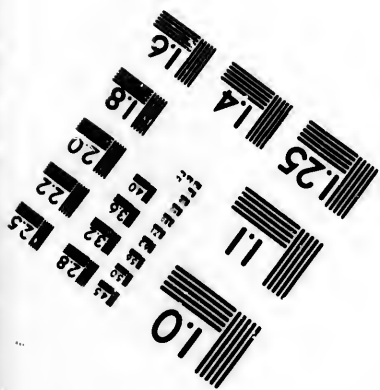
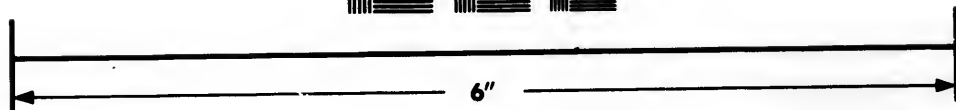
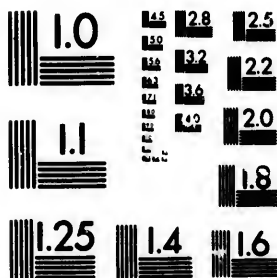


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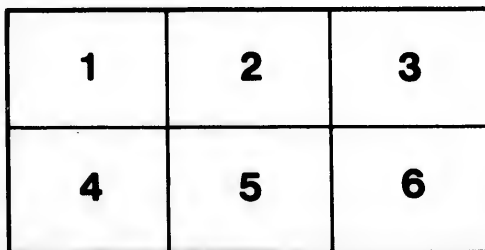
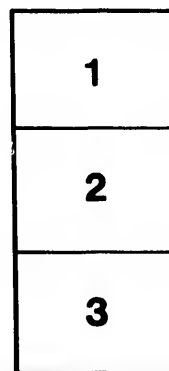
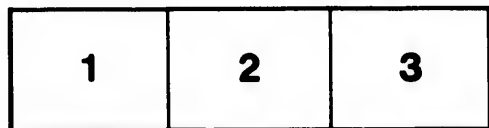
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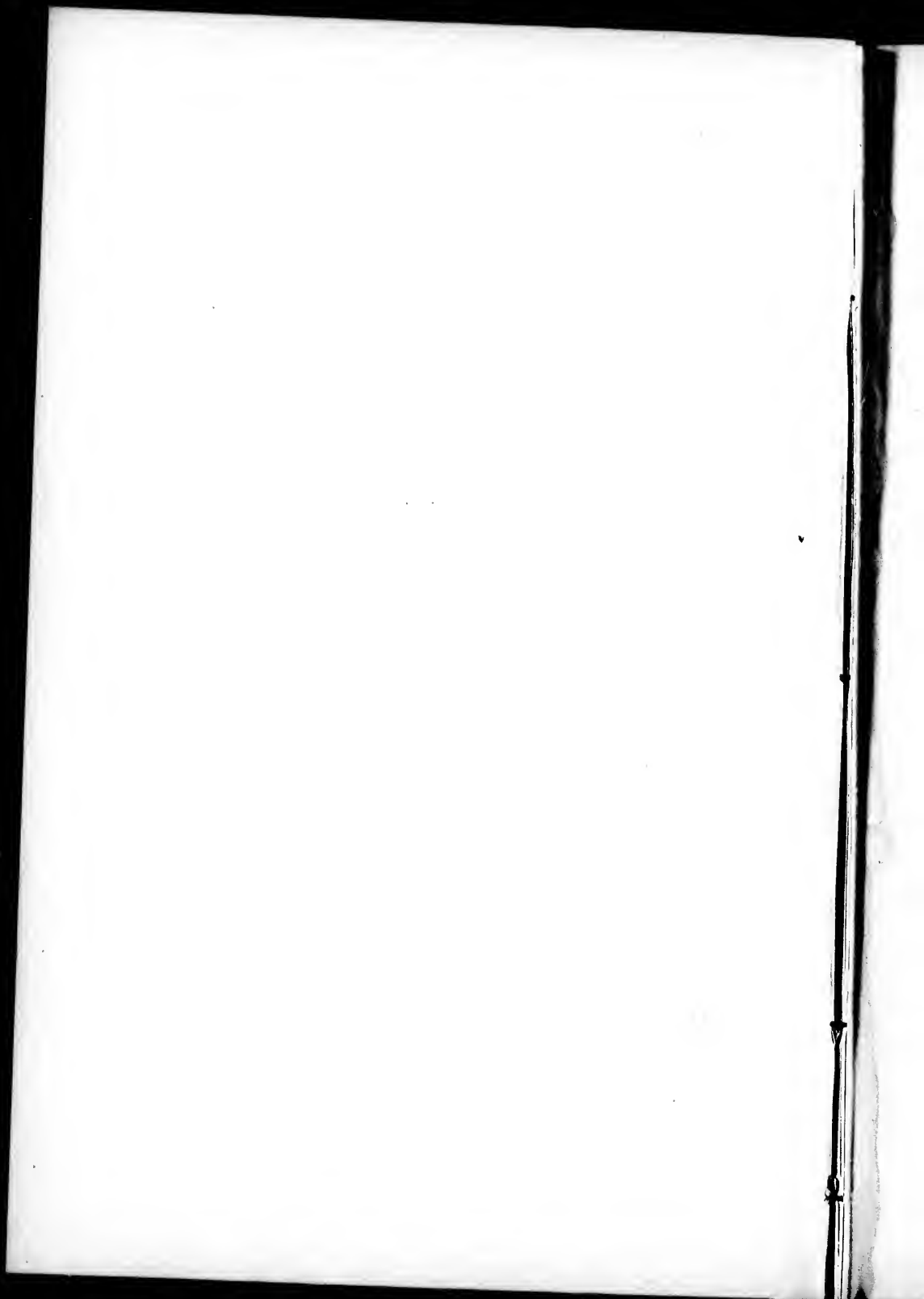
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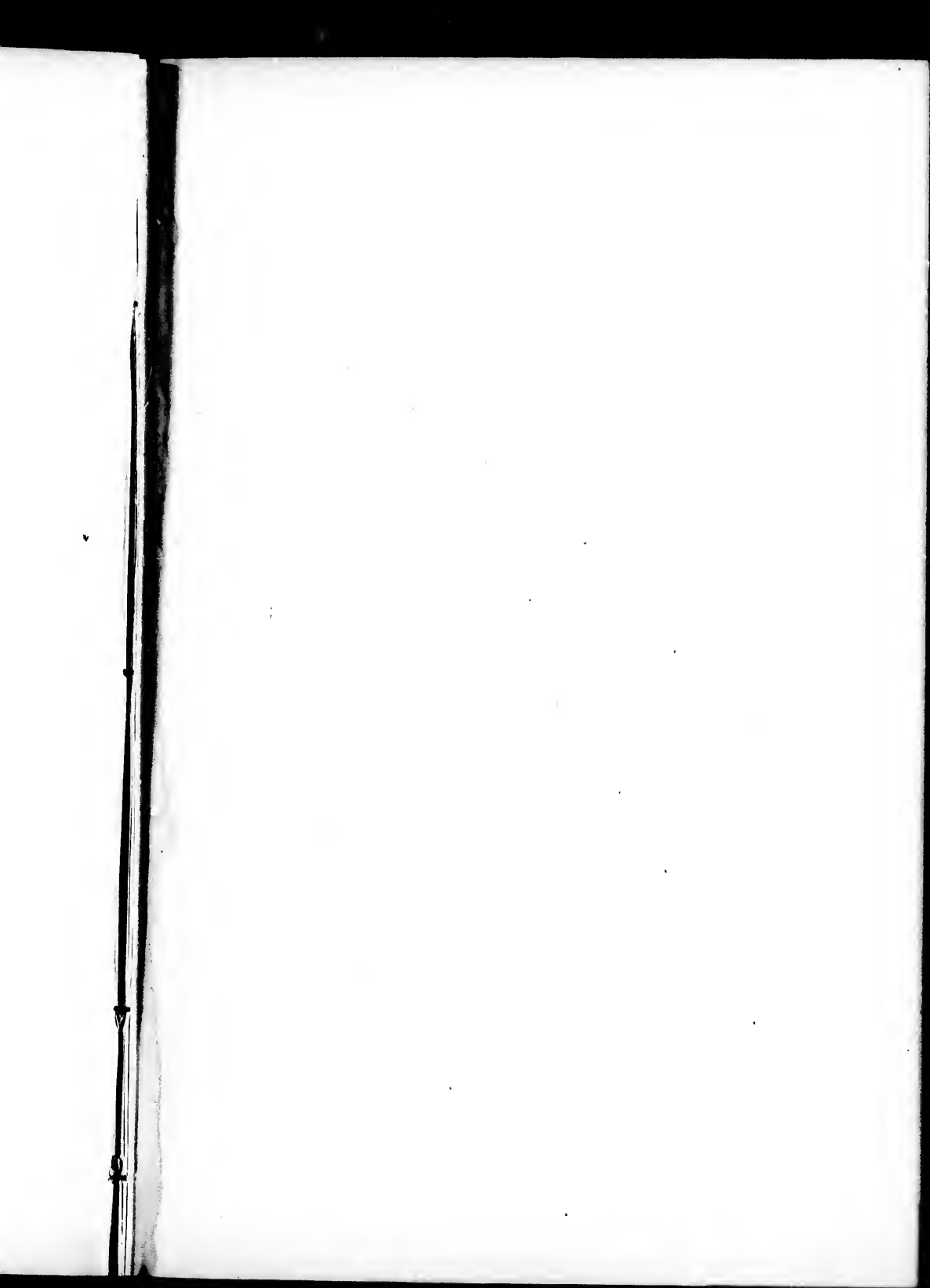
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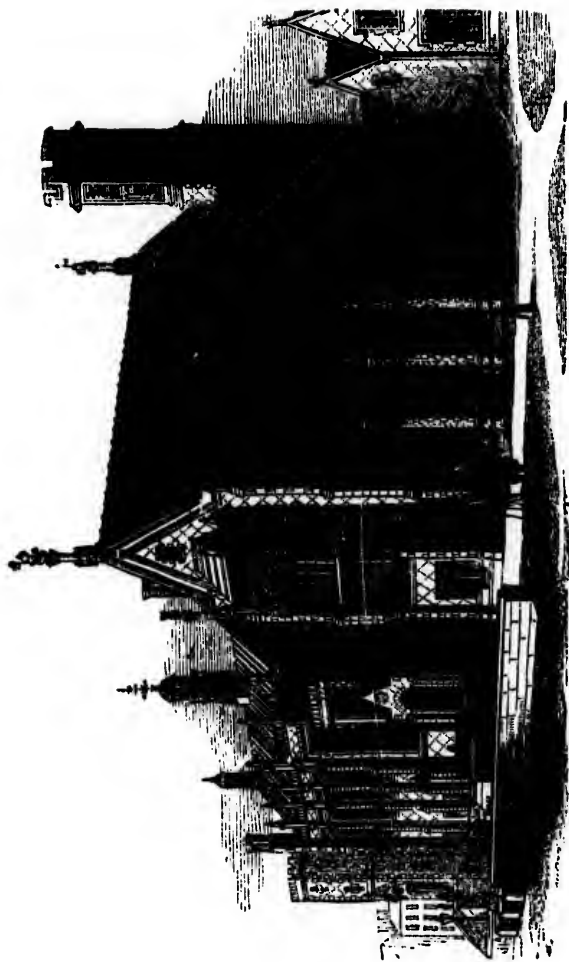


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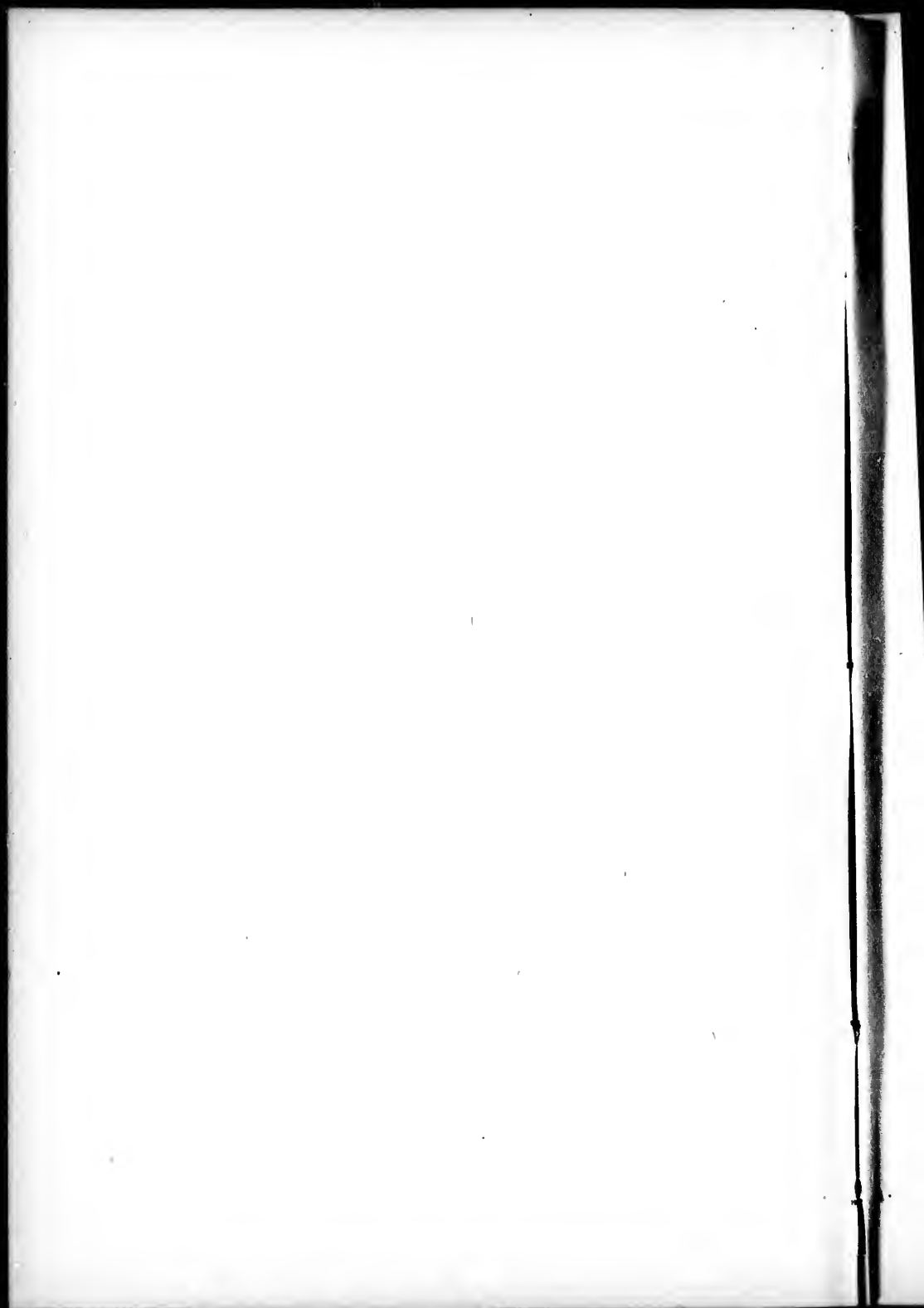
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## LIVES

OF THE

# CHIEF JUSTICES OF ENGLAND.

## CHAPTER XI.

LIVES OF THE CHIEF JUSTICES FROM THE DEMISE OF  
SIR EDWARD COKE TILL THE ESTABLISH-  
MENT OF THE COMMONWEALTH.

TO lessen the odium of Sir Edward Coke's violent removal from the office of Chief Justice of the King's Bench, there was selected as his successor a man who was very inferior to him in learning and ability, but who was generally popular, and who was capable of performing the part with decent credit. It used to be said of him, "He is perfectly qualified to be a Fellow of All Souls; for if *mediocriter doctus*, he is *bene natus* and *bene vestitus*." Not only was he remarkable for being well born, and dressing genteelly, but he was very good-looking, he had sprightly parts, and his manners were delightful. Though idly inclined, he was capable of occasional application; and all that he had acquired he could turn to the best advantage. In morals he was accommodating; but he would do nothing grossly dishonorable. This was a man to get on in the world and to avoid reverses of fortune, much better than the possessor of original genius, profound knowledge, and unbending integrity.

SIR HENRY MONTAGU, the subject of the following sketch, who added fresh splendor to an illustrious line, was the grandson of Sir Edward Montagu, whom I have commemorated as making a distinguished figure in the reigns of Henry VIII., Edward VI., and Queen Mary;

being a younger son of the eldest son of that Chief Justice. He was born in his father's castle of Boughton in Northamptonshire, about the middle of the reign of Queen Elizabeth. While yet a baby, a wizard, on examining the palm of his right hand, foretold that he would be "the greatest of the Montagus." This was then believed to be a true prophecy; but was interpreted by the supposition that his elder brothers would all die in infancy, and that the whole of the possessions of the family would center in him,—not that he was to be a Chief Justice of England, Lord Treasurer, and an Earl.

I do not find any mention of his school; but we know that he studied at Christ's College, Cambridge; and it is said that, while there, he showed good nature, exuberant spirits, and attention to external accomplishments, which made him a general favorite, although he had fallen into some irregularities. Having to make his own bread, at a time when younger sons had nothing to expect but an education becoming their birth, he resolved to try his luck in the law, in which his ancestor had been so prosperous; and he was entered a student of the Middle Temple. Here he showed a great talent for speaking at the "*Moots*," but he was remiss in his attendance at the "*Readings*," or lectures; and he was much better pleased to frequent the ordinaries and the fencing-schools in Alsatia. However, by a few weeks' *cramming*, he got decently well through the examinations and exercises which were then required as tests of proficiency before being called to the bar. Having put on his gown, he was desirous of obtaining practice; but his plan was to get on by bustling about in society, by making himself known, and by availing himself of the good offices of his powerful relatives,—rather than by shutting himself up in his chambers, or by constantly taking notes in the Courts of Westminster.

Although he was employed in some flashy actions for *scan. mag.*, and in some prosecutions which arose out of brawls in taverns, he had not for several years any regular business, and he was beginning to despond, when a new parliament was called. He determined to try his luck in the political line, and he was returned to the House of Commons as member for Higham Ferrers.

This was Queen Elizabeth's last parliament, in which the country party was so strong that he thought he should best come forward as a patriot. Accordingly, he joined those who made such a vigorous stand against the monopolies that the Queen was obliged in prudence to promise to abandon them. He delivered an animated speech in support of a bill to abolish them, pointing out that the proceeding against them in the last parliament by petition had proved wholly fruitless.<sup>1</sup>

But he gained the greatest *éclat* by impugning the doctrine that "all the goods of the subject belong to the sovereign, who may resume the whole, or any part, as occasion requires." This doctrine was boldly laid down by Sergeant Heale, who said, "I marvel much, Mr. Speaker, that the House should hesitate about a subsidy asked by the Queen, when all we have is her Majesty's, and she may lawfully at her pleasure take it from us; yea, she hath as much right to all our lands and goods as to any revenue of her crown." This calling forth *coughing*, and cries of OH! OH! he added, "I can prove what I have said by precedents in the times of Henry III., King John, and King Stephen."

*Mr. Montagu*: "That there was much robbery, public and private, in those reigns, no man may dispute; but I do deny that in those reigns, or in any other reign before or since the coming in of the Conqueror, is any precedent to be found of any tax being lawfully levied except by the will of the great council of the nation. If all the preambles of subsidies be looked into, you will find they are declared to be '*of free gift*.' Although her Majesty asks a subsidy, it is for us to give it, and not for her to exact it. As for the King taking the goods of the subject, there is the precedent of Edward III. having the tenth fleece of wool and the tenth sheaf of corn; but that was by grant of the Commons at his going to the conquest of France, because all the money then in the realm would not have been any way answerable to raise the great mass he desired. Centuries ago it has been *declared*, the King assenting, that no talliage shall be levied in England but by authority of all the states of the realm."<sup>2</sup>

<sup>1</sup> 2 Parl. Hist. 920.

<sup>2</sup> *Ibid.* 920



This was not the way to be made Attorney or Solicitor General, or to gain any favor from the Court,—but by such stout defenses of popular rights he rendered himself so acceptable to the City of London, that he was elected Recorder,—although it was said that he aided his interest in this quarter by his attentions to the wives of the aldermen.

Whatever means he employed, he was now in high favor eastward of Temple Bar; and in James's first parliament he was returned as one of the four members to represent the City in the House of Commons. But he thought that he had gained all that could be expected from popular courses; and, being admitted into the presence of the new Sovereign when carrying up a City address, he contrived to gain his favor by some observations on the divine right of kings, and the wonderful circumstance that James united in his person not only the claims of the red and the white roses, but of the Saxon and Norman dynasties. In consequence, Mr. Montagu was desired to kneel down, and, having received a gracious blow from the royal sword, to "rise Sir Henry."

He now warmly supported the Ministers; and, in proof of their confidence, he was placed at the head of a committee to review the statutes of the realm, and he was nominated as manager of a conference with the Lords concerning the abolishing of the Court of Wards.<sup>1</sup>

For several years he entertained warm hopes of being appointed Attorney or Solicitor General; but promotions in the law went on very slowly, insomuch that it was long before a vacancy could be found for Bacon, who was then considered as having a paramount claim. Montagu, therefore, that he might be raised to the bench on the first favorable opportunity, agreed in the meanwhile to become a King's Sergeant. Accordingly, he took the coif by writ in the usual form, on the 4th of February, 1611, and he was created a King's Sergeant by patent under the great seal a few days after.<sup>2</sup>

Continuing Recorder of London, he particularly distinguished himself in the festivities which took place in

<sup>1</sup> Comm. Journ., March, 1864.

<sup>2</sup> Dug. Ch. Ser. 103.

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the City on the infamous and fatal marriage between the Earl and Countess of Somerset. It was not thought inconsistent with the gravity of his office that he should dance a measure with the bride, who was at this time all gayety and frolic, although she had just done a deed which, when it was discovered, filled mankind with horror.

Three years afterwards, the guilty pair being put on their trial for the murder of Sir Thomas Overbury, Sergeant Montagu appeared as counsel against them. He had a very delicate task to perform; for the King, compelled by public opinion to permit the trial, wished to spare his favorite; and, dreadfully afraid of the disclosures which might be made if one with whom he had been so familiar should be driven to extremity, had with his own hand written this caution as to the manner in which he wished the prosecution to be conducted:—  
*"Ye will doe well to remember in your præamble that insigne, that the only zeal to justice maketh me take this course, and I have commandit you not to expatiate, nor digresse upon any other points that may not serve clearlie for probation or inducement of that point quhairof he is accused."*

When the Earl was brought before the Lord High Steward and Court of Peers, Montagu proceeded to open the case against him with fear and trembling,—anxious at once to comply with the King's wishes, and to appear to discharge his duty. Two yeomen of the guard were stationed ready to throw a cloth over the head of the prisoner, and to remove him from the hall, as soon as he should begin to say any thing offensive against the King, "the Lieutenant of the Tower having told him roundly, that, if in his speeches he should tax the King, the justice of England was to stop him, and all the people would cry, '*away with him!*' and the evidence should go on without him; and, then the people being set on fire, it would not be in the King's will to save his life."

Thus Sergeant Montagu began: "My Lord High Steward of England, and you my Lords, this cannot but be a heavy spectacle unto you to see that a man, that not long since in great place, with a white staff,

went before the King, now at this bar hold up his hand for blood; but this is the change of fortune, nay, I might better say, the hand of God and work of justice, which is the King's honor." He then gave a softened narrative of the leading facts of the case, and concluded by admonishing the peers to remember that the prisoner might be guilty, although at the time the murder was done, he was in the King's palace, and Sir Thomas Overbury was in the Tower; as "heretofore David, in the like case, was charged with the murder of Uriah; and though David was under his pavilion, and Uriah in the army, yet David was adjudged by Almighty God to be the murderer."

Somerset, trusting to the promise of a pardon which had been joined to the threat of severity, conducted himself quietly during the trial, which terminated in a verdict of *guilty*; and the Countess was persuaded to confess her guilt upon her arraignment. There was joy among the courtiers, as if a great victory had been obtained by the nation over a foreign enemy. The King, much relieved, expressed his satisfaction with Sergeant Montagu, and promised to serve him.

Sir Edward Coke, having given mortal offense to the King, and to Buckingham, the new favorite, by the lofty independence which he had displayed as a judge, was soon after, on the most frivolous pretenses, suspended from exercising the functions of his office of Chief Justice of the King's Bench, and it was determined to dismiss him from it. James suggested Sergeant Montagu as a fit successor; and Bacon, the Attorney General, his adviser, who was then in the near prospect of obtaining the great seal for himself on account of the age and declining health of Lord Chancellor Ellesmere, said that "a better choice could not be made." Returning home from an audience on this subject, Bacon thus wrote to the King:—

"I send your Majesty a warrant to the Lord Chancellor for making forth a writ for a new Chief Justice, leaving a blank for the name to be supplied by your Majesty's presence; for I never received your Majesty's express pleasure in it. If your Majesty resolve on Montagu, as I conceive and wish, it is very material, as these

times are, that your Majesty have some care that the Recorder succeeding be a temperate and discreet man, and assured to your Majesty's service."

Next day Montagu's appointment as Chief Justice passed the great seal, and a few days after he was solemnly installed in the Court of King's Bench at Westminster. On this occasion there was a grand procession from the Temple to Westminster Hall:—"First went on foot the young gentlemen of the Inner Temple: after them the barristers according to their seniority; next the officers of the King's Bench; then the said Chief Justice himself, on horseback, in his robes, the Earl of Huntingdon on his right hand, and the Lord Willoughby of Eresby on his left, with above fifty knights and gentlemen of quality following."

