1734 Jekyll, M.R., laid it down[3] that, "though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *vir bonus est quis?* The answer is, *qui consulta patrum, qui leges juraque servat.*" A discretion otherwise exercisable "is a power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with."

Similarly, though reporters of equity cases might think it necessary to apologize for the publication of their reports,[4] the chancellors found them necessary to guide their decisions, the practitioners found it necessary to collect them and use them, and the publishers soon found that, when printed, they had a ready sale. Equity, as Nelson said in the preface to his reports, had become artificial reason, and had such a mixture of law in it, that it would be much easier now for a lawyer to preach, than for a bishop to be a judge of the court of Chancery.

But, though this practice of relying upon the authority of decided cases was clearly making for fixity of rule, it was slow in its operation; and, at the close of this period, it had not as yet produced many fixed principles, still less many detailed rules. This was due to several causes. Firstly, the fact that the chancellor still decided each case which came before him upon its own facts and circumstances, as elicited by the examination of the parties and witnesses, gave him more opportunities than the

fit at present to make a decree finally to determine this cause;" on appeal to the House of Lords, the House referred the case back to the chancellor, "to decree for either party according to justice and equity, although no precedent should be found for that purpose"; in the end the court held that it could not relieve the plaintiff and dismissed the bill.

[1] Fry v. Porter 1 Mod. at p. 307. [2] Above 547.

[3] Cowper v. Cowper 2 P. Wms. 685-686. On the whole topic see Ashburner, Equity 48-50.

[4] See Reports in Chancery Pref.—after citing Nottingham's dictum in the Duke of Norfolk's Case, above 546 n. 7, to explain why chancellors so often reversed the decrees of their predecessors, it is pointed out that a "judge in Equity must search into deliberate resolutions, in cases of the like nature before him, and thereby wisely secure himself from making orders and decrees totally arbitrary"; Nelson, in the Pref. to his reports, says, "and since most decretal orders are now founded on certain rules and precedents, and many intricate cases are there determined; I think the reports of such cases would be as necessary as any other reports now extant."

common law judges had of distinguishing cases, and of deciding the case before him in accordance with his own notions of what was just. Hale, in discussing the question whether appeals from the Chancery should go to the House of Lords, could advance, as one of the reasons against the appellate jurisdiction, that equity cases were governed so much by circumstances that they were unfit to be heard by a large tribunal.[1] Secondly, a strong chancellor, like Lord Nottingham, could, as we have seen,[2] sometimes recall the original conception of equity in order to lay a fair rule without regard to previous decisions. Even when this was no longer possible, the court, as Ashburner has pointed out, retained, down to the passing of the Judicature Acts, "The power of enlarging its jurisdiction by the application of its established principles to new combinations of facts."[3] Thirdly, the undeveloped state of many of the branches of equity gave large opportunities to a strong chancellor of shaping their development as he pleased. For these reasons the recognition of the authority of decided cases did not quickly produce fixity in the principles of equity. But it is clear that, as the ground becomes covered by decisions, their cumulative weight will tend more and more to the attainment of this result.

In the third place, we have seen that the chancellors were men who had been educated as common lawyers, that some of them had been chief justices in the common law courts,[4] and that common lawyers practised at the Chancery Bar.[5] The common law judges also were sometimes called upon to assist the chancellor. These were links between the Benches and the Bars of the court of Chancery and the common law courts, which tended to make them more ready to co-operate with one another, and even to be ready to apply in one jurisdiction ideas and principles taken from the other.

It is clear that all these causes, which were beginning to operate at the close of this period and continued to operate with increasing force in the following period, will make for the systematization of equity. It may indeed be argued that the results were not wholly beneficial to equity. The elaboration of the system of equity procedure gradually sapped the usefulness of equity; and, in time, that system of procedure became the most crying abuse of an age in which many legal abuses flourished.[6] The system of case law was not perhaps so well suited to a jurisdiction in which more turned upon the conduct and the

[1] Jurisdiction of the House of Lords 201.
[2] Above 546-547.
[3] Principles of Equity 50
[4] Above 550-551.
[5] Above 550.
[6] Vol. i 435-442, 645-646; Pt. II c. 7 § 3.

special circumstances of the parties, than upon the ascertainment and application of fixed rules to a certain set of facts found by a jury; to a jurisdiction in which law and fact could not be precisely separated. Decisions which depended essentially upon the peculiar facts of a case, were sometimes supposed to lay down a rule of law to be followed in other cases; with the result that the court often found itself occupied, rather with the task of reconciling and distinguishing cases, than with the task of considering the merits of the case before it. The accumulation of cases which turned solely upon the construction of documents, and the evolution of unduly harsh rules for the conduct of trustees, are illustrations of some of the disadvantages of that transformation of equity which was just beginning at the close of this period. On the other hand, this transformation had advantages which, on the whole, outweighed the disadvantages. It was an advantage that the principles of equity should become more fixed, and therefore more capable of being known to those affected by them. Above all it was an advantage that there should be such an approximation between law and equity, that the embittered contests between them, which marked the last years of the sixteenth and the early years of the seventeenth centuries, were rendered impossible. We hear, it is true, both in Parliament[1] and in the courts,[2] slight echoes of these controversies. But they are only echoes; and the tracts in which, in 1695 and 1699, Sir Robert Atkyns tried to revive them, fell very flat.[3] The old rivalry between law and equity was dead. Each was ready to recognize the sphere of the other; and thus a parallel and a harmonious development of both was ensured, which rendered possible that settlement of their spheres and principles which was the work of the eighteenth century.

But, before I can deal with the history of that settlement, I must examine the manner in which the many rival courts and councils of this long transition period from mediæval to modern, had begun to develop the principles of our modern law.

[1] In 1676-1677, Marvel writes (Works, Ed. Grosart ii 512-513), "There was a sharpe complaint of several judges . . . but the debate spent itselfe upon the Chancery, and was formed into this resolution; that the extraordinary power and jurisdiction exercised by the high court of Chancery, and other courts of Equity, in matters determinable by common law, is grievous to the people. The House agreed, and ordered a Bill or Bills to redresse it;" cf. vol. i 463-465.

[2] Thus in Roscarrick v. Barton (1672) 1 Ch. Cas. at pp. 219, 220, Hale, C.J., said, "By the growth of equity on equity the heart of the common law is eaten out, and legal settlements are destroyed. . . . It is a great sore that mortgagees are but bailiffs."

[3] Vol. i 465; above 516.

APPENDIX

I

THE ORIGINAL DRAFTS OF THE STATUTE OF FRAUDS

HIST MSS. COMMISSION NINTH REP. APP. PT. ii NO. 202, PP. 48-49

April 14, 1675, Frauds and Perjuries Bill.—Amended draft of an Act for Prevention of Frauds and Perjuries. The original text, including the omitted portions, is the Bill of 1673-1674 (No. 174), re-copied. The additions now made in Committee are shown by italics, the omissions by small capitals.

"For prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury, Be it Enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled, and by the authority of the same, That from and after the *Twentieth* day of *February which shall be in the year of our Lord 1675* all Leases, Estates, Interests *of Freehold*, or terms of years, *or any uncertain interest* of, in, to, or out of any Messuages, Manors, Lands, Tenements, or Hereditaments made or created *by Livery and Seisin only* or by Parole, and not put into writing BY DIRECTION OF THE PARTIES THEREUNTO *and signed by the parties so making or creating the same or their Agents thereunto lawfully authorised by writing*, shall have the force and effect of Leases or Estates at will only, and shall not, either in Law or Equity, be deemed or taken to have any other or greater force or effect, any consideration for making such Parole Leases, or Estates, or any former law or usage to the contrary notwithstanding. *Except nevertheless all leases, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised.* And moreover no Leases, Estates, Interests, *either of Freehold*, or terms of years, *or any uncertain interest*,[1] of, in, to, or out of any Messuages, Manors, Lands, Tenements, or Hereditaments shall at any time hereafter be assigned, TRANSFERRED, *granted*, or surrendered, unless it be by deed or note in writing, *signed by the party or parties so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing*, or by Act and operation of Law.

"And be it further enacted by the authority aforesaid that, IN ALL ACTIONS UPON THE CASE, ACTIONS OF DEBT, OR OTHER PERSONAL ACTIONS, WHICH FROM AND AFTER THE DAY OF SHALL BE COMMENCED UPON ANY ASSUMPSIT, PROMISE, CONTRACT, OR AGREEMENT MADE OR SUPPOSED TO BE MADE BY PAROLE, AND WHEREOF NO MEMORANDUM, NOTE, OR

[1] "*Not being copyhold or customary interest*" in the Act, § iii. This was an amendment made in 1676-1677 (No. 336).

MEMORIAL IN WRITING SHALL BE TAKEN BY THE DIRECTION OF THE PARTIES THEREUNTO, NO GREATER DAMAGES SHALL AT ANY TIME BE RECOVERED THAN THE SUM OF ANY LAW OR USAGE TO THE CONTRARY NOTWITHSTANDING.

