THE COMMON LAW OF ENGLAND

BY A KING'S COUNSEL
WITH A FOREWORD BY
THE RIGHT HONOURABLE
VISCOUNT JOWITT
OF STEVENAGE
LORD HIGH CHANCELLOR

HOLLIS & CARTER

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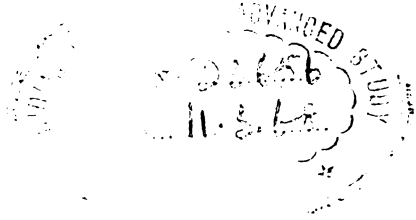

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FOREWORD

THE AUTHOR of these lectures, which were originally given as broadcast talks under the general title of "The Common Law of England", has decided to reproduce them in print; and to this reproduction he has asked me to write a foreword.

I feel honoured that I have been asked to do so, for I think his work possesses real distinction.

He desires to remain anonymous and I must of course respect his wishes, but he cannot hide certain clues as to his identity.

It is plain that he is a scholar, well versed in the history of our law, and that he has a feeling, almost of veneration, for its origin and structure.

All members of the Bar are traditionally "learned", yet there are not many of my learned friends who have that degree of learning necessary for the preparation of these lectures, and very few even of that select band who could have reproduced that necessary learning with such wit and charm.

And there, gentle reader, my hints must stop, but I feel sure that—alike on your behalf and on my own—I may urge the author to carry on his good work and give us some more talks as good as these.

JOWITT.

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I

THE HISTORY OF THE INNS OF COURT

THE COMMON LAW OF ENGLAND is certainly one of the great civilizing forces of the world. Its abiding home is in those four Inns of Court, Gray's Inn, Lincoln's Inn, the Middle and the Inner Temple, which for some seven centuries have formed the legal quarter of London.

The Inns of Court, as most people know, are the centre of the legal life of England and Wales. Through the wide expansion of the Common Law, which the early settlers took with them to plantations and colonies, the Inns of Court are also, in an historical sense at least, the centre of the legal life and memory of the Dominions and most of the British Colonies and possessions.

The way of life and thought of the United States—except in Louisiana which, one may recall, was purchased from France—follows the tradition of the Common Law. Even more; as men and women of any nation may join the Inns of Court and "eat their dinners" and be called to the Bar, the influence of the Inns extends to many countries whose legal systems lie outside our tradition. Between the wars an English judge on the Court of International Justice at The Hague found, to his surprise, that two of his fellow judges approached and handled legal problems much as he did. It turned out that both of them, who came from China, had learned their law at the Inns of Court. And so one understands why, during the war years, there was grief in many hearts when lawyers all over the world learnt that the ancient Halls and Libraries of the Inns of Court had suffered so much damage and destruction. Happily, the main buildings of Lincoln's Inn were spared; including the Old Hall, which dates from the fifteenth

century, and holds many memories of the most illustrious of the common lawyers, Sir Thomas More. But who will give us back the gem of Tudor architecture that was Gray's Inn Hall? Or the glorious screen and minstrels' gallery that embellished the spacious and lovely Hall of the Middle Temple? Who will restore the many thousands of books and manuscripts that attracted scholars from all parts to the Library of the Inner Temple?

The Common Law belongs in origin and outline to the age which gave us the Cathedrals and the Abbeys of England, and those ancient centres of Christian philosophy and theology, the Universities of Oxford and Cambridge. In the year 1185, as the Round Church of the Temple was being consecrated, the first book of the Common Law was being written by Hubert Walter, a prelate of the Church, who afterwards became Archbishop of Canterbury and Lord Chancellor.[1] During the whole of the twelfth and the thirteenth centuries, English law was administered by the ablest, the best-educated men in the realm: by the self-same men who were the "judges ordinary" of the Courts Christian.[2] These were ecclesiastical Courts, staffed by canon lawyers, and exercised a jurisdiction over layfolk not only in spiritual matters, but also in matters of marriage and legitimacy, and of wills and intestacies. The records of the reign of Richard I give a picture of the King's Court as it sat day by day. It was often enough composed of the Archbishop of Canterbury, two other bishops, two or three ordained clerks and two or three laymen.[3] In their journeys through the realm the King's Justices came in contact with local customs and usually expressed respect for them. Nor did they show any conscious desire to root them out. None the less, if local customs were not destroyed, there was a check to their further growth. The law of the King's Justices was the

custom of the King's Court, as opposed to the special customs and privileges of any county or borough. As the King's Court organized itself, says Professor Maitland, "slowly but surely justice done in the King's name becomes the most important kind of justice, reaches out into the remotest corners of the land, grasps the small affairs of small folk, as well as the great affairs of earls and barons. Above all local customs rose the custom of the King's Court": in other words, the Common Law of England.[4]

It was a clause in Magna Carta which led to the establishment of a permanent Court at Westminster Hall, and to the concentration in its neighbourhood of the judges and the men at law. There in the Great Hall at Westminster, built by William Rufus in 1097, the King's Courts sat from the reign of King John to that of Queen Victoria. It was only sixty years ago that the seat of justice was moved to the new Courts in the Strand, midway between the Middle Temple and Lincoln's Inn; and flanked on one side by the premises of the Law Society which represents the tradition of the old Inns of Chancery.