When he entered the Court he first presented himself at the bar, with Sergeant Hutton on his right hand, and Sergeant Moore on his left. The Lord Chancellor, seated on the bench, then delivered to him the writ by which he was constituted Chief Justice, and thus addressed him upon the duties of his new office. Lord Ellesmere's very spiteful speech, it will be observed, was spoken *at* Sir Edward Coke, and the virtues ascribed to old Montagu were meant to indicate the offenses for which the cashiered Chief Justice had incurred the royal displeasure:—

"This is a rare case, for you are called to a place vacant not by death or cession, but by a motion and deposing of him that held the place before you. It is dangerous in a monarchy for a man, holding a high and eminent place, to be ambitiously popular; take heed of it. In hearing of causes you are to hear with patience, for patience is a great part of a judge; better hear with patience, prolixity and impertinent discourse of lawyers and advocates, than rashly, for default of the lawyer to ruin the client's cause: in the one you lose but a little time; by the other the client loseth his right, which can hardly be repaired. Remember your worthy grand-

<sup>1</sup> Dugd. Or. Jur. p. 98. The only procession of this sort I ever witnessed was, when Lord Tenterden took his seat as a peer in the year 1827. The barristers, according to their seniority, all then attended him to the House of Lords.

father, Sir Edward Montagu, when he sat Chief Justice in the Common Pleas: you shall not find that *he* said vauntingly, that he would make 'Latitats' *latitare*;<sup>1</sup> when *he* did sit Chief Justice in this place, he contained himself within the words of the writ to be 'Chief Justice,' as the King called him, '*ad placita coram nobis tenenda*;' but did not arrogate or aspire to the high title of 'CAPITALIS JUSTITIA ANGLIÆ,' or 'CAPITALIS JUSTITARIUS ANGLIÆ,' an office which Hugh de Burgh and some few others held in times of the barons' wars, and while the fury thereof was not well ceased.<sup>2</sup> *He* never strained the statute 27 Edw. III. c. 1. to reach the Chancery, and to bring that court and the ministers thereof, and the subjects that sought justice there, to be in danger of *premunire*, an absurd and inapt construction of that old statute.<sup>3</sup> *He* doubted not but if the King, by his writ under his great seal, commanded the judges that they should not proceed *Rege inconsulto*, then they were dutifully to obey.<sup>4</sup> *He* challenged not powers from this court to correct all misdemeanors, as well extrajudicial as judicial, nor to have power to judge statutes void, if he considered them against common right and reason, but left the parliament and the King what was common right and reason.<sup>5</sup> Remember the removing and putting down your late predecessor, and by whom, —which I often remember unto you, that is the great KING OF GREAT BRITAIN,<sup>6</sup>—whose great wisdom and royal virtue, and religious care for the weal of his sub-

<sup>1</sup> This alludes to a controversy between the courts for *custom*, on which the profits of the judges mainly depended. The "latitat" was a contrivance to take causes into the King's Bench from the Common Pleas.

<sup>2</sup> Whoever has done me the honor to read the first volume of this work, will be aware that the Chancellor is here egregiously mistaken, for there were "Chief Justiciars" from the Conquest till the end of the reign of Henry III.: and the title of "Chief Justice of England," which Coke assumed, had been borne by many of his predecessors after the nature of the office had been altered.

<sup>3</sup> This refers to the controversy about staying, by injunction out of Chancery, execution on common law judgments.

<sup>4</sup> This is a sarcasm upon Coke's greatest glory,—that he would not allow the King to interfere with the regular administration of justice.

<sup>5</sup> Here he touches Coke, who, in Dr. Bonham's case, had talked nonsense about a statute being void if contrary to reason.

<sup>6</sup> The title which James had assumed without authority of parliament, and by which he delighted to be called

jects, and for the due administration of justice, can never be forgotten."

Montagu thus answered:—

"My most honorable Lord: I must acknowledge the great favors I have received from his Majesty; for, when I do consider my desert, I wonder what I am that he should exalt me to this high place. But I find the Wiseman's saying true, in great actions, *cor Regis in manibus Domini*, and 'what is done, *factum est a Domino*.' I will not inquire into my vow, but I will pay my vow and *pro posse meo*. I will endeavor my best. It hath been a fashion of those that have gone before me to excuse themselves; and this I might do better than they; yet I dare not disable myself lest I should tax my master's judgment. God I hope will supply what is defective in me. My Lord, what a spur have you put to prick me forward in mentioning my grandfather!" After enlarging on the merits of this worthy sage, he adds, "I will, for my own part, avoid four faults:—idleness, corruption, cowardliness,—and I will not be a heady judge. First, I will not be idle nor over busy. For the second, I have no need to be corrupt, neither in action nor affection, for I have estate sufficient. And, for my courage, if I fear, let me be amerced: I will be a lion in courage, not in cruelty. And for the fourth, I will be glad of good counsel, and I will not be busy in stirring questions, especially of jurisdictions. It comforts me to see the sages who sit there [the puisnies]. And yet I am discomfited in three things, in the loss of my profit, pleasure, and liberty. But I will devote myself *Deo, Regi, et Legi*."

The writ being then read, he took the oaths, mounted to the bench, and was placed in the seat of Chief Justice.

The new Chief Justice had a very slender stock of law, but much good sense and knowledge of the world. He was pronounced to be "a perfect gentleman," and from the uniform courtesy and kindness with which he treated the bar, there was a general disposition to support him. He had one steady puisne on whom he could rely Mr.

<sup>1</sup> The motto on his rings when he was called Sergeant.

<sup>2</sup> See Cro. Jac. 407. Moore's Reports, 826-830.

Justice Dodderidge, and with his aid he not only despatched the business decently well, but, from his ready elocution, and power of representation, he was regarded by the public as a great Judge. He always himself felt diffident and uncomfortable, and he often wished that "the time might come when he should hear no more of *Executory devises, or Recoveries with double voucher.*"

The only proceeding of much public interest in his court while he was Chief Justice was the awarding of execution against Sir Walter Raleigh, after the return of this extraordinary man from the delusive expedition of Guiana. When it was resolved to sacrifice him with a view to appease the indignation of the Spaniards, and it was found that he had done nothing while intrusted with foreign command which could be construed into a capital offense, he was brought up before the Judges of the King's Bench, that they might doom him to die under the sentence pronounced fifteen years ago,—since which, by authority under the great seal, he had been put at the head of a fleet and an army, and been authorized to exercise the power of life and death over the King's subjects. He now pleaded that this was equivalent to a pardon:—

"By that commission," said he, "I gained new life and vigor; for he that hath power over the lives of others, must surely be master of his own. In the 22d Edw. III., a man was indicted for felony, and he showed a charter whereby it appeared that the King had hired him for the wars in Gascony,—and it was allowed to be a pardon. Under the commission, I undertook a journey to honor my sovereign, and to enrich his kingdom; but it had an event fatal to me, the loss of my son, and wasting of my whole estate."

*Montagu, C. J.:* "Sir Walter Raleigh, this which you now speak touching your voyage is not to the purpose; there is no other matter now in question here but concerning the judgment of death formerly given against you. That judgment it is now the King's pleasure, for certain reasons best known to himself, to have executed, unless you can show good cause to the contrary. Your commission cannot in any way help you, for by that you are not pardoned. In felony, there may be an implied

pardon, as in the case you cite; but in treason, you must show a pardon by express words, and not by implication. There was no word tending to pardon in all your commission; and, therefore, you must say something else to the purpose; otherwise, we must proceed to give execution."

*Sir Walter Raleigh*: "If your opinion be so, my Lord, I am satisfied, and must put myself on the mercy of the King, who I know is gracious. Concerning the judgment at Winchester, passed so long ago, I presume that most who hear me know how that was obtained; nay, I know that his Majesty was of opinion that I had hard measure therein, and if he had not been anew exasperated against me, certain I am I might (if I could by nature) have lived a thousand and a thousand years before he would have taken advantage thereof."

*Montagu, C. J.*: "Sir Walter Raleigh, you had an honorable trial, and it were wisdom in you now to submit yourself, and to confess that your offense did justly draw down the judgment then pronounced upon you. During these fifteen years you have been as a dead man in the law, and might at any minute have been cut off; but the King in mercy spared you. You might justly think it heavy, if you were now called to execution in cold blood; but it is not so; for new offenses have stirred up his Majesty's justice to move him to revive what the law had formerly cast upon you. I know you have been valiant and wise, and I doubt not but you retain both these virtues, which now you shall have occasion to use. Your faith hath heretofore been questioned; but I am satisfied that you are a good Christian, for your book, which is an admirable work, doth testify as much. I would give you counsel, but I know you can apply unto yourself far better counsel than I am able to give you. Yet, with the good Samaritan in the Gospel, who, finding one in the way wounded and distressed, poured oil into his wounds and refreshed him, so will I now give unto you the oil of comfort; though (in respect that I am a minister of the law) mixed with vinegar. Fear not death too much nor too little—not too much, lest you fail in your hopes—nor too little, lest you die presumptuously. The judgment of the Court is, *that exe-*



*cution be granted; and may God have mercy on your soul!*"<sup>1</sup>

It must be admitted that Montagu's language on this occasion forms a striking contrast with the opprobrious epithets which had been used by his predecessor at the original trial; and I know not that any share of the infamy of the new proceeding is to be imputed to him; he had only to declare what the law was, and he expounded it soundly; for in strictness the attainder could only be done away with by letters patent under the great seal, reciting that it was for treason, and granting a free pardon.<sup>2</sup>

The life of a common law judge became more and more irksome to Montagu. He complained not only of the duties cast upon him for which he was not altogether fit, but of the society he was obliged to keep: sitting all the morning at Westminster, he was expected to dine at Sergeants' Inn, where, in their "computations," his "companions" talked of nothing but the points which they had ruled upon their circuits, and the cases depending before them in their several courts. The gayety he had was "grand day in term," or a "reader's feast," when, for the amusement of the judges, the barristers danced with each other in the halls of the Inns of Court. He thought he was better fitted to be a statesman than a lawyer; and he was sure that, holding a political office, he should at any rate pass his time more agreeably.

At last his wishes were gratified, and, in the end of the year 1620, he became Lord Treasurer, and was created a peer by the titles of Baron Kimbolton in the county of Huntingdon, and Viscount Mandevil. It is said that this arrangement cost him the sum of £20,000.

He by no means found that the change answered his expectations. Buckingham, arbitrary and rapacious, was sole minister, and wished to engross the profits as well as power of all offices under the Crown. Lord Chancel-

<sup>1</sup> Jardine's Criminal Trials. vol. i. p. 485-520.

<sup>2</sup> Lingard truly says that the Chief Justice's address to Raleigh was "conceived in terms of respect unusual on such occasions."—Vol. ix. p. 172.

lor Bacon, who was supposed to be some check upon the favorite, stood on the brink of the precipice from which he was soon precipitated.

The new Viscount was ushered into the House of Lords, with the usual solemnities, on the 30th of January, 1621, when the memorable parliament met which put an end to *monopolies* and *judicial corruption* in England.

He took an active part in guiding the deliberations of the Peers on the trial of Sir Giles Mompesson, impeached by the Commons for the oppressions of which he had been guilty under royal grants giving him the exclusive right to deal in commodities;—and he was appointed a manager for the Lords in the conferences between the two Houses which ended in the impeachment of Lord Bacon for bribery. The conscience-stricken defendant having besought their Lordships to “be merciful to a broken reed,” they had only to consider of the sentence. A wish was expressed that this should be pronounced by the Viscount Mandevil, long accustomed to judicial proceedings; but he, considering that the illustrious delinquent had been his rival, his friend, and his patron,—with the delicacy of feeling which always distinguished him, declined the invidious task; and his successor, Sir James Ley, the new Chief Justice, was appointed speaker for the occasion.

It was expected that Lord Mandevil would now receive the great seal; but he probably did not desire the elevation, and at any rate it better suited the views of the Government to select for the Chief Judge of the land a Welsh curate, who had never been in a court of justice in his life, and who had nothing of law beyond a few scraps which he had picked up when private secretary to a former Lord Chancellor. While he was learning the A B C of equity, the great seal was put into commission, and Lord Mandevil was prevailed upon to consent to be first commissioner. The Duke of Richmond, and Sir Julius Cæsar, Master of the Rolls, were associated with him; and the latter did the actual business of the court till it suited Williams to appear as Lord Keeper.

In less than a twelvemonth from the time of his re-

ceiving the Treasurer's wand,—on account of a difference with Buckingham, he was obliged to resign it, and to be contented with the office of Lord President of the Council.<sup>1</sup> This office he retained during the remainder of the present, and the early part of the succeeding, reign. Without taking any conspicuous part, he seems ever after to have acquiesced in, and supported, all the measures of the Court. In consequence, in 1626, he was created Earl of Manchester, the preamble of his patent containing a pompous recital of his public services. The following year he exchanged the Presidency of the Council for the Privy Seal, which he continued to hold till his death. "When Lord Privy Seal," says Fuller, "he brought the Court of Requests into such repute, that what was formerly called the Almes Basket of the Chancery, had in his time well nigh as much *meat* in, and *guests* about it (I mean suits and clients), as the Chancery itself."<sup>2</sup> "He was," says Lord Clarendon, "a man of great industry and sagacity in business, which he delighted in exceedingly; and preserved so great a vigor of mind, even to his death, that some, who had known him in his younger years, did believe him to have much quicker parts in his age than before."<sup>3</sup> He lived to see the meeting of the Long Parliament; but, on account of his years, and the influence of his son, he escaped the vengeance prepared for other authors of the tyranny inflicted on the nation for eleven years, during which no legislative assembly had been allowed to meet. "He was, unhappily, too much used as a check upon the Lord Coventry; and when that Lord perplexed their counsels and designs with inconvenient objections in law, the authority of the Lord Manchester, who had trod the same paths, was still called upon; and he did too frequently justify their unjustifiable designs and pretenses. He died in lucky time,"<sup>4</sup>—on the 10th of

<sup>1</sup> Clarendon says, "Before the death of King James, by the favor of the Duke of Buckingham he was raised to the place of Lord High Treasurer of England; and within less than a year afterwards, by the withdrawing of that favor, he was reduced to the almost empty title of President of the Council, and to allay the sense of the dishonor, created Viscount Mandeville. He bore the diminution very well, as he was a wise man, and of an excellent temper."—*Reb.* i. 84.

<sup>2</sup> Fuller, ii. 169.

<sup>3</sup> *Rebell.* i. 84.

<sup>4</sup> *Rebell.* i. 85.

November, 1642, in the eightieth year of his age. It must be admitted that he was possessed of very valuable qualities both for public and private life; and when we consider how much he accomplished, and the ways to greatness pursued by most of his contemporaries, the negative praise is creditable to him that he can be charged with no act of violence or corruption. He piqued himself on his consistency, and took for his motto, which is still borne by his descendants, "*Disponendo me, non mutando me.*"

His eldest son, Edward, was one of the most distinguished men who appeared in the most interesting period of our history, having, as Lord Kimbolton, vindicated the liberties of his country in the senate, as Earl of Manchester in the field, and having afterwards mainly contributed to the suppression of anarchy by the restoration of the royal line.<sup>1</sup>

Charles, the fourth Earl, was created Duke of Manchester by George I.; and William, the fifth Duke, is the present representative of Sir Henry Montagu, the Lord Chief Justice.<sup>2</sup>

We are now in the period of our juridical annals when the office of Chief Justice of the King's Bench was considered a step to political advancement. On the pro-

<sup>1</sup> He was a *quasi* legal character, and I might almost claim to be his biographer, for he was a Lord Commissioner of the Great Seal under the Commonwealth, and as Speaker of the House of Lords, conducted their judicial business. He again acted in this capacity at the meeting of the Convention Parliament, till Lord Chancellor Clarendon was sworn in.

<sup>2</sup> The descendants of the first Chief Justice must now be reckoned by hundreds of thousands. Pepys, in his diary of the 22d of September, 1655, has the following passage:—"Among other discourse concerning long life, Sir John Minnes saying that his great-grandfather was alive in Edward the VI.'s time; my Lord Sandwich did tell us how few there have been of his family since King Harry VIII., that is to say, the then Chief Justice, and his son and the Lord Montagu, who was father to Sir Sidney, who was his father. And yet, what is more wonderful, he did assure us from the mouth of my Lord Montagu himself, that in King James's time (when he had a mind to let the King to cut off the entail of some land which was given in Harry VIII.'s time to the family, with the remainder in the Crown), he did answer the King in showing how unlikely it was that it ever could revert to the Crown, but that it would be a present convenience to him; and did show that at that time there were 4000 persons derived from the very body of the Chief Justice. It seems the number of daughters in the family had been very great, and they too had most of them many children, and grandchildren and great-grandchildren. This he tells as a most known and certain truth."

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motion of Chief Justice Montagu to be Lord Treasurer, he was succeeded as Chief Justice by SIR JAMES LEY, who, in his turn, was promoted to be Lord Treasurer. This lawyer, although he filled such high offices, and lived to be an Earl, seems to have owed his elevation mainly to his medlocrity, for he never exhibited much talent either in his profession or in parliament; and, not having committed any considerable crimes, nor conferred any benefits on his generation, he is forgotten in Westminster Hall, and his name is hardly noticed by historians.

He was descended of an ancient family, long seated at Ley, in the county of Devon; but, being a younger son, he had to fight his way in the world. At the age of sixteen he was sent to Brazen-nose College, Oxford. Having taken a bachelor's degree there, he was transferred to Lincoln's Inn, where he is said to have devoted himself very assiduously to the study of the common law; but he seems to have been more distinguished by agreeable manners than by profound acquirements. After he had been fifteen years at the bar, he had hardly any business; and his prospects were very discouraging. On the accession of James I. he tried the experiment of becoming a Sergeant,—and this likewise failed, for he continued without clients in the Court of Common Pleas, as he had been when sitting in the Court of King's Bench. So hopeless was his condition, that he agreed to accept the appointment of Chief Justice of Ireland,—then pretty much what the office of Chief Justice of New Zealand would now be considered. He continued in exile five years, assisting the King with his new plan of colonizing Ulster, and trying to tame the *aborigines*. Being a man of prudence and address, he was very useful in this employment, and greatly recommended himself to his royal master, who expected lasting glory from civilizing a country which had become rather more barbarous since a settlement in it had first been attempted by the English. He is one of the "*Worthies*" of LLOYD, who, describing his residence in Ireland, says, "Here he practiced the charge King James gave him at his going over—'not to build his estate upon the ruins of a miserable nation, but, by the

impartial execution of justice, to aim at civilizing the natives instead of enriching himself."

Ley had at last leave to make a voyage home to his native country, and there he gave such a flattering account of the progress which Ireland was making under the new *régime*—ascribing much of it to himself—that James, as a reward for his eminent services, knighted him, gave him leave to resign his Irish Chief Justiceship, made him Attorney of the Court of Wards and Liveries in England, and, by warrant under the Privy Seal, assigned to him precedence in that Court above Sir Henry Hobart, Attorney General to the Crown. His fortune was now made. Till the abolition of military tenure, bringing along with it the custody of the lands of minors, the right of bestowing heiresses in marriage, and other such incidents, the practice in the Court of Wards and Liveries was far more profitable than in any other Court; and Sir James Ley not only had a great income with little labor, but he was much at Whitehall, and contrived to accommodate himself to all the humors of the royal pedant. The order of Baronets being established, he was one of the first batch—no doubt buying this distinction at the usual price.

He could not for a moment compare himself with Lord Coke; but when this legal leviathan was pronounced to be a public nuisance, the fashion arose of saying that a man with plain good sense and gentleman-like habits made the best Chief Justice. Ley's ambition increasing with his wealth, he insinuated that he should make as good a Chief Justice in England as he had done in Ireland; and, without any great stretch, he asserted that he was as much of a lawyer as Montagu, who was now presiding in the King's Bench, more quietly, and more for the support of the prerogative, than Coke, so renowned for his learning. He went so far as to censure Coke for having opposed the King's desire to sit on the bench himself, like Solomon, and to give judgment between his subjects. To add to his legal reputation, he compiled and circulated in MS. "A Treatise concerning Wards and Liveries," and "Reports of Cases decided in the Court of Wards and Liveries," which were afterwards printed, and may still be seen in curious collec-

tions. Above all, he cultivated Buckingham; and he has been said that he offered the rapacious minister a large sum of money for the Chief Justiceship when it should become vacant: but this statement, I apprehend, proceeded rather from the probability than from any positive evidence of the fact.

However the arrangement might have been brought about, when Montagu received the Treasurer's staff, the collar of S.S. was put round the neck of Sir James Ley, as Chief Justice of England. The following is the account we have of his installation, on the 1st day of February, 1621:—"The Lord Chancellor came and sat in the Court of King's Bench, and Sir James Ley came betwixt two of the King's Sergeants to the bar, where the Lord Chancellor made a short speech to him of the King's favor and reasons in electing him to that place; and he, being at the bar, answered thereto, showing his thankfulness, and endeavor in the due execution of his office. He then went into court and had his patent delivered to him, which was openly read, and was a short recital only that the King had constituted him to be Chief Justice there, commanding him to attend and execute it. He was then sworn."

The very same day he decided that an innkeeper may be indicted for taking an exorbitant price for oats. Objection was taken that the indictment was bad for not alleging with sufficient certainty what was the reasonable price of oats, for it only alleged "*quod commune pretium avenarum non fuit ultra 20d. the bushel;*" but he held the indictment sufficient in averring "*quod predictus A. B. demandavit et cepit pretium excessivum et extorsivum, viz. 2s. 8d. a bushel.*"<sup>2</sup> A few days after, he ruled that it was actionable for one married woman to say to another married woman, "Thou perjured beast, I will make thee stand upon a scaffold in the Star Chamber," though, for want of the word "art," they were spoken *adjectively*, not *positively*.<sup>3</sup>

During the two years and a half that he continued to preside in the King's Bench, I do not find any more important point coming before him; and if we may judge

<sup>1</sup> Cro. Jac. 610.

<sup>2</sup> Johnson's case, Cro. Jac. 610.

<sup>3</sup> *Benson et ux v. Hall et ux*, Cro. Jac. 613.

from the Reports, the business of his court must have dwindled away almost to nothing,—I presume from an opinion of his incompetency.

But he was engaged as one of the principal actors in a very solemn proceeding. It has been said that when Lord Bacon pleaded *guilty* to the charge of bribery, alleged against him by the House of Commons, and was deprived of the great seal, Ley for a short time became Lord Chancellor.<sup>1</sup> In reality he was only appointed Speaker of the House of Lords, the great seal having been put into commission.

He continued to preside on the woolsack while the House of Lords was engaged in some of the most important proceedings which have ever engaged its attention; and although he was not then a peer, and therefore had no right to debate or vote,—as the organ of the will of the assembly he acted a conspicuous part in the eyes of the public.

At first it was thought that the painful duty would have been cast upon him of calling upon Lord Bacon to kneel down at the bar, and of addressing him upon the enormity of the offense for which he was to receive sentence; but the illustrious convict was, or pretended to be, too ill to attend, and the Peers, to spare the shame of a man whom they all admired for his genius, and even loved for the blandness of his manners, agreed to pass judgment upon him in his absence.

The Lords then sent a message to the other House “that they were ready to give judgment against the Lord Viscount St. Albans if they, with their Speaker came to demand it.” The Commons soon appeared at bar, with Sir Thomas Richardson (afterwards Chief Justice of the King’s Bench) at their head, and “demanded judgment on the Lord Chancellor as the nature of his offenses and demerits require.” Sir James Ley, remaining covered, thus gave judgment:—“Mr. Speaker: Upon the complaint of the Commons against the Lord Viscount St. Alban, Lord Chancellor, this High Court, on his own confession, hath found him guilty of the crimes and corruptions complained of by the Commons, and of sundry other crimes and corruptions of like

<sup>1</sup> 2 St. Tr. 1112.



nature: Therefore this high Court, having first summoned him to attend, and having received his excuse of not attending by reason of infirmities and sickness, which he protested was not feigned, doth nevertheless think fit to proceed to judgment: And therefore this high Court doth adjudge, 1. That the Lord Viscount St. Alban, Lord Chancellor of England, shall undergo fine and ransom of £40,000. 2. That he shall be imprisoned in the Tower during the King's pleasure. 3. That he shall be for ever incapable of holding any office, place, or employment in the state or commonwealth. 4. That he shall never sit in parliament, nor come within the verge of the Court."

Subsequently, Sir James Ley pronounced judgment on Sir F. Mitchell, found guilty, along with Sir Giles Mompesson, of extortion and oppression under unlawful monopolies obtained from the Crown; and on Sir Henry Yelverton, the Attorney General, found guilty of corruption in preparing charters to pass the great seal. He had a ready eloquence, and on these occasions, where little knowledge of law was required, he appeared to advantage.

In the dispute between the two Houses respecting the punishment of Edward Floyde, he gave important assistance to the Lords in maintaining their exclusive right to try by impeachment. When the unhappy delinquent was at last brought to the bar of the House of Lords, the following dialogue was held, being begun by Lord Speaker Ley:—"What answer do you make to the uttering of the words laid to your charge?" *Floyde*: "I cannot remember that these words were ever spoken by me." *Ley*: "You must give a positive answer whether you spoke the words '*Goodman Palsgrave and Goodwife Palsgrave*.'" *Floyde*: "I spoke not the words in such sense as is alleged." *Ley*: "Did you speak the words, or words to that effect?" *Floyde*: "It would be folly for me to deny them, because they have been proved." The House then agreed to the frightful sentence of repeated scourgings, pillorying, &c., which reflects such indelible disgrace on the House of Lords, but for which Ley cannot be answerable, as he only acted ministerially in pronouncing it.<sup>1</sup>

<sup>1</sup> 1 Parl. Hist. 1249.

<sup>2</sup> *Ibid.* 1261.

When parliament again met, he ceased to be Speaker, the woolsack being occupied by Williams, Bishop of Lincoln, the new Lord Keeper of the Great Seal.<sup>1</sup>

The Chief Justice, on his return to his ordinary judicial duties, found them very irksome, and he was impatient to get rid of them. In the end of the year 1624 he succeeded.

The intrigue by which he then got possession of the office of Lord Treasurer and was raised to the peerage, will probably remain for ever in obscurity; but the probability is that he paid a large sum of money, to be divided between the King and Buckingham. However this may be, he now joyfully threw off his Judge's robes; he became Lord Ley, Baron Ley, of Ley, in the County of Devon; and, bearing the Treasurer's white wand, he took precedence of all peers, spiritual and temporal, except the Archbishop of Canterbury and the Lord Chancellor. He was at the same time admitted into the cabinet, and he continued in favor during the remainder of the reign of King James.

On the accession of Charles I. he was promoted in the peerage, and took a title which afterwards became one of the most illustrious in the peerage of England, being borne by the hero of Blenheim, Ramillies, and Malplaquet.

The first Earl of Marlborough, though he retained his office of Lord Treasurer for several years, mixed very little in public affairs, and was a mere puppet of the Duke of Buckingham. I cannot find the slightest trace of any speech he ever made in parliament after he was created a peer. He seems still to have had great delight in associating with his old legal friends at the Inns of Court, and we find him carrying his Treasurer's staff at a grand feast given at Sergeants' Inn by the brethren of the coif.<sup>2</sup>

By and by it suited the convenience of the favorite that he should be removed from his office of Lord Treasurer; when he was obliged to exchange it for that

<sup>1</sup> 1 Parl. Hist. 1295.

