THE KING'S PEACE

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A Historical Sketch of the English Law Courts

by
F.A. Inderwick, Q.C.

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A Historical Sketch of the English Law Courts

BY
F. A. INDERWICK, Q.C.
Author of "Side-Lights on the Stuarts," "The Interregnum," etc.

WITH 15 ILLUSTRATIONS AND 1 MAP

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To the Right Hon.

LORD RUSSELL OF KILLOWEN, G.C.M.G.

Lord Chief Justice of England

this Sketch

is Dedicated

INTRODUCTION

A STRANGER who, passing up the Strand, looks at our Royal Courts of Justice, will be struck with the graceful harmony of the pile standing at the gates of the city and supported by the church of Saint Clement Danes. The building has an appearance at once dignified and symmetrical, and seems to embody the idea of a Royal Court of Justice. On further investigation, however, there is found a noble stone-roofed hall of lordly proportions leading apparently to no result, with no outward sign of any facilities for the despatch of business. But wooden signboards are supplied to point the way to the courts, which are reached by narrow and precipitous causeways leading into crowded and inconvenient passages, where numbers painted on the doorposts indicate the various courts. A consideration of the combined effect of the external and internal arrangements of the building suggests the work of a man who, having in his mind a great sense of architectural beauty and recognising that success depends upon convenience and convenience upon accuracy of detail, has been cramped and harried by pressure to produce something practical, though not necessarily graceful, sufficient for the requirements of the moment without regard to the possibility of future expansion. But this combination of external beauty and

internal confusion presents, though unintentionally, a great similarity to the system of judicature for which it provides a home.

The leading motives of our law and our procedure have always been constant, founded as they are upon a spirit of equity and of self-government, and even now, with their suggested crudity, are the admiration of foreign jurists. But we have always sacrificed science and symmetry on the altar of utility. Our judges from time immemorial would rather give an ephemeral judgment doing practical justice between a man and his neighbour than deliver one of lasting reputation dealing with great interests and world-wide principles; our courts, in which all classes of our laymen take their places as spectators, litigants, jurymen, or assessors, have been constructed and altered and reconstructed to suit their varying notions of convenience; and our legislators being men not mainly of law, but of business, have made their laws to meet the daily and hourly requirements of the people and to render more easy and more safe the duties of their social life. For the social life of Englishmen, from the time when they shouted under the uplifted spear to the time when, as now, they sit with apparent content in the wooden boxes which the custom of many generations has consecrated to their use, has ever been concerned with the administration of justice to an extent unknown probably in any antient, certainly in any modern state. When, therefore, it was suggested to me to write some account of our Courts of Law, I recognised that such a theme did form part of our social story and might fairly be a chapter in our national life.

The methods and details of our procedure have moved on with the intelligence and education of our people. In the old Anglo-Saxon and Norman days, when the ordeal of God's judgment was invoked to decide questions of law and of fact and to demonstrate the innocence or the guilt of the accused, the administration of the law which was thus vouched by miracle was a sacred function in which it was a privilege, rather than a right, to take part. As superstition died out, and knowledge was spread over the face of England, the fortuitous success of a fiery ordeal or of a hireling champion was no longer regarded as due to a special intervention of Divine Providence. The law itself became the subject of comment and of discussion; our procedure rapidly assumed a practical character, and was regulated by well-recognised and definite rules, excluding as far as possible the old system of chance. Our forefathers worshipped the sun as the god of life, of heat, and of fertility, and our fathers, wiser than they, while rejecting his spiritual godhead, utilized his beams to bleach their linen and to force their fruits. And thus the determination of legal questions ceased to be regarded as the direct judgment of Heaven, and came to be accepted as the adjudication of a business-like community.

Limit of space has necessarily had its effect upon the thoroughness of this book; and accordingly, with a view to presenting a more compact volume than would otherwise have been possible, I have confined my sketch of the King's Peace (for it would be presumptuous to describe these pages as more than a sketch) to the consideration of what are commonly called the Superior Courts. I have

purposely avoided touching upon the Ecclesiastical Courts, as that would involve the consideration of an aspect of social life in England interesting, no doubt, but opening up an inquiry extending far beyond our restricted boundary. Similarly I have avoided any reference to the High Court of Parliament as involving the discussion of other phases of social life from another and a different standpoint. And when I have referred to any tribunals outside of our Superior Courts, I have done so but lightly and in few words.