In the middle of the thirteenth century, Henry of Bracton, Chancellor of Exeter Cathedral, "a man of genius as a lawyer and of talent as a Latinist," protesting that ignorant and unlettered men were ascending the chair of justice before they had learned the law, wrote his great work on the Laws and Customs of England. This book, 'the crown and flower of English medieval jurisprudence', was a leading textbook of the law and had no competitor in literary style and completeness of treatment till Blackstone composed his Commentaries five centuries later.[5] During all that time, at the Cathedral of Exeter, where Henry of Bracton lies buried, there sounded each morning a bell that was called Bracton's bell. I wonder if the bell still sounds which called men to Mass or Matins in his

name? For the words of Henry of Bracton still echo in our courts: "Everyman is presumed to be a good man till the contrary is proved by lawful evidence." "Everyman is by virtue of his nature free." "The King is under God and the law."[6] These last words were repeated by Sir Edward Coke in an historic altercation with James I, now claiming to rule by divine right.[7] And they were used at Nuremberg by Justice Robert Jackson of the Supreme Court of the United States who, speaking as Counsel for the prosecution declared that the Charter of the Tribunal showed "a faith that even rulers are under God and the law."[8]

The Pope was responsible for the withdrawal of the churchmen from the courts of Common Law and it was this which led to the appointment of new judges from the body of lay lawyers. To this day the English judges are drawn from practitioners at the Bar and live with them as colleagues in the Inns of Court where the men of law made their home in the fourteenth century, in the open space between the City of London and the Courts at Westminster. The English practice of appointing judges from the Bar is in striking contrast with the continental rule which obliges young men to elect between the career of an advocate and that of a judge. A continental lawyer who chooses a judicial career becomes in effect a civil servant, and, entering at the lowest rank of judicial office, makes his way, as a civil servant, from grade to grade, and scarcely knows what it is to be independent of the Executive. The independence of the English Bench and Bar is the last safeguard of English liberty.[9]

After the constitution of the Inns of Court the clergy were no longer "the only learned men in England, the only cultivated men, the only men of ideas." That, I think, is an important point. Vigorous intellectual effort was to be found outside the monasteries and the universities. "These

lawyers," says Professor Maitland, "are worldly men, not men of sterile caste, they marry and found families, some of which become as noble as any in the land; but they are in their way learned, cultivated men, linguists, logicians, tenacious disputants, true lovers of the nice case and the moot point. They are gregarious, clubable men, grouping themselves in hospices or Inns which became schools of law, multiplying manuscripts, arguing, learning and teaching, the great mediators between life and logic, a reasoning, reasonable element in the English nation."[10]

Between the fourteenth and seventeenth centuries the Inns of Court were the "university and Church Militant of the Common Law."[11] Law was taught in English, French and Latin. In fact the current language of the Common Law was for centuries a kind of Norman French. The long series of Year Books which contain a record of arguments used in Court are written in Law French. Even to-day most of our legal terms are French. Think of it: court, justice, judge, counsel, attorney, party, plaintiff, defendant, action, indictment, verdict, conviction, judgment, sentence, execution—all are French names. For this reason, the Common Law was not taught in the Middle Ages at Oxford or at Cambridge where science was studied only in Latin.[12] Moreover, a training in manners befitting a gentleman (which was a large part of the aim of the Inns of Courts) then formed no part of the academic curriculum of Cambridge or Oxford. To be educated at the Inns of Court, writes Erasmus, is reckoned among Englishmen to be no small part of nobility.[13]

During the Wars of the Roses which, according to Shakespeare, began with the plucking of a red rose and a white rose by two lawyers in the Temple Gardens,[14] Sir John Fortescue wrote his delightful book *De Laudibus*, "In praise of the Laws of England," and another book,

De Monarchia, on the Governance of England, which is the first treatise on Constitutional Law in English. In these books he fiercely condemns the use of torture in legal process as contrary to all the rules of justice, and a pathway to hell. He declares it is better that twenty guilty men should escape through pity, rather than that one innocent man should be condemned. And he also points the distinction between constitutional and absolute monarchy. "The King of England is not able to change the laws without the assent of his subjects, nor to burden an unwilling people with strange taxes."[15]

These principles are still part of the living law, though the power of a modern Chancellor of the Exchequer to burden an unwilling people with strange taxes which are "cheerfully granted" by the Commons is more assured and more extensive than that of a medieval king.[16]

In the constitutional struggles of the seventeenth century, the books and arguments of Bracton and Fortescue were in the hands and on the lips of Sir Edward Coke and John Selden and all those who defended the old ideas of constitutional liberty against the new notion of divine right. But when, after the Revolution of 1688, the divine right of Kings gave way to the divine right of Parliament, it was Common lawyers again like Chief Justice Holt and Sir William Blackstone who ventured to doubt the new orthodoxy. "An Act of Parliament", said Chief Justice Holt, "can do no wrong though it may do several things that look pretty odd. An Act of Parliament may not make adultery lawful; that is, it cannot make it lawful for A to lie with the wife of B, but it may make the wife of A to be the wife of B and so dissolve her marriage with A."[17]

And as for statutory rules and orders, who shall forget the dictum of the late Mr. Justice Darling apropos an order of the Ministry of Food: "This document seems to

me to have been drafted by a grocer and a lawyer. And the grocer seems to have done the lawyer's part, and the lawyer to have done the grocer's part."

When the Parliamentarians claim that their power is transcendent and absolute and cannot be confined within any bounds; and that, if you please, they may at their discretion make a law which is unjust and contrary to the principles of sound government, a common lawyer is dumb.[18] Is Parliament not bound by the rules of justice?