<sup>2</sup> Cro. Car. ix.

<sup>3</sup> Lord Clarendon says, "The Earl of Marlborough was removed under pretense of his age and disability for the work (which had been a better reason against his promotion)." He observes, "There were at that time five noble persons alive, who had all succeeded one another immediately in that

of President of the Council, which he held till the 14th of March following, when he expired, in the 78th year of his age. The cause of his death is said to have been grief at the quarrel between Charles and the RIGHT, which brought on an abrupt dissolution of the Parliament, and a resolution that the government of the country should henceforth be carried on by the prerogative alone. In his last moments he was supposed to have had revealed to him the terrible times when Englishmen were to fight against Englishmen in the field, and the scaffold was to be crimsoned with royal gore.

He is said to have been fond of antiquarian learning, and he amused himself with writing treatises on heraldry and other kindred subjects.<sup>1</sup> Wood describes him as "a person of great gravity, ability and integrity, and of the same mind in all conditions." This is flattery,—but it is curious to take a glance at one who, in an age of great men, with very slender qualifications, filled the offices of Coke and of Burleigh, and rose to higher rank than either of them. His earldom devolved successively on his two sons, Henry and William, and on the death of the latter, in 1679, without issue, it became extinct.<sup>2</sup>

The greatest honor ever conferred upon the house of Ley was by a sonnet addressed by Milton to the Lady Margaret, daughter of the Chief Justice. She resided in a battlemented mansion in Buckinghamshire, bosomed high in tufted trees, where she was "the cynosure of neighboring eyes." The poet, captivated by her charms,—as yet indifferent about popular privileges—and thinking that the surest way to win her was to praise her sire, thus apostrophised her:—

unsteady charge, without any other person intervening: the Earl of Suffolk, the Earl of Manchester, the Earl of Middlesex, the Earl of Marlborough, and the Earl of Portland."—*Rebellion*, i. 74.

<sup>1</sup> See Hearne's Collection of Curious Discourses (London, 1775, 8vo); Wood's Ath. Ox.; Bliss, ii. 441.; Dug. Ch. Ser. 105, 106.

<sup>2</sup> Henry had been called up to the House of Lords in his father's lifetime,—affording the only instance of a Chief Justice and his son sitting together in that assembly. "March 2, 1625.—HODIE Henry Lord Ley (the eldest son of James E. of Marlborough) was brought into the House (in his parliament robes) between the Lord Crumwell and the Lord North (Garter going before), and his Lordship delivered his writs, kneeling unto the Lord Keeper, which being read, he was brought to his place next to the Lord Deyncourt."

—3 *Lord's Journals*, 512.

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\* Daughter of that good Earl, once President  
Of England's Council and her Treasury,  
Who lived in both unstained with gold or fee,  
And left them both more to himself content,  
'Till sad the breaking of that Parliament  
Broke him, as that dishonest victory  
At Chæronœa, fatal to Liberty,  
Kill'd with report the old man eloquent  
Though later born than to have known the days  
Wherein your father flourish'd, yet by you,  
Madam, methinks I see him living yet,  
So well your words his noble virtues praise,  
That all both judge you to relate them true,  
And to possess them, honour'd MARGARET!"

I have very great delight in now presenting to the reader a perfectly competent and thoroughly honest Chief Justice. Considering the times in which he lived, the independent spirit which he displayed is beyond all praise. Since the judges have been irremovable, they can take part against the abuses of power on very easy terms; and, as Lord Mansfield remarked, "their temptation is all to the side of popularity." Under the Stuarts, a judge gave an opinion against the Crown with the certainty of being dismissed from his office; and, if he retained his virtue, he had this peculiar merit, that he might have sacrificed it without becoming infamous,—for, however profligate, numerous examples would have defended him, and the world would have excused him, saying "he is not worse than his neighbors." The name of RANDOLF<sup>1</sup> CREWE, therefore, ought to be transmitted with honor to the latest posterity. The more do we owe this debt of gratitude to his memory, that he was not, like Sir Edward Coke, ostentatious and blustering in the discharge of his duty. Not seeking to obtain the applause of the world, he was a quiet, modest, unambitious man, contented with the approbation of his own conscience.

The subject of this memoir was of ancient family, who took their name from a manor, in the county of Chester, which had belonged to them at least as far back as the beginning of the reign of Edward I. This possession had, for 250 years, belonged to owners of a

<sup>1</sup> Christian as well as surnames were, in those days, spelt very differently. We find this name writtē "Randophe," "Randolph," "Randulph," "Randulf," "Rondulph," "Ranulf," "Randalf," and "Randal."

different name, by the marriage of the heiress into another family, but was repurchased by our Chief Justice, the true heir male of the Crewes.

Born in the year 1588, he was the eldest son of John Crewe, of Nantwich, Esquire, a gentleman in rather reduced circumstances, but animated by a strong desire to restore the greatness of his lineage. There was one other son, Thomas; and their father resolved to breed them to the bar, as affording the best chance of honorably acquiring preferment. They were both lads of excellent parts, and he used to entertain them with stories of the greatness of their ancestors; he would point out to them the great manor of CREWE, forming a large section of the county; and he fired their imaginations with the vision of their recovering it, and again becoming "Crewes of that ilk." In the reign of Edward III. two brothers, of the name of Stratford, successively held the office of Lord Chancellor; and in recent times the two brothers Scott rose in the law to equal eminence. The two Crewes afford another instance of similar success. They were at the same school, the same college, and the same inn of court; always equally remarkable for steady application, sound judgment, and honorable conduct. They both followed exactly the same course till they were Sergeants-at-law, were knighted, and were successively Speakers of the House of Commons,—when fate varied their destiny.<sup>1</sup> Sir Thomas never having been a Chief Justice, I must confine my narrative to Sir Randolph.

We have to boast of him as one of the ornaments of Lincoln's Inn; and in our books are the following entries respecting him, marking the several stages of his career there:—

"Cestr, Radulphus Crewe admiss est in societate ibm decimo tertio die Novembris anno regni Reginæ Elizabeth decimo nono ad instanc Richi Wilbraham et Lawrencij Woodnett manuc—

<sup>1</sup> The son of Sir Thomas, soon after the Restoration, was created by Charles II., Baron Crewe of Stene, in the county of Northampton; but this peerage became extinct in 1721, by the death without issue of his two sons, who had successively inherited it.

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“It is orderede that these gentlemen hereafter namede shalbe called to the utter barre, vid. Mr. Jones and Mr. Sidleye and they to be called at the nexte moote in the hall the savinge of auncientye of Mr. Jonnes and Mr. Sidleye to the utter barrestors that have not mooted. And Mr. Molton and MR. CREWE to be called to the barre the firste moote the nexte terme.”

“Lyncolnes Inne. Ad Consilium ibm tēnt tertio die Novembris anno R<sup>ma</sup> Eliz.: c<sup>o</sup> quadragesimo scdo. 1600.

“Yt ys ordered that Mr. Edward Skepwyth Mr. James Leighe and Mr. RANDOLPHE CREWE shalbe called to the Benche and be published at the next pleading of the next whole Moote in the Hall.

“Lincolnes Inne. Ad Consilium ibm tent nono die Maij anno r. R<sup>ma</sup> Dnæ Elizabeth z xliiij<sup>o</sup> 1602.

“Att this Counsell Mr. RANDOLPHE CREWE is elected and chosen to be reader the next somer and is to have such allowances as the last somer reader hadd, and Mr. Gellybrand and Mr. Christopher are elected to be Stewar-des of the Reader’s Dynner.”

He made himself a deep black-letter lawyer; and, from early training, he was particularly fond of geneology and heraldry: He had likewise a ready elocution, and he conducted with discretion and success the causes intrusted to him. Business flowed in upon him almost from his call to the bar; and, never forgetting that he might be reinstated in the family possessions, he saved every broad piece that he could lay by without being mean.

When, in the hope of obtaining a supply, a parliament was called in the spring of 1614, he had acquired such distinction that, without solicitation, he was returned to the House of Commons as member for his native county; and at the opening of the session he was elected Speaker. He “disqualified” himself in the approved fashion; but, being “allowed” by the King, with high commendation for his known learning and

ability, -in demanding the privileges of the Commons he delivered a flowery address to the King, in which he contrived to allude to his Majesty's descent from Cedric the Saxon, as well as William the Conqueror and the Scottish monarchs, whom he carried back nearly to the Flood. James, much tickled with this pedigree, again expressed his satisfaction that the Commons had made so worthy a choice; but strictly commanded the new Speaker to prevent the introduction of improper bills into the House, or the use of improper topics in debate, and to urge the Commons with all speed to vote the supply of which he stood so much in need.

Crewe had a very unhappy time of it while in the chair of the House of Commons, and conceived a disgust for politics which lasted as long as he lived. Instead of granting a supply, the leaders of the country party, now grown strong and bold, talked of nothing but grievances; and a quarrel arose between the two Houses respecting a speech made by the Bishop of Lincoln, derogatory to the dignity of the Commons. The King blamed the Speaker; but the Speaker declared that he could do nothing more to further the King's business without trenching on those privileges which it was his duty to uphold. At the end of a few weeks, employed in useless altercation, the King abruptly put an end to the session by a dissolution.<sup>1</sup>

The ex-Speaker now resolved to devote himself exclusively to his profession, and with this view he took upon himself the degree of Sergeant-at-law.<sup>2</sup>

He refused to accept a seat in the next parliament, which, meeting in Jan. 1621, distinguished itself by the punishment of Lord Bacon;—and he does not appear to have been again in any way brought before the public till Sir James Ley's resignation of the office of Chief Justice of the King's Bench when made Lord Treasurer.

Two Chief Justices having presided in succession who were politicians rather than lawyers, there was a cry that "Bishop Williams, the Chancellor, wished to have the common law judges as incompetent as himself." In deference to the public voice, which even in absolute gov-

<sup>1</sup> 1 Parl. Hist. 1149-1169.

<sup>2</sup> Dug. Chr. Ser. 105.

ernments is not to be despised, the resolution was taken to select a good lawyer for the vacancy, and every one pointed to Sergeant Randolph Crewe as the fittest man that the profession afforded. Accordingly, on the 26th of January 1625, he took his seat as Chief Justice of the Court of King's Bench.

There never was a more laudable appointment, and he even exceeded the sanguine expectations that had been entertained of his fitness. To learning hardly inferior to that of Coke, and to equal independence of mind, he added—what Coke wanted so much—patience in hearing, evenness of temper, and kindness of heart.

On the demise of the Crown, he was immediately re-appointed to his office, and he continued to fill it with increasing reputation till the unfortunate Charles began that course of illegal and unconstitutional measures which ended so tragically.

"CRO JAC.," "CRO CAR.," and the other Reports of that time, swarm with decisions of Lord Chief Justice Crewe; but they have almost all become obsolete, with the laws on which they were founded. There is one of his recorded judgments, however, which, as a true specimen of English eloquence in the 17th century, will continue to be read and recited as long as we are a nation.

A contest arose in the year 1626, in consequence of the death of Henry de Vere, Earl of Oxford, respecting the right to that earldom, between Robert de Vere, claiming as heir male of the family, and Lord Willoughby de Eresby, claiming through a female, as heir general to the last earl. The case was referred by Charles I. to the House of Peers, who called the Judges to their assistance. The opinion of these venerable sages was delivered in the following terms by Lord Chief Justice Crewe:—

"This great and weighty cause, incomparable to any other of the sort that hath happened at any time, requires much deliberation and solid and mature judgment to determine it. Here is represented to your Lordships *certamen honoris*, illustrious honor. I heard a great peer of this realm and a learned say when he lived, 'there is no King in Christendom hath such a subject as Oxford.'



And well might this be said, for DE VERE came in with the Conqueror, being the Earl of Guynes; shortly after the Conquest, he was made Great Chamberlain by Henry I. the Conqueror's son, above 500 years ago. By Maud, the Empress, he was created Earl of Oxford, the grant being ALBERICO COMITI, so that he was clearly an Earl before. He was confirmed and approved by Henry-Fitz-Empress, Henry II. This great honor, this high and noble dignity, hath continued ever since in the remarkable surname of DE VERE, by so many ages, descents, and generations, as no other kingdom can produce such a peer in one and the self-same name and title. I find in all this time but two attainders of this noble family, and those in stormy times, when the government was unsettled and the kingdom in competition.

"I have labored to make a covenant with myself, that affection may not press upon judgment; for I suppose there is no man that hath any apprehension of gentry or nobleness, but his affection stands to the continuance of a house so illustrious and would take hold of a twig or twine thread to uphold it. And yet time hath his revolutions; there must be a period and an end to all temporal things—*finis erum*—an end of names and dignities, and whatsoever is terrene;—and why not of DE VERE?—for where is BOHUN? Where is MOWBRAY? Where is MORTIMER? Nay, which is more, and most of all, where is PLANTAGENET? They are entombed in the urns and sepulchres of mortality! Yet let the name of DE VERE stand so long as it pleaseth God."

He then went on to show, that although the earldom was at first held in fee-simple by the family of DE VERE, so that it might descend to a female, nevertheless it was entailed on *Aubrey de Vere* "*and his heirs male*" by the parliament of 16 Richard II., so that the right had descended to *Robert de Vere* as his heir male, and the *De Veres* as long as the line continued must be Earls of Oxford. The Lords were guided by this opinion,<sup>1</sup> but the successful claimant died without an heir male; and DE VERE, along with BOHUN, MOWBRAY, MORTIMER and

<sup>1</sup> Cruise on Dignities, p. 101.

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Before Sir Randolph Crewe had completed the second year of his Chief Justiceship, although revered by the people, he was found wholly unfit for the system of government which had been determined upon by the King and his ministers. After the abrupt dissolution of Charles's second parliament without the grant of a supply, all redress of grievances being refused,—the plan was deliberately formed of discontinuing entirely the use of popular assemblies in England, and of ruling merely by prerogative. For this purpose it was indispensably necessary that the King should have the power of imposing taxes, and the power of arbitrary imprisonment. He began to exercise both these powers by assessing sums which all persons of substance were called upon to contribute to the revenue according to their supposed ability, and by issuing warrants for committing to jail those who resisted the demand. But these measures could not be rendered effectual without the aid of the Judges; for hitherto in England the validity of any fiscal imposition might be contested in a court of justice; and any man deprived of his liberty, might, by suing out a writ of *habeas corpus*, have a deliberate judgment upon the question "whether he was lawfully detained in custody or not?" Sir Thomas Darnel, Sir Edmund Hampden, and other public-spirited men, having peremptorily refused to pay the sums assessed upon them, had been cast into prison, and were about to seek legal redress for their wrongs.

In the coming legal contest, almost every thing would depend upon the Chief Justice of the King's Bench. According to a well-known fashion which prevailed in those times, the Attorney General, by order of the Government, sounded Sir Randolph Crewe respecting his opinions on the agitated points, and was shocked to hear a positive declaration from him that, by the law of England, no tax or talliage, under whatever name or disguise, can be laid upon the people without the authority of parliament, and that the King cannot im-

<sup>1</sup> The title was renewed by Queen Anne in favor of Harley, descended from the De Veres through a female.

prison any of his subjects without a warrant specifying the offense with which they are charged. This being reported to the Cabinet, Sir Randolf Crewe was immediately dismissed from his office; and, in a few weeks after, Sir Nicholas Hyde, who was expected to be more compliant, was made Chief Justice in his stead.

When he gave his answer to the Attorney General, he was not ignorant of the punishment which he must incur, and he bore it with perfect equanimity,—rejoicing that he had done his duty, and that he was delivered from temptation.

It has often been said that he was removed for opposing ship-money; but this ingenious tax had not then been devised, and, indeed, Noy, its author, was still a patriot, and one of the counsel for those who denied the legality of the present imposition. There having been no proceeding in court in which he had expressed any opinion against the prerogative, and his private conference with the Attorney General being then unknown, his dismissal seems to have caused great astonishment. Croke, the reporter, thus notices it:—

“Mem. Upon Friday, the 10th of November, Sir Randolf Crewe, Chief Justice of the King's Bench, was discharged of that place, by writ under the great seal, for some cause of displeasure conceived against him; but for what was not generally known.”

Fuller, writing when the truth had been partly disclosed, says, in his quaint style,—

“King Charles' occasions calling for speedy supplies of money, some great ones adjudged it unsafe to venture on a parliament, for fear, in those distempered times, the physic would side with the disease, and put the King to furnish his necessities by way of loan. Sir Randal, being demanded his judgment of the design, and the consequences thereof, (the imprisoning of recusants to pay it), openly manifested his dislike of such preter-legal courses, and thereupon, Nov. 9, A. D. 1626, was commanded to forbear his sitting in the court, and the next day was by writ discharged from his office; whereat he discovered no more discontentment than the

weary traveler is offended when told that he is arrived at his journey's end."

He had it in his power to be returned member for his native county, in the parliament which met soon after, and the opposition might have been led by two ex-Chief Justices of the King's Bench; but he had neither the vigor nor the thirst for vengeance which animated Sir Edward Coke, and he preferred the repose of private life,—not being without hope of being restored to his judicial functions.

At the end of two years he wrote the following letter to Buckingham, which is, I think, most creditable to him; for, notwithstanding his earnest desire to be replaced on the bench, he makes no concession or promise at all inconsistent with his principles;—

"My duty most humbly done to your grace, vouchsafe, I beseech your grace, to read the misfortune of a poor man herein, and take them into your noble thoughts, whose case is considerable. I have lived almost two years under the burden of his Majesty's heavy displeasure, deprived of the place I held, and laid aside as a person not thought of, and unserviceable, whereof I have been soe sensible, that ever since living at my house att Westminster, I have not sett my foot into any other house there or at London (saveing the house of God), but have lived private and retired as it best became me.

"I did decline to be of this late parliament, distrusting I might have been called upon to have discovered in the public, the passages concerning my removal from my place which I was willing should be lapped up in my own busome.

"I likewise took special care if my name were touchit upon in the Comons house, that some of my friends there should doe their best to divert any further speech of me, for I alwaies resolved wholly to relie upon the King's goodness, who I did not doubt would take me into his princely thoughts, if your grace vouchsafed to intercede for me. The end of the Parliament was the time when I prefixed myself to be a suitor to your grace, and I have now encouragement soe to be: the petition of right whereunto your grace was a party

speaks for me, and for the right of my place, but I humbly desire favour. God doth knowe, it was a great affliction to me to deny anything commanded me, the King that my heart soe loved, and to whom I been soe bound, prince and King: but had I done it, I had done contrary to that which all his judges resolved to doe (and I only suffer), and if I had done it and they had deserted me therein, I had become a scorne to men, and had been fit to have become a scritch owl in the darke; so likewise if I had done it and had been knowne to have been the leader herein, and the rest of the judges had been pressed to have done the like, the blame and the reproof would have been laid on me, and by me they might in some measure have excused themselves. But yet their was a greater obligation to restrain me than these (for these be but morall reasons), and that was the obligation of an oath, and of a conscience, against both which (then holding the place of a judge), I in my own understanding had done, had I subscribed my name to the writing which the King was then advised to require me to doe, for therein I had approved the commission, and consequently the proceedings thereupon, wherein here I had been condemned, and with how loud and shrill a voice, I leave to your grace to judge. Wherefore, most noble Lord, vouchsafe to weigh these my reasons in the ballance of your wisdom and judgement, and be soe noble and just as to excuse me to the King herein, and in a true contemplation of that nobleness and justice, be soe good as to be the means, that I may be really restored to the King's grace and favour. Your grace has in your hands Achilles' speare which hurts and heales. I am grievously hurt, your grace hath the means to heale me to whom I make my address. The time is now fitt for me: now you are upon a forraigen expedition, you take my prayers, my wife's, and my children's with you, and I hope your journey will be the more prosperous.

“I am row in the seventieth year of my age; it is the general period of man's life, and my glass runs on apace. Well was it with me when I was King's serjeant, I found profit by it: I have lost the title and place of Chief Justice. I am now neither the one or other; the latter

makes me incapable of the former, and since I left the Chiefe's place, my losse has been little less than £3,000 already.

"I was by your favour in the way to have raised and renewed in some measure my poore name and family, which I will be bold to say hath heretofore been in the best ranke of the famileys of my cuntry, till by a general heir the patrimony was carried from the male line into another surname, and since which time it hath been in a weak condition. Your grace may be the means to repair the breach made in my poor fortune, if God soe please to move you, and you will lose no honour by it. Howsoever I have made my suit to your noblenesse, and your consciencie, for I appeal to both, and whatsoever my success be, I shall still appear to be a silent and patient man, and humbly submit myself to the will of God and the King. God be with your Grace, He guide and direct you, and to his holy protection I commit you, resting ever

"A most humble servant to your grace,

"RANDULPH CREWE.

"Westminster, 28th Junii."

On a copy of this letter, preserved among the family papers at Crewe, there is the following memorandum in the handwriting of the Chief Justice:—"A little before the D. going to the Isle of Ree, he told Sir Randal, in the presence of Lord Treasurer Weston and Sir Robt. Pye, that he would at his return right him in the King's favor, for it was he that had injured him, and therefore was bound in honor to do it." However friendly the Duke's intentions might have been, the arm of Felton, within a month from the time when this remonstrance was delivered to him, for ever prevented him from carrying them into execution.

The ex-Chief Justice then renounced all thoughts of public employment, and spent the rest of his long life rationally and happily in rural amusements, in literary pursuits, and in social enjoyments. It happened soon after that the manor of Crewe was in the market for sale. Either of the two brothers had the means of purchasing it; but the preference was given to Sir Randolf the elder, and he was more gratified, when he took pos-

session of it and became "Crewe of that ilk," than if he had been installed as Chancellor in the marble chair,—saying, "How delighted my poor dear father would be if he could look down and see his fond wish accomplished!" Here he built a magnificent new manor-house, which was admired and copied by the men of Cheshire. Fuller says, "He first brought the model of excellent building into these remote parts; yea, brought London into Cheshire, in the loftiness, sightliness, and pleasantness of their structures."

He lived on till the Long Parliament had sat several years, and he might actually have been present in the House of Commons in 1641, when Mr. Hollis, inveighing against the corrupt Judges who had decided in favor of ship-money, draw this contrast between them and a Judge who had acted well:—

"What honor is he worthy of, who, merely for the public good, hath suffered himself to be divested and deprived of what he highly values?—such a judge as would lose his place, rather than to do that which his conscience told him was prejudicial to the commonwealth?—and this did that worthy reverend judge, the Chief Justice of England, Sir Randulf Crewe. Because he would not, by subscribing, countenance the loan in the first year of the King, contrary to his oath and conscience, he drew upon himself the displeasure of some great persons about his Majesty, who put on that project which was afterwards condemned by the Petition of Right as unjust and unlawful; and by that he means he lost his place of Chief Justice of the King's Bench; and hath, these fourteen years, by keeping his innocency, lost the profit of that office which, upon a just calculation in so long a revolution of time, amounts to £26,000 or thereabout. He kept his innocency when others let theirs go; when himself and the commonwealth were alike deserted; which raises his merit to a higher pitch. For to be honest when everybody else is honest, when honesty is in fashion and is *trump*, as I may say, is nothing so meritorious; but to stand alone in the breach—to own honesty when others dare not do it, cannot be sufficiently applauded, nor sufficiently rewarded. And that did this good old man do; in a time of general de-

sertion, he preserved himself pure and untainted. 'Temporibus malis ausus est esse bonus.'<sup>1</sup>

Hollis afterwards succeeded in carrying an address to the King, praying "that his Majesty would bestow such an honor on his former Judge, Sir Randulf Crewe, Knt., late Lord Chief Justice of England, as may be a noble mark of sovereign grace and favor, to remain to him and his posterity, and may be in some measure a proportionable compensation for the great loss which he hath, with so much patience and resolution, sustained." Nothing was done for him before the civil war broke out; but he had that highest reward, the good opinion of his fellow citizens. He seems to have enjoyed the sympathy and respect of all honest men from the time of his dismissal from office. Fuller says quaintly, "The country hath constantly a smile for him for whom the court hath a frown. This knight was out of office, not out of honor, —living long after at his house in Westminster, much praised for his hospitality." He adds, "I saw this worthy Judge in 1642, but he survived not long after."<sup>2</sup>

His last days were disturbed by the clash of arms. The struggle between the parties which, in his youth, had been carried on in St. Stephen's Chapel, and in Westminster Hall, was now transferred to Edgehill and Marston Moor. We are not informed to which side he inclined, but the probability is, that, being a steady friend of constitutional monarchy, he dreaded the triumph of either, and that, like the virtuous Falkland, he exclaimed with a sigh, PEACE! PEACE! He languished till the 13th of Jan., 1646, when he expired in the eighty-seventh year of his age,—leaving Cromwell to wield the sceptre which he had seen in the hand of Queen Elizabeth. He was buried in the family cemetery at Crewe. All lawyers are familiar with his singularly shrewd physiognomy, from an admirable print of him in Dugdale's *ORIGINES JURIDICIALES*.

His male descendants remained "Crewes of that ilk" for several generations. The estate then came to an heiress, who married John Offley, Esq., of Madely, in the county of Stafford. Their son, on succeeding to it, took, by act of parliament, the name and arms of Crewe.

<sup>1</sup> 3 St. Tr. 1298.

<sup>2</sup> Worthies, vol. ii.



His grandson was raised to the peerage by King George III., being created Baron Crewe of Crewe, in the county of Chester; and the Chief Justice is represented by Richard, the third Lord Crewe.

We must now go back to SIR NICHOLAS HYDE, elevated to the bench that he might remand to prison Sir Thomas Darnel and the patriots who resisted the illegal tax imposed under the name of "loan," in the commencement of the reign of Charles I. He was uncle of the great Lord Clarendon. They were sprung from the ancient family of "*Hyde of that ilk*" in the county palatine of Chester; and their branch of it had migrated, in the 16th century, into the west of England. The Chief Justice was the fourth son of Lawrence Hyde, of Gussage St. Michael, in the county of Dorset.

Before being selected as a fit tool for an arbitrary government, he had held no office whatever; but he had gained the reputation of a sound lawyer, and he was a man of unexceptionable character in private life. He was known to be always a staunch stickler for prerogative, but this was supposed to arise rather from the sincere opinion he formed of what the English constitution was, or ought to be, than from a desire to recommend himself for promotion. He is thus goodnaturedly introduced by Rushworth:—

"Sir Randolf Crewe, showing no zeal for the advancement of the loan, was removed from his place of Lord Chief Justice, and Sir Nicholas Hyde succeeded in his room:—a person who, for his parts and abilities, was thought worthy of that preferment; yet, nevertheless, came to the same with a prejudice,—coming to the place of one so well-beloved, and so suddenly removed."<sup>1</sup>

Whether he was actuated by mistaken principle or by profligate ambition, he fully justified the confidence reposed in him by his employers. Soon after he took his seat in the Court of King's Bench, Sir Thomas Darnel, and several others committed under the same circumstances, were brought up before him on a writ of *habeas corpus*; and the question arose whether the King of England, by *lettre de cachet*, had the power of perpetual imprisonment without assigning any cause? The return

<sup>1</sup> 1 Rushw. 420.