The Courts and the procedure of the Anglo-Saxons were, until very recently, almost a sealed book to any but the most experienced of antiquaries. Coke, Spelman, Prynne, Selden, Dugdale, and other writers of the seventeenth century, without making a special study of that period, but investigating its laws and customs in common with other branches of the law, have given us their views, in which they generally concur, on many matters connected with this subject. The nineteenth century has produced writers and students who have devoted themselves with unwearied assiduity to the special study of the Anglo-Saxon period, with the result that the nineteenth century finds the seventeenth century to have been ignorant and inaccurate. Such men as Dr. Stubbs, the Anglo-Saxon essayists, Professor Freeman, and others, have evolved a scheme of Anglo-Saxon law and procedure which places before us the lives and habits of the people of this period with a completeness of detail never before attempted. Whether the twentieth century will cause us or our children to

modify these views, and will draw for us an altogether different picture of the daily life of our ancestors, time alone will show. There are still, however, many matters, even after this patient investigation of the subject, fairly open to discussion. The place of the King in the antient judicature, whether he was, as always contended by the lawyers, the fountain and the last resort of justice, or, as now propounded by the philosophers, merely an over-lord, whose decrees and judgments could be over-ridden by the freemen of the County Court, is one of those open questions upon which the authors to whom I refer may be read with profit. For my own part, I hold to the view of the lawyers, and I believe that the further the question is investigated, the more clearly this will appear. A question more difficult of solution is perhaps to be found in the consideration how far, if at all, the Roman had any part in the formation of the English Common Law. That it had such part in determining civil rights I cannot doubt; though how far its influence extended in the formulating of the system actually in vogue at, and before the Conquest, may be somewhat doubtful, and is, at all events, a topic well worthy of the discussion it has raised. Descriptions of Anglo-Saxon procedure are, however, necessarily speculative. If A owed B fifty pence, a trustworthy account of the precise course of procedure to be adopted by B to recover his money cannot be given.

A study of the social life of our citizens as affected by successive laws and ordinances and by the varying provisions of our common law would be especially in-

teresting in these days, when public attention has been directed by some of our deepest thinkers and most lucid writers to the social condition of the masses at all periods of our national history. It would include amongst other topics an inquiry into Saxon and Norman customs and rights, feudal tenures, the varying reciprocal rights and duties of men and women, the course of sumptuary laws, and the changing and gradually civilizing views of the community on crimes and punishments. But these, with many similar considerations, are outside the province of this sketch, and must remain for their elucidation by other writers and teachers of these abstruse and recondite subjects.

It is a remarkable incident in this study that as just one thousand years have passed since King Alfred is said to have set his hand to our judicial institutions, so the history of the courts divides itself by natural selection into cycles of two centuries each. From the suggested origin of our jurisprudence under Alfred to the Norman Conquest is just two hundred years. The duration of the Curia Regis as the Supreme Court of England was two hundred years. Another two hundred years passed from the division of the courts to the end of the Wars of the Roses, after which the time came, with the advent of peace under Henry VII., for a further development of the judicature and the confirmation of the reforms of Edward IV. The period from the advent of the Tudors to the end of the Commonwealth saw us through a cycle of arbitrary government, of personal rule, of an interference with the courts rudely resented by the nation, and of republican attempts to amend the process of the courts and the laws

which they administered. And this was accomplished within a fraction of another two hundred years. In the course of 1660 the reconstituted Royal Courts resumed their sittings on, what was hoped to be, new lines of liberty and integrity, and in 1867, just two hundred years afterwards, Sir Roundell Palmer, reflecting public opinion, made his celebrated speech in the House of Commons, successfully calling for a return to the antient procedure and for the erection of one Supreme Court of Justice for the whole of England. We begin, therefore, under the Anglo-Saxons, with all the functions of justice discharged in and by the several counties of England, each doing completely its own work, with appeals discouraged and decentralization supreme. With the Conquest we have the opposite system, the work of the country collected together and disposed of in one central court by one supreme authority; decentralization is in principle condemned, and centralization is supreme. After a trial of two centuries the Supreme Court is found unable to discharge the duties cast upon it, and by a compromise always dear to the English heart a portion of the Supreme Court is decentralized, and by dividing the labour and increasing the labourers, the central tribunal once more comes abreast of the wants of the country.