I borrow one final sentence from Maitland: "What is distinctive of medieval England is not Parliament, for we may everywhere see assemblies of estates, nor trial by jury, for this was but slowly suppressed in France. But the Inns of Court and the Year Books that were read therein, we shall hardly find their like elsewhere."[19]

NOTES AND REFERENCES

1. For the opinion that the book which is called Glanvill (*Summa quae vocatur Glanvill*) is in fact the work of Hubert Walter, see Holdsworth, *History of English Law*, Vol. 2 (1923 ed.), pp. 189-190. Professor Holdsworth thinks there is "considerable probability" in the conjecture of Maitland that the book was written by Hubert Walter, but with Glanvill's consent, and perhaps under his supervision. The opinion of Maitland is to be found in Pollock and Maitland, *History of English Law*, 2nd edition, Vol. 1, pp. 164-5. As a prelate of the Church, Hubert Walter would naturally be acquainted with the main principles and the methods of the Canon law. "English law", says Maitland, "more especially the English law of civil procedure, was rationalized under the influence of the canon law": ibid., p. 134.
2. Pollock and Maitland, *H.E.L.*, 2nd edition, Vol. 1, pp. 132-3.
3. Ibid., p. 132.
4. For the way in which the custom of the King's Court came to be the custom of England, and therefore the Common Law of England, see Pollock and Maitland, *H.E.L.*, 2nd edition, Vol. 1, pp. 184-6. The overseas' development of the Common Law is illustrated by Sir Frederick Pollock in *The Expansion of the Common Law*. See also the admirable work of Prof. Theodore Plucknett, *A Concise History of the Common Law*, 4th ed., 1948.

5. A new edition of Bracton, *De Legibus et Consuetudinibus Angliae*, is in course of being published by a well-known American Scholar, Dr. George E. Woodbine, of Yale. Four volumes have been published: Vol. 1 (1915); Vol. 2 (1922); Vol. 3 (1940); Vol. 4 (1942). One volume is to come.

   In a learned article in the *English Historical Review* for May, 1945 (Vol. 60, pp. 136-176), a distinguished scholar in the Roman Civil Law, Dr. Fritz Schulz, traced some of the sources on which Bracton drew or may be supposed to have drawn in writing the part of the *De Legibus* that deals with Kingship. According to Dr. Schulz, Bracton took his legal (and his theological) principles from the Old and New Testaments, the Councils and Fathers of the Church, the *Decretum* of Gratian and the *Decretals* of Pope Gregory IX, the *Summa de Causis* and the *Summa de Matrimonio* of Raymond of Pennafort, the *Summa Decretalium* of Bernard of Pavia, the *Ordo Judiciarius* and the *Summa de Matrimonio* of Tancred, from the *Corpus Juris Civilis*, and from Azo of Bologna, "the master of all the masters of the law"; and from his own English masters, Martin Pateshull and William Ralcigh. See *Bracton and Azo*, and *Bracton's Note-book*, by F. W. Maitland.

6. "*De omni homine presumitur quod sit bonus homo donec probetur in contrarium.*" "*Libertas est naturalis facultas ejus, quod cuique facere libet, nisi quod jure aut vi prohibetur. Sed secundum hoc videtur quod servi sint liberi . . . In hac parte jus civile vel gentium detrahit juri naturali . . .*"

   "*Rex non debet sub homine sed sub Deo et sub lege quia lex facit regem . . . Attribuat igitur rex legi quod lex attribuit ei videlicet dominationem et potestatem. Non est enim rex ubi dominatur voluntas et non lex.*"

   There follows a piece of reasoning which, with its direct references to our Lord and our Lady, shows that the essential rule of the English Constitution was dictated by the Christian spirit and stamped with the Christian character: *Et quod sub lege esse debeat, cum sit dei vicarius, evidenter apparet ad similitudinem Ihesu Christi, cuius vices gerit in terris. Quia verax dei misericordia, cum ad recuperandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, qua ad destruendum opus diaboli non virtute uteretur potentiae sed iustitiae ratione. Et sic esse voluit sub lege, ut eos qui sub lege erant redimeret. Noluit enim uti viribus, sed iudicio. Sic etiam beata dei genetrix, virgo Maria, mater domini, quæ singulari priveligio supra legem*

fuit pro ostendendo tamen humilitatis exemplo legalibus subdi non refugit institutis. Sic ergo *rex, ne potestas sua maneat infrenata. . . .*"

7. In a speech in the Star Chamber in 1616, James I declared: It is atheism and blasphemy to dispute what God can do. Good Christians content themselves with His will revealed in His word. So, it is presumption and high contempt in a subject to dispute what a King can do or say, that a King cannot do this or that: but rest in that which is the King's Will revealed in his Law."

Coke: "Your Majesty, the law is the golden measure to try the causes of his subjects and which protects His Majesty in safety and peace. The King cannot take any case out of his Courts and give judgment upon it himself. The judgments are always given *per curiam* and the Judges are sworn to execute justice according to the law and customs of England.

James I: "This means that I shall be under the law which it is treason to affirm."

Coke: "Sir, Bracton saith: '*Quod Rex non debet esse sub homine sed sub Deo et sub lege*'."

His Majesty (we are told) "fell into that high indignation as the like was never known in him, looking and speaking fiercely with bended fist, offering to strike him; which the lord Coke perceaving fell flat on all fower."

8. See *Proceedings of the International Military Tribunal at Nuremberg*, Part 1, p. 78.

9. At the Lord Mayor's Banquet, 1946, Viscount Jowitt, Lord Chancellor, declared that the legal profession were the inheritors of a great tradition. "They had in the past asserted their freedom and independence from the interference of the Crown. To-day, they are prepared to assert their freedom and independence from the Executive." *The Times*, 11 November, 1946.

10. F. W. Maitland, Introduction to the *Year Books of Edward II*, Selden Society.

11. The phrase is taken from the fine work by Professor Lévy-Ullmann on the *English Legal Tradition*, p. 87.

12. Fortescue, *De Laudibus Legum Angliæ*, cc. 48-49 ed. Chrimes, 1942, pp. 115-121. On the use of 'Law French', see *Cambridge History of English Literature*, Vol. 1, pp. 407-412; Pollock and Maitland, *H.E.L.*, Vol. 1, pp. 80-87.