"PROVIDED THAT THIS ACT SHALL NOT EXTEND TO SUCH ACTIONS OR SUITS WHICH SHALL OR MAY BE GROUNDED UPON CONTRACTS OR AGREEMENTS FOR WARES SOLD, OR MONEY LENT, OR UPON ANY QUANTUM MERUIT, OR ANY OTHER ASSUMPSITS OR PROMISES WHICH ARE CREATED BY THE CONSTRUCTION OR OPERATION OF LAW; BUT THAT ALL AND EVERY SUCH ACTION SHALL AND MAY BE SUED AND PROSECUTED IN SUCH MANNER AS THE SAME MIGHT HAVE BEEN BEPORE THE MAKING OF THIS ACT, ANYTHING HEREINBEFORE TO THE CONTRARY NOTWITHSTANDING *from and after the said twentieth day of February, no action shall be brought whereby to charge an Executor or Administrator upon any especial promise to answer damages out of his own Estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, or to charge any person upon an agreement made in consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.*

"And be it further enacted by the authority aforesaid That, from and after the *said twentieth* day of *February*, EVERY LAST WILL OR TESTAMENT IN WRITING MADE IN TIME OF SICKNESS, WHEREBY ANY LANDS, TENEMENTS, OR HEREDITAMENTS ARE DEVISED OR BEQUEATHED, SHALL BE UTTERLY VOID, AND OF NO EFFECT, UNLESS THE PERSON SO MAKING HIS LAST WILL AND TESTAMENT SHALL, AFTER THE MAKING THEREOF, LIVE TO GO ABROAD AGAIN, AND BE SEEN IN SOME CHURCH IN THE TIME OF DIVINE SERVICE, OR IN SOME PUBLIC AND OPEN MARKET PLACE *all devises and bequests of any lands, tenements, or hereditaments devisable either by force of the Statute of Wills, or by this Statute, or by force of the Custom of Kent, or the Custom of any Borough, or any other particular Custom, shall be in writing and signed by the party so devising the same, or any other person*[1] *in his presence or by his express directions, and shall be attested and subscribed in the presence of the devisor by three or more witnesses,*[2] *or else they shall be utterly void and of no effect.*

"And moreover no WILL *Devise* in writing WHEREBY ANY *of* lands, tenements, or hereditaments ARE DEVISED OR BEQUEATHED, nor any clause thereof, shall, at any time after the said *twentieth* day of *February*, be revocable BY PAROLE OR otherwise than by some other Will or Codicil OR INSTRUMENT in writing, *or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the Testator himself, or in his presence and by his directions and consent.* But all devises and bequests of lands and tenements shall remain and continue in force until the same be *burnt, cancelled, torn, or obliterated by the testator, or by his directions, in manner aforesaid,* (*or*) *unless the same be* altered by some other Will *or* Codicil OR INSTRUMENT in writing, *or other writing of the Devisor, signed in the pre-*

[1] Altered to ("*and no other person*") in the Bill of Oct. 14, 1675 (No. 291), and amended as in the Act, § v, in the final Bill of Feb. 17, 1676-1677 (No. 336).

[2] "*Credible witnesses*" in the Bill of Oct. 14, 1675, as in the Act § v. *See* No. 291.

sence of three or more witnesses, declaring the same, any former law or usage to the contrary notwithstanding.

"And be it further enacted by the authority aforesaid that, from and after the *said twentieth* day of *February*, all declarations or creations of Trusts or Confidences BY PAROLE *of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such Trust, or by his last will in writing, or else they* shall be utterly void and of no effect. And WHERE ANY TRUST OR CONFIDENCE IS OR SHALL BE MADE AND DECLARED IN WRITING *be it further enacted that all grants and assignments of* SUCH *any* Trust or Confidence BY PAROLE *shall be in writing, signed by the party granting or assigning the same, or by such last Will, or else* shall likewise be utterly void and of no effect.

"Provided always that where any Conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, *or be transferred or extinguished by the act or operation of law*, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this Statute had not been made, anything hereinbefore contained to the contrary notwithstanding.

"And be it further enacted by the authority aforesaid that, from and after the *aforesaid twentieth* day of *February*, it shall and may be lawful for every Sheriff or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, or upon any Judgment, Statute, or Recognizance hereafter to be made, or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, AND tenements, *rectories, tithes, rents, and other hereditaments* as any other person or persons be in any manner of wise seised *or possessed*, or hereafter shall be seised *or possessed* in trust for him ONLY against whom Execution is so sued, like as the Sheriff or other officer might or ought to have done if the said party, against whom Execution hereafter shall be so sued, had been SOLELY seised of such lands AND tenements, *rectories, tithes, rents, and other hereditaments* of such estate as they be seised of, in trust for him, at the time of the said execution sued.[1]

"And if any Cestuy que trust hereafter shall die leaving a trust in fee-simple to descend to his heir, there, and in every such case, such trust shall be deemed and taken, and is hereby declared, to be assets by descent, and the heir shall be liable to, and chargeable with, the obligation of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been if the LAND ITSELF AND THE INHERITANCE THEREOF *Estate in law* had descended to him in possession, in like manner as the Trust descended, any law, custom, or usage to the contrary in any wise notwithstanding."[2]

[The Bill consisting of the Lord Keeper's original Draft of 1673-1674, was committed on the 15th. On the 17th the Committee, of whom E. Aylesbury was chairman, agreed to the preamble, and desired the attendance of the Judges, whom they wished to consult as to whether Leases in writing should not be under hand and seal, and whether copyhold estates should be included in the second paragraph. On the 20th, *C. J. North* stated that "if a deed be in writing, it is understood to be under hand and seal. If there be a note in writing, it will prevent perjury. That it should be put in writing in the

[1] The words in the Act, which follow here, were inserted in the final Bill of Feb. 17, 1676-1677 (No. 336).

[2] The proviso (§ xi of the Act) which follows here, was inserted in the final Bill of Feb. 17, 1676-1677.

presence of the parties. A copyhold estate in the eye of the law is but an Estate at Will." After partially amending the first clause, the Committee referred to the Judges for amendment the second clause, with its proviso, for which was substituted, on the 22nd, the clause which forms § iv. of the Statute of Frauds. The next clause, concerning Wills, was also referred to the Judges, and on the 29th L.C. Justice North proposed in its place, and the Committee adopted, the clause which forms § v. of the Statute. He offered also some other amendments and clauses, which were agreed to, and the Committee then ordered the Judge of the Prerogative Court (Sir Leoline Jenkins) and the King's Advocate and Proctor to attend on 3 May, concerning the better ascertaining of Nuncupative Wills than they are yet by law. Accordingly, on 3 May, Sir Leoline offered some articles (*b*) which were read, and the next day, after agreeing to some additional clauses (*c*) offered by L.C. Justice North, the Committee ordered Sir Leoline's articles to be drawn into enacting clauses by the Judges, with a preamble as follows: "In regard of the many uncertainties and inconveniences that have been observed and by experience found in and concerning Nuncupative Wills, for remedy thereof be it enacted." After these clauses another clause was to be added, to preserve the jurisdiction of the Prerogative Court and other Ecclesiastical Courts in these cases, subject to these rules and alterations. On the 6th, L.C.J. North offered the clauses as directed, together with another clause, all of which (*d*) were agreed to be added at the end of the Bill. The Bill thus amended was then ordered to be reported. (Com. Book of Dates.) It dropped, however, in the Commons, but was reintroduced next session (*see* No. 291), and again in 1676-1677, when it became law. (*See* No 336.)]

Annexed :—

(*a*) 22 April. Fair copy of preceding, as amended up to this day. Interlined, in the handwriting of C. J. North, are the later amendments on the 29th, which were offered by him. (Com. Book of dates and 20 April.)

(*b*) 3 May. Propositions of Sir Lionel Jenkins respecting Nuncupative Wills :—

1. No Nuncupative Will to be allowed to stand, or the probate thereof put under the seal of any Court, but what is made in the time of the last sickness of him that dies, and in the house or place where deceased formerly lived or made his abode and died ; except such person be surprised or taken sick, being from his own home or in his journey, and dies.
2. Nor except the same be certified by the oaths of three witnesses at the least.
3. That if a Will for land or goods be once made in writing, no subsequent words or Will by word of mouth, not committed to writing and after read over to him, or by him, and by him allowed and so verified as is aforesaid, shall set aside the first Will in writing, or alter or change any clause, devise, or bequest in the former Will contained.
4. That no Nuncupative Will shall be good, nor anything thereby given of any force, except those that are standers by be bid by the deceased to bear witness that those words are his Will, or that he speak words to that effect.
5. That no Nuncupative Will shall be pleaded or proved in any court where months are expired since the pretended testamentary words were spoken.

   Provided that any soldier, being in actual military service, or any mariner or seaman, being at sea, may by Will by word of mouth dis-

pose of his movables, wages, or personal estate, in presence of two witnesses.

6. That no Nuncupative Will shall pass the seal of any court till fourteen days after the death of the party be fully expired, nor then neither except a process do first issue to call the widow or next of kin to see the same proved, in case the estate or the greatest part thereof be given from them or either of them to a stranger in blood. (See Com. Book 3, 4, and 6 May.)

(*c*) 4 May. Clauses (marked A) offered by L.C J. North, and agreed to this day. (Com. Book of date.) They contain a few corrections, in the Chief Justice's hand, and form, almost verbatim, §§ 12 to 17 of the Act, the only differences being "hereditaments *endeavoured* to be charged thereby shall, in *construction* of law" (comp. § xiv.) and "whereon *he* received the same" (for "he and they" in § xv.)

(*d*) 6 May. Clauses (marked B) offered by L.C.J. North and agreed to this day (Com. Book of date, and 4 May). They form, almost verbatim, §§ xviii *ad fin.* of the Act, the differences being few and wholly verbal.

(*e*) 10 May. Lords Amendments in Committee. (Reported this day. L.J., XII., 686, and Com. Book, 6 May.)

II

THE LAW OFFICERS OF THE CROWN

(1) MODERN PATENT OF THE ATTORNEY-GENERAL

GEORGE THE FIFTH BY THE GRACE OF GOD

of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To All To Whom these Presents shall come Greeting WHEREAS We did by Our Letters Patent under the Great Seal of Our said United Kingdom bearing date at Westminster the seventh day of October in the first year of Our Reign constitute and appoint Our right trusty and well-beloved Counsellor Sir Rufus Daniel Isaacs Knight Commander of Our Royal Victorian Order one of Our Counsel learned in the law to be Our Attorney General during Our pleasure NOW KNOW YE that We by these Presents Do revoke the said Letters Patent AND FURTHER KNOW YE that we of Our especial Grace DO CONSTITUTE AND APPOINT Our right trusty and well-beloved Counsellor SIR JOHN ALLSEBROOK SIMON Knight Commander of Our Royal Victoria Order one of Our Counsel learned in Law Our Solicitor General to be Our Attorney General during Our pleasure together with all salaries fees authorities and advantages due and of right belonging thereto IN WITNESS Whereof We have caused these Our Letters to be made patent WITNESS Ourself at Westminster the twenty-first day of October in the fourth year of Our Reign

BY THE KING HIMSELF.