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of the jailer, being read, was found to set out, as the only reason for Sir Thomas Darnel's detention, a warrant, signed by two privy councillors, in these words:—

"Whereas, heretofore, the body of Sir Thomas Darnel hath been committed to your custody, these are to require you still to detain him, and to let you know that he was and is committed BY THE SPECIAL COMMAND OF HIS MAJESTY."

Lord Chief Justice Hyde proceeded, with great temper and seeming respect for the law, observing, "Whether the commitment be by the King or others, this Court is a place where the King doth sit in person, and we have power to examine it; and if any man hath injury or wrong by his imprisonment, we have power to deliver and discharge him; if otherwise, he is to be remanded by us to prison again."

Selden, Noy, and the other counsel for the prisoners, encouraged by this intimation, argued boldly that the warrant was bad on the face of it, *per speciale mandatum Domini Regis* being too general, without specifying an offense for which a person was liable to be detained without bail; that the warrant should not only state the authority to imprison, but the cause of the imprisonment; and that if this return were held good, there would be a power of shutting up, till a liberation by death, any subject of the King without trial and without accusation. After going over all the common law cases and the acts of parliament upon the subject, from MAGNA CHARTA downwards, they concluded with the *dictum* of Paul the Apostle, "It is against reason to send a man to prison without showing a cause."

*Hyde, C. J.*: "This is a case of very great weight and great expectation. I am sure you look for justice from hence, and God forbid we should sit here but to do justice to all men, according to our best skill and knowledge; for it is our oaths and duties so to do. We are sworn to maintain all prerogatives of the King; that is one branch of our oath,—but there is another—to administer justice equally to all people. That which is now to be judged by us is this: 'Whether, where one is committed by the King's authority, and by cause declared of his commitment, we ought to deliver him by bail, or to remand him?'"

At such a fair beginning there must have been a general anticipation of a just judgment; but, alas! his Lordship, without combating the arguments, statutes, or texts of Scripture relied upon, said "the Court must be governed by precedents," and then, going over all the precedents which had been cited, he declared that there was not one where, there being a warrant *per speciale mandatum Domini Regis*, the judges had interfered and held insufficient. He said he had found a resolution of the judges in the reign of Queen Elizabeth, that if a man be committed by the commandment of the King, he is not to be delivered by a *habeas corpus* in this court, "for we know not the cause of the commitment." Thus he concluded:

"What can we do but walk in the steps of our forefathers? Mr. Attorney hath told you the King has done it for cause sufficient, and we trust him in great matters. He is bound by law, and he bids us proceed by law; we are sworn so to do, and so is the King. We make no doubt the King, he knowing the cause why you are imprisoned, will have mercy. On these grounds we cannot deliver you, but you must be remanded."

This judgment was violently attacked in both Houses of Parliament. In the House of Lords the Judges were summoned, and required to give their reasons for it. Sir Nicholas Hyde endeavored to excuse himself and his brethren from this task by representing it as a thing they ought not to do without warrant from the King. Lord Say observed, "If the Judges will not declare themselves, we must take into consideration the point of our privilege." To soothe the dangerous spirit which disclosed itself, Buckingham obtained leave from the King that the Judges should give their reasons, and Sir Nicholas Hyde again went over all the authorities which had been cited in the King's Bench in support of the prerogative. These were not considered by any means satisfactory; but, as the Chief Justice could no longer be deemed contumacious, he escaped the commitment with which he had been threatened. Sir Edward Coke, and the patriots in the House of Commons, were not so easily appeased, and they for some time threatened

Lord Chief Justice Hyde and his brethren with an impeachment; but it was hoped that all danger to liberty would be effectually guarded against for the future by compelling the reluctant King to agree to the PETITION OF RIGHT. Before Charles would give the royal assent to it,—meaning not to be bound by it himself, but afraid that the Judges would afterwards put limits to his power of arbitrary imprisonment,—he sent for Chief Justice Hyde and Chief Justice Richardson to White hall, and directed them to return to him the answer of themselves and their brethren to this question, “Whether in no case whatsoever the King may commit a subject without showing cause?” The answer shows that they had been daunted by the denunciations of Sir Edward Coke, and that they were driven to equivocate: “We are of opinion that, by the general rule of law, the cause of commitment by his Majesty ought to be shown; yet some cases may require such secrecy that the King may commit a subject without showing the cause, for a convenient time.” Charles then delivered to them a second question, and desired them to keep it very secret, “Whether, if to a *habeas corpus* there be returned a warrant from the King without any special cause, the Judges ought to liberate him before they understand from the King what the cause is?” They answered, “If no cause be assigned in the warrant, the party ought, by the general rule of law, to be liberated: but, if the case requireth secrecy, and may not presently be disclosed, the Court, in its discretion, may forbear to liberate the prisoner for a convenient time, till they are advertised of the truth thereof.” He then came to the point with his third question, “Whether, if the King grant the Commons’ PETITION, he doth not thereby exclude himself from committing or restraining a subject without showing a cause?” Hyde reported this response, “Every law, after it is made, hath its exposition, which is to be left to the courts of justice to determine; and, although the PETITION be granted, there is no fear of conclusion as is intimated in the question.”

The Judges having thus pledged themselves to repeal the act for him by misconstruing it, he allowed it to be

<sup>1</sup> Hargrave MS. xxxii. 97

added to the statute book. No sooner was the parliament that passed it abruptly dissolved than it was flagrantly violated, and Selden, Sir John Eliot and other members of the House of Commons, were arrested for the speeches they had delivered, and for requiring the Speaker to put from the chair a motion which had been made and seconded. This proceeding was more alarming to public liberty than anything that had been before attempted by the Crown: if it succeeded, there was no longer the hope of any redress in parliament for the corrupt decisions of the common law courts.

To make all sure by an extra-judicial opinion, Lord Chief Justice Hyde and the other Judges were assembled at Sergeants' Inn, and, by the King's command, certain questions were put to them by the Attorney General. The answers to these, given by the mouth of the Chief Justice, if acted upon would forever have extinguished the privileges and the independence of the House of Commons:—"That a parliament man committing an offense against the King in parliament, not in a parliamentary course, may be punished after the parliament is ended; for, though regularly he cannot be compelled out of parliament to answer things done in parliament in a parliamentary course, it is otherwise where things are done exorbitantly:" and, "That by false slanders to bring the Lords of the Council and the Judges, not in a parliamentary way, into the hatred of the people, and the Government into contempt, was punishable, out of parliament, in the Star Chamber, as an offense committed in parliament beyond the office, and besides the duty, of a parliament man."

The parties committed were brought up by *habeas corpus*, and, the public being much scandalized, an offer was made that they might be bailed; but, they refusing to give bail, which they said would be compromising the privileges of the House of Commons, Lord Chief Justice Hyde remanded them to jail.

The Attorney General having then filed an *ex-officio* information against them for their misconduct in parliament, they pleaded to the jurisdiction of the Court "because these offenses, being supposed to be done in

parliament, ought not to be punished in this court, or elsewhere than in parliament."

Chief Justice Hyde tried at once to put an end to the case by saying that "all the Judges had already resolved with one voice, that an offense committed in parliament, criminally or contemptuously, the parliament being ended, rests punishable in the Court of King's Bench, in which the King by intendment sitteth."

The counsel for the defendants, however, would be heard, and were heard in vain; for Chief Justice Hyde treated their arguments with scorn, and concluded by observing, "As to what was said, that 'an inferior court cannot meddle with matters done in a superior,' true it is that an inferior court cannot meddle with the *judgments* of a superior court; but if particular members of a superior court offend, they are oft-times punishable in an inferior court,—as if a judge shall commit a capital offense in this court, he may be arraigned thereof at Newgate. The behavior of parliament men ought to be parliamentary. Parliament is a higher court than this, but every member of parliament is not a court, and if he commit an offense we may punish him. The information charges that the defendants acted *unlawfully*, and they could have no privilege to violate the law. No outrageous speeches have been made against a great minister of state in parliament that have not been punished."—The plea being overruled, the defendants were sentenced to be imprisoned during the King's pleasure, and to be fined, Sir John Eliot in £2,000, and the others in smaller sums.

The judgment was severely condemned by the House of Commons at the meeting of the Long Parliament, and was afterwards reversed, on a writ of error, by the House of Lords.<sup>1</sup>

But Lord Chief Justice Hyde escaped the fate of his predecessor, Chief Justice Tresilian, who was hanged for promulgating similar doctrines, for he was carried off by disease when he had disgraced his office four years and nine months. He died at his house in Hampshire, on the 25th of August, 1631.

One is astonished to find judges in the seventeenth

<sup>1</sup> 3 St. Tr. 235-335

century so setting law and decency at defiance, when Sir Edward Coke, and those who had carried the PETITION OF RIGHT, were still alive: but it was well understood that parliaments were never to meet again; and, if it had not been for Charles's folly in embroiling himself with the Scottish nation about episcopacy, he and his descendants might long have enjoyed absolute power; although, no doubt, in course of time, the violence of popular discontent, and the weakness of a despotic government, would at last have brought about a sudden and dreadful convulsion, such as those which we now see raging in the Continental states.

In justice to the memory of Sir Nicholas Hyde, I ought to mention that he was much respected and lauded by true courtiers. Sir George Croke describes him as "a grave, religious, discreet man, and of great learning and piety." Oldmixon pronounces him to have been "a very worthy magistrate;" and highly applauds his judgment in favor of the power of the Crown to imprison and prosecute parliament men for what they have done in the House of Commons.

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Hyde was succeeded by a man who was still more pliant, but who was ever eager to combine popularity with Court favor. This was SIR THOMAS RICHARDSON, son of Dr. Thomas Richardson, of Hardwicke, in the county of Suffolk. Here he was born on the 3d of July, 1569. I find no account of his education till he was sent to study law in Lincoln's Inn. He was very diligent in his profession, and, while yet young at the bar, he was elected Recorder of Bury St. Edmund's, and of Norwich; and he obtained the appointment of Attorney

<sup>1</sup> Cro. Car. 225.—He was censured for having favorites at the bar; but the extent to which this sort of favoritism was then carried, may be judged by what Roger North says of it, and what he considers its legitimate limits:—"When the Lord Chief Justice Hyde was alive, he usually went the Norfolk circuit; and this judge was industriously favorable to his Lordship, calling him *cousin* in open court, which was a declaration that he would take it for a respect to himself to bring him causes; and that is the best account that can be given of a favorite; in which capacity a gentleman pretends to be easily heard, and that his errors and lapses, when they happen, may not offend the judge or hurt a cause,—beyond which the profession of favor is so censurable both in judge and counsel."—*Life of Guilford*, l. 82.

General to Queen Anne, the consort of James I. Soon afterwards he took upon himself the degree of Sergeant-at-law. In the parliament which met on the 30th of January, 1621, he was returned to the House of Commons as member for St. Alban's, not intending that his parliamentary duties should at all interfere with his profession, to which he was much devoted. But on the first day of the session, to his great surprise and mortification, he was elected Speaker. He *disqualified* himself not only according to ancient precedent, but *bonâ fide*,—and earnestly implored that the House would excuse him and proceed to a new choice. "Seeing that no excuse would serve the turn, he wept downright." Unfortunately, no account is preserved of his oration before the King the following day, when he was presented for confirmation at the bar of the House of Lords.

He must have belonged to the popular party, who, at last, constituted the majority in the Lower House, and were thoroughly determined to punish corruption and to reform abuses. Out of respect to his office, he was knighted on his first appearance at Whitehall as Speaker. He had much more laborious duties to perform in his new office than any of his predecessors. In early times, the session of parliament did not last longer than a few days; and recently it was terminated in a few weeks,—either amicably, the required supply being granted,—or, upon an obstinate inquiry into grievances, by an abrupt dissolution. The present session, with an interval of an adjournment, continued a whole year; and Sergeant Richardson's practice at the bar, during this long period, must have been seriously interfered with, although it was not considered incorrect that he should sit in the chair of the House of Commons in the morning, and consult with his clients at his chambers in the evening; and he was allowed to plead before the Judges of the Court of Common Pleas on the days when the House did not meet.

He rendered good service in advising the proceedings upon the impeachments carried on before the Lords against Lord Chancellor Bacon, Sir Giles Mompesson, and Sir Henry Yelverton; but he betrayed the Com-

<sup>1</sup> 4 Nich. Proc. James I., p. 651; Parl. Hist. 1168.



mons into a very serious embarrassment, by persuading them that they had power to adjudge as well as to accuse wherever any offense was committed against the state. Edward Floyd, a gentleman of family and fortune, having, after the taking of Prague, talked contemptuously of the King and Queen of Bohemia, then very popular, as "Goodman Palsgrave and Goodwife Palsgrave," was impeached as an enemy to the Protestant religion. He was accordingly arrested by order of the House of Commons; and the Speaker gave it as his clear opinion, that the Commons have power to hear and to determine as well as to accuse, where they deem it for the public good to exercise such a jurisdiction. Accordingly, Floyd was brought to the bar of the House, and, offering no sufficient defense, Mr. Speaker, after reciting the horrid words that he had spoken, thus proceeded:—

"It further appeareth that these words were spoken by you in a most despiteful and scornful manner, with a fleering and scoffing countenance, on purpose to disgrace as much as in you lay these illustrious and pious princes: whereupon, the Commons in parliament assembled, of their love and zeal to our sovereign lord the King, and not minding to let pass unpunished these things that tend to the disgrace of his Majesty's issue, a part of himself, who is head of the parliament, have called you before them, and have found that the matters whereof you are impeached are true and notorious; therefore the said Commons do adjudge and award that, for the offense you have committed, you be returned this night prisoner to the Fleete, and to-morrow morning you shall be brought to Westminster into the yard before the Great Hall of Pleas, and do there stand in the pillory from nine until eleven of the clock in the forenoon, with a paper upon your hat, bearing this inscription in capital letters:—FOR FALSE, MALICIOUS, AND DESPITEFUL SPEECHES AGAINST THE KING'S DAUGHTER AND HER HUSBAND: from thence you shall presently ride to the Exchange within the city of London, upon a horse without a saddle, with your face backwards towards the horse's tail, holding the tail in your hand, with the said paper on your head; and that you do there stand in the

pillory for two hours; and from thence you shall ride in like manner to the Fleete, and be imprisoned there; and next Friday morning you are to ride in like manner into Cheapside, and there stand in the pillory with the said paper and inscription as before, by the space of two hours, and then ride back in like manner to the Fleete; and further, you shall pay to the King a fine of £1000."

The Lords were highly indignant at this sentence,—by no means on account of its cruelty, but because it was an encroachment on their jurisdiction. They insisted that the impeachment should go on before them; and the other House having acquiesced, they awarded the same punishment, adding to it that Mr. Floyde should be whipped at the cart's tail, notwithstanding an objection made to this by some peers "because he was a gentleman."<sup>1</sup>

Mr. Speaker Richardson, at the commencement of the session, had been considered a patriot; but in the course of it he yielded to the blandishments of the Court, and submitted to the royal mandates which he received from time to time. James, taking it into his head that he could, by the direct exercise of his prerogative, adjourn the two houses of parliament as well as prorogue them, sent down a commission to the House of Commons, ordering an adjournment from the 4th of June to the 20th of November following. The popular members opposed the reading of it, saying that "although in compliance with a request of the King, they might agree to an adjournment for a reasonable time, an adjournment could only be by a vote of the majority." But the Speaker, without putting any vote, declared the House to be adjourned till the 20th day of November, saying that this was by the King's order,—and following the form used by the Lord Chancellor in announcing a prorogation.

This point of parliamentary law was not then settled, and the Speaker's decision was acquiesced in; but he was afterwards censured by the House for "his habit of leaving the chair as often as the acts of any state offi-

<sup>1</sup> "Another question was, whether he should have his ears nailed to the pillory? It was agreed *per plures*, not to be nailed."—*1 Parl. Hist* 1261.

cers were called in question in a manner disagreeable to the Court."<sup>1</sup>

On the dissolution of the parliament in January, 1622, Richardson returned to the undisturbed pursuit of his profession; and, seeing that popularity did not lead to promotion, he now openly enlisted himself a retainer of the Duke of Buckingham. As a reward for his servility, he was made a King's Sergeant.

Continuing steadily in this line, soon after the accession of Charles I. he was appointed Chief Justice of the Court of Common Pleas. His first judicial opinion indicated some degree of independence. Mr. Pine, a country squire, having a company of guests at his table, talked very irreverently of the King, saying to one who had boasted of having seen the King at Mr. Pawlet's, at Hinton, "Then hast thou seen as unwise a King as ever was; for he is carried as a man would carry a child with an apple. As for meeting him at Mr. Pawlet's, that is nothing, for I might have had him at my house; he is to be carried any whither. Before God he is no more fit to be a King than Kirkwright." This Kirkwright was a well-known simpleton.

For these words the Government wished that Mr. Pine should be hanged, drawn, and quartered; but,—a doubt being raised whether the mere speaking of them amounted to treason,—before bringing him to trial the question was referred to the Judges, and the Attorney General cited a great many cases in former reigns in which men had been convicted and executed for a similar offense. However, Chief Justice Richardson concurred in the opinion that "the mere speaking of the words, although they were as wicked as might be, did not amount to treason; for it had been adjudged to charge the King with a personal vice, as to say of him 'He is the greatest whoremonger or drunkard in the kingdom,' is no treason."<sup>2</sup> So Mr. Pine entirely escaped, as the crown lawyers would not acknowledge that the words merely constituted a misdemeanor.

On the next consultation of the Judges, Richardson likewise gained credit. Torture, to extort confessions from state criminals, had been practiced by warrant from

<sup>1</sup> Guthrie, 754.

<sup>2</sup> Cro. Car. 117.

the Privy Council in every reign, at least since the time of Henry VI. ; but, from the growing intelligence of the age, a question had been made respecting its legality. At last, Felton, the assassin of the Duke of Buckingham, having denied that he had been prompted to this deed by the Puritans, Laud told him, "if he would not confess, he must go to the rack." He replied, "But in the extremity of torture I know not whom I may accuse; I may say that I was prompted by my Lord of London, or some other of your Lordships." They then fell into debate, whether by the law of the land they could justify putting him to the rack; and the King, being present, said, "Before any such thing be done, let the advice of the Judges be had therein, whether it be legal or no?" And his Majesty desired Sir Thomas Richardson, the Chief Justice of the Common Pleas, to say "whether it might be done by law?" adding, "if it may, I will not use my *prerogative* in this point." Richardson consulted all the Judges at Sergeants' Inn, and reported to the King their unanimous opinion that "the prisoner ought not to be tortured by the rack, for no such punishment is known or allowed by our law." Notwithstanding the King's salvo about his *prerogative*, Felton, without any further attempt to force from him that he had accomplices, was brought to trial in the course of law; and torture has never since been inflicted in England.

Chief Justice Richardson also showed moderation in the case of Mr. Richard Chambers, a London merchant, prosecuted in the Star Chamber for saying, "that merchants are in no part of the world so screwed and wrung as in England, and that in Turkey they had more encouragement." Laud moved that, besides being imprisoned till he made submission for his offense at the Council Board, in the Court of Star Chamber, and on the Royal Exchange, he should be fined £3000. Richardson insisted that a fine of £500 would be sufficient, and he succeeded in reducing it to £2000.<sup>1</sup>

Considering the moderation with which he conducted himself since he was promoted to the bench, we are quite at a loss to account for a favor now conferred upon him.

<sup>1</sup> 3 St. Tr. 367.<sup>2</sup> 3 St. Tr. 373.

Hitherto no common law judge had ever been made a peer till he had retired from the seat of justice; and a notion prevailed, that, as a writ of error lay from the courts of common law to the House of Lords, the same individual could not be a member of the court of original jurisdiction and of the court of appeal. Nevertheless it was resolved that the family of Sir Thomas Richardson should be ennobled, and that all question should be avoided as to his disqualification. From the venality of the times, the probability is, that the payment of a good round sum of money removed all the objections that might have been made to the plan. By his first marriage the Chief Justice had five sons; and he was married again to Elizabeth, daughter of Sir Thomas Beaumont, and relict of Sir John Ashburnham, ancestor of the present Earl of Ashburnham. This Elizabeth, by letters patent dated 28th of Feb. 1628-29, was created a peeress of Scotland by the title of Baroness Cramond,—to hold to her for life, with remainder to Thomas Richardson, eldest son and heir apparent of the Chief Justice, her husband, by Ursula his first wife,—with remainder to the heirs male of her said husband in succession.<sup>1</sup> Many gibes and pasquinades were elicited by this occurrence, for the amusement of Westminster Hall.

Between two and three years afterwards, the “getter of peers,” as he was denominated, was elevated to be Chief Justice of England. But it is doubtful whether this step was agreeable to him. Many supposed that, as in the case of Sir Edward Coke, it was meant as a punishment for some offense he had given to the Government. He lost greatly in profit while he gained in precedence.

On the 24th of October, 1631, he was conducted to the bar of the Court of King's Bench by a large bevy of Sergeants. Lord Keeper Coventry then, in a short and rather uncomplimentary address, said, “it was his Majesty's pleasure that, for the public good, Sir Thomas Richardson should be moved to preside in the King's Bench;” and in answer he merely said that “he submit-

<sup>1</sup> According to Crawford, this is the only instance of a female creation in the peerage of Scotland, although many Scotch peerages are descendable to females, having been limited to the first grantee and his heirs general.

ted himself to his Majesty's pleasure." Thereupon the writ appointing him was read. Having taken the oaths, he was placed on the bench, and immediately began business.

He presided here between three and four years, and he might have boasted—which few Chief Justices of those days could have done—that he did not do any thing very outrageous while sitting in his own court. Luckily he was not led into temptation, for during this period there were no trials for treason or sedition, and he had only such points to determine as whether an action would lie by a merchant for saying of him "that he is £1000 worse than nothing," or by a captain who had served in the wars, for saying to him "Thou art a notorious pimp."

But he was called upon to take part in several Star Chamber cases which excited great interest. In the prosecution against Mr. Sherfield, Recorder of Salisbury, for breaking painted glass in the window of a church, under an order of the vestry, obtained without leave of the Bishop, he allowed that the defendant had acted improperly, but tried to mitigate the heavy punishment proposed by Lord Strafford and Laud, saying—

"The defendant conceived it was idolatry, or the cause of idolatry. The offense was, that God the Father should be pictured there in the form of an old man in blue and red, for he never was nor ever can be pictured. Moses himself saw but his back parts. This worshiping of idols is the greatest sin of all others. It is to give God's honor unto creatures. To my knowledge Mr. Sherfield hath done much good in Salisbury since I went that circuit; so that there is neither beggar nor drunkard to be seen there. I have been long acquainted with him; he sitteth by me sometimes at church; he bringeth a Bible to church with him (I have seen it) with the Apocrypha and Common Prayer Book in it,—not of the new cut."

Instead of being dismissed from his office of Recorder, and fined £1000 as proposed, the defendant got off with a fine of £500.<sup>1</sup>

<sup>1</sup> Cro. Car. 225-403.

<sup>2</sup> 3 St. Tr. 519-561.

Lord Chief Justice Richardson showed no mercy to poor Prynne when prosecuted in the Star Chamber for publishing his *HISTRIO-MASTYX*, which inveighed against stage plays, music, dancing, hunting, and other amusements of the King and Queen :—

“My Lords,” said he, “since I have had the honor to attend this court, writing and printing of books, though sharply censured, doth grow daily worse and worse. Now, forsooth, every man taket<sup>1</sup>. it upon him to understand every thing according to his conceit, and thinks he is nobody except he be in print.’ We are troubled here with a book—a monster! ‘*Monstrum horrendum, informe, ingens;*’ and I do hold it a most scandalous, infamous libel to the King’s Majesty, a most pious and religious King—to the Queen’s Majesty, a most excellent and gracious Queen—such a one as this land never enjoyed the like—and I think the earth never had a better. I say eye never saw, nor ear ever heard, of such a scandalous and seditious thing as this misshapen monster is. What saith he in the Epistle Dedicatory, speaking of play books? ‘They are printed on far better paper than most octavo and quarto bibles, which hardly find so good a vent as they.’ This monster, this huge misshapen monster! I say it is nothing but lies and venom against all sorts of people. He doth not only condemn all play-writers, but all protectors of them, and all beholders of them, and all who dance and all who sing;—they are all damned—and that no less than to hell. He asserts that ‘dancing is the devil’s profession,’ ‘that ‘the woman who singeth is the prioress of the devil,’ and that ‘fiddlers are the minstrels of the devil.’ I say this is a seditious libel. I protest unto your Lordships it maketh my heart to swell and my blood in my veins to boil, so cold as I am, to see this or anything attempted which may endanger my gracious Sovereign, or give displeasure to his royal Consort. Not to hold your Lordships longer, it is a most wicked, infamous, scandalous, and seditious libel. Mr. Prynne, I must now come to your sentence, which makes me very sorry, for I have known you long, and now I must

<sup>1</sup> Few know that the *causes scribendi* was so much complained of in England 200 years ago!

utterly forsake you ; for I find you have forsaken God and his religion, and the allegiance you owe to both their Majesties and the rule of charity to all noble ladies in the kingdom."

He concluded by moving that the book should be burned by the common hangman ; and that the author should be disbarred, degraded from his academical degrees, set twice in the pillory, lose both his ears, be fined £5000, and be imprisoned during life. This sentence was pronounced accordingly,<sup>1</sup> and carried into rigorous execution.