13. In a letter to one Faber, apropos Sir Thomas More, Erasmus writes: *Natus est Londini, in qua civitate multo omnium celeberrima natum et educatum esse apud Anglos nonnulla nobilitatis pars habetur.*

14. In the First Part of *King Henry VI*, the fourth Scene of the Second Act is laid in the Temple Garden. The players are the Earls of Somerset, Suffolk and Warwick; Richard Plantagenet, Vernon, and a lawyer.

Plantagenet:
Since you are tongue-tied and so loath to speak
In dumb significants proclaim your thoughts:
Let him that is a true-born gentleman
And stands upon the honour of his birth,
If he suppose that I have pleaded truth,
From off this brier pluck a white rose with me.

Somerset:
Let him that is no coward and no flatterer,
But dare maintain the party of the truth,
Pluck a red rose from off this thorn with me.

Warwick:
I love no colours, and without all colour,
Of base insinuating flattery
I pluck this white rose with Plantagenet.

Suffolk:
I pluck this red rose with young Somerset
And say withal I think he held the right.

15. *De Laudibus Legum Angliæ*, Chrimes' edition, 1942. On Torture, Cap. 22, pp. 47, 51, 53. On Absolute and Limited Monarchy, cc. 9-14, 34, 35, 36, 37, pp. 25-35, 79-93. On Taxes and Tallages, cc. 9, 36, pp. 25, 87.

16. The Preamble to each Finance Act runs as follows: Most Gracious Sovereign: We, Your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom in Parliament, assembled towards raising the necessary supplies to defray Your Majesty's public expenses and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned and do therefore most humbly beseech Your Majesty that it may be enacted and be it enacted by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same.

The Preamble to every Consolidated Fund Act is as follows: Most Gracious Sovereign: We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards making good the supply which we have cheerfully granted to Your Majesty in this session of Parliament, have resolved to grant unto Your Majesty the sums hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same.

17. The citation is taken from the judgment of the Lord Chief Justice in the famous case of *The Mayor of London v. Wood*, 1692. 12 *Modern Reports*.

18. In the current (1946) edition of *May's Parliamentary Practice*, it is said that "the constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government: but Parliament is not controlled in its discretion and when it errs its errors can only be corrected by itself . . . The power of Parliament is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds."

The claim of Parliament to set aside the principles of prudence and of justice is illustrated in a speech of Sir Hartley Shawcross, K.C., M.P., Attorney-General, which is reported in *The Times* newspaper dated 13th May, 1946: "Parliament is sovereign; it can make any laws. It could ordain that all blue-eyed babies should be destroyed at birth: but it has been recognized that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, those laws will be supported and can be enforced."

Parliamentary jurisprudence, it seems, recognizes no principles or limits of justice or of right; it is a nice calculation of force.

19. Maitland, *English Law and the Renaissance*, Essays in Anglo-American Legal History. Vol. 1, p. 200.

II

THE SUBSTANCE OF THE COMMON LAW

THE WORLD is ruled by two great systems of law and legal tradition: first, we have the Roman Civil Law with a history of twenty-five centuries: the law of a city that became an Empire; and secondly, the English Common Law, with a history of eight centuries: the law of a country that became a Commonwealth.

Now you may ask: why was not the Roman Law taken as a model for the Common Law? It had been the law of Britain during the Roman occupation, in the first four centuries of the Christian era. In the sixth century it had been reduced to order by the Emperor Justinian in his Code and Digest; and, after the disorders of the Dark Ages, early in the century that gave us the beginnings of the Common Law, the manuscripts of Justinian had been re-discovered and there was throughout Europe a mighty renaissance of Roman Law. The laws of Justinian, like a great wave on an undefended coast, seemed likely to submerge Italy, France, even England, and to wipe out all trace of the customs which the folk lawyers of Europe had laboriously and clumsily raised.[1] The English coasts were overrun. A school of Roman Law was actually set up at Canterbury.

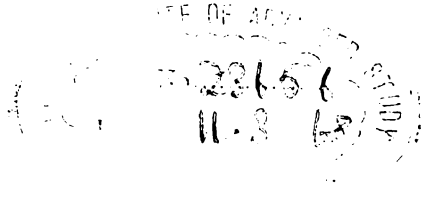
In that hour of peril some unknown man among the lawyers of the King's Court made a decision that was big with fate not only for England, but also for several undiscovered continents; and that was in the end for the good of the whole world.[2] The unknown Englishman rejected the enchantment to which Italy, France and Germany were to yield. He turned his eyes away from the fascinating pages of the Roman Law, and designed for England a new system more suited to the habit and way of life of Christian

men and free men; a system which Oliver Wendell Holmes, afterwards Justice of the Supreme Court of the United States, declared to be "a far more developed, more rational, and mightier body of law than the Roman."[3]

For all its technical perfection, Roman Law was in origin and essence a pagan thing. It obliged man to pay divine honours to the Emperor, as the story of the Christian martyrs shows. It gave him absolute power and legislative omnipotence. The pleasure of the prince had the force of law. Hence, I think, the tendency to totalitarianism that follows the tradition of the Roman Law, as we have recently seen in Germany and in Italy. It was a French King, too, who declared: "L'Etat, c'est moi."

In the field of family relations, Roman Law gave the like omnipotence to the *paterfamilias*. He could control his son of any age; he could forbid his marriage at any age; he could force a marriage on him; could compel him to divorce his wife.[4] In matters of property, everything was for the father. The son was like a slave. The institution of slavery was the brute basis of the whole system. In essence, a slave was a human being without rights: not a person, but a living instrument or thing.