MUIR MACKENZIE.

(2) MODERN PATENT OF THE SOLICITOR-GENERAL

GEORGE THE FIFTH BY THE GRACE OF GOD

of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To All To Whom These Presents Shall Come Greeting Whereas His late Majesty King Edward the Seventh did by Letters Patent under the Great Seal of Our said United

Kingdom bearing date at Westminster the ninth day of March in the tenth year of his reign constitute and appoint Our trusty and well-beloved Sir Rufus Daniel Isaacs Knight one of Our Counsel learned in the Law to be his Solicitor General during His pleasure NOW KNOW YE that We by these presents do revoke the said Letters Patent AND FURTHER KNOW YE that We of Our especial Grace DO CONSTITUTE AND APPOINT Our trusty and well-beloved JOHN ALLSEBROOK SIMON Esquire One of Our Counsel learned in the Law to be Our Solicitor General during Our pleasure together with all salaries fees authorities and advantages due and of right belonging thereto IN WITNESS Whereof We have caused these Our Letters to be made patent WITNESS Ourself at Westminster the seventh day of October in the first year of Our Reign.

BY THE KING HIMSELF.
MUIR MACKENZIE.

(3) ATTORNEY-GENERAL'S WRIT OF ATTENDANCE TO THE HOUSE OF LORDS

GEORGE THE FIFTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To Our right trusty and well-beloved Counsellor Sir John Allsebrook Simon Knight Commander of Our Royal Victorian Order one of Our Counsel learned in the Law Our Attorney General Greeting.

Whereas Our Parliament for certain arduous and urgent affairs concerning Us the State and Defence of Our said United Kingdom and the Church was lately with the advice and consent of Our Council summoned to be holden at Our City of Westminster the thirty-first day of January in the first year of Our Reign which Parliament hath been from that time by several adjournments and prorogations adjourned prorogued and continued to and until the twenty-second day of December now next ensuing at Our City aforesaid to be then there holden and there with the Prelates Nobles and Peers of Our said United Kingdom to confer and treat We strictly enjoining command you that all other things laid aside you be personally present at Our said Parliament with Us and with others of Our Council to treat of the aforesaid affairs and to give your advice and this you may in no wise omit WITNESS Ourself at Westminster the twenty-first day of October in the fourth year of Our Reign.

MUIR MACKENZIE.

TO

Our right trusty and well-beloved Counsellor Sir John Allsebrook Simon Knight Commander of Our Royal Victorian Order one of Our Counsel learned in the Law Attorney General.

A Writ of Attendance at Parliament.

MUIR MACKENZIE.

III

THE KING'S COUNSEL

(1) SOME EARLY PATENTS OF KING'S COUNSEL AND THE MODERN FORM

Francis Bacon.

Rex omnibus ad quos &c. Salutem.

Sciatis quod Nos,

Tam in consideratione boni fidelis & acceptabilis Servitii, per Dilectum Servientem nostrum *Franciscum Bacon* Militem præstiti & impensi, quam

pro diversis aliis Causis & Considerationibus ad hoc Nos specialiter moventibus,

De Gratia nostra speciali, ac ex certa Scientia & mero Motu nostris, constituimus ordinavimus & appunctuavimus, ac, per Præsentes, pro Nobis Hæredibus & Successoribus nostris, constituimus ordinamus & appunctuamus præfatum *Franciscum Bacon* Consiliarium nostrum ad Legem sive unum de Consilio nostro erudito in Lege,

Dedimus etiam & concessimus &, pro Nobis Hæredibus & Successoribus nostris, damus & concedimus, per Præsentes, Præfato *Francisco* Locum & Præsidentiam in Curiis nostris vel alibi & Præaudientiam, necnon omnia & singula Proficua Advantagia Emolumenta Iura Præminentia Confidentias, seu alia quæcunque quæ ad unum Consiliarium nostrum ad Legem, ut Consiliario huiusmodi, & minime ratione alicuius specialis Officii, spectant aut pertinent, aut spectare aut pertinere consueverunt aut de jure debent,

Volumus etiam & concedimus, pro Nobis Hæredibus & Successoribus nostris, quod præfatus *Franciscus Bacon* habeat plenam & sufficientem Protestatem & Auctoritatem, ad omnia & singula præstanda exequenda & perimplenda, quæ quivis alius de Consilio nostro erudito in Lege, ut unus de Consilio nostro prædicto & minime ratione specialis alicuius Officii possit exequi & perimplere,

Habenda & tenenda gaudenda percipienda & excercenda Potestatem Authoritatem Proficua, ac omnia & singula præconcessa sive expressa, præfato *Francisco* quamdiu ipse se bene gesserit in executione & exercitio Muneris Authoritatis & Potestatis prædictarum, in tam amplis modo & forma quam aliquis alius de Consilio nostro erudito in Lege, vel ipse *Franciscus*, ratione Verbi Regii *Elizabethæ* nuper Antecessoris nostri, vel ratione Warranti nostri sub signatura nostra Regia, habuit tenuit gavisus est vel executus est, nichilominus nolumus quod hæc Concessio nostra deroget alicui Officio antehac, per Nos aut Antecessores nostros dato vel concesso,

Et ulterius, de uberiori Gratia nostra, pro exercitio Servitii prædicti, dedimus & concessimus, ac per Præsentes, pro Nobis Hæredibus & Successoribus nostris, damus & concedimus præfato *Francisco Bacon* Vadium & Feodum *Quadraginta Librarum* bonæ & legalis Monetæ Angliæ per Annum, solvendam annuatim eidem *Francisco Bacon* ad Festa Sancti Michaelis Archangeli & Paschæ per æquales Portiones, de Thesauro nostro Hæredum & Successorum nostrorum, per Manus Thesaurarii & Camerariorum ibidem pro tempore existentium, prima Solutione inde incipienda ad Festum Festorum prædictorum proximo post Datam Præsentium,

Habendum & tenendum gaudendum & percipiendum Vadium & Feodum prædictum, durante Vita naturali prædicti *Francisci Bacon.*

In cuius rei &c.

Teste Rege apud *Harfield* vicesimoquinto Die Augusti.

Per Breve de Privato Sigillo.

Pat. 2 Jac. I., p. 12, m. 15, Rymer, Fœdera, xvi, 596.

John Finch.

Rex etc. omnibus ad quos etc. Salutem. Sciatis quod nos pro diversis causis et considerationibus ad hoc nos specialiter moventibus de gratia nostra speciali ac ex certa scientia et mero motu nostris, Constituimus Ordinavimus et Appunctuavimus ac per presentes pro nobis heredibus et successoribus nostris constituimus ordinamus et appunctuamus Johannem Finch militem Conciliarum nostrum ad legem sive unum de Concilio nostro erudito in lege. Dedimus etiam et concessimus et pro nobis heredibus et successoribus nostris damus et concedimus per præsentes præfato Johanni Fynch eundem locum et

precedentiam in curiis nostris vel alibi et preaudienciam prout Henricus Montague miles modo comes Mancestriæ et præses Concilii nostri seu Franciscus Bacon miles modo vicecomes sancti Albani seu aliquis eorum seu aliquis alius nuper ante hac habuit seu gavisus fuit. Necnon omnia et singula proficua advantagia emolumenta iura preheminencia confidencias seu alia quæcunque quæ ad unum Conciliarorum nostrorum ad legem ut Conciliario huiusmodi et minime ratione alicuius specialis officii spectant aut pertinent aut spectare aut pertinere consueverunt aut de iure debent. Volumus etiam et concedimus pro nobis heredibus et successoribus nostris quod præfatus Johannes Fynche habeat plenam et sufficientem potestatem et auctoritatem ad omnia et singula præstanda exequenda et perimplenda quæ quivis alius de Concilio nostro erudito in lege ut unus de Concilio nostro predicto et minime ratione specialis alicuius officii possit exequi et perimplere. Habenda et tenenda gaudenda percipienda et exercenda potestatem auctoritatem proficua ac omnia et singula præconcessa sive præexpressa præfato Johanni Finch quamdiu ipse se bene gesserit in executione et exercitio muneris auctoritatis et potestatis prædictarum in tam amplis modo et forma quam predictus Henricus Montagu aut prædictus Franciscus Bacon aut aliquis de Concilio nostro erudito in lege habuit tenuit gavisus est vel executus est. Nihilominus nolumus quod hæc concessio nostra deroget alicui officio antehac per nos aut antecessores nostros dato vel concesso. Et ulterius de uberiore gratia nostra pro exercicio servicii prædicti dedimus et concessimus ac per presentes pro nobis heredibus et successoribus nostris damus et concedimus præfato Johanni Finch vadium et fœdum quadraginta librarum bonæ et legalis monetæ Angliæ per annum solvendam annuatim eidem Johanni Finch ad festa Paschæ et sancti Michaelis Archangeli per æquales porciones de Thesauro nostro heredum et successorum nostrorum per manus Thesaurarii et Camerariorum ibidem pro tempore existentium prima solutione inde incipienda ad festum festorum prædictorum post datum presencium. Habendum et tenendum guadendum et percipiendum vadium et fœdum predictum durante vita naturali prædicti Johannis Finch.

In cuius rei etc.

Teste Rege apud Westmonasterum decimo septimo die Marcii.

Per breve de privato sigillo.

Patent Roll (Chancery), 1 Charles I., part i, no. 2.

George Radcliffe.