When left entirely to himself, Lord Chief Justice Richardson rather showed a leaning in favor of the Puritans. While sitting as judge of assize at Exeter, a complaint was brought before him of the profanation of the Sabbath, by holding, on that day, wakes and church-ales, which were said to have led to drunkenness, riot, and immorality. He thereupon not only inveighed against wakes and church-ales in his charge to the grand jury, but issued an ordinance against them, which he directed to be read in all churches within the county. The clergy complained of this as an encroachment on ecclesiastical jurisdiction, and sent up a memorial upon the subject to Archbishop Laud, signed by seventy of them, to prove the antiquity and inoffensiveness of these diversions. Laud, taking it up with a high hand, immediately brought it before the Privy Council, and the Chief Justice was summoned thither to answer for his delinquency. Oldmixon says that, "when he came from the board, the Earl of Dorset, meeting him with tears in his eyes, asked how he did? Judge Richardson replied, 'Very ill, my Lord, for I am like to be choaked with the Archbishop's lawn sleeves.' And for this cause alone, he was, by Laud's means, to his great grief and loss, put from riding the Western, and forced to go the Essex circuit, reported the meanest of all others, and which no justice but the puisne judge or sergeant used to ride." Part of the sentence of the Privy Coun-

<sup>1</sup> St. Tr. 461-592. Mr. Hume very much lauds the good intention the court thus manifested, to inspire better humor into Prynne and his brother Puritans ; although he had doubts whether pillories, fines, and prisons, were the best expedients for that purpose. (Hist. vol. vi. 299.)



cil being that the Chief Justice should reverse his ordinance, he did so with a very ill grace. After reciting it in an instrument under his hand and seal, he said, "But being commanded to reverse the same, I do hereby reverse it as much as in me lies; yet, I doubt not, if the Justices of the Peace will truly inform his Majesty of the grounds thereof, and of the great disorders occasioned by wakes and church-ales, his Majesty will give order to confirm it."

The Justices accordingly drew up a petition in favor of what the Chief Justice had done; but the Archbishop, being informed of what was coming, caused a proclamation to be published in the King's name, and to be read in all churches and chapels, by which "dancing, either for men or women, archery for men, leaping, vaulting, and any such harmless recreation, after divine service on Sundays, were enjoined on all the King's loving subjects."

Notwithstanding the hostility of Laud, Chief Justice Richardson was well respected by Charles I., who, at this period of his reign, acted as his own minister; and he retained his office till he died, on the 4th day of February, 1635, in the 67th year of his age. He was buried in Westminster Abbey, behind the choir, near the cloisters door, where may now be seen a beautiful monument in black marble erected to his memory, with his bust in his judge's cap, robes, ruff, and collar of S.S., and an inscription which, after a pompous enumeration of his offices and of his virtues, thus concludes: "Thomas Richardson, fil. unicus eques aurat. Baro Scotiæ designatus patri incomparabili posuit."

He seems to have had in his own time but an indifferent reputation for honesty and veracity; and, after his death, he was more talked of as a jester than a lawyer. The following anecdote is recorded by L'Estrange:—"Judge Richardson, in going the Westerne Circuite, had a great flint stone throwne at his head by a malefactor, then condemned (who thought it meritorious, and the way to be a benefactor to the Commonwealth, to take away the life of a man so odious), but leaning low on his

<sup>1</sup> 2 Oldmixon, 121; 3 Kennett, 71; Whitel. Mem. 17; Dart's History of Westminster Abbey.

elbow, in a lazy, reckless manner, the bullet flew too high, and only took off his hatt. Soone after, some friends congratulating his deliverance, he replyde by way of jeast (as his fashion was to make a jest of everything), —‘You see now, if I had beene an *upright judge* (intimating his reclining posture) I had been slaine.’”

His contemporaries did not spare him, notwithstanding his high judicial dignity, as we learn from another anecdote of L'Estrange:—“The Lord Chief Justice Richardson went with Mr. Mewtis, the Clarke of the Councell, to see his house at *Gunness-bury*,<sup>1</sup> which was furnish't, with many pretty knacks and rarities. My Lord viewed all, and lik't well, ‘but Mr. Mewtis,’ sayes he, ‘if you and I agree upon the price, I must have all your fooleries and bables into the bargaine.’ ‘Why, my Lord,’ sayes he, ‘for these I will not stand with you; they may e'ene be entail'd if you pleas upon you and your heires.’”

Another collection of legal jokes says, “When Charles Richardson was dead (younger son of the Lord Chief Justice, then living), some were questioning where the body should be interred. ‘Why,’ says one, ‘where should he be buried but where his father *lyes*—at Westminster?”

The Chief Justice left behind a large estate to his eldest son, who, on the death of the first Baroness Cramond, became Lord Cramond; and the title was borne by the descendants of the Chief Justice till the year 1735, when it became extinct from the failure of heirs male.

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On the vacancy in the office of Chief Justice of the King's Bench, created by the death of Sir Thomas Richardson, the King and his Ministers were exceedingly anxious to select a lawyer fitted to be his successor. Re-

<sup>1</sup> Anecdotes and Traditions,” published by Camden Society, p. 53.

<sup>2</sup> Gunnersbury, afterwards celebrated as the seat of the Princess Amelia, daughter of George II.

<sup>3</sup> Anecdotes and Traditions, p. 19.

<sup>4</sup> Ib. 21. This reminds one of the epitaph prepared by John Clerk, Lord Eldin, for a Scotch judge:—

“Here ceaseth to lye  
The Right Honorable,” &c., &c.

solved to raise taxes without the authority of Parliament, they had launched their grand scheme of ship-money, and they knew that its validity would speedily be questioned. To lead the opinions of the Judges, and to make a favorable impression on the public, they required a Chief on whose servility they could rely, and who, at the same time, should have a great reputation as a lawyer, and should be possessed of a tolerable character for honesty. Such a man was MR. SERGEANT BRAMPSTON.

He was born at Maldon, in Essex, of a family founded there in the reign of Richard II. by a citizen of London, who had made a fortune in trade and had served the office of sheriff. When very young he was sent to the University of Cambridge, and there he gained high renown by his skill in disputation, which induced his father to breed him to the bar. Accordingly, he was transferred to the Middle Temple, and studied law there for seven years, with unwearied assiduity. At the end of this period he was called to the bar, having then amassed a store of law sufficient to qualify him at once to step upon the bench. Different public bodies strove to have the benefit of his advice; and very soon he was standing counsel for his own University, and likewise for the City of London, with an annual fee *pro concilio impenso et impendendo*. Having been some years an "apprentice," he took the degree of Sergeant-at-law.

According to a practice very common in our profession, he had, in the language of Mr. Gurney the famous stenographer, "started in the sedition line," that is, defending persons prosecuted for political offenses by the Government. He was counsel for almost all the patriots who, in the end of the reign of James I. and the beginning of the reign of Charles I., were imprisoned for their refractory conduct in the House of Commons; and one of the finest arguments to be found in our books is one delivered by him in Sir Thomas Darnel's case, to prove that a warrant of commitment by order of the King, without specifying the offense, is illegal.<sup>1</sup>

He refused a seat in the House of Commons, as it suited him better to plead for those who were in the

<sup>1</sup> 3 St. Tr. 5.

Tower than to be sent thither himself. By and by, the desire of obtaining the honors of the profession waxed strong within him, and he conveyed an intimation, by a friend, to the Lord Keeper that it would be much more agreeable to him to be retained for the Government than to be always against it. The offer was accepted; he was taken into the counsels of Noy, the Attorney General, and he gave his assistance in defending all stretches of prerogative. Promotions were now showered down upon him; he was made Chief Justice of Ely, Attorney General to the Queen, King's Sergeant, and a Knight. Although very zealous for the Crown, and really unscrupulous, he was anxious to observe decency of deportment, and to appear never to transgress the line of professional duty.

Noy would have been the man to be appointed Chief Justice of the King's Bench to carry through his tax by a judicial decision in its favor, but he had suddenly died soon after the ship-money writs were issued; and, after him, Sir John Brampton was deemed the fittest person to place at the head of the common law Judges. On the 18th of April, 1636, his installation took place, which was, no doubt, very splendid; but we have no account of it except the following, by Sir George Croke:—

“First, the Lord Keeper made a grave and long speech, signifying the King's pleasure for his choice, and the duties of his place: to which, after he had answered at the bar, returning thanks to the King, and promising his endeavor of due performance of his duty in his place, he came from the bar into court, and there kneeling, took the oath of supremacy and allegiance: then standing, he took the oath of judge: then he was appointed to come up to the bench, and then his patent (which was only a writ) being read, the Lord Keeper delivered it to him. But Sir William Jones (the senior puisne judge) said, the patent ought to have been read before he came up to the bench.”<sup>1</sup>

<sup>1</sup> Cro. Car. These forms are no longer used. The Chief Justice is now sworn in privately before the Chancellor; and without any speechifying he enters the court and takes his place on the bench with the other judges. But in Scotland they still subject the new judge to *trials* of his sufficiency; while these are going on he is called Lord Probationer; and he might undoubtedly be *plucked* if the Court should think fit.

In quiet times, Lord Chief Justice Brampton would have been respected as an excellent judge. He was above all suspicion of bribery, and his decisions in private causes were sound as well as upright. But, unhappily, he by no means disappointed the expectations of the Government.

Soon after his elevation, he was instructed to take the opinion privately of all the Judges on the two celebrated questions :—

“ 1. Whether, in cases of danger to the good and safety of the kingdom, the King may not impose ship-money for its defense and safeguard, and by law compel payment from those who refuse? 2. Whether the King be not the sole judge both of the danger, and when and how it is to be prevented ?”

There is reason to think that he himself was taken in by the craft of Lord Keeper Coventry, who represented that the opinion of the twelve Judges was wanted merely for the King's private satisfaction, and that no other use would be made of it. At a meeting of all the Judges in Sergeants' Inn Hall, Lord Chief Justice Brampton produced an answer to both questions in the affirmative, signed by himself. Nine other Judges, without any hesitation, signed it after him ; but two, Croke and Hutton, declared that they thought the King of England never had such a power, and that, if he ever had, it was taken away by the act *De Tallagio non concedendo*, the PETITION OF RIGHT, and other statutes ; but they were induced to sign the paper, upon a representation that their signature was a mere formality.

The unscrupulous Lord Keeper, having got the paper into his possession, immediately published it to the world as the unanimous and solemn decision of all the Judges of England ; and payment of ship-money was refused by JOHN HAMPDEN alone.

His refusal brought on the grand trial, in the Exchequer Chamber, upon the validity of the imposition. Lord Chief Justice Brampton, in a very long judgment, adhered to the opinion he had before given for the legality of the tax, although he characteristically expressed doubt as to the regularity of the proceeding on technical grounds. Croke and Hutton manfully insisted that the

tax was illegal; but, all the other Judges being in favor of the Crown, Hampden was ordered to pay his 20s.<sup>1</sup>

Soon after, the same point arose in the Court of King's Bench in the case of the Lord Say, who, envying the glory which Hampden had acquired, allowed his oxen to be taken as a distress for the ship-money assessed upon him, and brought an action of trespass for taking them. But Banks, the Attorney General, moved that counsel might not be permitted to argue against what had been decided in the Exchequer Chamber; and Lord Chief Justice Brampton said, "Such a judgment should be allowed to stand until it were reverted in parliament, and none ought to be suffered to dispute against it."<sup>2</sup>

The Crown lawyers were thrown into much perplexity by the freak of the Rev. Thomas Harrison, a country parson, who can hardly be considered a fair specimen of his order at that time, and most either have been a little deranged in his intellect, or animated by an extraordinary eagerness for ecclesiastical promotion. Having heard that Mr. Chief Justice Hutton, while on the circuit, had expressed an opinion unfavorable to ship-money, he followed him to London, and, while this reverend sage of the law was seated, with his brethren, on the bench of the Court of Common Pleas, and Westminster Hall was crowded with lawyers, suitors, and idlers, marched up to him, and, making proclamation "*Oyez! Oyez! Oyez!*" said with a loud voice, "Mr. Justice Hutton! you have denied the King's supremacy, and I hereby charge you with being guilty of high treason." The Attorney General, however much he might secretly honor such an ebullition of loyalty, was obliged to treat it as an outrage, and an *ex-officio* information was filed against the delinquent for the insult he had offered to the administration of justice. At the trial the reverend defendant confessed the speaking of the words, and gloried in what he had done; saying—

"I confess that judges are to be honored and revered as sacred persons so long as they do their duty; but having taken the oath of supremacy many times, I am bound to maintain it, and when it is assailed, as by the

<sup>1</sup> 3 St. Tr. 826-1283.

<sup>2</sup> Cro. Car. 524.

denying of ship-money, it is time for every loyal subject to strike in." *Brampton, C. J.*: "The denying of ship-money may be, and I think is, very wrong; but is it against the King's supremacy?" *Harrison*: "As a loyal subject, I did labor in defense of his Majesty, and how can I be guilty of a crime? I say, again, that Mr. Justice Hutton has committed treason, for upon his charge the people of the country do now deny ship-money. His offense being openly committed, I conceived it not amiss to make an open accusation. The King will not give his judges leave to speak treason, nor have they power to make or pronounce laws against his prerogative. We are not to question the King's actions; they are only between God and his own conscience. 'Sufficit Regi, quod Deus est.' This thesis I will stand to—that whatsoever the King in his conscience thinketh he may require, we ought to yield."

The defendant having been allowed to go on in this strain for a long time, laying down doctrines new in courts of justice, although, in those days, often heard from the pulpit, the Chief Justice at last interposed, and said—

"Mr. Harrison, if you have anything to say in your defense, proceed; but this raving must not be suffered. Do you not think that the King may govern his people by law?" *Harrison*: "Yes, and by something else too. If I have offended his Majesty in this, I do submit to his Majesty, and crave his pardon." *Brampton, C. J.*: "Your 'If' will be very ill taken by his Majesty; nor can this be considered a submission."

The defendant, being found guilty, was ordered to pay a fine to the King of £5,000, and to be imprisoned,—without prejudice to the remedy of Mr. Justice Hutton by action. Such an action was accordingly brought, and, so popular was Mr. Justice Hutton, that he recovered £10,000 damages; whereas it was said that, if the Chief Justice had been the plaintiff in an action for defamation, he need not have expected more than a *Norfolk groat*.<sup>1</sup>

Lord Chief Justice Brampton's services were likewise required in the Star Chamber. He there zealously as-

<sup>1</sup> Cro. Car. 503; Hunt. 131; 3 St. Tr. 1370.

sisted Archbishop Laud in persecuting Williams, Bishop of Lincoln, ex-Keeper of the Great Seal. When the sentence was to be passed on this unfortunate prelate, ostensibly for tampering with the witnesses who were to give evidence against him on a former accusation which had been abandoned as untenable, but in reality for opposing Laud's popish innovations in religious ceremonies, Brampton declaimed bitterly against the right reverend defendant, saying—

“I find my Lord Bishop of Lincoln much to blame in persuading, threatening, and directing of witnesses; a foul fault in any, but in him most gross who hath *curam animarum* throughout all his diocese. To destroy men's souls is most odious, and to be severely punished. I do hold him not fit to have the cure of souls, and therefore I do censure him to be suspended *tam ab Officio quam a Beneficio*, to pay a fine of £10,000, and to be imprisoned during the King's pleasure.”<sup>1</sup>

The sentence, although rigorously executed, did not satiate the vengeance of the Archbishop; and the Bishop, while lying a prisoner in the Tower, having received some letters from one of the masters of Westminster School, using disrespectful language towards the Archbishop, and calling him “a little great man,” a new information was filed against the Bishop for not having disclosed these letters to a magistrate, that the writer might have been immediately brought to justice. Of course he was found *guilty*; and, when the deliberation arose about the punishment, thus spoke Lord Chief Justice Brampton:—

“The concealing of the libel doth by no means clear my Lord Bishop of Lincoln, for there is a difference between a letter which concerns a private person and a public officer. If a libelous letter concern a private person, he that receives it may conceal it in his pocket or burn it; but if it concern a public person, he ought to reveal it to some public officer or magistrate. Why should my Lord of Lincoln keep these letters by him, but to the end to publish them, and to have them at all times in readiness to be published? I agree in the proposed sentence, that, in addition to a fine of £5,000 to the

<sup>1</sup> 3 St. Tr. 787.



King, he do pay a fine of £3,000 to the Archbishop, seeing the offense is against so honorable a person, and there is not the least cause of any grievance or wrong that he hath done to my Lord of Lincoln. For his being degraded, I leave it to those of the Ecclesiastical Court to whom it doth belong. As to the pillory, I am very sorry and unwilling to give such a sentence upon any man of his calling and degree. But when I consider the quality of the person, and how much it doth aggravate the offense, I cannot tell how to spare him; for the considerations that should mitigate the punishment add to the enormity of the offense."<sup>1</sup>

As no clerical crime had been committed for which degradation could be inflicted, and as it was thought not altogether decent that a bishop, wearing his lawn sleeves, his rochet, and his mitre, should stand on the pillory, to be pelted with brickbats and rotten eggs, the Lord Chief Justice was overruled respecting this last suggestion, and the sentence was limited to the two fines, with perpetual punishment. The defendant was kept in durance under it till the meeting of the Long Parliament, when he was liberated; and, becoming an Archbishop, he saw his persecutor take his place in the Tower, while he himself was placed at the head of the Church of England.<sup>2</sup>

Now came the time when Lord Chief Justice Brampton himself was to tremble. The first grievance taken up was ship-money, and both Houses resolved that the tax was illegal, and that the judgment against Hampden for refusing to pay it ought to be set aside. Brampton was much alarmed when he saw Strafford and Laud arrested on a charge of high treason and Lord Keeper Finch obliged to fly beyond the seas.

The next impeachment voted was against Brampton himself and five of his brethren, but they were more leniently dealt with, for they were only charged with "high crimes and misdemeanors;" and, happening to be in the House of Lords when Mr. Waller brought up the impeachment, it was ordered "that the said Judges for the present should enter into recognizances of £10,000

<sup>1</sup> 3 St. Tr. 814.

<sup>2</sup> See Lives of Chancellors, vol. ii. ch. lix.

each to abide the censure of Parliament." This being done, they enjoyed their liberty, and continued in the exercise of their judicial functions, but Mr. Justice Berkeley, who had made himself particularly obnoxious by his indiscreet invectives against the Puritans, was arrested while sitting on his tribunal in Westminster Hall, and committed a close prisoner to Newgate.<sup>1</sup>

Chief Justice Brampton tried to mitigate the indignation of the dominant powers by giving judgment in the case of *Chambers v. Sir Edward Brunfield, Mayor of London*, against the legality of ship-money. To an action of trespass and false imprisonment, the defendant justified by his plea under "a writ for not paying of money assessed upon the plaintiff towards the finding of a ship." There was a demurrer to the plea, so that the legality of the writ came directly in issue. The counsel for the defendant rose to cite Hampden's case and Lord Say's case, in which all their Lordships had concurred, as being decisive in his favor; but Brampton, C. J., said,—

"We cannot now hear this case argued. It hath been voted and resolved in the Upper House of Parliament and in the House of Commons, *nullo contradicente*, that the said writ, and what was done by color thereof, was illegal. Therefore, without further dispute thereof, the Court gives judgment for the plaintiff."<sup>2</sup>

The Commons were much pleased with this submissive conduct, but *pro forma* they exhibited articles of impeachment against the Chief Justice. To the article founded on ship-money he answered, "that at the conference of the Judges he had given it as his opinion that the King could only impose the charge in case of necessity, and only during the continuance of that necessity."<sup>3</sup>

<sup>1</sup> Parl. Hist. 700.

<sup>2</sup> Cro. Car. 60r.

<sup>3</sup> His son, the Autobiographer, to prove the truth of this allegation, relates the following anecdote:—"I being with my Lord Chief Justice Brampton at Mr. Justice Crooke's chambers in Sergeant's Inn, my Lord Chief Justice spake to Mr. Justice Crooke to this effect: 'Brother Crooke, you know what opinion I delivered upon consideration with the other Judges, upon the question sent unto us concerning ship monie; you are old, and if it should please God to call you, I would be glade that it might be knowne what my opinion was, and how I carried myself in it: therefore, I pray tell it to our brother Phesant,'—if Mr. Justice Crooke should die. Whereunto Mr. Justice Crooke answered:—'That he did well remember,

The impeachment was allowed to drop; and the Chief Justice seems to have coquetted a good deal with the parliamentary leaders, for, after the King had taken the field, he continued to sit in his court at Westminster, and to act as an attendant to the small number of peers who assembled there, constituting the House of Lords.

But when a battle was expected, Charles, being told that the Chief Justice of England was Chief Coroner, and, by virtue of his office, on view of the body of a rebel slain in battle, had authority to pronounce judgment of attainder upon him, so as to work corruption of blood and forfeiture of lands and goods, thought it would be very convenient to have such an officer in the camp, and summoned Lord Chief Justice Brampton to appear at head-quarters in Yorkshire. The Lords were asked to give him leave of absence, to obey the King's summons, but they commanded him to attend them day by day at his peril. He therefore sent his two sons to make his excuse to the King. His Majesty was highly incensed by his asking leave of the Lords; and, considering another apology that he made, about the infirmity of his health and the difficulty of traveling in the disturbed state of the country, a mere pretense,—by a *supersedcas* under the great seal, dismissed him from his office, and immediately appointed SIR ROBERT HEATH to be Chief Justice of England in his stead. In a few days after, the ex-Chief Justice received the following handsome letter from his successor:—

“My Lord (for soe you shall ever be to me), when you shall truely understand the passages of things you will know that I have binn farr from supplantinge you, whome I did truely love and honor, and that I have binn and will be your servant; and I believe you know that the Kinge hath engaged himselfe to be mindfull of you, and I assure you, at my humble suite, he hath given me leave to be his remembrancer, which I will not neg-

that my Lord Bramston did declare his opinion to bee that the Kinge could impose that charge, but only in case of necessitie; and that my Lord Bramston refused to subscribe unto the question otherwise, but was overruled by the more voices, whereupon he did subscribe.”—p. 79. But I believe this to be a pious invention, and, if it were true, would only show the Chief Justice to have acted in a very cunning and sneaking manner.

ject : in the mean tyme I am and ever will be your very true servant,  
ROBERT HEATH."

Brampston must now have given in his full adhesion to the parliamentary party, for in such favor was he with them that, when the treaty of Uxbridge was proceeding, they made it one of their conditions that he should be reappointed Lord Chief Justice of the Court of King's Bench; although the Autobiographer stoutly denies that his father ever temporized, and says that this proposal only shows that "they had a better opinion of him than he had of them or their cause." From the same source we have the following further statement, which must be taken with some grains of allowance:—

"After that, they would have brought him into the House of Lords as an assistant, *which he did not absolutely denie*, but avoided attending by the help of friends. They had thoughts of making him their keeper of their seale; and the Commons passed some vote for it in March, 1646, which was to be communicated to the Lords. My father went to London and prevented it by his friends in the Lords' House. And thus he escaped ruin; for had he been put to refuse (as accept he would not) any employment, he must inevitably have binn undone. At length Cromwell toke upon him the Protectorship; he sent his Secretary Thurlow to him, and to bringe him to the Cockpitt at Whitehall, where he treated him with great respect, and urged him to take the office of Chiefe Justice again; but he excused himselfe as being old, and, havinge made tryall, could not satisfie; therefore he must now medle noe more with publique matters. Cromwell brought him down stayers, sayinge he would take no deniall, and wished him to advise with his brother Rolle, whoe was his friend and an honest man. And I know Rolle came to my father and protested he would be banished rather than be a judge: when, contrary to these words, he was first a Puisne Judge, and afterwards Cheife Justice of the Bench, which they called the Upper Bench."

I will not say that he would have been willing to resume his office, with the title of "Chief Justice of the

Upper Bench of HIS HIGHNESS OLIVER, THE LORD PROTECTOR," if Rolle had not outwitted him, and got it for himself; but it is quite clear that he conformed very submissively to the republican *régime*.

After Rolle's appointment Brampton withdrew entirely from public life, and spent the remainder of his days at his country-house in Essex. There he expired, on the 2d of September, 1654, in the 78th year of his age. If courage and principle had been added to his very considerable talents and acquirements, he might have gained a great name in the national struggle which he witnessed; but, from his vacillation, he fell into contempt with both parties; and, although free from the imputation of serious crimes, there is no respect entertained for his memory.

However, the following lines, to be read on his monument in the church of Roxwell in Essex, represent him as very faultless, and very sanguine as to the result of his own trial at the GRAND ASSIZE:—

"AMBITIONE, IRA DONOQUE POTENTIOR OM  
QUI JUDEX ALIIS LEX FUIT IPSE SIBI:  
QUI TANTO OBSCURAS PENETRAVIT LUMINE CAUSAS  
UT CONVICTA SIMUL PARS QUOQUE VICTA FORET;  
MAXIMUS INTERPRES, CULTOR SANCTISSIMUS ÆQUI,  
HIC JACET, HEU, TALES MORS NIMIS ÆQUA RAPIT!  
HIC ALACRI EXPECTAT SUPREMUM MENTE TRIBUNAL,  
NEC METUIT JUDEX JUDICIS ORA SUI."

One of his sons, the Autobiographer, was made a Knight of the Bath by Charles II., and the other a Baron of the Exchequer. His possessions are inherited by his lineal heir, Thomas William Brampton, Esq., now one of the representatives for his native county; a distinction which has been conferred upon the family in fifteen parliaments since the death of the Chief Justice.<sup>1</sup>

We must now attend to Sir Robert Heath, who was the last Chief Justice of Charles I., and was appointed by him to pass judgment, not on the living but on the dead. If we cannot defend all his proceedings, we must

<sup>1</sup> See Clar. Hist. Reb. ii. 32, 179; Peck's Des. Cur. lib. xiv. p. 27; Whit. Mem. p. 245; Sir John Brampton's Autobiography, published in 1845 by the Camden Society,—very ably edited by Lord Braybrooke, the President.

allow him the merit—which successful members of our profession can so seldom claim—of perfect consistency; for he started as a high prerogative lawyer, and a high prerogative lawyer he continued to the day of his death.

He was of a respectable family of small fortune, in Kent, and was born at Etonbridge in that county. He received his early education at Tonbridge School, and was sent from thence to St. John's College, Cambridge. His course of study there is not known; but when he was transferred to the Inner Temple, we are told that he read law and history with the preconceived conviction that the King of England was an absolute sovereign, and so enthusiastic was he that he converted all he met with into arguments to support his theory. One most convenient doctrine solved many difficulties which otherwise would have perplexed him: he maintained that Parliament had no power to curtail the essential prerogatives of the Crown, and that all acts of parliament for such a purpose were *ultra vires* and void. There is no absurdity in this doctrine, for a legislative assembly may have only a limited power,—like the Congress of the United States of America; and it was by no means so startling then as now, when the *omnipotence of parliament* has passed into a maxim. He had no respect whatever for the House of Commons or any of its privileges, being of opinion that it had been called into existence by the Crown only to assist in raising the revenue, and that, if it refused necessary supplies, the King, as PATER PATRIÆ, must provide for the defense of the realm in the same manner as before it had existence. He himself several times refused a seat in that assembly, which he said was “only fit for a pitiful Puritan or a pretending patriot;” and he expressed a resolution to get on in his profession without beginning, as many of his brethren did, by herding with the seditious, and trying to undermine the powers which for the public good the Crown had immemorably exercised and inalienably possessed. To enable him to defend these with proper skill and effect, he was constantly perusing the old records, and, from the Conquest downwards, they were as familiar to him as the cases in the last number of the periodical Reports are to a modern prac-

tioner. Upon all questions of prerogative law which could arise he was complete master of all the authorities to be cited for the Crown, and of the answers to be given to all that could be cited against him.