For six hundred years the compromise between the Anglo-Saxon and the Anglo-Norman system was effectual to transact, with varying success and slight modifications, the business of the country. But the divided court again became unequal to the pressure put upon it, and now another compromise between the two systems finds us

rapidly approaching the constitution of the original Curia Regis, discussing the propriety of abolishing the circuits, and on the high-road to a complete system of centralization.

One of the most valuable elements of our judicial procedure is the right of every litigant in our courts to be represented by counsel of his own selection. When and under what circumstances this right arose it is impossible with any accuracy to determine. It grew with the expansion of our legal system, and we can only distinctly affirm that it existed in the time of Edward I. The Serjeants, the fathers of the Bar, whether described in Latin as *narratores*, in French as *conteurs*, or in English as *counters*, began, as will be seen, as nominees of the Crown and officers of the courts. They continued to increase in strength, affluence, and independence, until, in the great pressure of business, they became almost overshadowed by members of the Bar who never received or aspired to that rank and degree. But though Serjeants were recognised by early statute, neither they nor any other class of counsel were constituted by that or by any other statute or edict, for the entire constitution and position of the Bar rests on custom and tradition. Custom puts their services at the call of every member of the community, grants them freedom and immunity of speech and pre-audience in the courts, and tradition declares them to be agents and ministers of justice in the discovery of truth and in the correct ascertainment of the law. In their professional conduct they are by custom responsible only to their colleagues in council assembled, with an appeal from the judgment of

their colleagues to the judges of the Royal Courts convened in solemn session. But the Serjeants, though they have disappeared, have not been abolished, and the same public clamour which rendered necessary the restoration of a Supreme Court might at any time revive the degree and dignity of a Serjeant-at-Law.

As we are still strictly conservative in retaining the antient forms of our judicial process and, so far as may be, of our judicial staff, so it will be seen that we are alike conservative in the outward model and habits of the judges. The fashion and colour of their robes differ but slightly to-day from those of the first judges, who in the time of the Plantagenets sat in the newly erected court of King's Bench; and they are identical in colour and texture with those worn by Chief Justice Gascoigne when he committed the Prince of Wales to prison and by Chief Justice Fortescue when, under Henry VI., he declared the law of England from his seat in Westminster Hall.

During the eight hundred years of our modern procedure various courts have disappeared, numerous methods of trial have ceased, and great judicial offices have been discontinued. And yet no statute has ordered their discontinuance, and no day can be ascertained upon which it may be said that their functions ceased or were determined. As they arose by custom and were confirmed by prescription, so they ceased by non-user, and their cesser was made perpetual by prescription. The Witenagemot dissolved into the Curia Regis, but no date can with precision be affixed to the dissolution of the one or the establishment of the other. The Curia Regis died out, having struggled on into the life-time of its suc-

cessor. The ordeals of fire and water and other of God's judgments came to an end through the growing intelligence of the people and the teaching of the Church, and the wager of battle, being challenged in the present century, was found never to have been legally abolished, though no duel had been fought for nearly three hundred years. The Courts of the Forest ceased to harass and plunder when the national sentiment would no longer permit of their continuance, but no Act of Parliament disestablished the judges of those courts until nearly two centuries after the last effective assertion of their authority. The Courts of Markets and of Fairs came to an end one hardly knows how or when. And we recognise in these gradual changes over a long period of years not only the beneficent operation of our unwritten law and its remarkable adaptability to the requirements of the day, but also in a high degree the power of public opinion to remove abuses without the active interference of any ordinance or statute.