The men who made the Common Law of England, rejecting the lure of the Roman Law, fashioned a system suited to the life of a free community; and animated by the principles of Christian thought. These men were not without experience of slavery. One recalls the English boys and girls in the slave market at Rome, whom Gregory called *non Angli sed Angeli*. At the Norman Conquest a flourishing slave trade was being carried on at Bristol. In fact, the larger half of the rural population of England was unfree, slave or serf or villein. The ploughman, the cow-herd and their progeny were serfs attached to the soil and sold with the soil; and their pedigrees were carefully kept.[5]



The aim and achievement of the Common Law was to raise Everyman to the status and the dignity of freedom; to build a society of free men and women, nourished by the institution of Christian marriage, and living in the fellowship of a free community. The first clause of Magna Carta, which guarantees the freedom of the Church in England, illustrates a concept of personality unknown to the ancient world. What in effect it did was to put the moral and spiritual life of men and women beyond the reach of the political officers of the Community.[6]

In the first book of English law, in 1189, we meet the great conception of the "free and lawful man".[7] Among laymen, says Maitland, men of one sort, free and lawful men, can be treated as men of the common, the ordinary, the normal sort. "The lay Englishman, free but not noble, who is of full age, and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person."[8] In the end, in obedience to its own principles, the Common Law had to treat bondman and serf and villein as free and lawful men. Implicit, therefore, in our law from the beginning was the principle, enforced in 1771 in favour of an African slave, detained on board ship in the port of London, for whom a Habeas Corpus was sought. You remember Lord Mansfield's famous words: "By the Common Law of England no man may hold property in another. . . . And therefore the black must be discharged."[9]

The judges and lawyers of the Inns of Court were thus the artificers of English freedom, while the equal achievement of English Equity was to endow free men with a clean conscience.

With freedom goes responsibility. A free man is answerable for his own acts and omissions. At Common Law, Everyman was answerable for his own acts. The King's servants are answerable for their acts before the ordinary

Courts. That is the rule of law. Again, no man is answerable for the act of another unless he has commanded it or consented to it. "It would be against all reason to impute blame of default to a man where he has none in him, for the carelessness of his servant cannot be said to be his act." Employers' liability is not an original principle of the law, but a development that came, one may say, with the industrial revolution.[10]

Everyman is also presumed to be a good man (for all his frailty), and a friend at heart to his fellow man. At Common Law, it is the right of Everyman to hold speech and intercourse with everyman, and within the limits of justice to exchange goods with him. Nor may restraints be put upon their trade that are unreasonable from the point of view of the parties or of the public good.

The friendship and fellowship of man and woman in marriage belongs to a different and deeper plane of living than the ordinary relation of citizen and citizen. The spouses who give life and being to the community are the agents of social welfare and the common good. The deepest friendship, too, is of necessity the most enduring. In all the centuries before 1857, matters touching marriage and legitimacy were dealt with in the Courts Christian or (after the Reformation) in the King's Ecclesiastical Courts. Before 1857—less than a hundred years ago—no English court had jurisdiction to decree a dissolution of marriage. Apart from the so to say brute force of a Statute, marriage was indissoluble. The stability of marriage was designed to enable the parents to maintain and educate their children until they were of an age to look after their own affairs. In this way the law anticipated the conclusions of modern psychology that "the best guarantee of a happy adult life is a childhood spent in the visible love and protection of both parents."

The respect paid to the institution of marriage and the family is illustrated in an old dictum that "the house of Everyman is to him as his castle and fortress, as well for his defence against injury as for his repose."[11] Even as late as 1919 Lord Atkin declared that, in matters of internal economy, "each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."[12]

In the tradition of the Common Law, Everyman has thus a certain fullness of being, an ability to rule his own home, to maintain and educate his own children, to acquire property and to manage his own affairs. The wide diffusion of property was the ideal of the Common Law. Its typical product was the yeoman who, in the Tudor and Stuart time, was "the backbone of England," the "pith and substance of the country."[13]

England was thus a society of free men living in the fellowship of a free community. Unlike the Roman Emperor, the King was a constitutional monarch. "The medieval king," says Maitland, "was every inch a king; but just for this reason he was every inch a man, and you did not talk nonsense about him. If you said he was Christ's vicar, you meant what you said; and you might add he would become a servant of the devil if he declined towards tyranny."[14] An unknown scribe put it in a Year Book: "The law is the highest inheritance of the King by which he and all his subjects shall be ruled. And if there were no law, there would be no king, and no inheritance." And another scribe added: "The common law is the surest and best inheritance that any subject hath and he who loses this loses all." *Qui perde ceo, perde tout.*

On what was to a common lawyer an evil day, the omnipotence which was denied to the King was allowed to Parliament. Omnipotence, unless it be divine omnipotence,

has no fellowship with freedom. Almost the first act of the new parliamentary Omnipotence was to destroy the whole body of the yeomanry as it had destroyed the integrity of the Christian Church, and would destroy the integrity of Christian marriage.

A certain parliamentarian lately published a book in which he said: "Housewives as a whole cannot be trusted to buy all the right things, where nutrition and health are concerned. This is really no more than an extension of the principle according to which the housewife herself would not trust a child of four to select the week's purchases. For in the case of nutrition or health the gentleman in Whitehall really does know better what is good for people than the people themselves."[15] Has the free and lawful man of the Common Law descended (in the person of the modern housewife) to the level of an infant or of a kind of mental defective? This is a serious question. After all the expense of our education, are we doomed forever to look for wisdom to the sons and daughters of Omniscience in Whitehall? Only, I think, if we have forgotten not only the Common Law, but the principles of freedom it embodies.