Rex omnibus ad quos etc. Salutem. Sciatis quod nos tam in consideracione boni et fidelis servicii nobis antehac impensi et impostere impendentis per dilectum nostrum Georgium Radcliffe Armigerum attornatum nostrum coram nobis et Concilio nostro in partibus borealibus stabilito quam de fidelitate experiencia et integritate præfati Georgii Radcliffe plurimum confidentes ac pro diversis aliis bonis causis et consideracionibus ad hoc nos specialiter moventibus de gratia nostra speciali ac ex certa scientia et mero motu nostris constituimus ordinavimus et appunctuavimus ac per presentes pro nobis heredibus et successoribus nostris constituimus ordinamus et appunctuamus præfatum Georgium Radcliffe Consiliarium nostrum ad legem sive unum de Consilio nostro erudito in lege. Dedimus etiam et concessimus ac pro nobis heredibus et successoribus nostris per presentes damus et concedimus præfato Georgio Radcliffe eundem locum et presidentiam in Curiis nostris vel alibi et præudienciam prout Henricus Montague miles modo comes Manchestriæ et custos privati sigilli nostri seu Franciscus Bacon nuper miles et postea vicecomes sancti Albani aut Johannes Finch miles modo Attornatus Generalis præclarissimæ Consortis nostræ Henriettæ Mariæ

Reginæ aut Willelmus Denney miles seu aliquis eorum sive aliquis alius nuper antehac habuit seu gavisus fuit. Necnon omnia et singula proficua advantagia emolumenta iura preheminencia confidencias seu alia quæcunque quæ ad unum Consiliariorum nostrorum ad legem. [The rest of the patent is substantially in the same form as Finch's patent.]

Patent Roll (Chancery), 8 Charles I., part i, no. 3.

Richard Shelton.

Rex omnibus ad quos etc. Salutem. Sciatis quod nos pro diversis bonis causis et consideracionibus nos ad hoc specialiter moventibus de gratia nostro speciali ac ex certa scientia et mero motu nostris constituimus ordinavimus et appunctuavimus ac per præsentes pro nobis heredibus et successoribus nostris constituimus ordinamus et appunctuamus Ricardum Shelton militem Consiliarium nostrum ad legem sive unum de Consilio nostro erudito in lege. Dedimus etiam et concessimus ac per præsentes pro nobis et heredibus et successoribus nostris damus et concedimus prefato Ricardo Shelton omnia et singula proficua advantagia emolumenta iura preheminencia confidencias seu alia quæcunque quæ ad unum Consiliariorum nostrorum ad legem ut Consiliario hujusmodi et minime ratione alicuius specialis officii spectant aut pertinent aut spectare aut pertinere consueverunt aut de iure debent. Volumus etiam et concedimus nobis heredibus et successoribus nostris quod præfatus Ricardus Shelton habeat plenam et sufficientem potestatem et auctoritatem ad omnia et singula præstanda exequenda et perimplenda quæ quivis alius de Consilio nostro prædicto et minime ratione alicuius specialis officii possit exequi et perimplere habendum et tenendum gaudendum percipiendum et exercendum potestatem authoritatem proficua ac omnia et singula præconcessa sive præexpressa prefato Ricardo Shelton quamdiu nobis placuerit. [The rest of the patent is substantially in the same form as Finch's patent.]

Patent Roll, 10 Charles I, part xxxix, no. 10.

Thomas Levingston.

Rex omnibus ad quos etc. Sciatis quod nos pro diversis causis et consideracionibus nos ad hoc specialiter moventibus de gratia nostra speciali ac ex certa scientia et mero motu nostris constituimus ordinavimus et appunctuavimus ac per præsentes pro nobis heredibus et successoribus nostris constituimus ordinamus et appunctuamus Thomam Levingston Armigerum Consiliarium nostrum ad legem sive unum de Consilio nostro erudito in lege. [The rest of the patent is substantially in the same form as Finch's patent.]

Patent Roll (Chancery) 17 Charles I., part i, no. 2.

Francis North.

This patent is on exactly the same lines as the others. It is dated April 22, 20 Charles II., and is on the Patent Roll 20 Charles II., part iv, no. 24.

The Modern Form.

GEORGE THE FIFTH BY THE GRACE OF GOD of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To all to whom these Presents shall come Greeting : KNOW YE that We of our especial grace have constituted ordained and appointed our trusty and well beloved one of our Counsel learned in the Law And We have also given and granted unto him as one of our Counsel aforesaid place precedence and preaudience next after

in our Courts. And We also will and grant to the said full power and sufficient authority to perform do and fulfil all and every the things which any other of our Counsel learned in the Law as one of our said Counsel may do and fulfil. We will that this our Grant shall not lessen any Office by Us or by our Ancestors heretofore given or granted. In witness whereof We have caused these Our Letters to be made Patent. WITNESS Ourself at Westminster the day of in the year of Our Reign.

BY THE KING HIMSELF.

(2) THE OATHS OF THE SERJEANTS AND THE KING'S SERJEANTS, AND THE MODERN DECLARATION MADE BY THE KING'S COUNSEL.

The Serjeant's Oath.

1. That he shall well and truly serve the King's people, as one of the Serjeants of the Law.
2. That he shall truly counsel them, that he shall be retained with, after his cunning.
3. That he shall not defer, tract, or delay their causes willingly, for covetousness of money, or other thing that may tend to his profit.
4. That he shall give due attendance accordingly.

Coke, Second Instit. 214.

The Oath of the King's Serjeant.

1. That he shall well and truly serve the King and his people, as one of the King's Serjeants at law.
2. That he shall truly counsel the King in his matters when he shall be called.
3. And duely and truly minister the King's matters after the course of the Law, to his cunning.
4. He shall take no wages or fee of any man for any matters, where the King is party, against the King.
5. He shall as duly, as hastily speed such matters, as any man shall have to do against the King in the Law, as he may lawfully do without delay, or tarrying the party of his lawful Proces in that belongeth to him.
6. He shall be attendant to the King's matters when he shall be called thereto.

Coke, Second Instit. 214.

The Modern Declaration made by a King's Counsel.

I do declare that well and truly I will serve the King as one of His Counsel learned in the Law and truly counsel the King in His matters, when I shall be called, and duly and truly minister the King's matters and sue the King's process after the course of the Law, and after my cunning. For any matter against the King where the King is party I will take no wages or fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the Law against the King as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth. I will be attendant to the King's matters when I be called thereto.

IV

SHORT TITLES OF LAW BOOKS PUBLISHED BETWEEN 1668 AND 1700.

(Arber's edition of the Term Catalogues.)

[The various series of law reports, special reports of trials, abridgments of the reports, editions and abridgments of the statutes, are not included in this list. For some of them see vol. iv. 308-313; vol. v. 355-378; vol. vi. 312-313, 551-574.]

(1) PRACTICE AND PLEADING.

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. A Collection of Entries of Declarations, Barres, Replications, etc. By William Rastell, Esq.	Easter, 1670; Midsummer, 1670	i 39 i 44	Vol. v 384-385, 461
ii. The Practical Register, or the Accomplished Attorney: consisting of Rules, Orders, and the most principal Observations concerning the Practice of the Common Law in the Courts at Westminster. By William Style, Esq. The Second Edition, enlarged.	Midsummer, 1670; Mich., 1693	i 45, 53 ii 485	Vol. vi 598
iii. A Collection of such of the Orders heretofore used in Chancery, with such alterations and additions thereunto as the Lord Chancellor, by and with the advice of the honourable Sir Harbottle Grimston, Master of the Rolls, has thought fit at present to Ordain and Publish.	Midsummer, 1670	i 53	Vol. vi 614
iv. The Practical Counsellor in the Law; touching Fines, Common Recoveries, Judgments, etc. By Will. Sheppard.	Mich., 1670	i 58-59	Vol. vi 599
v. The Compleat Clerk; containing the best form of all sorts of Presidents for Conveyances, and Assurances, and other Instruments: with forms of Bills, Pleadings, and Answers in Chancery. The Third Edition, enlarged.	Easter, 1671; Trin., 1677; Easter, 1683	i 77 i 286 ii 20	Vol. vi 616
vi. A Book of Entries, containing Presidents of Accounts, Declarations, etc. By Sir Edward Coke.	Easter, 1671	i 77	Vol. v 461
vii. Formulæ bene placitandi. A Book of Entries; containing a variety of choice precedents of Counts, Declarations, Informations, etc. Collected from the MSS., as well of some late learned Prothonotaries of the Courts of Common Pleas, as of divers other Practicers in the Court of King's Bench. By W. B., a Clerk of the Court of Common Pleas.	Mich., 1671; Easter, 1675	i 89-90 i 207	
viii. The Second Part of the foregoing work.	Mich., 1673; Easter, 1675	i 155 i 207	
ix. The Compleat Solicitor. The Fourth Edition.	Mich., 1671	i 93	Vol. vi 437, 598

(I) PRACTICE AND PLEADING—*continued.*

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
x. The practice of the High Court of Chancery. With the nature of the several offices belonging to that Court: and the Reports of many Cases wherein relief hath been there had; and when denied.	Easter, 1672	i 108	
xi. The Clerk's Guide. By Thomas Manley of the Middle Temple, Esq.	Mich., 1672	i 124	Vol. vi 616
xii. Practica Walliæ, or the proceedings in the Great Sessions of Wales. By Rice Vaughan.	Mich., 1672	i 124	Vol. vi 599
xiii. The Course and Practice of the Court of Common Pleas at Westminster. By Thomas Cory, Esq., late chief Prothonotary thereof: continued by W. B.	Mich., 1672	i 124	Vol. vi 599
xiv. Placita Latine Rediva. Containing perfect and approved Precedents of Counts, Declarations, etc. Collected out of the MSS. of R. Brownlow, J. Gulston, Rob. Moyle, and Tho. Cory, Esquires.	Mich., 1673	i 159	Vol. v 385
xv. Praxis Utriusque Banci. The Ancient and Modern Practice of the two Superior Courts at Westminster.	Hil., 1674	i 165	Vol. iii 646 n. 2, 650 n. 6, 651-652 Vol. vi 599
xvi. Liber Placitandi. A Book of Special Pleadings.	Easter, 1674	i 173	Vol. v 386
xvii. Placita Generalia et Specialia, in an exact collection of the most usual and necessary presidents of Declarations, etc.	Trin., 1674	i 180	
xviii. A Second Book of Judgments. By George Townsend, Esq., second Protho-Notary of the Court of Common Pleas.	Mich., 1674	i 190	
xix. The practick part of the Law; showing the Office of an Attorney and a Guide for Sollicitors.	Easter, 1676; Hil., 1681; Mich., 1694	i 242 i 434 ii 531	Vol. vi 437, 598
xx. The Office of the Clerk of Assize: together with the Office of the Clerk of the Peace.	Easter, 1676; Hil., 1694	i 242 ii 496	Vol. vi 599
xxi. The New Natura Brevium, of the most Reverend Judge, Mr. Anthony Fitzherbert, corrected and revised.	Mich., 1676; Easter, 1687; Easter, 1689	i 263 ii 195 ii 262	Vol. ii 522 Vol. v 380 Vol. vi 598
xxii. Doctrina Placitandi, on L'Art et Science de Bon Pleading; Elucubratione. S.E.	Trin., 1677	i 282	Vol. v 386-387 Vol. vi 600
xxiii. The Clerk's Manual, or an exact Collection of the most approved Forms of Declarations, etc.	Mich., 1677; Easter, 1682	i 290 i 488	
xxiv. The Entering Clerk's Vade mecum; a collection of precedents for Declarations, etc., with variety of Actions upon Bills of Exchange, Policies of Assurance, etc. By W. Brown.	Hil., 1678	i 303	
xxv. The Common Law epitomized; with directions how to prosecute and defend personal Actions. To which is annexed the nature of a Writ of Error and the proceedings thereupon. By William Glisson and Anthony Gulston, Esquires.	Mich., 1678	i 338	Vol. vi 599