Doubts have been freely expressed as to the probable results of the latest amendment of our judicial procedure. The change is too recent, and legal, like agricultural experiments, are too slow in development, to justify any expression of opinion on this topic. As our methods are founded on expediency rather than on any other virtue, as our present procedure is flexible and our complex legal system is susceptible of receiving rapid adaptation to whatever may be the requirements of the time, we may look forward to a considerable, though a gradual, extension of the scheme propounded, rather than accomplished, by the Judicature Acts. Pessimist predictions have no place

in our national horoscope. From the earliest days of our judicature we have slowly but surely moved on in the path of reform. We have had some melancholy incidents and encountered many impediments in our progress, but we have steadily advanced in freedom of judicial thought, as in freedom of political life. Where in some instances we may seem to have failed in the realization of our ideas, such failure has arisen rather from the promulgation of premature and ill-considered schemes than from the reluctance of our judges to join in the movement, or from the opposition of our people to necessary reforms. A too great veneration for an existing system may somewhat impede the action of Parliament in what many would consider the requirements of modern legislation, but a spirit of steadfastness and caution, characteristic of the Anglo-Saxon strain, is one of the surest safeguards for the purity and integrity of our Courts of Justice. And so long as the law is administered by judges of irremovable tenure, of sufficient means, of independent character, and of legal training, it matters but little to the ordinary Englishman what is the precise nature or construction of the channel through which the stream of justice is compelled to flow.

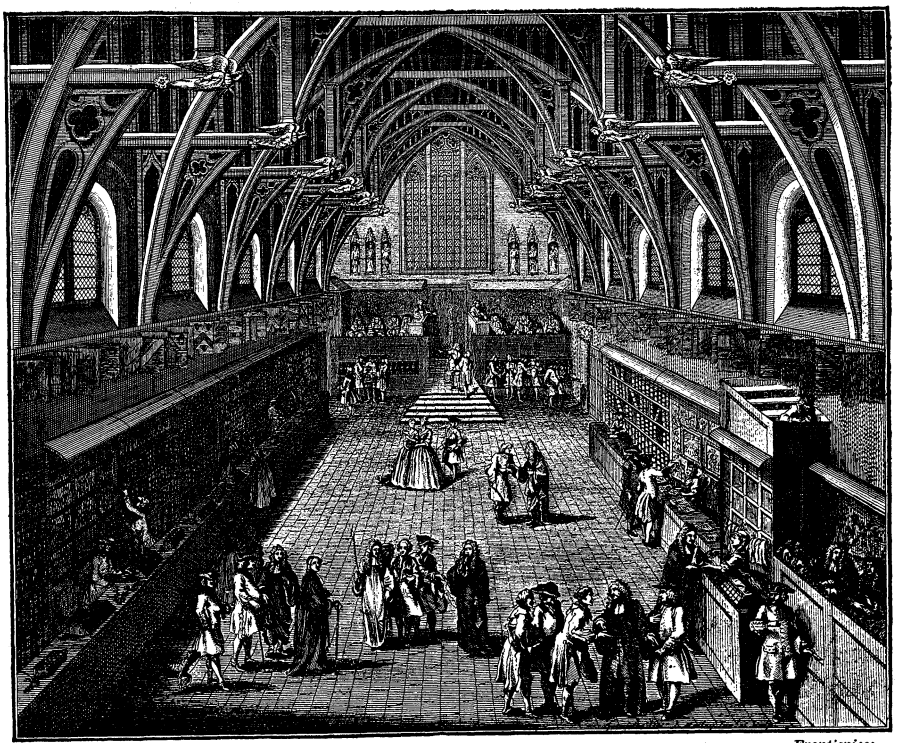
To bring the view of justice to every man's door, to emulate the Cadi under the palm tree, the justice-seat in the king's gate, the shout of the Wapentake, has ever been the ideal of law reformers. Equally necessary is it to bring to the doors of our people some knowledge of the principles on which our laws are modelled and of the system under which they are administered. No better mode of transmitting this knowledge can probably be

found than by a consideration of the story of our Courts of Law, their origin, their growth, their disuse, their modification, and the more freely this subject is discussed the more clearly will it appear that our laws have been framed and our procedure has been settled in the interests of the people; that for their benefit these Courts exist; that through the medium of the Courts internal quiet is secured, contracts are enforced, rights are respected, and injuries are redressed; and that the safety, the freedom, and the social happiness of our nation are mainly dependent upon the fearless and impartial administration of the King's Peace.

WINCHELSEA, *July*, 1895.

"THE FIRST DAY OF TERM," *an engraving by Gravelot, a French engraver, who came to England in* 1733, *left about* 1745, *and died in Paris,* 1773. *It shows Westminster Hall as it would have appeared down to the time of George II.*

The original of this illustration is in the Library of the Inner Temple.



WESTMINSTER HALL. *Frontispiece.*

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