Happily, one of the greatest of our Parliamentarians,[16] bred in the tradition of the Inns of Court, has warned us of late of the peril of Totalitarianism; and desiring to safeguard our ancient freedom, has exhorted us to hold on to the Christian ethic and philosophy which gave its inspiration to the Common Law.

NOTES AND REFERENCES

1. The figure of a great wave breaking on an undefended coast is used by Professor Meynial to illustrate the mighty renaissance of the Roman law in the eleventh to twelfth centuries: see *The Legacy of the Middle Ages*, p. 367. For the return of the Roman law to Canterbury and to Oxford in the same centuries, see Professor de Zulueta's introduction to the Selden Society edition of the *Liber Pauperum* of Magister Vacarius.

2. On the last page of their classical *History of the English Law*, Pollock and Maitland penned these words: "The law of the age that lies between 1154 and 1272 deserves patient study. For one thing, it is a luminous age throwing light on both past and future . . . But we wrong this age if we speak of it only as one that throws light on other ages. It deserves study for its own sake. It was the critical moment in English legal history and, therefore, in the innermost history of our land and race. It was the moment when old custom was brought into contact with new science. Much of our national life and character depended on the result of that contact. It was a perilous moment. There was the danger of an unintelligent 'reception' of misunderstood and alien institutions. There was the danger of a premature and formless equity. On the other hand, there was the danger of a stubborn *nolumus*, a refusal to learn from foreigners and from the classical past . . . Of this there can be no doubt, that it was for the good of the whole world that one race stood apart from its neighbours, turned its eyes away at an early time from the fascinating pages of the *Corpus Juris* and, more Roman than the Romanists, made the grand experiment of a new formulary system . . . Nor can we part with this age without thinking once more of the permanence of its work. Those few men who gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of Kingless common-wealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our Children."

3. See *The Common Law* by Oliver Wendell Holmes at p. 210.

4. See *Roman Law and Common Law* by Buckland and McNair, pp. 36, 37.

5. See Holdsworth, *History of the English Law*, Vol. 2, p. 42. The social movement of pre-Norman times is thus described by Professor Stenton: "The central course of Old English social development may be described as the process by which a peasantry, at first composed of essentially free men, acknowledging no lord below the king, gradually lost economic and personal independence.": *Anglo-Saxon England*, p. 463.

6. "Behind the forms of the great conflict (sc. between Papacy and Empire, Church and State) we have to recognise the appearance in the consciousness of the civilised world of principles new and immensely significant. For behind it all there lies a development of the conception of individuality or personality which was unknown to the ancient world . . . Men have been

compelled to recognise that the individual religious and moral experience transcends the authority of the political and even of the religious society, and that the religious society as embodying this spiritual experience cannot tolerate the control of the State." Carlyle, *Medieval Political Theory in the West*, Vol. 3, pp. 7-8.

7. See Glanvill, *De Legibus*, Book 13, cap. 16, ed. Woodbine, p. 166: "Octo liberos et legales homines." The term "legalis homo" implied freedom from legal disability of every kind, excommunication, outlawry, minority, infamy caused by perjury, and so forth.

8. See Pollock and Maitland, *History of English Law*, 2nd edition, I, 407. In the course of time, all the unfree and dependent classes were merged in one mass under the general title of *villani*, and in the end the *villein* came to be treated as a "free and lawful man".

9. Somersett's case (1771-2), 20 St. Tr. I.

10. At Common Law Everyman is answerable for his own act. No man is answerable for the act of another unless he has commanded it or consented to it: *quia quis pro alieno facto non est puniendus.* Thus, the mere relationship between lord and villein did not make the one responsible for the acts of the other. In the quaint Norman-French of the Year Book: "Ce serra encounter tout reason de mitter culpe ou default en un home, lou il n'ad nul en luy, car negligence de ses servants ne poit être dit son fesauns." See Pollock and Maitland, II, 529, 533. Holdsworth, *H.E.L.*, III, 373, 383; VIII, 473.

11. The references is to Semayne's case (1604), 5 Co. 91, where it is added: *Domus sua cuique est tutissimum refugium.*

12. A whole passage of the judgment calls for citation: "The Common law does not regulate the form of agreements between spouses (sc. living in amity). Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for little in these cold courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the Common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Court, Sheriff's officer and reporter. In respect of these promises, each house is a domain into which the

King's writ does not seek to run, and to which his officers do not seek to be admitted." *Balfour v. Balfour*, 1919, 2 K.B. 571, 579.

13. With the decline of villeinage went the growth of a large middle class of tenant farmers and yeomen who were called and were in truth "the backbone of England". From this middle class the bulk of the jurors were drawn. The existence of such a class of men is affirmed by Sir John Fortescue, *De Laudibus Legum Angliæ*, c. 29, ed. Chrimes, pp. 67-71: "Do not wonder, therefore, prince, if the law by which truth is sought in England is not common to other nations, for they cannot, like England, make adequate and similar juries." See also ibid., p. 178: and see Mildred Campbell, *The English Yeoman*, passim.

14. See *Law Quarterly Review*, XVII, p. 132.

15. Douglas Jay, M.P., in *The Socialist Case*.

16. Sir Stafford Cripps, K.C., M.P., in a series of speeches in the House of Commons, on the radio, and on the platform: See *e.g.*, the issues of *The Times* dated 24th, 29th October, 1947, 6th January, 1948.