As he would neither go into parliament nor make a splash in Westminster Hall in the "sedition line," his friends were apprehensive that his great acquirements as a lawyer never would be known; but it happened that, in the year 1619, he was appointed "Reader" for the Inner Temple, and he delivered a series of lectures explaining his views on constitutional subjects, which forever established his reputation.

On the first vacancy which afterwards occurred in the office of Solicitor General he was appointed to fill it; and Sir Thomas Coventry, the Attorney General, expressed his high satisfaction at having him for a colleague. Very important proceedings soon after followed, upon the impeachment of Lord Bacon and the punishment of the monopolists, but as these were all in parliament he made no conspicuous figure during the remainder of the reign of James I.

Soon after the commencement of the reign of Charles I. he was promoted to the office of Attorney General; and then, upon various important occasions, he delivered arguments in support of the unlimited power of the Crown to imprison and to impose taxes, which cannot now be read without admiration of the learning and ingenuity which they display.

The first of these was when Sir Thomas Darnel and his patriotic associates were brought by *habeas corpus* before the Court of King's Bench, having been committed in reality for refusing to contribute to the forced loan, but upon a warrant by the King and Council which did not specify any offense. I have already mentioned the speeches of their counsel.<sup>1</sup> "To these pleadings for liberty" says Hallam, "Heath, the Attorney General, replied in a speech of considerable ability, full of those high principles of prerogative which, trampling as it were on all statute and precedent, seemed to tell the Judges that they were placed there to obey rather than to determine."<sup>2</sup>

<sup>1</sup> Ante, p. 37.

<sup>2</sup> Const. Hist. i. 527.

"This commitment," he said, "is not in a legal and ordinary way, but by the special command of our Lord the King, which implies not only the fact done, but so extraordinarily done, that it is notoriously his Majesty's immediate act, and he wills that it should be so. Shall we make inquiries whether his commands are lawful?—who shall call in question the justice of the King's actions? Is he to be called upon to give an account of them?"

After arguing very confidently on the legal maxim that "the King can do no wrong," the constitutional interpretation of which had not yet been settled, he goes on to show how *de facto* the power of imprisonment had recently been exercised by the detention in custody, for years, of popish and other state prisoners, without any question or doubt being raised. "Some," he observed, "there are in the Tower who were put in it when very young; should they bring a *habeas corpus*, would the Court deliver them?" He then dwelt at great length upon the resolution of the Judges in the 34th of Elizabeth in favor of a general commitment by the King; and went over all the precedents and statutes cited on the other side, contending that they were either inapplicable or contrary to law. He carried the Court with him, and the prisoners were remanded without any considerable public scandal being then created.<sup>1</sup>

During the stormy session in which the "Petition of Right" was passed, Heath, not being a member of the House of Commons, had very little trouble; but once, while it was pending, he was heard against it as counsel for the King before a joint committee of Lords and Commons. Upon this occasion he occupied two whole days in pouring forth his learning to prove that the proposed measure was an infringement of the ancient, essential, and inalienable prerogatives of the Crown.<sup>2</sup> He was patiently listened to, but he made no impression on Lords or Commons; and the King, after receiving an assurance from the Judges that they would effectually do away with the statute when it came before them, for interpretation, was obliged to go through the form of giving the royal assent to it.

<sup>1</sup> 3 St. Tr. 1-234.

<sup>2</sup> Ibid. 133.



As soon as the parliament was dissolved, Heath was called into full activity; and he now carried every thing his own way, for the extent of the royal prerogative was to be declared by the Court of King's Bench and the Star Chamber. Sir John Eliot, Stroud, Selden, and the other leaders of the country party who had been the most active in carrying the "Petition of Right," were immediately thrown into prison, and the Attorney General having assembled the Judges, they were as good as their word, by declaring that they had cognizance of all that had happened in parliament, and that they had a right to punish whatsoever was done there by parliament men in an unparliamentary manner.<sup>1</sup>

The imprisoned patriots having sued out writs of *habeas corpus*, it appeared that they were detained under warrants signed by the King, "for notable contempts committed against ourself and our government, and for stirring up sedition against us." Their counsel argued that a commitment by the King is invalid, as he must act by responsible officers; and that warrants in this general form were in direct violation of the "Petition of Right," so recently become law. But Heath still boldly argued for the unimpaired power of arbitrary imprisonment, pretending that the "Petition of Right" was not a binding statute. "A petition in parliament," said he, "is no law, yet it is for the honor and dignity of the King to observe it faithfully; but it is the duty of the people not to stretch it beyond the words and intention of the King, and no other construction can be made of the "Petition" than that it is a confirmation of the ancient rights and liberties of the subject. So that now the case remains in the same quality and degree as it was before the "Petition." He proceeded to turn into ridicule the whole proceedings of the late parliament, and he again went over the bead-roll of his precedents to prove that one committed by command of the King or Privy Council is not bailable. The prisoners were remanded to custody.

In answer to the *informations*, it was pleaded that a court of common law had no jurisdiction to take cognizance of speeches made in the House of Commons:

<sup>1</sup> 3 St. Tr. 237.

that the Judges had often declared themselves incompetent to give an opinion upon such subjects; that the words imputed to Sir John Eliot were an accusation against the ministers of the Crown, which the representatives of the people had a right to prefer; that no one would venture to complain of grievances in parliament if he should be subjected to punishment at the discretion of an inferior tribunal; that the alleged precedents were mere acts of power which no attempts had hitherto been made to sanction; and that although part of the supposed offenses had occurred immediately before the dissolution, so that they could not have been punished by the last parliament, they might be punished in a future parliament. But:—

"*Heath, A. G.*, replied that the King was not bound to wait for another parliament; and, moreover, that the House of Commons was not a court of justice, nor had any power to proceed criminally, except by imprisoning its own members. He admitted that the judges had sometimes declined to give their judgment upon matter of privilege; but contended that such cases had happened during the session of parliament, and that it did not follow that an offense committed in the House might not be questioned after a dissolution."

The Judges unanimously held, that, although the alleged offenses had been committed in parliament, the defendants were bound to answer in the Court of King's Bench, in which all offenses against the Crown were cognizable. The parties refusing to put in any other plea, they were convicted, and, the Attorney General praying judgment, they were sentenced to pay heavy fines, and to be imprisoned during the King's pleasure.<sup>1</sup>

Heath remained Attorney General two years longer. The only difficulty which the Government now had was to raise money without calling a parliament; and he did his best to surmount it. By his advice a new tax was laid on cards, and all who refused to pay it he mercilessly prosecuted in the Court of Exchequer, where his will was law. All monopolies had been put down at the conclusion of the last reign, with the exception of new inventions. Under pretense of some novelty, he granted

<sup>1</sup> St. Tr. 235-335: 2 Hall. Const. Hist. 3-7.

patents, vesting in particular individuals or companies the exclusive right of dealing in soap, leather, salt, linen rags, and various other commodities, although, of £200,000 thereby levied on the people, scarcely £1,500 came into the royal coffers. His grand expedient was to compel all who had a landed estate of £40 a year to submit to knighthood, and to pay a heavy fee; or, on refusal, to pay a heavy fine. This caused a tremendous outcry, and was at first resisted; but the question being brought before the Court of Exchequer, he delivered an argument in support of the claim, in which he traced knighthood from the ancient Germans down to the reigns of the Stuarts, showing that the prince had always the right of conferring it upon all who held of him *in capite*—receiving a reasonable compliment in return. In this instance, Mr. Attorney not only had the decision of the Court, but the law, on his side.' Blackstone says, "The prerogative of compelling the King's vassals to be knighted, or to pay a fine, was expressly recognized in parliament by the statute de Militibus, 1 Ed. II.,—but yet was the occasion of heavy murmurs when exerted by Charles I., among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch and the legal exertion of prerogative."<sup>1</sup>

All these expedients for filling the Exchequer proving unproductive, the last hopes of despotism rested upon Noy, who, having been a patriot, was eager to be the slave of the Court, and proposed his ship-money. If this should be supported by the Judges, and endured by the people, parliaments for ever after would have been unnecessary. Heath was willing enough to defend it; but the inventor was unwilling to share the glory or the profit of it with another. Luckily, at that very time, a vacancy occurred in the office of Chief Justice of the Common Pleas; and there being an extreme eagerness to get rid of Heath, notwithstanding his very zealous services to the Crown, he was "put upon the cushion," and Noy succeeded him as Attorney General.

<sup>1</sup> The case is not in print, but I have a very full MS. report of it.

<sup>2</sup> Bl. Com. 69. Compulsory knighthood was abolished by the Long Parliament, 16 Car. I. c. 20.

To qualify him to be a Judge, it was necessary that he should first become a Sergeant; and, according to ancient custom, he distributed rings, choosing a motto which indicated his intention still to put the King above the law,—“*Lex Regis, vis Legis.*” “On the 25th of October, 1631, he came in his party-colored robes to the Common Pleas, and performed his ceremonies as Sergeant, and the same day kept his feast in Sergeants’ Inn; and afterwards, on the 27th of October, he was sworn in Chief Justice.”<sup>1</sup>

In the four years during which he held this office, no case of public interest occurred in his own court; but he took an active part in the Star Chamber, and having prosecuted the Recorder of Salisbury for breaking a painted window without the bishop’s consent, was sentenced him for the offense.<sup>2</sup> The grand scheme of ship-money, which had been long in preparation, was ready to be brought forward, when, to the astonishment of the world, Heath was removed from his office. It has been said that the Government was afraid of his opinion of ship-money, and wished to prefer Finch—the most profligate of men—on whom they could entirely rely. The truth seems to be, that he continued to enjoy the favor and confidence of the Government, but that a charge had been brought against him of taking bribes, which was so strongly supported by evidence, that it could not be overlooked, although no parliament was sitting, or ever likely to sit; and that the most discreet proceeding, even for himself, was to remove him quietly from his office. The removal of Judges had, under the Stuarts, become so common, that no great sensation was created by a new instance of it, and people merely supposed that some secret displeasure had been given to the King.

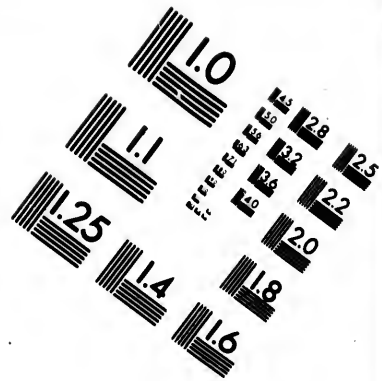
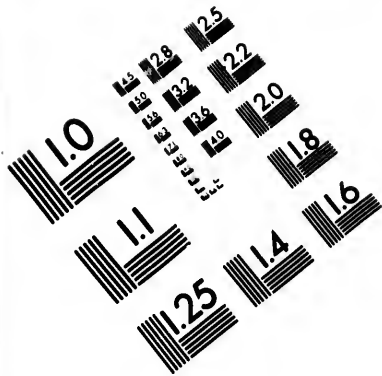
It happened at the same time that Banks was made Attorney General on the death of Noy, and the following pasquinade was stuck upon the gate of Westminster Hall:—

*Noy’s flood is gone,  
The Banks appear,  
Heath is shorn down,  
And Finch sings there.*

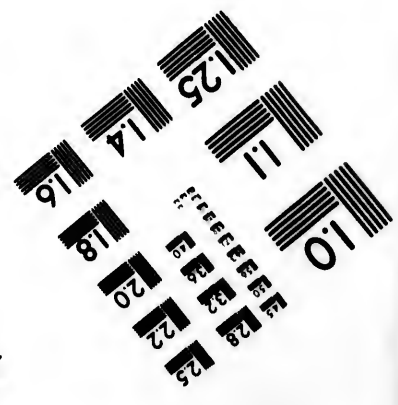
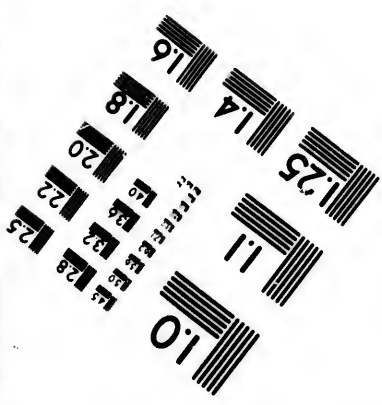
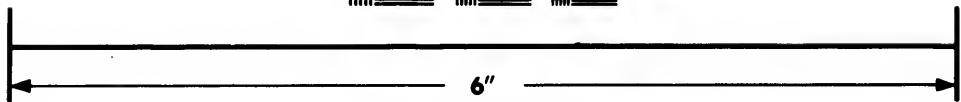
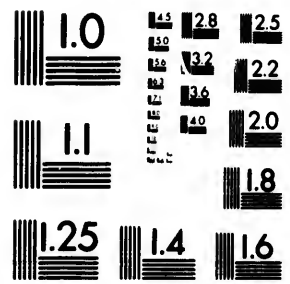
<sup>1</sup> Cro. Car. 225.

<sup>2</sup> St. Tr. 541; Cro. Car. 375; Sir W. Jones’ Rep. 350.





**IMAGE EVALUATION  
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Heath presented a petition to the King, setting forth his services as Attorney General in supporting the royal right to imprison and to tax the subject, as well as the good-will he had manifested while he sat on the bench ; and expressing a hope that, as he had been severely punished for his fault, he might not be utterly ruined, but might be permitted to practice at the bar. To this the King, by advice of the Privy Council, consented, on condition that he should be put at the bottom of the list of Sergeants, and should not plead against the Crown in the Star Chamber.<sup>1</sup>

Accordingly, he took his place at the bar of the Court of Common Pleas, as junior, where he had presided as chief ; and speedily got into considerable business. How he quoted his own decisions when Chief Justice, or treated them when quoted against him, we are not told. He very soon again insinuated himself into the favor of the Government, and assisted Sir John Banks, the Attorney General, in state prosecutions. He first addressed the jury for the Crown in the famous case of Thomas Harrison, indicted for insulting Mr. Justice Hutton in open court ; leaving the Attorney General to sum up the evidence.

Not having been on the bench when the Judges gave the extra-judicial opinion in favor of ship-money, nor when Hampden's trial came on, he escaped impeachment at the meeting of the Long Parliament ; and, on the removal of those who were impeached, he was made a Puisne Judge of the Court of King's Bench.

When hostilities were about to commence, he happened to be Judge of Assize at York, where the King lay. He always protested that he was innocent of any plot to make himself Chief Justice of the King's Bench ; yet, knowing that, from bodily infirmity and lukewarmness in the royal cause, Brampton would not come to York when summoned by the King, there is strong reason to suspect that he suggested the propriety of this summons, on the pretense that the Chief Justice of England might, as Chief Coroner, declare an attainder of rebels slain in battle,—which would subject their lands

<sup>1</sup> Cro. Car. 375.



and goods to forfeiture.<sup>1</sup> Brampton was ordered to come to York, and not making his appearance, he was removed from his office; and Sir Robert Heath was created Chief Justice of England, that he might attain the slaughtered rebels. Sir John Brampton, the Autobiographer, says—"When Sir Robert Heath had that place, that opinion vanished, and nothing of that nature was ever put in practice."

But in the autumn of the year 1643, the royalists having gained an ascendancy in the West of England, a scheme was formed to outlaw, for high treason, the leaders on the Parliament side,—as well those who were directing military operations in the field as the noncombatants who were conducting the Government at Westminster. A commission passed the great seal, at Oxford, directed to Lord Chief Justice Heath and three other Judges who had taken the King's side, to hold a court of oyer and terminer at Salisbury. Accordingly, they took their seats on the bench, and swore in a grand jury, whom Heath addressed, explaining the law of high treason, showing that flagrant overt acts had been committed by conspiring the King's death and levying war against him, and proving by authorities that all who aided and assisted by furnishing supplies, or giving orders or advices to the rebels, were as guilty as those who fought against his Majesty with deadly weapons in their hands. Bills of indictment were then preferred against the Earls of Northumberland, Pembroke, and Salisbury, and divers members of the House of Commons. The grand jury, however,—probably without having read Grotius and the writers on public law, who say that when there is a civil war in a country the opposite parties must treat each other as if they were belligerents belonging to two independent nations, but actuated by a sense of injustice and impolicy of treating as a common malefactor those who, seeking to reform abuses and vindicate the liberties of their fellow-citizens, were commanding armies and enacting laws,—returned all the bills *ignoramus*: and there could neither be any trial nor process of outlawry.

<sup>1</sup> Sir John Brampton relates a conversation on the subject, in which Mr. Hyde, afterwards Earl of Clarendon, said "I am confident that somebody that hath design upon the place, hath put the King on this."—(p. 85.)

This rash attempt only served to produce irritation, and to render the parliamentarians more suspicious and revengeful when negotiations were afterwards opened which might have led to a satisfactory accommodation.<sup>1</sup>

In the summer of the following year, Chief Justice Heath held assizes at Exeter, and there actually obtained the conviction of Captain Turpine, a parliamentary officer, who had been taken in arms against the King, and was produced as a prisoner at the bar. The Sheriff appears to have refused to carry the sentence into execution; but the unfortunate gentleman was hanged by Sir John Berkeley, Governor of Exeter. The Parliament, having heard of their partisan being thus put to death in cold blood, ordered that the Judges who condemned him might be impeached of high treason; but they were afterwards satisfied with passing an ordinance to remove Heath, and his brethren who had sat with him on this occasion, from their judicial offices, and to disable them from acting as judges in all time to come.<sup>2</sup>

Sir Robert Heath never ventured to take his seat as Chief Justice of the Court of King's Bench at Westminster,—but, after traveling about for some time with the King, fixed himself at Oxford, where he was made a Doctor of the Civil Law, and attended as a Judge when Charles's parliament was held there.

When Oxford was, at last, obliged to surrender, and the royalists could no longer make head in any part of England, Heath found it necessary to fly for safety to

<sup>1</sup> Whitelock, 78, 181; Ordinance, 22d Nov. 1645. Lord Clarendon says "Lord Chief Justice Heath, who was made Chief Justice for that purpose, sat to attain the Earl of Essex, and many other persons who were in rebellion, of high treason" (vol. ii. p. 62). I do not know whether he refers to the commission at Salisbury: there is no account extant of legal proceedings instituted, then or at any other time, against the Earl of Essex.

Upon the failure of the experiment of putting the common law in force against the rebels, martial law was resorted to; but this was speedily superseded by the LEX TALIONIS. "The King's officers having caused divers of the Parliament party to be hanged for spies, as one poor man by Prince Rupert's order, upon the great elm near the Bell in Henley, and many others,—now the council of war at Essex House condemned two for spies who brought a proclamation and letters from Oxford to London, which were taken about them, and they were both hanged."—*Whitelock*, p. 78.

<sup>2</sup> Whitelock, 96. Lords' Journals Nov. 22, 24, 1645.

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the Continent. The parliamentary leaders said that they would not have molested him if he had confined himself to the discharge of his judicial duties; or even if, like Lord Keeper Littleton and other lawyers, he had carried arms for the King; but as, contrary to the law of nations, he had proceeded against several of those who bore a commission which the parliament had granted to them in the King's name, they were determined to make an example of him. Therefore, when an ordinance was passed, granting an indemnity to the royalists who submitted, he was excepted from it by name.<sup>1</sup> After suffering great privations, he died at Caen, in Normandy, in the month of August, 1649.

He had, from his professional gains, purchased a large landed estate, which was sequestrated by the Parliament, but afterwards was restored by Charles II. to his son. He had never tried to make his peace with the dominant party by any concession, and he declared that "he would rather suffer all the ills of exile than submit to the rule of those who had first fought their Sovereign in the field, and then had murdered him on the scaffold." With the exception of his bribery, which was never properly inquired into, and does not seem to have injured him much in the opinion of his contemporaries, no grievous stain is attached to his memory; and we must feel respect for the constancy with which he adhered to his political principles, although we cannot defend them.<sup>2</sup>

<sup>1</sup> Whitelock, 345.

<sup>2</sup> Wood's Fasti Ox. 45.



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## CHAPTER XII.

### CHIEF JUSTICES OF THE UPPER BENCH DURING THE COMMONWEALTH.

ALL the Chief Justices whom I have hitherto commemorated held their offices under royal authority, and were supposed to represent the King in the administration of the law. I now come to a class who were appointed by the House of Commons or by the Protector, and were supposed to represent the majesty of the people of England. It is creditable to the times in which they lived, that they were men of learning and respectability. A few fanatical spirits then appeared, who were for abrogating the whole fabric of our laws, and who thought that any disputes about property which might arise would best be decided by some man of plain sense, whose mind was not perverted by attending to legal distinctions;—but the great mass of the nation, although the office of king was abolished, clung fondly to the ancient laws as their best birthright, and were desirous of seeing the bench occupied by men of education and professional skill. For all high judicial qualities, the republican judges were superior to their predecessors and immediate successors.

Chief Justice *ROLLE*, with whom I begin, was regarded by his contemporaries as a man of profound learning, of great abilities, and of unspotted honor—and I hardly know any action of his life which is liable to grave objection. Not even is an apology required for him from the violence of the times in which he lived.

He was the younger son of a respectable family in Devonshire, and was born at Heanton in that county, in the year 1589. I know nothing of his school education. He passed between two and three years at Exeter

College, Oxford; but, without having taken a degree, he was removed to the Inner Temple, London. Here he studied the law with an intensity which must astonish the most diligent men in our degenerate age. He had for his companions Selden and others of the same stamp, who could hardly have been made of flesh and blood. Except a very few hours for sleep, they dedicated the whole of their time to professional improvement, reading and commonplacing every thing that had ever been printed respecting the common law of England, together with many unpublished records and MSS. which they found in the Tower and other repositories. Their only relaxation was meeting together and conversing on what they had read, "for it was the constant and almost daily course for many years together, of those great traders in learning, to bring in their acquests therein, as it were, in a common stock by natural communication, whereby each of them, in a great measure, became the participant and common possessor of each others' learning and knowledge." Rolle now composed that wonderful Digest which, with additions and corrections made by him in after-life, was given to the world under the title of "Rolle's Abridgment," and which shows not only stupendous industry, but a fine analytical head for legal divisions and distinctions.

He had become a very ripe lawyer before he was called to the bar,—instead of trusting, according to modern fashion, to the chance of picking up *pro re nata* a superficial acquaintance with a particular point on getting a brief, he confined himself to practice in one court—the King's Bench; not running about, as has always been too much the fashion, to any place where he might pick up a fee. "By this means he grew master of the experience of that court, whereby his clients were never disappointed for want of his skill or attendance. He argued frequently and pertinently. His arguments were plain, short, and perspicuous; yet were they significant and weighty."<sup>1</sup>

He sat for the borough of Callington in the parliaments held in the end of the reign of James I. and the beginning of the reign of Charles I., and took the liberal

<sup>1</sup> Wood's Ath. iii. 415.

Wood's Ath. iii. 417.

side, but always with moderation. He maintained the good old maxim, that "redress of grievances should come before supply:" and to the arguments that the King's wants were so urgent, he replied, that "if the necessity for money was so great, this was the very time to press for redress of grievances."<sup>1</sup> When the impeachment of the Duke of Buckingham was moved, he ably vindicated the jurisdiction of the House of Commons over such a case, and showed various instances in which it had been beneficially exercised.<sup>2</sup> During the suspension of parliaments he devoted himself to his forensic pursuits. He did not shine as a popular orator, and he does not seem to have been retained in any important political case either in the Star Chamber or courts of common law, although he continued steadily to support the sound constitutional principles with which he started.

In 1638 he was elected "Reader" of the Inner Temple; but, on account of the prevalence of the plague, he did not deliver his lectures till the beginning of 1640. They were received with much applause, and immediately after finishing them he was called to the degree of Sergeant-at-law.<sup>3</sup>

At the meeting of the Long Parliament he declined a seat which, from the interest of his family, he might have had either in Devonshire or Cornwall. He had not nerve to mix in the stormy scenes which he saw were coming; yet he adhered to the Parliament, he took the covenant along with the Earl of Manchester and the Presbyterian leaders, and he conscientiously approved of the reforms introduced both into the church and the state: at the same time he was always for preserving the ancient form of government by King, Lords, and Commons, and he deeply deplored the excesses of the Roundheads.

Under these circumstances it is very creditable to the House of Commons that, merely from a sense of his fitness for the bench, when they were negotiating terms of settlement with the King during the civil war, they stipulated that Sergeant Rolle should be appointed one of the Judges of the Court of King's Bench; and that

<sup>1</sup> 3 Parl. Hist. 35.

<sup>2</sup> 4 Dug. Chr. Ser. iii.

<sup>3</sup> Ibid. 55.

afterwards, on the extinction of the royal authority, they named him to that office by their own authority.

He was much perplexed how to conduct himself in this emergency. All the forms of judicial procedure were carried on as if the King were on the throne, and the patent of the new Judge would pass under the great seal with the royal arms of England impressed upon it; but the awkward truth could not be disguised, that those under whom he was really to act had fought several pitched battles in the field against his Majesty, and expected very soon to make him a prisoner. The doctrines which Rolle had laid down, when he was writing the title "Prerogative del Roy;" came strongly into his mind: but he persuaded himself that the Parliament had right on its side, he saw that its authority was recognized over the greatest part of England; he said to himself that "justice must be administered;" he was soothed, instead of being startled, by the thought that he was to swear allegiance to the King; and he still fostered the fond hope that a pacification would take place, and that the King, yielding to the reasonable conditions proposed to him, might soon again be quietly keeping his court at Whitehall. He submitted to be sworn in before the Lords Commissioners, and took his seat on the bench according to ancient forms, the only innovation being that his patent ran "*quamdiu se bene gesserit*," instead of "*durante bene placito*."

He continued a Puisne Judge for three years, during which time he may be considered as *presiding* in the Court of King's Bench; for, although Sir Robert Heath, the King's Chief Justice, was superseded by an ordinance, no successor to him was appointed,—and Rolle had only one colleague, who was very inefficient. But it was allowed that justice was now admirably administered; and if there were a certainty of always having a judge like Rolle in the common law courts, he might safely be left to his own resources without assistance or control.