(I) PRACTICE AND PLEADING—*continued.*

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
xxvi. Officina Brevium. Select and approved Forms of Judicial Writs, and other Process.	Trin., 1679	i 359	Vol. vi 599
xxvii. Le Beau Pledeur. A Book of Entries containing Declarations, etc. By the Reverend Sir Humphrey Winch, sometime of the Justices of the Court of Common Pleas.	Hil., 1680	i 383	Vol. v 386 n. 2
xxviii. The exact Pleader.	Trin., 1681	i 451	
xxix. The Touchstone of Precedents relating to Judicial Proceedings at Common Law. By G. F. of Gray's Inn.	Mich., 1681	i 460	
xxx. Tryals per Pais, or the Law of England concerning Juries by Nisi Prius, etc. Second Edition newly revised. By G. D. of the Inner Temple.	Trin., 1682	i 498	Vol. vi 599
xxxi. The Rules and Orders of the Court of Common Pleas, made since his Majesties Restauration.	Easter, 1683	ii 15	Vol. vi 599
xxxii. The exact Pleader. By Andrew Vidien, late one of the Clerks of the Papers in the Court of King's Bench.	Mich., 1683	ii 45	Vol. v 386
xxxiii. The Compleat Sollicitor, Entering Clerk, and Attorney.	Mich., 1683; Mich., 1699	ii 46 iii 164	
xxxiv. Declarations and Pleadings in the Court of King's Bench from the 12th to the 24th year of the reign of Charles II., collected from the MSS. of J. Read, late of the Middle Temple. To which is added precedents of the same court to this present time by R. A.	Hil., 1684	ii 61	
xxxv. The Clerk's Assistant; being a Collection of True and Perfect Forms of Declarations, etc.	Hil., 1684	ii 61	
xxxvi. A Book of special Entries of Declarations, etc. Collected by the particular Direction of Sir Thomas Robinson, Baronet, late chief Prothonotary of the Court of Common Pleas, from the MSS. of his Office.	Easter, 1684	ii 72	Vol. v 385
xxxvii. *Jus Filizarii*, or the Filacer's Office in the Court of King's Bench. By John Trye of Gray's Inn.	Easter, 1684	ii 72	Vol. vi 599
xxxviii. A Book of Entries, of Declarations, and other Pleadings. Together with Observations in Pleading. By John Hansard Gent. late of Clement's Inn. To which is added, Appeals of Murder and Mayheme, with variety of Pleadings therein.	Mich. 1685	ii 145	Vol. v 386 n. 2
xxxix. Registrum Brevium, tam Originalium quam Judicialium. Editio Quarta. Cui subjicitur Appendix diversa Brevia (quæ in Registro Brevium non extant) continens Una cum Libro Consultissimi Viri Simonis Theloall, cui Titulus, "Le Digest des Briefs Originals et des choses concernants eux."	Trin. 1687	ii 199	Vol. ii 515-517, 520; Vol. v 380-381, 387 Vol. vi 598

(I) PRACTICE AND PLEADING—*continued.*

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
xli. Thesaurus Brevium, or a Collection of approved Forms of Writs, and Pleadings to those Writs. By J. C. The Second Edition corrected and enlarged.	Mich., 1687	ii 206	
xlii. The Clerk's Tutor in Chancery.	Mich., 1687; Trin., 1694	ii 206 ii 514	Vol. vi 616
xliii. A Compendium of the several branches of Practice in the Court of Exchequer.	Trin., 1688; Trin., 1689	ii 231 ii 274	Vol. vi 599
xliv. The Opinion of the Judges, upon the clause in the Act of 21 and 23 (sc.) Car. II. Regis cap. 9, for giving no more costs than damages.	Trin., 1688	ii 231	
xlv. Regula Placitandi.	Trin., 1691; Mich., 1693 Trin., 1699	ii 368 ii 485 iii 478	Vol. vi 600
xlvi. The fees of all the courts at Westminster.	Mich., 1693;	ii 478	
xlvii. *Praxis Almæ Curiæ Cancellariæ.* Precedents of pleading in the Court of Chancery, and on appeals from Chancery to the House of Lords; with a collection of writs and process, and an introduction setting out in rules the practice of the Court.	Easter, 1694; Hil., 1700	ii 501 iii 172	Vol. vi 616
xlviii. The Method of Pleading by Rule and President.	Mich., 1696	ii 601	Vol. vi 600
xlix. Ordinis Cancellariæ. Orders of the court from 1 Charles I. to the present day, to which is added the rules and orders of the court of Exchequer.	Hil., 1698	iii 54	Vol. vi 599
l. Methodus Novissima Intrandi Placita Generalia. The method of pleading according to the alterations made by the late Rules of Court, with an analysis of the science of true pleading. By W. Brown, the author of Formulæ bene placitandi.	Trin., 1699	iii 137	Vol. vi 600
li. The Practice of the equity-side of the Court of Exchequer.	Trin., 1699	iii 145	

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. The Second, Third, and Fourth Parts of the Institutes of the Laws of England. Written by the Lord Coke. All new printed.	Mich., 1668; Mich., 1681	i 3 i 467	Vol. v 468-471
ii. Brief Animadversions on the Fourth part of the Institutes of the Laws of England. By William Prynne, Esq., Keeper of the Records at the Tower.	Mich., 1669	i 20	Vol. i 554, 558; Vol. v 147, 476
iii. The Compleat Lawyer. By W. Noy, Attorney General to Charles I.	Midsummer, 1670; Trin., 1674	i 45, 53 i 182	
iv. The First Part of the Institutes of the Laws of England. By Edward Coke. The Seventh Edition.	Midsummer, 1670; Easter, 1684	i 53 ii 76	Vol. v 466-468 Vol. vi
v. The Young Clarke's Tutor enlarged.	Hil., 1671; Hil., 1675; Mich., 1676; Hil., 1680; Mich., 1682; Hil., 1685; Mich., 1689	i 68 i 201 i 263 i 389 i 516 ii 160 ii 294-5	602
vi. Littleton's Tenures in French and English.	Easter, 1671	i 77	Vol. ii 573-575; Vol. v 396, 466-467
vii. The Young Clerk's Companion, or A Manual for daily practice, etc.	Mich., 1672	i 124	
viii. Speculum Juris Anglicani, or A view of the Laws of England. By John Brydall, of Lincoln's Inn.	Hil., 1673	i 130	Vol. vi 601
ix. Two Dialogues in English between a Doctor of Divinity and a Student in the Laws of England.	Mich., 1673 Easter, 1687; Easter, 1689	i 159 ii 196 ii 263	Vol. i 460; Vol. v 266-269
x. Enchiridion Legum. A Discourse of the beginnings and nature of laws in general.	Mich., 1673	i 159	Vol. vi 601
xi. Modus intrandi placita Generalia, composed for the benefit of Students of the Common law. By W. Brown, Gent., author of Formulæ bene placitandi.	Hil., 1674; Trin., 1687	i 165 ii 202	Vol. vi 602
xii. Studii Legalis Ratio, or Directions for the Study of the Law. The Third Edition, enlarged by W.P.	Hil., 1675	i 201	Vol. v 23 Vol. vi 601
xiii. Hughes' Queries, or Choice Queries for Moots. By W. Hughes, late of Graies Inn.	Easter, 1675	i 206	Vol. vi 601-602
xiv. A Preparative to Pleading. By Geo. Townsend, Esq.	Mich., 1675; Hil., 1685	i 222 ii 120	Vol. vi 602
xv. A brief method of the Law; being an exact Alphabetical Disposition of all the heads necessary for a perfect Commonplace. The like never before printed.	Trin., 1680	i 405	Vol. vi 601
xvi. A similar book.	Trin., 1681	i 450	
xvii. Nomenclatura Clericalis, or the Young Clerk's Vocabulary in English and Latin. By George Meriton, Gent.	Hil., 1685	ii 114	
xviii. *Legis Series*, or the Process of the Law, and introduction to Clerkship.	Hil., 1690	ii 301	
xix. Instructor Clericalis. Directions as to the abbreviation and contraction of words.	Easter, 1693	ii 454	Vol. vi 602
xx. The young Lawyer's Recreation, a collection of pleasant cases, passages, and customs in the law.	Mich., 1692	ii 478	Vol. vi 602

(3) CONVEYANCING AND THE LAND LAW.