III

THE PRACTICE OF THE COMMON LAW

JUSTICE, IN the classical and the Christian tradition, is the aim and binding principle of States. Law is the pedagogue of justice. Human laws, said Fortescue, are none other than rules by which perfect justice is taught.[1] This was as true of enacted or Statute law as of unenacted or Common Law. In 1468, a Lord Chancellor told the House: "Justice is ground, well and root of all prosperity, peace and public rule of every realm."

Parliament was once, in truth as well as in name, the High Court of Parliament. Like the Common Law, legislation was governed by rules of justice. Even a rebel like Jack Cade paid homage to justice: "We blame not all the laws, nor all those about the King's person, nor all gentlemen or yeomen, nor all men of law, but all such as may be found guilty by just and true inquiry and by the law."

A profound change in political ideas led men to think that legislation should no longer aim at fashioning free and lawful men and women, but at increasing the wealth and power of the State. Parliament, which must have the last word in law-making, claimed to be omnipotent; to be no longer bound by rules of justice. In *May's Parliamentary Practice* (1946), it is said that "a law may be unjust and contrary to the principles of sound government: but Parliament is not controlled in its discretion, and when it errs its errors can only be corrected by itself."[2] Governments which retain a majority are unlikely to correct their errors. For a whole century, Omnipotence has been working overtime. There are now so many Statutes, rules and orders, that it is difficult for the most law-abiding subject to avoid offending the law.[3]

The judges are obliged to interpret and enforce the law, however unintelligible. All men must, for the sake of peace and order, obey laws even when they are felt to be unjust. But the judges must also protect the rights and liberties of citizens.[4] In 1923, the Court of Appeal granted a Habeas Corpus ordering the Home Secretary in effect to release a hundred citizens who had been unlawfully arrested, deported to Ireland and imprisoned there.[5] In 1947, the Court of Appeal gave protection to a citizen to whom the local authority and the Ministry of Health had denied elementary rights and whom they "sought to bludgeon into submission," as the Court put it, to their illegal demand.[6]

The King's judges are sworn "to do right to all manner of people after the laws and usages of the realm without fear or favour, affection or ill-will." The records of the Courts are continuous for eight centuries. During the Commonwealth, when there was no King, the judges administered the law; no one doubted the validity of their decisions or their value as precedents. The judges are servants first of the law, and afterwards of the King. It has long been established that they hold office during good behaviour, and are removable only on an address from both Houses of Parliament.

In the *Doctor and Student*, one of the old books of authority, judges and men at law are bidden to keep a pure and clean conscience: "I counsel thee that thou do nothing against Truth and that thou do Justice to Everyman; and also that thou observe and keep Equity. And if thou do this, I trust the light of thy lantern, that is thy conscience, shall never be extinct."

It is essential in our law that the proceedings of the Courts should be in public. Proceedings *in camera* are discountenanced and most rare. Justice is dealt out in open

court.[7] The basis of justice is Truth. Witnesses are sworn to tell the truth, the whole truth, and nothing but the truth. The jury are sworn to give a true verdict according to the evidence. To mislead the Court is for an advocate an unforgivable sin. The Bar Council has declared it most undesirable that one to whom a confession of guilt has been made should undertake the defence. In that case another advocate should be retained. If the original advocate is obliged to continue, he may object to the competency of the court, the form of the indictment, the admissibility of evidence. He may *not* suggest that some other person has committed the offence or call evidence he must know to be false, for example, to support an alibi.

The jury has been for centuries the principal criterion of truth in the law of England. It keeps law on a level of popular understanding. So many "good and lawful men and women" are summoned to serve as jurors at Sessions or Assizes. Erskine said that the jury are "the Commons house in the English judicial system." The greatest practitioners have always had a genuine belief in trial by jury. A roguish Irishman, who used to practise in the English Courts, once explained his preference for trial by jury: "I have never seen the twelve members of the jury asleep at the same time."

The Common Law has a noble conception of the citizen. Everyman is presumed to be a good man, innocent of crime or wrong-doing, honest in his dealings and efficient in his work. If you allege he is dishonest, you must prove it. If you complain that the suit your tailor made does not fit, you must prove it. Everyman is likewise presumed to be of good repute among his neighbours; and to act always in good faith. The law always assumes the integrity of the citizen.

In our law the parties are answerable for the conduct of their case in court. Litigation is a species of game in which

the judge is umpire. In criminal cases the Crown is virtually plaintiff suing a prisoner before a judge and jury.[8] The judge is there to see that the rules are kept; not, like an Inquisitor, to discover the truth, but to answer the question: "How's that?"

A little time ago in Paris a leading French advocate gave his impression of the Nuremberg Trials. He was lost in admiration of the way the proceedings were kept on a purely professional plane by the Court and counsel; the presiding judge always exhibiting patience, courtesy, impartiality. There were no exchanges between the President and the prisoners in the dock; no altercation; no loss of dignity. When the prisoners were in the witness box, matters remained in the hands of defending and prosecuting counsel. The serenity and detachment of the President was beyond the imagination of the practised French advocate.

It is the foible of all judicatures to value their own Justice and to pretend there is no other so exquisite. The testimony of the French advocate is therefore worthy of record.

In an address to the American Bar Association in September, 1947, Viscount Jowitt, the Lord Chancellor, spoke of his predecessors in office as good men and bad men, saints and sinners. So it is with other members of Bench and Bar. At Gray's Inn, the memory of Chief Justice Gascoigne is still green: he it was who committed Prince Hal for contempt, because he would have taken a prisoner from the Bar of the King's Bench.[9] The Prince went below as he was ordered. Of Chief Justice Holt, Steele wrote: "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."