At last the time arrived when in reality the Commonwealth was established, although the kingly title had not been formally abolished; and, on the suggestion of Oliver St. John, it was resolved to fill up all the vacant

offices of the law. From his political ascendancy, this daring popular leader might have chosen any one of them for himself; but as, for private reasons, he preferred the "cushion of the Common Pleas," Rolfe was promoted to be Chief Justice of the King's Bench.<sup>1</sup>

On the 15th of November, 1648, the Lords Commissioners of the Great Seal went into that court, and a writ which they had sealed was read, whereby "Charles I., by the grace of God of Great Britain, France, and Ireland King [then a prisoner in Carisbrook Castle], assigned his trusty and well-beloved Henry Rolfe to hold pleas before him," &c. It would have been very curious to read the orations delivered on this occasion, but the only further account we have of the ceremony is by Lord Commissioner Whitelock, who merely says, "The Commissioners of the Great Seal went into the King's Bench, where we sat in the middle, the Judges sitting on each side of us, and there we did swear the Lord Chief Justice of that Court, Judge Rolles; and Sir Thomas Widdrington (my brother commissioner) made a very learned speech to him."<sup>2</sup>

Rolfe had long been kept ignorant of the determination to bring the King to an open trial. Highly disapproving of this proceeding, he refused not only to preside at it, but to allow his name to be introduced into the ordinance for creating the High Court of Justice. The Lords having rejected the ordinance, and thereupon having been voted "useless," he was greatly alarmed at the coming crisis, though desirous that measures should be taken to ward off anarchy. On the 11th of January, 1648-9, Whitelock makes this entry:—"A visit to Lord Chief Justice Rolles, a wise and learned man. He seemed much to scruple the casting off of the Lords, and was

<sup>1</sup> "1648. Whereas, Mr. Justice Rolfe is ordained by both Houses of Parliament to be Ch. J. of the King's Bench, who is now by letters patent one of the Justices of that Court (*quamdiu se bene gesserit*), the Lords and Commons do ordain, That, to the intent he may be constituted Ch. Justice, according to the said ordinance, the said Mr. Justice Rolfe be desired to surrender the said letters patents; which the Commissioners of the Great Seal are hereby ordered and authorized to accept, and immediately thereupon to constitute him Chief Justice, according to the said ordinance, without any supersedeas to his said letters patents."—*Nov. 13, 10 Lord's Journals*, 587.

<sup>2</sup> *Mém.* 343, 349; *Styles*, 340.



troubled at it. Yet he greatly encouraged me to attend the House of Commons, notwithstanding the present force upon them, which could not dispense with their attendance and performance of their duty who had no force upon them in particular."

When the bloody catastrophe had been consummated, and an ordinance had passed "for abolishing kingship as unnecessary, burthensome, and dangerous to the liberty, safety, and public interest of the people of the nation," Rolle was again thrown into deep perplexity; but, upon the whole, he deemed it the part of a good citizen to submit to the supreme power established in the state, and he, together with five other judges, agreed to assist in the administration of Justice under the "Keepers of the Liberties of England." To guard against the wild schemes then agitated, they required an assurance "that the fundamental laws should not be abolished." In consequence, the fundamental laws of England were preserved; many most important reforms were introduced into them,—and other improvements were proposed, which, after being forgotten for near two centuries, we have adopted in the reign of Queen Victoria.<sup>1</sup>

Rolle, feeling that the deliberations of the executive government could not be beneficially carried on without the presence of some one well skilled in the law, and deeming it essential that, at this time, the preponderance of the military chiefs should have some counterpoise, agreed to accept a seat in the Council of State, and he continued to attend its meetings till it was dissolved by Cromwell, together with the Long Parliament.<sup>2</sup>

He was no longer in Cromwell's confidence; and, without taking any prominent political part, or caballing with the Protector's enemies, he satisfied his strong dislike of the arbitrary government then established. When

<sup>1</sup> Mem. 368. In anticipation of the King's death, there was a grand consultation the same day with respect to the words to be substituted for *Carolus Dei gratia*, &c.; and it was at last agreed to substitute "The Keepers of the Liberties of England." The style continued till Oliver was made Protector.

<sup>2</sup> One of them has still been successfully resisted by prejudice and selfishness—the establishment of a "General Register of Deeds affecting Real Property;" but this cannot be much longer deferred. Whitelock, 378.

<sup>3</sup> Whitelock, 441, 448.

the free parliament was called in 1654, he was returned as one of the members for Devonshire; and he several times advised the House of Commons on juridical questions with admired calmness and dignity. Here, however, he was in danger of being overpowered by loquacity, pertness, and ignorance; and it was with much reluctance that he ever gave his attendance.<sup>1</sup> His delight was to preside as a magistrate, and both in civil and criminal courts he was allowed to be unrivaled.

The questions of civil right which he determined have become obsolete; but several questions of constitutional law came before him which must always be interesting. Captain Streater, a zealous republican, setting at defiance the usurped power of Cromwell, was committed to prison under two warrants, one by the Council of State, and the other by the House of Commons—neither of them specifying the offense with which he was charged. Thereupon he sued out a *habeas corpus* in the UPPER BENCH, and prayed that he might be discharged on the ground that both warrants were illegal. Rolfe, C. J., held the first warrant to be void, in spite of decisions to the contrary under the monarchy; but laid down a rule, which has been followed ever since, that parliamentary commitments cannot be challenged in a court of law:—

“Mr. Streater,” said he, “one must be above another, and the inferior must submit to the superior, and in all justice an inferior court cannot control what the parliament does; if the parliament should do one thing and we do the contrary here, things would run round; we must submit to the legislative power; for if we should free you, and they should commit you again, why here would be no end, and there must be an end in all things. We may call inferior courts to account why they do imprison this or that man against the known laws of the land.”

Captain Streater was remanded; but, the parliament being dissolved, he sued out another *habeas corpus*, when Prideaux, the Attorney General for the Commonwealth, contended that the Court had no power to discharge him:—

Rolfe, C. J.: “We examine not the orders of parlia-

<sup>1</sup> See Barton's Diary; Parl. Hist. 1428-1471

ment: the question is, whether the order doth now continue? and I conceive it is determined by the dissolution of the parliament, and so it would have done by a prerogation. Let the prisoner be set at liberty."

The most interesting case which came before him was that of Don Pantaleon Sa. This nobleman, who was a knight of Malta, had accompanied his brother, the Portugese ambassador, on a mission to London to negotiate a treaty with the Commonwealth of England. Having received some supposed affront in the New Exchange in the Strand,<sup>1</sup> he came to this quarter the following day at the head of an armed band, wantonly attacked the English who were there gathered together, and with a pistol, which he deliberately fired, shot dead an English gentleman who was casually passing by. He then took shelter in his brother's house, and claimed the right of remaining there as in a place of sanctuary. But he was seized, with several of his accomplices, and carried before Lord Chief Justice Rolle; who, exercising the same functions as his predecessors, acted like a modern police magistrate in taking preliminary examinations, granting warrants of commitment, and directing prosecutions to be instituted. He ordered these offenders to be imprisoned in Newgate, and brought to trial for murder. Strong representations were made by the Portugese government that this proceeding was a violation of the law of nations; but, upon the advice of Rolle, Cromwell was firm in his determination that the blood of an Englishman should be avenged, so that the English name might be respected all over the world.

A special commission of *oyer and terminer* was issued to try the case, Chief Justice Rolle being at the head of it, assisted by four doctors of the civil law. Don Pantaleon and three of his accomplices were jointly indicted for the murder. He pleaded, in abatement to the jurisdiction of the Court,—“1st, that he was a foreign ambassador; and 2dly, that he was secretary to a foreign ambassador when the supposed offense was committed, and at the time of the arraignment.” The only proof offered in support of the first plea was a letter to him

<sup>1</sup> 5 St. Tr. 386; Styles, 415; Lord Campbell's Speeches, 238.

<sup>2</sup> Afterwards called “Exeter Change,” now removed as a nuisance.

from the King of Portugal, intimating an intention to make him ambassador in England when his brother, the present ambassador, should be recalled. The fact alleged in the second plea was not disputed; but the counsel for the prosecution strongly argued, that an ambassador, and, at all events, the attendants and servants of an ambassador, are liable to be tried by the municipal courts for any offense committed against the law of nature or the law of God, in the country where they have forfeited their privilege.

*Rolle, C. J.*: "We are not called upon to decide in this case whether a foreign ambassador is exempted from the jurisdiction of our common law courts, if he commits an offense contrary to the law of God and punishable with death if committed by an English subject. A foreign ambassador certainly is not liable for any infraction of the mere municipal laws of that nation wherein he is to exercise his functions. If he makes an ill use of his character, he may be sent home and accused before his own master, who is bound to punish him or avow himself the accomplice of his crimes. But great doubts have been entertained whether this exemption extends to crimes which are *mala in se*, and whether a distinction may be made among crimes *mala in se*, so as to take away the exemption only in regard to crimes more particularly dangerous and atrocious? Some authorities say that if an ambassador commits any offense against the law of reason and nature, he shall lose his privilege; while others say, that although, if an ambassador conspires the death of the King in whose land he is, he may be condemned and executed for treason, if he commits any other species of treason he must be sent to his own kingdom. It may be urged that to the natural universal rule of justice, ambassadors as well as other men are subject in all countries; and consequently it is reasonable that wherever they transgress it, there they shall be liable to make atonement. But, on the other hand, it may be thought that the security of ambassadors is of more importance than the punishment of a particular crime; and the judgment of the Romans upon the ambassadors of Tarquin may be fitly followed, who were sent back unpunished when detected in com-

mitting acts amounting to treason against the state, upon which Livy observes, 'Et quamquam visi sunt commisisse, et hostium loco essent, JUS TAMEN GENTIUM VALUIT.' Here, however, as I before remarked, the question does not arise; for, upon the evidence, the prisoner Don Pantaleon Sa is no ambassador. He does not represent the King of Portugal to our Commonwealth; and the very letter which he produces, proves that his brother alone is in that capacity, as it only expresses a conditional intention of appointing him ambassador at a future time. What we have to consider therefore is the nature and extent of privilege he enjoys as being in the employment of the ambassador. No authority has been cited to prove the existence of the exemption contended for, and we can only consider how it stands upon principle. Is it necessary to the due carrying on of diplomatic intercourse between independent nations? I clearly think that it is not, and here there is no balance between the convenience and the mischief of the exemption claimed. It may be necessary that the persons of the secretaries and other servants of ambassadors should be privileged from civil process, and little inconvenience follows from exempting them; but although it may be essential that the ambassador himself should not be tried for crimes in the country to which he is accredited, he may still represent his sovereign and carry on his negotiations after one in his service has been apprehended for a crime; and what a frightful condition we should be in, if the doctrine were laid down that all who are in the employment of a foreign ambassador in England may rob, ravish, and murder with impunity! I am therefore clearly of opinion that the prisoner Don Panaleon Sa must plead to this indictment.<sup>1</sup> As yet we are bound to consider him innocent, and we shall all heartily join in the prayer that 'God may send him a good deliverance.'

The three civilians expressed their concurrence: the prisoner pleaded not guilty, along with the others joined in the indictment; and a jury *de medietate linguæ*, half English and half foreigners, was impaneled to try them.

<sup>1</sup> See Vattel, b. 4. c. 7.

Don Pantaleon Sa then prayed that he might have the assistance of counsel in conducting his defense on the merits:—

*Rolle, C. J.*: "By our rules of proceeding this may not be. On questions of law only, are persons tried for felony to have the assistance of counsel. With respect to facts they are supposed to be competent to conduct their own defense, and in this case you shall find that we the Judges stand equal between you and the Commonwealth."

The trial then proceeded, and was conducted with great impartiality and regularity.<sup>1</sup> A number of witnesses were examined, who clearly proved that the attack made by the prisoners at the New Exchange was premeditated and unprovoked; that Mr. Greneway, a gentleman of Grey's Inn, son to the Lady Greneway, was there with his sister and a gentlewoman whom he was to have married; that the word "*Safa*" being given, which was the word when the Portuguese were to fall on, without any affront being offered to them, one of them shot Mr. Greneway dead with a pistol; that a number of other Englishmen were dangerously wounded; that Don Pantaleon Sa was the leader of the insurgents; and that the other prisoners were armed, and took an active part in the affray.

The jury found all the prisoners *guilty*, and "Lord Chief Justice Rolle sentenced them to be hanged." Unfortunately, no part of his address to them in passing sentence is preserved.

Great interest was made to save them, and protests were presented not only by the Portuguese govern-

<sup>1</sup> During the Commonwealth, criminal procedure was greatly improved. Down to the breaking out of the civil war, trials for felony and treason were conducted without any regard to rules of evidence, and written depositions or confessions of accomplices were admitted without scruple. But, through the instrumentality of the Commonwealth judges, the rule was laid down that no evidence could be received against prisoners, except that of witnesses confronted with them and sworn. The defect of depriving them of the assistance of counsel, which continued near two centuries longer, had then been very nearly remedied; for Lord Commissioner Whitelock said, "I confess I cannot answer the objection that for a trespass of *6d.* value, a man may have a counselor-at-law to plead for him, but where his life and posterity are concerned, he is not admitted the privilege. A law to reform this, I think would be just, and give right to the people."—*Mem.* Nov. 1649.

ment, but by several other foreign ambassadors, who were alarmed by the thought of such a precedent; but Cromwell, after taking the opinion of Rolle and the other judges, remained firm. Determined that the principal offender should suffer, and thinking that one victim would sufficiently vindicate the national honor, he was a good deal perplexed respecting the manner of dealing with the others, for the "Instrument of Government," under which he now professed to act, gave him no power to pardon in cases of murder.<sup>1</sup> In doing what he thought substantially right, he did not long regard such formalities. "On the 10th of July the Portugal ambassador's brother was conveyed from Newgate to Tower Hill in a coach and six horses, in mourning, with divers of his brother's retinue with him. On the scaffold he spake something to those who understood him, in excuse of his offense, laying the blame of the quarrel and of the murder upon the English. After a few private words and passages of popish devotion with his confessor, he gave him his beads and crucifix, laid his head on the block, and it was chopt off at two blows. The execution of the others was stayed, and, without any formal pardon, after a few months' imprisonment, they were set at liberty. The very day after the execution of Don Pantaleon Sa, articles of peace with Portugal were signed, and the whole affair greatly exalted the fame of the English nation all over Europe."<sup>1</sup>

Chief Justice Rolle had refused to sit on the trial of royalists, but he continued to perform the usual duties of his office, and, soon after, he went to the Western Circuit with one of his *puisnics*. While holding the assizes at Salisbury, he was in the greatest danger of coming to a violent end. Penruddock, at the head of a band of several hundred cavaliers, suddenly got possession of the city. Some of the most unruly, without his knowledge, seized Chief Justice Rolle and his brother judge, who were then actually in court in their robes, and required

<sup>1</sup> "Art. III.—All writs, &c., which now run in the name and style of 'The Keepers of the Liberties of England,' shall run in the name and style of 'THE LORD PROTECTOR,' from whom, for the future, shall be derived all magistracy and honors in these three nations; and shall have the power of pardon, except in cases of murder and treason."

<sup>2</sup> Rebellion, iii. 746; 5 St. Tr. 462-518.



them to order the sheriff to proclaim Charles II., meaning after the proclamation "to cause them all three to be hanged, who (says Lord Clarendon) were half dead already." They refused, and the threat was about to be executed in good earnest; but many country gentlemen protested against it, and Penruddock dismissed the Judges, having taken their commissions from them, and desired them to "remember on another occasion to whom they owed their lives." They were still resolved to hang the sheriff, "who positively, though humbly and with many tears, refused to proclaim the King;" but he contrived to make his escape. It so happened that in a few days this insurrection was quelled, and the greatest number of the insurgents, being taken prisoners, were lodged in Salisbury jail. Orders thereupon came down from London to Chief Justice Rolle, requiring him to try them for high treason; but he returned to town without trying any of them, saying that "he much doubted whether they had done anything which amounted to treason; and that at any rate he was unfit to give judgment in this case, wherein he might be considered a party concerned."

He was now on very bad terms with the Protector, who imitated almost every act of arbitrary power which he had formerly reprobated. After all that had been said about the levying of taxes without authority of Parliament, he had, by his own authority alone, imposed a tax upon the importation of goods. Mr. George Cony, a merchant of London—another Hampden—brought an action to recover back a sum of money which the collector had extorted from him under pretense of this tax. Cromwell at first tried to cajole him into submission, and then committed him to prison. Here we have the counterpart of "*Darnel's Case*,"<sup>1</sup> for a writ of *habeas corpus* was sued out, and the validity of the commitment was debated. The following is the amusing conclusion to the story, as related by Lord Clarendon:—

"Maynard, who was of counsel with the prisoner, demanded his liberty with great confidence, both upon the illegality of the commitment and illegality of the im-

<sup>1</sup> Rebellion, iii. 845; Wood's Ath. iv. 417.

<sup>2</sup> Ante, p. 36.



position. The Judges could not maintain or defend either, and plainly enough declared what their sentence would be; therefore the Protector's attorney required a farther day to answer what had been urged. Before that day, Maynard was committed to the Tower for presuming to question or make doubt of his authority, and the Judges were sent for and severely reprehended for suffering that license. When they, with all humility, mentioned the law and MAGNA CHARTA, Cromwell told them, with words of contempt and derision, 'their *Magna F\*\*\*\** should not control his actions, which he knew were for the safety of the commonwealth.' He asked them, 'Who made them Judges?—whether they had any authority to sit there but what he gave them?—and if his authority were at an end, they knew well enough what would become of themselves; and therefore advised them to be more tender of that which could only preserve them,' and so dismissed them with caution 'that they should not suffer the lawyers to prate what it would not become them to hear.'"<sup>1</sup>

It is not true, as has been sometimes said, that, "in *Stuart fashion*, Rolle was actually dismissed from his office;" but he thought it very necessary for his own dignity that he should withdraw. "In the mean time," says Ludlow, "upon consideration that his continuance in that station was like to ensnare him more and more, he desired, by a letter to Cromwell, to have his *Quietus*; and Sergeant Glyn was appointed to succeed him in his employment, as a fitter instrument to carry on the design on foot."

He retired to a country-house he had purchased, at Shapwick, near Glastonbury, in Somersetshire; and, after languishing a year, expired there in the sixty-eighth year of his age.

<sup>1</sup> Rebellion, iii. 985. The noble historian adds, with his usual candor,— "Thus he subdued a spirit which had been often troublesome to the most sovereign power, and made Westminster Hall as subservient and obedient to his commands as any of the rest of his quarters. In all other matters which did not concern the life of his jurisdiction he seemed to have great reverence for the law, rarely interposing between party and party."

<sup>2</sup> Mem. p. 201; Styles, 452. In a debate in the House of Commons in March, 1659, Chaloner, during the debate, said, "Judge Rolles, learned and honest as any, was shuffled out of his place by the Lord Protector, and another put in his place."—Burton's Diary.

He was buried in a little parish-church in the neighborhood, and no monument was erected to his memory; but he continues to be reverentially remembered in our profession by his labors and his virtues. Every lawyer's library contains reports by him of "Divers Cases in the Court of King's Bench, in the time of King James I.," remarkable for their clearness, precision, and accuracy; and his "Abridgment of the Common Law," the fruit of his early industry. Although he lives as an author, it is as a great magistrate that he is now venerated. And he really seems to have had a *genius* for judging causes; that is to say, that he did this better than any thing else in the world,—better than any one of his admirers would have thought possible,—and as well as any of those who have most distinguished themselves in the same line. *Laudatus a laudato*; his principal panegyrist is Sir Mathew Hale, who, after bestowing warm praise upon him as an advocate, thus proceeds:—

"Although when he was at the bar he exceeded most others, yet when he came to the exercise of judicature his parts, learning, prudence, dexterity, and judgment were more conspicuous. He was a patient, attentive, and observing hearer, and was content to bear with some impertinences, rather than lose anything that might discover the truth or justice of any cause. He ever carried on as well his search and examination, as his directions and decisions, with admirable steadiness, evenness, and clearness; great experience rendered business easy and familiar to him, so that he gave convenient despatch, yet without precipitancy or surprise. In short, he was a person of great learning and experience in the common law, profound judgment, singular prudence, great moderation, justice, and integrity."<sup>1</sup>

It seems that he was liable to the imputation of being too fond of money. Hood thus concludes his short notice of him;—

"The great men of the law living in those times used to say that this Henry Rolle was a *just* man, and that Matthew Hale was a *good* man: the former was by nature penurious, and his wife made him worse; the other,

<sup>1</sup> Preface to Rolle's Abridgment by Sir Mathew Hale.

on the contrary, being wonderfully charitable and open-handed."<sup>1</sup>

The Chief Justice left numerous descendants. The late Lord Rolle was the head of the family, which, if we may trust to the pedigree prefixed to the *ROLLIAD*, was descended from the ancient Duke Rollo of Normandy, and the wife of a Saxon drummer.<sup>2</sup>

Rolle's successor as Chief Justice of the Upper Bench was a man of very different character;—able and well-versed in his profession, but eager to advance himself,—fond of political intrigue, busy, bustling, and unscrupulous. JOHN GLYN was born at Glyn Llynon, in Caernarvonshire, and was the younger son of a respectable family which had long been seated there. He had an excellent education, being bred at Westminster, Oxford, and Lincoln's Inn. He was called to the bar in 1630; and, rapidly getting into practice, was while a very young man, made High Steward of Westminster, and Recorder of London. He associated himself with the patriots from ambition rather than principle, and made himself popular by declaiming at clubs and coffee-houses against the arbitrary acts of the Government. In consequence, when the year 1640 arrived and it became indispensably necessary to apply to the House of Commons for supplies, he was elected representative for the city of Westminster, first in the "Short Parliament," and then in the "Long Parliament." Thus his career is described by Wood:—"He was appointed one of those doughty champions to bait the most noble and worthy Thomas Earl of Strafford, in order to bring him to the block;" which being done he showed himself a great enemy to the bishops and their functions, a zealous covenanter, a busy man in the Assembly of Divines—and what not?—to promote his interest and gain wealth."<sup>3</sup>

<sup>1</sup> *Athenæ*, iv. 418.

<sup>2</sup> A doubt is stated to have existed whether, in the time of the wars of York and Lancaster, although the Rolles were represented by our author to have been sheriffs of the county ("Sheriff *Devonienses Rolli fuerunt*,") the head of the house was not a sheriff's officer ("Bailivus ipse potius quam *Sheriffus*.") But the Chief Justice certainly vindicated the glory of his race. See "Short Account of the Family of the Rollos, now Rolles, faithfully extracted from the Records of the Heralds' office."

<sup>3</sup> He drew, and delivered to the Lords, the replication of the Commons to Lord Strafford's plea.—*Com. Journ.*

<sup>4</sup> *Athenæ*, iii. 752; 2 *Parl. Hist.* 1023.

There is only one parliamentary speech of his preserved. This he made in the committee of the House of Commons which met at Guildhall after Charles's insane attempt to arrest the five members with his own hand. The orator, in defense of parliamentary privilege so grossly violated, inveighs bitterly against all implicated in the transaction; and he was the first to threaten personal violence to the King himself. According to a report of his speech prepared by himself, he thus denounced vengeance:—

“I conceive, sir, did these persons but remember the many precedents yet extant of the just and deserved punishments inflicted by a former parliament upon such miscreants,—as witness the Archbishop of York, the Earl of Suffolk, Chief Justice Tresilian, and others condemned to death for the like offense in the reign of Richard II.,—they would have prejudged that the like danger would fall upon themselves for their evil actions. Nay, sir, these men, if they had considered with themselves the just judgments of God that have immediately lighted upon the necks of such as have been the troublers of kingdoms whereof they have been members, as recorded in sacred writ, they would have laid their hands upon their mouths and hearts when they went about to speak or do any thing tending to the dishonor of Almighty God.”

Glyn at this time was a strong Presbyterian, and so remained till the Independents had completely gained the ascendancy. Taking the covenant, he assisted in framing the “Directory for Public Worship,” which superseded the *Liturgy*; and he was as strong against allowing private judgment in matters of religion as any Papist. Meanwhile, in the language then used by his opponents, “he was very diligent in feathering his own nest.” He obtained a sinecure in the Petty-Bag Office, worth £1000 a year; and other places, which he could not hold himself, he procured for his creatures and kindred. The army, however, viewed with envy the manner in which, while *they* were encountering all sorts of dangers and privations, the members of the House of Commons were enriching themselves; and Cromwell, taking advantage of this feeling, brought in his famous “Self-denying

Ordinance,"—the foundation of his subsequent greatness. Glyn, with Hollis and Stapleton, his close allies, strenuously opposed a measure likely to be detrimental to themselves and to their party. "These were all men of parts, interest, and signal courage, and did not only heartily abhor the intentions which they discerned the army to have, and that it was wholly to be disposed according to the designs of Cromwell, but had likewise declared animosities against the persons of the most active and powerful officers."<sup>1</sup> They had a considerable majority in the House of Commons, and upon a peaceable division the Ordinance must have been thrown out. A council of officers, therefore, on Cromwell's suggestion, preferred an impeachment for high treason against Glyn and ten other members of the House of Commons, and insisted that they should be immediately sequestered and imprisoned. The demand was at first resisted, on the ground that the accusation was general; but it was answered, that on a similar accusation, the Earl of Strafford had been committed to the Tower by the House of Lords,—and, ere long, Glyn was in the same cell which the great state offender had occupied. The self-denying Ordinance having passed, he was deprived of all his employments, including even the Recordership of the City of London.<sup>2</sup>

Glyn was a man in every political revolution to side with the victorious party, and to contrive to gain the favor of those who had beaten him. We are not informed how he made advances to the Independents on his liberation, but, soon after, he was allowed to resume his seat in the House of Commons as member for Westminster; and when negotiations were going on for a settlement with the King, now a prisoner in the Isle of Wight, we find him in the confidential situation of one of the commissioners on the part of the Parliament. He was soon after raised to the degree of Sergeant-at-law,

<sup>1</sup> Rebellion, iii. 87. By Glyn's advice, Hollis sent Ireton a challenge, and the saintly soldier answering that it was against his conscience to fight a duel, the challenger pulled his nose, observing, "If your conscience keeps you from giving satisfaction, it should keep you from offering affronts." This affair greatly exasperated the differences between the Presbyterians and Independents.

<sup>2</sup> Rebellion, ii. 907, iii. 91; *Athenæ*, iii. 753.

being one of those on whom this honor was conferred by order of the House of Commons.