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. Landlord's Law, the Third Edition. By George Meriton.	Trin., 1669; Easter, 1681	i 15 i 447	Vol. vi 603
ii. The Tenants' Law. By R. T., Gent. The Second Edition.	Midsummer, 1670; Trin., 1674; Mich., 1683	i 45, 53 i 183 ii 56	Vol. vi 603
iii. The Complete Copyholder. By Sir Edward Coke. With additions.	Mich., 1673	i 159	Vol. iii 209; Vol. v 460
iv. Arcana Clericalia, or the Mysteries of Clerkship; being a sure way of settling estates by deeds, etc. Forms of Charter parties, etc. By G. Billinghurst of Gray's Inn.	Easter, 1674	i 173	Vol. vi 604
v. The Law of Charitable Uses. Whereunto is added the learned Reading of Sir Francis Moore upon the statute of 43 Eliza. By George Duke of the Inner Temple.	Hil., 1676	i 232	Vol. v 395 n. 4 Vol. vi 616
vi. Modus Transferendi Status: being instructions for granting and transferring estates by matter of record.	Mich., 1676	i 258	Vol. vi 604
vii. The President of Presidents, or One general President for common Assurances by Deeds. By W. Sheppard, Esq. The Second Edition corrected.	Easter, 1677	i 276	Vol. v 397 n. 4
viii. A Compendious and accurate Treatise upon Recoveries upon Writs of Entry in the Post, and Fines upon Writs of Covenant.	Hil., 1678; Mich, 1692	i 303 ii 432	Vol. vi 604
ix. The Young Clerk's Guide. An exact Collection of choice English Precedents for all sorts of Indentures, etc. By Sir R. H., Counsellor, and revised by an able Practitioner. The fifteenth edition.	Hil., 1682; Mich., 1689 Mich., 1690	i 477; ii 294; ii 342	Vol. vi 604
x. Sir Orlando Bridgman's Conveyances.	Mich., 1682; Hil., 1690	i 507; ii 300	Vol. vi 604-605
xi. The Clerk's Grammar. Rules for drawing bonds and deeds.	Hil., 1684 Trin., 1699	ii 61; iii 147	Vol. vi 604
xii. A similar book published by different publishers.	Mich., 1684	ii 98	
xiii. *Ars Clericalis.* The art of conveyancing explained. By R. G., Gent.	Mich., 1690	ii 335	Vol. vi 604
xiv. The Modern Conveyancer, with an introduction concerning conveyancing in general.	Mich., 1694	ii 523	Vol. vi 604
xv. *Ars transferendi dominium.* The law of conveyancing. By John Brydall of Lincoln's Inn, Esq.	Trin., 1697; Trin., 1699	iii 25; iii 147	Vol. vi 604
xvi. *Modus Transferendi status per recorde.* Precedents for conveyances by fine or recovery; with two discourses as to their nature and operation and the practice relating to them. By W. Brown, clerk of the Common Pleas.	Trin., 1698	iii 76	Vol. vi 604
xvii. The Laws of Commons and Commoners, and the pleadings connected therewith.	Trin., 1698	iii 76	Vol. vi 603

(4) THE CRIMINAL LAW.

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. Advice to Grand Jurors in cases of Blood. By Zachary Babington, Gent.	Hil., 1677 Easter, 1680	i 268; i 394	Vol. vi 605
ii. Pleas of the Crown, a brief but full account of whatsoever can be found relating to that subject.	Hil., 1678	i 303	Vol. vi 605
iii. Pleas of the Crown. A methodical summary by Sir Matthew Hale.	Easter, 1678 Mich., 1681 Hil., 1685	i 312 i 467 ii 119	Vol. vi 591
iv. An Abridgment of the Laws of England touching Treasons, etc. By John Brydall, Esq.	Mich., 1678	i 334	Vol. vi 605
v. Decus et Tutamen, or A Prospect of the Laws of England framed for the safety of the King's Majesty. By John Brydall, of Lincoln's Inn.	Hil., 1679 Hil., 1680	i 342 i 383	Vol. vi 605
vi. The Laws of Q. Elizabeth, K. James, and K. Charles the First concerning Jesuits, etc.; and concerning the Oaths of Supremacy and Allegiance. To which is added the Statute xxv Car. II. cap. 2 for preventing dangers which may happen from Popish Recusants. By Will. Cawley of the Inner Temple, Esq.	Trin., 1680	i 405	Vol. vi 606
vii. An Explanation of the Laws against Recusants, etc., abridged by Joseph Keble, of Grayes Inn, Esq.	Trin., 1681	i 450	Vol. vi 606
viii. The Reading of Sir R. Holborne, Attorney General to King Charles I. upon the Statute of 25 Ed. III. c. 2; to which is added, Cases of Prerogative, Treason, Misprision of Treason, Felony, etc. By Francis Bacon.	Trin., 1681	i 450	Vol. v 395
ix. A Perfect Guide to Protestant Dissenters in case of Prosecution upon any of the Penal Statutes made against them.	Easter, 1682	i 487	Vol. vi 606
x. The Subjection of all Traytors etc. to the Laws and Tryals by Juries of England in the King's Bench at Westminster for treasons in Ireland or any Foreign Countrey: being an argument in the Court of King's Bench Hill 20 Caroli Regis in the case of Connor Maguire. By William Prynne, Esq.	Trin., 1682	i 500	
xi. The Traveller's Guide, and the Countries Safety. Being a Declaration of the Laws of England against Highwaymen. By J. M.	Hil., 1683; Mich., 1683; Trin., 1692	ii 7; ii 57; ii 413	Vol. vi 606
xii. Observations upon the Statute 22 Car. II. cap. 1, Entitled An Act to prevent and suppress Seditious Conventicles. By Sir Edmond Saunders, late Lord Chief Justice of England.	Hil., 1685	ii 113	Vol. vi 606
xiii. An abstract of the laws in force against profaneness, etc.	Trin., 1698	iii 76	Vol. vi 606

(5) COMMERCIAL LAW.

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. The Resolutions of the Judges upon the several Statutes of Bankrupts; as also the like resolutions upon 13 Eliza. and 27 Eliza. touching fraudulent Conveyances. By T. B., Esq.	Easter, 1670; Mich., 1676	i 35; i 263	Vol. vi 606
ii. Advice concerning Bills of Exchange. By Jo. Marius, Publick Notary. The Third Edition enlarged.	Midsummer, 1670	i 52	Vol. v 131 Vol. vi 606
iii. Index Vectigalium, touching customs, duties, etc.	Easter, 1671	i 72-3	
iv. De Jure Maritimo et Navali. In three Books. By Charles Molloy.	Hil., 1676; Mich., 1700	i 227; iii 220	Vol. v 131 Vol. vi 606
v. A New Book of Instruments fitted for the use of Attorneys and generally for all persons concerned in trade.	Trin., 1680	i 405	
vi. *Consuetudo vel Lex Mercatoria;* or the Law Merchant. By Gerard (de) Malynes, Merchant. The Third Edition, to which various Tracts are annexed.	Mich., 1686	ii 184	Vol. v 132-134 Vol. vi 606
vii. The Law against Bankrupts, with pleadings and forms. By Thomas Goodinge, Serjeant at law.	Mich., 1693; Easter, 1695	ii 478; ii 549	Vol. vi 606
viii. The Scrivener's Guide. A collection of Precedents for all sorts of business.	Trin., 1695	ii 558	
ix. The Reading upon the statute 13 Eliza. c. 7 touching Bankrupts, by John Stone.	Trin., 1695	ii 558	Vol. v 395 Vol. vi 606

(6) SPECIAL BRANCHES OF THE COMMON LAW.

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. March's Actions for Slander, and Arbitraments. Reviewed by W. B.	Hil., 1674	i 165	Vol. v 382, 393, 397
ii. Actions upon the Case for Slander. By William Sheppard, Esq.	Easter, 1674	i 175	Vol. vi 606
iii. Actions upon the case for Deeds, viz. Contracts, Assumpsits, Deceipts, Nuisances, Trover and Conversion, Delivery of Goods, and for other Malefeasance and Misfeasance. The Second Edition corrected. By William Sheppard, Esq.	Mich., 1674	i 193	Vol. vi 606
iv. The Law of Obligations and Conditions, dealing with the law as to Bills, Bonds, Conditions, Recognizances, and Defeasances. By J. A. of Gray's Inn, Esq.	Hil., 1693	ii 439	Vol. vi 606
v. Baron et Feme. A Treatise of the Common Law concerning Husbands and Wives.	Trin., 1700	iii 198	Vol. vi 607

(7) ECCLESIASTICAL LAW.

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. The Parson's Guide, or the Law of Tithes. The Second Edition, enlarged. By W. Sheppard.	Easter, 1670; Midsummer, 1670	i 40; i 45	
ii. The Touchstone of Wills, Testaments, and Administrations. By George Meriton, Gent.	Easter, 1671; Mich., 1674	i 77; i 193	
iii. Parson's Law, or A view of Advowsons. By Will. Hughes of Gray's Inn, Esq.	Hil., 1673	i 130	
iv. The Orphan's Legacy, or a Testamentary Abridgement in Three Parts. 1. Of Last Wills and Testaments. 2. Of Executors and Administrators. 3. Of Legacies and Devises. By John Godolphin, LL.Dr.	Mich., 1673; Mich., 1676; Mich., 1685	i 155; i 263; ii 150	Vol. v 15
v. The Office and Duty of Executors, or a Treatise of Wills and Executors. By Thomas Wentworth of Lincoln's Inn. With an Appendix by Thomas Manley, Esq.	Hil., 1676; Hil., 1690	i 232; ii 307	Vol. v 15
vi. The Parson's Counsellor, with the Law of Tithes. By Sir Simon Degge.	Easter, 1676; Mich., 1685; Hil., 1695	i 239; ii 150; ii 543	
vii. A Treatise of Testaments and last Wills. By Henry Swinburn, sometime Judge of the Prerogative Court of York. The Fourth Edition enlarged.	Trin., 1677	i 286	Vol. iii 537; Vol. v 14
viii. Reportorium Canonicum, or an Abridgment of the Ecclesiastical Laws of the Realm, consistent with the Temporal. By John Godolphin, LL.D.	Hil., 1678; Mich., 1679; Mich., 1687	i 303; i 376; ii 213	Vol. v 15
ix. Provinciale, seu Constitutiones Angliæ. Autore Gulielmo Lyndewode, J.V.D. Cui adjiciuntur Constitutiones Legatinæ D. Othonis et D. Othoboni, Cardinalium; et sedis Apostolicæ in Anglia Legatorum. Cum profundissimis annotationibus Johannis de Athono.	Hil., 1679	i 345	Vol. i 582-583; Vol. iii 537, etc.
x. The Parson's Monitor. By G. Meriton, Gent.	Trin., 1681	i 450	
xi. The Case and Cure of Persons excommunicated according to the present Law of England.	Trin., 1682	i 497	
xii. *Praxis* Franscisci Clerke, tam jus dicentibus quam aliis omnibus qui in foro Ecclesiastico versantur apprime utilis. Per Tho. Bladen, S.T.D. Editio Secunda priori multo castigator.	Hil., 1684	ii 65	
xiii. The Practice of the Spiritual and Ecclesiastical Courts: to which is added a brief discourse of the Structure and manner of forming the Libel or Declaration. By H. C.	Mich., 1684; Hil., 1700	ii 98; iii 176	
xiv. A Treatise of Sponsals and Matrimonial Contracts. By the late famous and learned Mr. Henry Swinburn.	Hil., 1686	ii 157	Vol. v 14

