

THE LAW'S MUTATIONS

I suppose that the laws of society touch and glance, hit and miss, with the law of the Infinite. I suppose that they hit and touch oftener to-day than they did a thousand years ago, when, instead of filing a bill of complaint the aggrieved filed a bill of challenge and counsel settled at swords' points their clients' differences. And yet, it may chance, that even now the issue of a contest at law, and that, too, without a single fact in dispute, will be more difficult to anticipate than was the issue of a trial of skill in the lists where the client might at least speculate on the known — on the tried valor, the brawny arm and the tempered armor of his counsel. Now, not unfrequently (with all due respect be it said) the balances of the blind-folded goddess incline, this way or that, with a full dinner or a gouty toe. * * *

England's common law is as hoary as the Druids. It was, it is said, begotten of necessity upon the common sense of primitive English Society. Those, however, who first dealt in its crude maxims had little idea of founding a system or of serving any other than their own immediate ends. He who first daubed his right hand all over with ink and slapped it down on the parchment at the same time, that he gave utterance to the now fossilized phrase—then a very tangible fact—"Witness my hand," little dreamed how in the dim vistas of the rolling centuries his words were destined to perpetuate themselves, when the very age in which he lived had been forgotten. But although the offspring of so excellent a parent as Common Sense, common law early began to exhibit traits of wrong-headedness, and it soon became evident, to the lay mind at least, that between the parent, which, by the way, no one ever dreamed of recognizing as such, and the offspring there was deadly feud. The former was ever seeking to apply its rugged, uncut, unsystematized ideas to legal complications, whilst the latter resisted with all its might, and never ceased in its endeavor to make all acts that came within its purview square with its maxims. It invented quibbles and fictions to hide from its votaries the utter incompetency of its antiquated maxims to cope with the ever varying complications of a progressive society. How Common Law was ultimately rescued we shall see further on.

Speaking more particularly of criminal law, England's great commentator says: "It should be founded upon principles that are permanent, uniform and universal, and should be always conformable to the dictates of Truth and Justice, the feelings of humanity and the indelible rights of mankind." Here, however, the difficulty at once presents itself, that humanly considered, principles are *not*, as is assumed by the learned writer, either *permanent, uniform, or universal*, and even the "dictates of Truth and Justice" are one thing here in Toronto, and another in Zululand, are one thing with Herbert Spencer, and were something quite different with

his flaxen-haired, sea-pirate ancestor who swooped down upon the coast of England a thousand years ago. It is not very long since Lord Coke lived, and his was one of the master minds of his time. Upon principles which he deemed "permanent, uniform and universal and conformable to the dictates of Truth and Justice," he committed reputed witches to the flames. I suppose that our views on the subject of witchcraft are an accident of our birth in the 19th instead of the 16th century. A curious law—cited by Blackstone—at one time obtained in the Isle of Man. In that little territory the theft of a horse or an ox was adjudged a mere trespass, whilst he who stole a hen or pig lost his head. Here you observe the influence of surroundings. It was next to impossible to conceal in so small an island a stolen horse or ox, but a pig or hen might readily be hidden or consumed.

The Laws of Society are, then, or at least, ought to be, relative. As the Sciences, the pioneers of Social Progress hew out new realms of thought, and new fields of action are cleared, as society becomes acclimated to these and new order of things are established, so must the Laws of Society, if they are to fulfil their function, adapt themselves to the changed circumstances. But the genius of the law was early discovered to be Conservative. Dogmas were elevated to the dignity of principles, and undisputed sway was everywhere given to precedents. I suppose that the routine habits, the study of the law, is so well adapted to engender, has not been without its reacting influence. No doubt it was this disposition to follow precedent at all hazards that brought that celebrated corps of London Attorneys, The Devil's Invincibles, into such unenviable military notoriety. It is said that whenever their commanding officers gave them the word "charge," instead of fixing bayonets, two-thirds of the rank and file invariably took out their note books and wrote: "Six shillings and eight pence." * * *

But, whatever the cause, there can be no doubt as to the effect. The Common Law, instead of retaining its primitive simplicity and conscientiousness, gradually became harsh, rigid, formal. Then it was that our Equity Jurisprudence had its birth. That most high and mighty monarch King Edward I., did not fail to detect the impotency of the Common Law. He wisely called to his aid Common Sense, but foolishly hid her from view under the wig and gown of the keeper of his most august conscience. Jurisprudence had again unwittingly been established upon its true foundation, and for a time all things promised fair. The first Lord Chancellor who dabbled in matters litigious, was, of course, unhampered by precedents, and his common sense had a fair field. In its early days, Equity Jurisprudence was characterized by greater simplicity than symmetry, and there was no doubt more than a modicum of truth in the saying then current, and even yet quoted by disappointed suitors, "Equity is a roguish thing. 'Tis all one, as if they made the standard of measure the Chancellor's foot." * * *