Sir Matthew Hale, a worthy of Lincoln's Inn, was ready to defend Charles I, if the king had not challenged the jurisdiction of the Court. Hale was, like Holt, distinguished for his humanity and scrupulous fairness to prisoners. "A man of great natural abilities," says Professor Holdsworth, "and of really beautiful character comparable, among English judges, only to that of Sir Thomas More." The "just and intrepid" Lord Mansfield, a noble Scot, was, both at the Bar and on the Bench, the greatest Common lawyer of the eighteenth century. His enlightened administration as Lord Chief Justice made his home in Lincoln's Inn Fields a centre of attack during the Gordon Riots.

The Inner Temple holds the great name of Littleton, author of the *Tenures*, which Coke declared was "the ornament of the Common Law and the most perfect and absolute work that was ever written in any humane science." Coke's own mission was to teach the early Stuarts how to live "under God and the Law." He was the principal author of the Petition of Right which, in constitutional importance, ranks second only to Magna Carta.

Edmund Plowden, a man of learning and integrity, built the lovely Hall of the Middle Temple. In the days of Elizabeth, he declined the office of Lord Chancellor out of loyalty to an ancient faith. In equal honour the Inn holds Hardwicke, of whom Lord Chesterfield said: "He was perhaps the greatest Magistrate this country has ever had." It was the opinion of Burke and Mansfield that when Hardwicke pronounced his decrees as Chancellor, "wisdom herself might be supposed to speak."

One last name: of a Speaker of the House of Commons and a Lord Chancellor, who was executed on Tower Hill.

The fame of Sir Thomas More is the heritage of Lincoln's Inn; yet he belongs in a sense to all the Inns: and to a wider circle. Shakespeare paid tribute to him in one hundred and fifty lines of his own handwriting, part of a manuscript play in the British Museum.[10] The United States have just published his Correspondence through Princeton University Press. In 1944, at the dispersal of the John Burns Collection, the Soviet Government is said to have bought certain copies of the Utopia to add to their collection of More's writings in the Marx-Engels Museum.[11] Sir Thomas More is thus a herald (or is he the last hope?) of the United Nations. A true Englishman, even a Cockney, if you will, he is cherished in America as a scholar, revered in Moscow as a prophet, honoured as a saint in Rome. This most attractive, perhaps even the greatest character in English history, was a practitioner in the Courts of Common Law.

NOTES AND REFERENCES

1. See *De Laudibus Legum Angliæ*, c. 4, ed. Chrimes, pp. 10-11. *Leges humanæ non aliud sunt quam regulæ quibus perfecta justitia edocetur.*

2. *May's Parliamentary Practice* (1946). Reference may be made to an article on *The Omnipotence of Parliament* in the *Nineteenth Century and After*, 1947, pp. 232-240.

3. The criticism is made in so many words by Lord Goddard, Lord Chief Justice, in *The Times* of 31st January, 1948.

   The criticism is repeated by Lord Macmillan in his lecture at St. Andrew's University on Law and Custom, given on the 5th April, 1948: "The lover of our ancient laws and institutions, which we have inherited from our fathers, cannot but look on with some dismay at the process which we see daily in operation around us whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for the usuages and customs of the people, but are dictated by 'ideological theories.' There will soon be little of the common law left either in England or in Scotland, and the Statute-book and

the vast volumes of statutory rules and orders will take its place."

4. At Bow Street, on 27th February, 1948, the Chief Magistrate, Mr. L. R. Dunne declared: "These Courts exist not only to enforce the law but to stand between the citizen and the effect of the law where to enforce the law would be unjust. To enforce any penalties in this case would be oppressive."

5. The case referred to is that of *R. v. The Home Secretary, ex parte O'Brien*, 1923, 2 K.B. 361; 1923, Appeal Cases 603.

6. See the judgment of Lord Justice Evershed in *Blackpool Corporation v. Locker*, 1948, 1. *All England Reports* at pp. 99-100.

7. The principle of public hearing and public judgment is affirmed by the House of Lords in the case of *Scott v. Scott*, 1913. Appeal Cases 417. An exception is created by the Supreme Court of Judicature (Amendment) Act 1935 (25 Geo. 5, c. 2) which enacts that "in any proceedings for nullity of marriage, evidence on the question of sexual capacity shall be heard *in camera*, unless in any case the judge is satisfied that in the interest of justice such evidence ought to be heard in open Court."

8. "A criminal trial is to be regarded not so much in the light of a public inquiry into the truth of the matters alleged against the prisoner as in that of a private litigation between the prisoner and the prosecutor": Stephen, *A General View of the Criminal Law*, 2nd edition, p. 45.

9. The incident is referred to by Shakespeare: *King Henry IV*, Part II, Act 1, Scene 2, 11-65 seqq.

10. The MS. was first published by Alexander Dyce in 1844. In 1871, Richard Simpson offered the opinion in *Notes and Queries* that three pages in this play of Sir Thomas More were in the style and in the handwriting of Shakespeare. In 1916, Sir Edward Maunde Thompson, a distinguished palæographer, after a detailed study, concluded that the hand which wrote these three pages is identical with the hand which wrote the known signatures of Shakespeare. In 1923, the literary problems which arise out of these three pages were examined by a group of experts, in a book entitled, *Shakespeare's Hand in the Play of Sir Thomas More*; and yielded the same conclusion. All controversy may be said to have been set at rest by the late Professor R. W. Chambers in a lecture on *Shakespeare and the Play of More*, the text of which is to be found in his work entitled *Man's Unconquerable Mind*.

11. For an indication of Socialist and Soviet interest in Sir Thomas More, see Chambers, *Thomas More* (Cape, 1935) at pp. 373-4: "The love of Sir Thomas More is one which joins together many and diverse spirits, as does the love of the mountains, or of St. Francis of Assisi."