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. A Practical demonstration of County Judicatures, dealing with Sheriffs and Coroners, together with the Original, Jurisdiction and method of keeping all Countrey Courts. By William Greenwood. The Third Edition.	Easter, 1669; Easter and Trin., 1686	i 11 ii 171	
ii. A sure guide to His Majesties Justices of Peace. The Second Edition.	Mich., 1669	i 23	
iii. Officium Vicicomitum. The Office and Authority of Sheriffs. Corrected and much enlarged by Mich. Dalton, late of Lincoln's Inn, Esq., and one of the Masters of the Chancery. To which is added a Supplement of Statutes touching Sheriffs made since Mr. Dalton's writing.	Midsummer, 1670; Trin., 1682	i 52-53 i 499	Vol. iv 119 Vol. vi 607
iv. Reports of Special Cases relating to the City of London. By Sir H. Calthrop, sometime Recorder of London, together with an account of divers antient Customs of the said City.	Mich., 1670	i 63	Vol. v Vol. vi 608
v. A Guide for Constables, Churchwardens, Overseers of the Poor, etc. The Third Edition. By George Meriton, Gent.	Easter, 1671; Mich., 1674; Mich., 1676; Trin., 1679	i 77 i 193 i 263 i 363	
vi. The Duty and Office of High Constables of Hundreds, Petty Constables, tything men, and such inferior Ministers of the Peace. First collected by William Lambard; and and now enlarged by R. Turner, Gent.	Hil., 1672	i 100	Vol. iv 119 Vol. vi 607
vii. Officium Clerici Pacis. A Book of Indictments, etc. Also the manner of holding the Sessions of Peace.	Hil., 1675; Easter, 1676; Trin., 1692	i 199 i 242 ii 416	
viii. Jurisdiction of Courts Leet, Court Barons, Court of Marshalseys, Court of Pypowder, and Antient Demesne. By John Kitchin.	Hil., 1675	i 201	Vol. iv. 120-121 Vol. vi 607
ix. The Office and Authority of Coroners and Sheriffs. By John Wilkinson. The Fourth Edition, with additions.	Easter, 1675	i 206	
x. Camera Regis, or a view of London.	Mich., 1675	i 222	
xi. The exact Constable. As also the Office of Churchwardens and other inferior officers. By E. W. of Gray's Inn, Esq. The Fourth Edition.	Mich., 1676; Hil., 1680; Hil., 1682	i 259 i 388 i 478	
xii. The Court-keeper's Guide for the keeping of Courts Leet and Courts-Baron. With precedents of copies of Court-Rolls. By Will. Brown.	Mich., 1676	i 263	
xiii. The County Justice. The Practice of the Justices out of Sessions. By Mich. Dalton. To which is now added, the Duty and Power of Justices of Peace in their Sessions.	Trin., 1677; Mich., 1682; Hil., 1690; Trin., 1697	i 285 i 517 ii 307 iii 28	

(8) LOCAL GOVERNMENT—*continued.*

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
xiv. Choice Presidents upon all Acts of Parl. relating to the Office and Duty of a Justice of Peace. By R. Kilburne, Esq., late Justice of the Peace for Kent.	Hil., 1680; Trin., 1681; Mich., 1684	i 384 i 454 ii 106	
xv. Lex Londinensis, or the City Law. An account of the courts of the City, with several Acts of the Common Council.	Mich., 1680	i 417	Vol. vi 608
xvi. The practick part of the Office of a Justice of the Peace. A collection of precedents.	Mich., 1681	i 460	
xvii. A short Treatise touching Sheriffs' Accounts. By Sir Mathew Hale. To which is added A Tryal of Witches at Bury St. Edmunds, in 1664.	Mich., 1682	i 507	Vol. vi 589
xviii. An Assistance to Justices of the Peace. By J. Keble, of Gray's Inn, Esq.	Hil., 1683	ii 4	
xix. A Discourse touching Provision for the Poor. By Sir Mathew Hale.	Hil., 1683	ii 6	Vol. vi 589
xx. A Compleat Guide of Justices of Peace. By J. Bond, of Gray's Inn, Gent.	Mich., 1685; Trin., 1687; Trin., 1696; Trin., 1699	ii 145 ii 203 ii 594 iii 147	
xxi. The Charter of Romney Marsh, or the Laws and Customs of Romney Marsh.	Hil., 1686; Mich., 1690	ii 160 ii 342	Vol. vi 607
xxii. The Reading of Robert Callis, Esq., upon the Statute 23 H. 8, Chap. 5 of Sewers. The Second Edition, enlarged.	Hil., 1686; Mich., 1690	ii 160 ii 342	Vol v. 498
xxiii. The Laws and Customs of the Miners in the Forest of Dean.	Trin., 1687	ii 199	Vol. vi 608
xxiv. The Compleat Constable, to which is added a Treatise of Warrants and Commitments.	Hil., 1692	ii 393	
xxv. Calling and Qualifications of the Justice of the Peace, by Edmund Bohun.	Hil., 1693	ii 442	
xxvi. A Guide to Surveyors of Highways. By G. Meriton.	Hil., 1694; Hil., 1695	ii 492 ii 539	
xxvii. A help to magistrates, parish and ward officers, juries, coroners, constables, scavengers, etc.; rules of servants' wages, customs of London, penalties on forestallers, badgers, etc.	Hil., 1700; Trin., 1700	iii 175 iii 204	
xxviii. A new guide to Constables, Headboroughs, etc., containing heads of statutes relating to them to the present time. By J. P., Gent.	Mich., 1700	iii 213	

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. Jus Sigilli, or The Law of England touching His Majesties four principal Seals. Also of those grand Officers to whose custody these Seals are committed.	Trin., 1673; Hil., 1696; Trin., 1696	i 144 ii 573 ii 595	Vol. vi 608-609
ii. Jus Imaginis apud Anglos, or the Law of England relating to the Nobility and Gentry. By John Brydall.	Hil., 1675	i 199	Vol. vi 608
iii. The Ancient Method and Manner of holding Parliaments in England. By Henry Elsynge, Esq. The Third Edition enlarged.	Easter, 1675	i 206	Vol. vi 608
iv. The Privileges and Practice of Parliaments in England.	Mich., 1679	i 373	
v. Jura Coronæ. His Majesties Royal Rights and Prerogatives asserted.	Hil., 1680	i 384	Vol. vi 608
vi. The Soveraign, or a political discourse upon the Office and Obligations of the Supreme Magistrate.	Easter, 1680	i 397	
vii. The Constitution of Parliaments in England, deduced from the time of King Edward the Second. By Sir J. P. Knight, a late Member of Parliament.	Trin., 1680	i 408	
viii. John Selden. Of the Judicature of Parliaments.	Easter, 1681; Easter, 1689	i 443 ii 251	Vol. i 366 Vol. v 409
ix. Rights of the Kingdom, or Customs of our Ancestors. Touching the Duty, Power, Election, or Succession of our Kings and Parliaments; historically treated.	Hil., 1682	i 477	
x. The King's Prerogative, and the Subject's Priviledges, asserted according to the Laws of England. By J. N.	Mich., 1683	ii 50	
xi. Memorials of the methods and manner of Proceedings in Parliament in passing Bills. Together with Orders of the House. By H. S., Esq.	Trin., 1685; Easter, 1689	ii 138 ii 252	
xii. Arcana Parliamentaria, or Precedents concerning Elections, Proceedings, Priviledges, and Punishments in Parliament. By R. C. of the Middle Temple, Esq. To which is added the Authority, Form, and Manner of holding Parliaments. By the learned Sir Tho. Smith, Doctor of Laws.	Trin., 1685	ii 138	Vol. iv 174 seqq.
xiii. Methods, Orders, and Proceedings heretofore used in the House of Lords. By Henry Scobell. To which is added the Privileges of the baronage of England by John Selden.	Trin., 1689	ii 280	Vol. v 409
xiv. *Lex Parliamentaria*, by G. P.	Trin., 1690	ii 321	
xv. Freedom of election to Parliament a Fundamental Law.	Trin., 1690	ii 323	
xvi. English Liberties, containing Magna Carta and other Statutes with a commentary; also information as to Appeals of Murder, Parliament, Jurors, the Toleration Act, Penal laws against Roman Catholics, duties of Constables, etc.	Trin., 1692	ii 416	

(10) POLITICAL TRACTS.

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. The Pretended Perspective Glass; or some Reasons against the proposed Registering Reformation.	Easter, 1671	i 73	Vol. vi 610
ii. Reasons for the continuance of Writs of Copies and Process of Arrests in Actions of Debt.	Easter, 1671	i 73	Vol. vi 610
iii. The Reforming Registry. Mischiefs which will arise from the proposed County Registeries for recording Deeds, Evidences, and Mortgages of freehold land. By Fabian Philips, of the Middle Temple, Esq.	Easter, 1671	i 73	Vol. vi 610
iv. Regale Necessarium, or the Legality and Necessity of the Privileges claimed by the King's Servants. By Fabian Philips, Esq.	Easter, 1671	i 73	
v. The ancient and necessary rights of Courts of Justice, in Writs of Copies, Arrests, and process of Outlawry, and the inconvenience of the proposal to abolish them in Actions of Debt.	Hil., 1677	i 268	Vol. vi 610
vi. Reasons against a Registry for Lands, etc. In answer to a late Book, Entituled, "Reasons for a Registry, with some Reasons for a Registry of personal Contracts."	Trin., 1678	i 321	Vol. vi 610
vii. The Clergy Vindicated, or the rights and Priviledges that belong to them asserted; more particularly touching the sitting of Bishops in Parliament, and their making Proxies in Capital Cases.	Mich., 1679	i 372	Vol. vi 609
viii. The Honour of the Lords Spiritual asserted and their Priviledges to vote in Capital Cases.	Trin., 1679; Easter, 1680	i 364 i 398	Vol. vi 609
ix. The Grand Question concerning the Bishops' right to vote in cases Capital stated.	Mich., 1679; Easter, 1680(?)	i 374 i 398	Vol. vi 609
x. A Letter shewing that the Bishops are not to be judges in Parliament in Cases Capital.	Mich., 1679	i 375	Vol. vi 609
xi. The Ancient right of the Commons of England asserted, showing that the Commons were ever an essential part of Parliament. By William Petyt.	Mich., 1679	i 375	
xii. The Power of the Lords and Commons in Parliament, in point of Judicature.	Hil., 1680	i 383	Vol. vi 609
xiii. A Survey of the Lord High Steward of England, his Office, Dignity, and Jurisdiction. In a Letter to the Lords in the Tower. Written at the request of their Lordships by an eminent Lawyer.	Hil., 1680	i 383	Vol. vi 609
xiv. The Right of Tithes Reasserted, especially from the Objections taken out of Mr. Selden's "History of Tithes."	Easter, 1680	i 397	Vol. vi 609

(10) POLITICAL TRACTS—*continued.*

Name of Book and Author.	Date of Publication.	Reference in the Term Catalouges.	Reference in this History.
xv. The Englishman's Right. A Dialogue between a Barrister at Law and a Juryman.	Trin., 1680; Mich., 1680	i 407 i 424	
xvi. Jani Anglorum facies Nova, or Several Monuments of Antiquity touching the Great Councils of the Kingdom. Wherein the sense of the Common Council of the King concerning Clergymen's Voting in Capital Cases is submitted to the Judgement of the Learned.	Trin., 1680	i 408	Vol. vi 609
xvii. The Grand Juryman's Oath and Office explained. A Dialogue between a Barrister and a Grand Juryman.	Mich., 1680	i 417	Vol. vi 609
xviii. Leges Angliæ, the Lawfulness of Ecclesiastical Jurisdiction in the Church of England asserted in answer to Mr. Hickeringill's late Scandalous Pamphlet. By Francis Fullwood, D.D.	Hil., 1681	i 429	Vol. vi 609
xix. A full and clear Answer to a Book, written by William Petyt, Esq. Together with some Animadversions upon a Book called Jani Anglorum Facies Nova.	Hil., 1681	i 429	Vol. vi 609
xx. Jenkinsius Redivius, or the Works of Judge Jenkins whilst a Prisoner in the Tower at Newgate by command of the rebellious Long Parliament.	Easter, 1681	i 439	
xxi. A Vindication against the trivial objections of one Fullwood in a libelling Pamphlet entitled "Leges Angliæ." By Phil. [or rather Edward] Hickeringill.	Easter, 1681	i 441	Vol. vi 609
xxii. The Bishops' Court Dissolved, or the Law of England touching Ecclesiastical Jurisdiction stated.	Trin., 1681	i 452	Vol. vi 609
xxiii. Proceedings against the Right Honourable the earl of Shaftesbury.	Hil., 1682;	i 475	Vol. vi 609
xxiv. Billa Vera, or the Arraignment of Ignoramus.	Hil., 1682	i 476	Vol. vi 609
xxv. Proceedings at the Sessions of the Peace held at Hicks Hall, Dec. 5th, 1681, concerning putting the Laws in Execution against Popish Recusants and Conventicles.	Hil. 1682	i 476	
xxvi. The Forfeitures of London's Charter.	Easter, 1682	i 487	Vol. vi 610
xxvii. The City of London's Plea to the Quo Warranto.	Trin., 1682	i 495	Vol. vi 610
xxviii. The Replication to "The City of London's Plea to the Quo Warranto."	Trin., 1682	i 495	Vol. vi 610
xxix. London's Liberties, or the Opinions of L.C.J. Hale, Wylde J., and Serjeant Maynard about the election of Mayor, Sheriffs, Aldermen, and Common Councilmen of London, and concerning their Charter and the forfeiture of it.	Mich., 1682	i 517	Vol. vi 610

(10) POLITICAL TRACTS—*continued.*

Name of Book and Author.	Date of Publication.	Reference in the Term Catalouges.	Reference in this History.
xxx. The Case of the Charter of London stated.	Trin., 1683	ii 29	Vol. vi 610
xxxi. An Introduction to the old English History. An Answer to Petyt's Right of the Commons Asserted, to Jani Anglorum facies Nova, and to a book entitled Argumentum Anti-normanicum. Also a History of the succession to the Crown. The Second Edition. By Robert Brady, Doctor of Physick.	Trin., 1684	ii 83	Vol. vi 609
xxxii. An Appeal to the Conscience of a Fanatick. Showing that the King of England is as absolute and independent a Monarch as any of the Kings mentioned in Scripture.	Trin., 1684	ii 86	
xxxiii. The Prerogative of the Monarchs of Great Britain asserted. Also a Confutation of that false maxim that Royal Authority is originally in the People.	Trin., 1684	ii 87	
xxxiv. The Established Government of England vindicated from all Republican Principles. By Fabian Philips of the Middle Temple, Esq.	Mich., 1686	ii 180	
xxxv. Tracts upon the case of Godden v. Hales by Herbert, C.J.	Easter, 1689	ii 251-252	Vol. vi 223
xxxvi. Tracts on the powers etc. of Parliament, and a discourse concerning Ecclesiastical Jurisdiction in England. By Sir R. Atkyns.	Easter, 1689	ii 252	Vol. vi 609
xxxvii. Discourse in answer to a vindication of the late Ecclesiastical Commission.	Trin., 1689	ii 278	Vol. vi 609
xxxviii. Book of Oaths. Forms of oaths for public servants.	Mich., 1690	ii 341	
xxxix. A proposal for creating County Registers for freehold land. By E. Bohun.	Mich., 1696	ii 604	Vol. vi 610
xl. Arguments and materials for a Register of Estates.	Hil., 1698	iii 57	Vol. vi 610

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. Modus Tenendi Parliamentum. Together with some Privileges of Parliament, and the manner how Laws are there enacted. By W. Hakewill, Esq. of Lincoln's Inn.	Hil., 1671	i 69	Vol. ii 424-452 Vol. vi 611
ii. A brief discourse touching the Office of Lord Chancellor. By John Selden, Esq. With a true catalogue of Lord Chancellors and Lord Keepers from the Norman Conquest till this present year 1671. By William Dugdale, Esq., Norroy King of Arms.	Trin., 1671; Trin., 1677	i 81; i 286	Vol. v 409 Vol. vi 597
iii. Origines Juridicales, or Historical Memorials of the English Laws, etc. By Will Dugdale, Esq., Norroy King of Arms.	Mich., 1671; Trin., 1680	i 90 i 410	Vol. vi 596
iv. De Laudibus Legum Angliæ by Sir John Fortescue. With Hengham's Magna and Parva, and Selden's notes on Fortescue and Hengham.	Mich., 1672	i 124	Vol ii 569-570 Vol. vi 611
v. Tractatus de legibus et consuetudinibus Regis Anglicæ, by Glanvil.	Trin., 1673	i 144	Vol. ii 188-192
vi. Fragmenta Antiquitatis. Ancient Tenures of Land, and Jocular Customes of some Mannors. By Thos. Blount, of the Inner Temple, Esqr.	Hil., 1679	i 342	Vol. vi 611
vii. The Great Charter of the Forest. With some observations taken out of Coke's Fourth Institute.	Easter, 1680	i 394	Vol. vi 611
viii. The Royal Charter of Confirmation granted by King Charles II. to the City of London. By S. G., Gent.	Easter, 1680	i 394	
ix. Magna Carta. Observations from Coke's comments upon it. Translated by Edw. Coke of the Middle Temple, Esqre.	Trin., 1680 Hil., 1682	i 405 ii 479	Vol. vi 611
x. The Journals of all the Parliaments during the reign of Queen Elizabeth. By Sir Symonds D'Ewes. Revised and published by Paul Bowes of the Middle Temple, Esqre.	Easter, 1682; Mich., 1692	i 486 ii 431	Vol. v 405 Vol. vi 486
xi. Of the Law Terms. By Sir Henry Spelman.	Mich., 1683	ii 45	Vol. vi 611
xii. A perfect Copy of all Summons of the Nobility to the great Councils and Parliaments of this Realm from 49 Henry III. to the present time. Extracted from publicke Records by Sir William Dugdale.	Mich., 1685	ii 145	
xiii. Chronica Juridicalia. A calendar of the Kings of England, the Lord Chancellors, Lord Keepers, Judges, and Serjeants, and of Archbishops and Bishops who have held high office in the state.	Mich., 1685	ii 145	
xiv. Cotton's Abridgment of Records. By Sir W. Prynne.	Easter, 1689	ii 262	Vol. ii 423 Vol. v 406
xv. Historical account of penal laws enacted by Papists against Protestants, and by Protestants against Papists—a vindication of the Reformation. By S. Blackerberry [should be Blackerly] barrister of Grey's Inn.	Trin., 1689	ii 273	Vol. vi 611
xvi. Reliquiæ Spelmannianæ, the posthumous works of Sir Henry Spelman.	Hil., 1698; Hil., 1699	iii 56 iii 110	Vol. vi 611

(12) GENERAL

Name of Book and Author.	Date of Publication.	Reference in the Term Catalogues.	Reference in this History.
i. A Law Dictionary. By Tho. Blount, Esqre.	Mich., 1670; Hil., 1691	i 58 ii 351	Vol. vi 612
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