Glyn was too cautious a man to take any part in the King's trial; and he remained very quiet for several years, following his profession, and watching the course of events. But when the Protectorate was firmly established, he professed to be a zealous supporter of the plan for putting the royal diadem on the head of the Protector.

In Cromwell's reformed parliament he was returned for the county of Caernarvon, and, being a member of the committee appointed to remove the objections made by his Highness to accept the title of OLIVER I., which was offered him, he not only took an active part in the conferences at Whitehall, but published a pamphlet, entitled "Monarchy asserted to be the best, most ancient, and legal form of government."

When Chief Justice Rolle refused to try Penruddock and the royalists in the West, who had saved his life, and Sir Matthew Hale, then a Judge of the Common Pleas, had excused himself from this service, Glyn was sent down to Salisbury along with Sergeant Maynard to dispose of them; and their services on this occasion were celebrated in the well-known lines of Hudibras:—

" Was not the King, by proclamation,  
Declared a rebel o'er all the nation?  
Did not the learned Glyn and Maynard,  
To make good subjects traitors, strain hard?"

We have a very full account of the trial by Penruddock himself, from which it would appear that Glyn treated him with extreme harshness and insolence. The indictment was for high treason in levying war against the Lord Protector. The prisoner argued that "there could be no treason unless by common law or statute law, but this is neither on the common law or the statute; *ergo*, no treason."

*Glyn*: "Sir, you are peremptory; you strike at the Government; you will fare never a whit the better for this speech." *Penruddock*: "Sir, if I speak anything which grates upon the present Government, I may confidently expect your pardon; my life is as dear to me as this Government can be to any of you. The holy

prophet David, when he was in danger of his life, feigned himself mad, and the spittle hung upon his beard. You may easily therefore excuse my imperfections. The 'Protector' is unknown to the common law; and if there be any statute against which I have offended, let it be read. My actions were for the King, and I well remember Bracton saith, 'Rex non habet superiorem nisi Deum.' You shall also find that whoever shall refuse to aid the King, when war is levied against him or against any that keep the King from his just rights, offends the law, and is thereby guilty of treason; and yet you tell me of a statute which makes my adhering to my King according to law to be high treason. Pray let it be read."

The only answer he received was, "Sir, you have not behaved yourself so as to have such a favor from the Court." Evidence of the insurrection being then given, and of the taking of Salisbury in the King's name while the Protector's judges were holding the assizes there, Penruddock delivered a very eloquent speech to the jury, which he gives at full length:—

"This being done," he says, "Sergeant Glyn, after a most bitter and nonsensical speech, gave sentence against me, viz., to be drawn, hanged, and quartered; I observe treason in this age to be an *individuum vagum*, like the wind in the Gospel which bloweth where it listeth; for that shall be treason in me to-day, which shall be none in another to-morrow, as it pleaseth Mr. Attorney."

He was a very pious as well as a very brave man, and as he was ascending the scaffold he said beautifully, "This I hope will prove to be like Jacob's ladder; though the feet of it rest on earth, yet I doubt not but the top of it reacheth to heaven."

Rolle being driven, not long after, to resign the Chief Justiceship of the Upper Bench, Glyn was appointed to succeed him. His installation took place with great ceremony, when L'Isle, Lord Commissioner of the Great Seal, "did make a learned speech, wherein he spoke much in commendation of the good government (as he termed it) that they then lived under."

<sup>1</sup> 5 St. Tr. 767-790.

<sup>2</sup> Athenæ, iii. 753. The following is from Styles:—"Memdum.—Trin.

Glyn filled this office till the eve of the Restoration, a period of nearly five years, during which he discharged its judicial duties very creditably. He was an extremely good lawyer, he was very assiduous in private causes, he was very impartial, and he could even put on a show of independence between the Protector and the subject.

His chief reporter is Styles, who, being obliged by an ordinance of the House of Commons to abjure the Norman French, thus laments the hardship imposed upon him:—

“I have made these reports speak English, not that I believe they will be thereby generally more useful, for I have been always, and yet am, of opinion that that part of the common law which is in English, hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others than to defend themselves; but I have done it in obedience to authority, and to stop the mouths of such of this English age, who, though they be as confusedly different in their minds and judgments as the builders of Babel were in their languages, yet do think it vain, if not impious, to speak or understand more than their own mother tongue.”

While in St. Stephen's Chapel (where the House of Commons still met) political convulsions were happening which changed the aspect of the world, I do not find any more important point decided by the UPPER BENCH in Westminster Hall than the following:—

“Action on the case for these words ‘Helena (meaning the plaintiff) is a great witch.’ Verdict for the plaintiff, with damages. Motion in arrest of judgment, and, by the unanimous opinion of all the justices, judgment was arrested, because the words only indicated that the plaintiff was a witch, without alleging that she had bewitched any person or any thing; and it not

Term. 1655. Justice Aske sat alone in the Court of Upper Bench, being then the sole Judge there, the late Lord Chief Justice Rolle having surrendered his patent. Afterwards John Glyn, his Highness the Lord Protector's Sergeant-at-law, took his place of Lord Chief Justice of England in this court, and the Lord Lisle, one of the Lords Commissioners of the Great Seal, made a speech unto him according to the custom.”—*Styles*, 452.



being punishable to be a witch without actually exercising the black art, it is not actionable simply to impute the power of witchcraft to another."

The next reporter of the UPPER BENCH was Siderfin, who, not publishing till after the Restoration, availed himself of the recovered privilege of using the Norman French. The following is a fair specimen of the decisions which he records:—

"Le defendant dit ceux scandalous parols del plaintiff. 'He hath got M. N. with child.' Motion pour arrester le judgment pour ceo que ceux parols ne sont actionables sans alleging que M. N. ne feut sa feme. Mais per Glyn, C. J.: Les parols sont actionables car il ne gist dans la bouch del defendant a dire que le plaintiff et M. N. estoient baron et feme."

On several occasions when writs of *habeas corpus* were moved for in the UPPER BENCH, Glyn intimated with some reluctance that, sitting there, he must declare the law as it had been handed down to him; whereupon (probably by his advice in the Council of State) the arbitrary acts deemed necessary were carried through by the agency of the "Major Generals" and the "High Court of Justice."

There was one treason trial before the UPPER BENCH while Glyn presided there, that of Undercome, who had engaged in a plot to assassinate the Lord Protector. As he was certainly guilty of a crime revolting to all Englishmen, it was thought that a jury might safely be trusted with the case, instead of referring it to any extraordinary tribunal.

It is curious to a lawyer to observe that the indictment is framed after the precedents of stat. 25 Edward III., for "compassing and imagining the death of the Lord Protector." The overt act charged was hiring a room in Westminster, fitting it with guns, arquebusses, and pistols charged with leaden bullets and iron slugs, to shoot, kill, and murder him. The facts being proved

<sup>1</sup> Styles, ii. So it is held not actionable to say "Mary is a witch, for she has bewitched me," the context showing that he meant she had made the defendant fall in love with her: any more than to say "you are a thief, for you have stolen my heart;" or, "you have committed murder for your beauty has forever murdered my peace of mind."

<sup>2</sup> Siderfin, ii. 17.

very clearly, Lord Chief Justice Glyn thus met the objection that in the statute of Edward III. there is no mention of a "Protector:"—

"By the common law, to compass or imagine the death of the chief magistrate of the land, by what name soever he was called, whether *Lord Protector* or otherwise, is high treason; he being the spring of justice, in whose name all writs run, all commissions and grants are made; the statute 25 Edw. III. did only declare what the common law before was, and introduced no new law."

The jury, consisting of very respectable men, having, without difficulty, found a verdict of *guilty*, the ancient sentence in cases of treason, with all its frightful particulars, was pronounced; but this Sindercome disappointed, by taking poison the night before the day fixed for his execution.<sup>1</sup>

Glyn was member for Caernarvonshire in Cromwell's third parliament, and assisted the House of Commons with his legal advice. In the proceedings against Naylor the Quaker, he gave it as his opinion "that, upon a simple commitment by the House of Commons for a contempt, at the end of the session the party committed was entitled on a *habeas corpus* to be discharged; but if the House were to proceed judicially, and, after conviction, sentence him to imprisonment for a time certain, no inferior court could interfere to relieve him."<sup>2</sup>

The Chief Justice continued in high favor with Cromwell, and again made an effort to induce him to become King.<sup>3</sup> This having failed, and the House of Lords being restored, he was made a peer,—he and his wife being called Lord and Lady Glyn.<sup>4</sup>

On the accession of Richard his patent as Chief Justice of the Upper Bench was renewed, and he took his seat as a peer in the new parliament, but made no effort to ingratiate himself with the military usurpation which followed, foreseeing that it would be short-lived. On the restoration of the Rump he again took his seat as member for Westminster, and affected a zeal for the Presbyterians, who were now the dominant party.

<sup>1</sup> 5 St. Tr. 841-872.

<sup>2</sup> 3 Parl. Hist. 1498.

<sup>3</sup> Burton's Diary.

<sup>4</sup> 3 Parl. Hist. 1418.

As Monk's army approached from the north he had a very shrewd guess at the intentions of "honest George," and thought it did not become him to act longer as a Judge under a usurped authority. He therefore sent in his resignation of the office of Chief Justice of the Upper Bench, and strenuously assisted in the recall of the exiled royal family. He zealously joined in the vote for the final dissolution of the Long Parliament; and, being returned to the Convention Parliament as member for the county of Caernarvon,<sup>1</sup> he opposed the motion made by Sir Matthew Hale for requiring conditions from Charles II. In short, he was as loyal as any Cavalier. It seems rather strange that he now printed the speech he had made, to induce Oliver to accept the Crown, in the shape of a pamphlet entitled "Monarchy asserted to be the best, most ancient, and legal form of government; in a conference held at Whitehall with the Lord Protector and a Committee of Parliament, April, 1650." His object probably was to prove that he had always been a royalist in his heart. Wood asserts that, in spite of this new-born zeal, Glyn was so obnoxious on account of what he had done when an ultra-republican, that he would have been excepted from the indemnity, and, although not directly concerned in the King's death, that he would have been brought to trial for high treason, like Sir Harry Vane the younger, if he had not given a bribe to Lord Chancellor Clarendon.<sup>2</sup> However this may be, the ex-Chief Justice was quickly as great a favorite with Charles II. as he had ever been with Oliver. He was not only pardoned, but created King's Ancient Sergeant; and, kneeling to kiss the hand of his legitimate Sovereign, rose SIR JOHN GLYN, KNIGHT. He was again returned for Caernarvonshire on the dissolution of the Convention Parliament, and he supported all the measures of the Court with indiscriminate zeal. "He departed this mortal life in his house situated in Portugal Row, Lincoln's Inn Fields, near London, on the 15th of Novem-

<sup>1</sup> 4 Parl. Hist. 8.

<sup>2</sup> When the *Athenæ* came out, after Lord Chancellor Clarendon's death, his son sued the author for this calumny in the Vice-Chancellor's Court, and had judgment against him.

ber, 1666, was buried with great solemnity (being accompanied to his grave by three heralds of arms) in his own vault under the altar in the chancel of the church of St. Margaret, within the city of Westminster."<sup>1</sup>

The office of Chief Justice of the UPPER BENCH having become vacant by the resignation of Glyn, although the supreme power really was in the hands of Monk, who was approaching London at the head of a large army, the Rump resolved that, for the due administration of the law, a new Chief Justice should be created. Accordingly an order was made, both by the Council of State and by the House of Commons, to confer the office on SIR RICHARD NEWDIGATE; and, as he was regularly installed in it, I must take some notice of him, notwithstanding that the period for which he held it was very brief.

He was of a respectable Warwickshire family. He studied at Oxford, and he was called to the bar at Gray's Inn. I find no public notice of him till the year 1644, when he was appointed junior counsel of the Commonwealth in certain state prosecutions which were then going on, having Prynne and Bradshaw for his leaders. I suspect that he was a hard-headed special pleader, without display or pretension, who, delighted with the smell of old parchment, was indifferent about politics and literature; but who was complete master of his own craft, and who could be relied upon with absolute confidence for drawing an indictment or arguing a demurrer. He never was a member of the House of Commons, neither sitting in the Long Parliament nor any of the whimsical deliberative assemblies called either by Oliver or Richard.

The next we hear of him is as counsel for Glyn, Hollis, and the rest of the eleven members who were impeached for high treason because they opposed the "Self-denying Ordinance." He drew and signed their answer, which seems to have been a service of some danger, as Whitelock greatly rejoiced in being released from it. The case never came to a hearing, the object

<sup>1</sup> *Athenæ* iii. 754.

being only to frighten the leading Presbyterians—not to hang them.<sup>1</sup> Although opposed to the Government, on account of his reputation as a lawyer he was called upon, along with Pepys and Wyndham, to become a Judge.<sup>2</sup> They at first all declined the honor, and, being summoned into the Protector's presence, expressed doubts as to his title, and scruples as to whether they could execute the law under him. Whereupon he said, in wrath, "If you gentlemen of the *red robe* will not execute the law, my *red coats* shall." Out of dread of what might happen either to the state or to themselves, they are said all to have exclaimed, "Make us Judges; we will with pleasure be Judges."

Newdigate, in consequence, became a Puisne Justice of the Court of King's Bench, but was too honest long to retain the office. Presiding at the assizes for the county of York, when Colonel Halsey and several other royalists were tried before him for levying war against the Lord Protector, he observed that, "although by 25 Ed. III. it was high treason to levy war against the King, he knew of no statute to extend this to a Lord Protector;" and directed the jury to acquit the prisoners.

In consequence, a mandate from the Protector in Council came to the Lords Commissioners of the Great Seal for a *supersedeas* to dismiss him.<sup>3</sup>

He returned to the bar, and practised with great success for some years.

He was restored to the bench, as a Puisne Judge, when the Protectorate was abolished, and the government was again carried on in the names of the "Keepers of the Liberties of England."<sup>4</sup> Two days after, an ordinance passed by which he was constituted "Chief Justice of the Upper Bench." The object was, in the present crisis, to select an individual who could give no offense to any political party, and who must be acceptable to all from his acknowledged learning and integrity.

He filled the office with entire satisfaction to the public till the 29th of May following, when Charles II.

<sup>1</sup> Memorials, 259.

<sup>2</sup> Whitelock, 591.

<sup>3</sup> According to another edition of the story he said, "If I cannot rule by *red gowns* I will rule by *red coats*."

<sup>4</sup> Whitelock, 625.

<sup>5</sup> *Ib.* 678.

making his triumphal entry into London amidst universal rejoicings, the Commonwealth Judges were considered as superseded, and ceased to act.

The only case of much importance which came before him was that of Sir Robert Pye who having been committed to the Tower by the House of Commons, his counsel moved for a *habeas corpus* to discharge him: Ludlow says, "So low were the affairs of Parliament, and their authority so little regarded, even in Westminster Hall, that Judge Newdigate, demanding of the counsel for the Commonwealth what they had to say why it should not be granted, they answered that they had nothing to say against it: whereupon the Judge, though no enemy to monarchy, yet ashamed to see them so unfaithful to their trust, replied, that if they had nothing to say, he had; for that Sir Robert Pye being committed by an order of the Parliament, an inferior court could not discharge him."<sup>1</sup>

Newdigate had always born his faculties so meekly that in the Act immediately passed "for confirming all writs and process in the names of the Protectors, Oliver and Richard, or of the Keepers of the Liberties of England,"<sup>2</sup> it would have been graceful to have introduced a clause ratifying his appointment, or to have reconstituted him a Judge under the royal great seal now held by the Earl of Clarendon; but he was so little of an intriguer that he was removed from his office in seeming disgrace, while his predecessor, Glyn, who had been instrumental in overturning the monarchy, and had behaved with the utmost harshness to many royalists, was immediately basking in the sunshine of Court favor.

He returned to the bar, and was a second time called to the degree of coif, along with other sergeants, whose first writs had been issued by the "Lord Protector," or

<sup>1</sup> Ludlow, p. 821. The following is a different report of the case by Siderfin—"Sir Ro. Pye et M. Fincher esteant commit al Tower move per leur counsel pro Hab. Corp. Et al jour del retour ils appiert in court. Et fuit move per leur conseil, que ils serra baile avant este longtems imprison sans ascun prosecution fait vers eux. Et fuit dit per le Court que coment ils fuer' imprison pur suspicion de treason, que ils na poent deny al eux baile in cas que le conseil del Commonwealth ne voil proceed vers eux; car est le birthright de chascun subject destre try acc al Ley del terre." *Sid.*

179.

<sup>2</sup> 12 Car. II. c. 4.

the "Keepers of the Liberties of England." When he saw that there was no chance of his being restored to the bench, and found that he was too old to wrangle with jurors trying to push themselves into notice, he retired into the country and amused himself with rural sports. Still he was not a keen politician, and he associated chiefly with the Cavaliers. By Colonel Halsey, whose life he had saved, he was introduced, in extreme old age, to Charles II., and he was created a baronet. He died on the 14th of October, 1668. On his death-bed he perceived, by the signs of the times, that another revolution was approaching, although no one could then tell whether it would lead to a constitutional monarchy or to a re-establishment of the Commonwealth.<sup>1</sup>

<sup>1</sup> See Noble's Family of Cromwell, vol. ii. On the east wall of Harefield Church, in Middlesex, is a monument to Sir Richard Newdigate, with the following inscription:—"M. S. Ricardi Newdigate, servientis ad legem et baronetti, filii natu minimi Joannis Newdigate in agro Warwicensi militis. Natus est 17mo die Septembris, A. D. 1602, et post tyrocinium in Academiâ Oxoniensi feliciter incohatum juris municipalis studio in Graiorum hospitio reliquum temporis impendit; vitam degit animi fortitudine et mirâ equitate spectabilem; summo candore et morum suavitate ornatus erat, nec minore probitate et prudentiâ. Deplorandis illis inter Carolum primum regem et ordines regni controversiis non omnino admiscuit, nec adduci potuit ut prædiorum regis vel illorum qui ob ejus parte steterunt emptione rem suam contaminaret; sed nobiliore quamvis minus expedito ad divitias contendas itinere; indefesso nempe studio et labore, summâque in arduis sori negotus peritiâ et fide; quibus ita claruit, ut reempto hujus loci manerio, antiquæ suæ familiæ penè collapsæ, atque ex veteri Newdegatorum in Surria prosapia oriundæ, sedi plurima adjecit latirundia quæ nullæ viduarum lachrymæ nec diri orphanorum gemitus infausto omine pollurunt."—*Lyson's Environs of London.*





## CHAPTER XIII.

### LIFE OF CHIEF JUSTICE OLIVER ST. JOHN.

I MUST complete my list of Commonwealth Chief Justices with the name of OLIVER ST. JOHN, and I am well pleased with an opportunity of tracing his career and portraying his character. He has been noticed by historians, but he has not occupied the prominent position which is suitable to his merits or his crimes. With the exception of Oliver Cromwell, he had more influence on the events which marked the great constitutional struggle of the 17th century than any leader who appeared on the side of the Parliament. He was the first Englishman who ever seriously planned the establishment of a republican form of government in this country; he adhered resolutely to his purpose through life; and to attain it he took advantage, with consummate skill, of all events as they arose, foreseen or unseen, and of the various incongruous propensities and conflicting passions of mankind. When the ancient monarchy had been overturned, he resisted the establishment of tyranny under a new dynasty; and finally, rather than desert his principles, he was willing to spend his old age in exile and penury. At the same time, while he was a distinguished statesman he was an able lawyer,—not like many who have been called to the bar *pro forma*, and having gone a single circuit have entirely abandoned their profession for politics, but, sounding all the depths of the law, he showed himself worthy to be trusted in the most important causes ever argued before an English tribunal; and he himself for years distributed justice as a great and enlightened magistrate. There were, indeed, dark shades in his character, but these only render it the more worthy of our study.



It is a curious circumstance that there should be a dispute about the parentage of such a distinguished individual, who flourished so recently. Lord Clarendon, who knew him intimately from his youth, who practised with him in the Court of King's Bench, who sat in the House of Commons with him, and who was both associated with him and opposed to him in party strife, repeatedly represents him as illegitimate; and states that he was "a natural son of the house of Bullingbrook."<sup>1</sup> Lord Bacon's account of his origin is equivocal—calling him "a gentleman as it seems of an ancient house and name."<sup>2</sup> By genealogists and heralds a legitimate pedigree is assigned to him, deducing his descent in the right male line from William St. John, who came in with the Conqueror; but some of them describe him as the son of Sir John St. John, of Lydiard Tregose in Wiltshire, and others as the son of Sir Oliver St. John of Cagshoe in Bedfordshire, and they differ equally respecting his mother.<sup>3</sup> Lord Clarendon could hardly be mistaken on such a point, and I cannot help suspecting that the contrary assertions proceed from a desire to remove the bar sinister from the shield of a Chief Justice.

He was born in the latter end of the reign of Queen Elizabeth. To whomsoever he might be related, or by whomsoever begot, he had from nature wonderful power of intellect, and great pains were taken with his education. He received much early kindness from the Earl of Bedford, as well as the Earl of Bolingbroke; and he was brought up with the young Russells and St. Johns who were to support the greatness of these two noble houses.

Some say that he was educated at Catharine Hall, Cambridge, and others at Trinity College, Oxford; but the former statement is much the more probable.<sup>4</sup> Al-

<sup>1</sup> Rebellion i. 327.

<sup>2</sup> Works, 429.

<sup>3</sup> See Noble's *Memoirs of the Cromwell's Family*, i. 16.

<sup>4</sup> *Fasti*, i. 453. At a request of a friend Dr. Philip Bliss, Principal of St. Mary Hall, and keeper of the Archives of the University, has, though in vain, made a diligent search for Oliver St. John's matriculation at Oxford. He thus politely prefaces a letter stating the result of his inquiries: "Lord Campbell has a claim on me, and all who have records in their custody, as his work may be considered a valuable contribution to our national biography." He then states that after a search of several days, the only St. Johns he can find matriculated from 1570 to 1614, are Oliver St. John, of

though we certainly know that he studied law at Lincoln's Inn, the exact dates of his entry, and call to the bar there, are not ascertained, from the defective state of the books of the Society at that period.<sup>1</sup>

We have ample notice of his appearance and habits soon after he was called to the bar, which describe him as thoughtful and moody, never partaking in youthful amusements, and seldom even allowing his features to relax into a smile. He read much and reflected more. Though a deep lawyer, and almost always to be found at his chambers when he was not attending the courts, he had nothing showy in his manner; and the attorneys ascribed his taciturnity to dullness, so that for a considerable time he had hardly any practice, either on the circuit or in London. But those who were intimately acquainted with him foresaw that he must one day attract general admiration.

How his attention was first directed to politics is unknown, but it is certain that, from early youth, he was impressed with the notion that the Stuart family was systematically engaged in a plan to subvert public liberty; he saw the mischiefs arising from monopolies, which were still persisted in, notwithstanding the repeated promises to abolish them; and, above all, he was alarmed by the danger of parliaments being entirely discontinued, if the pretension should be acquiesced in of raising money by the exercise of the prerogative. It is supposed that, during a long vacation, he had taken a trip to Holland, and that it was from seeing with his

Trinity College matriculated 20th Dec. 1577, son of John St. John, Esq. being the Lord Deputy of Ireland in 1616, and created Baron Tregoze in 1626, represented by Collins as having died in 1630, aged seventy; George St. John, the son of a knight born in the county of Wilts, matriculated of Trinity College April 3, 1601, aged fifteen; and William St. John, the son of an esquire, born in the county of Hants, matriculated of Magdalene College May 8, 1600, aged sixteen. The matriculation records of Cambridge at this period are so defective, that the non-appearance of a name in them affords hardly any argument; and Wood's assertion that our Oliver was of Catharine Hall is strongly corroborated by the fact of his having been afterwards Chancellor of the University of Cambridge.

<sup>1</sup> There are entries respecting an Oliver St. John (without any designation as to parentage) who is stated to have been admitted in 1630, and to have been called to the bar on the 30th of January, 1637(S); but this cannot refer to our Oliver, who must then have been forty years of age, and was well known as a lawyer and a politician.

own eyes the respect for property as well as personal liberty, and the comfortable and contented condition of all classes in that country, he was first imbued with a taste for a republican form of government.

However this may be, it is certain that James I., in the interval of parliaments, having made an attempt to raise a tax under the name of a "Benevolence," or compulsory loan which was never to be repaid,—the amount exacted from the supposed lender being assessed by the borrower,—Oliver St. John, still a mere stripling, resolved to stir up resistance to it; and with this view he wrote and published "A letter to the Mayor of Marlborough," citing the various statutes, from MAGNA CHARTA downwards, by which the imposition was condemned, and denouncing it contrary to law, reason, and religion. Sir Francis Bacon was then the Attorney General, and impatient to grasp the great seal. That he might recommend himself to the Court, he prosecuted this indiscreet boy in the Star Chamber, for a libel, and had him arrested while the suit was depending. When the hearing of the case came on, he made a speech which might well fix the hatred of tyranny in the breast of the young patriot:—

"This gentleman," said he, "hath upon advice, not suddenly by the slip of his tongue—not privately, or in a corner—but publicly—as it were to the face of the King's ministers, slandered and traduced the King our sovereign, the law of the land, the parliament, and infinite particulars of his Majesty's worthy and loving subjects. Nay, the slander is of that nature, that it may seem to interest the people in grief and discontent against the state; whence might have ensued murmur and sedition. So that it is not a simple slander, but a seditious slander, like that the poet speaks of—*Calamosque armare veneno*—a venomous dart that hath both iron and poison." He then at great length justified the Benevolence, and commented bitterly on the alleged libel. Thus he concluded: "Your menace, that 'if there were a Bollingbroke (or I cannot tell what), there were matter for him,' is a very seditious passage. You know well that, howsoever Henry IV.'s act by a secret providence of God prevailed, yet it was but an usurpation;

and if it were possible for such a one to be this day, wherewith it seems your dreams are troubled, I do not doubt his end would soon be upon the block, and that he would sooner have the ravens sit upon his head at London Bridge, than the crown at Westminster; and it is not your interlacing with your *God forbid!* that will salve these seditious speeches. If I should say to you, for example, 'Mr. Oliver St. John, if these times were like some former times of King Henry VIII., which *God forbid!* Mr. Oliver St. John, it would cost you your life!' I am sure you would not think this to be a gentle warning but rather that I incensed the Court against you. And this I would wish both you and all to take heed of--how you speak seditious matter in parables, or by tropes, or examples. There is a thing in an indictment called an *innuendo*; you must beware how you beckon or make signs upon the King in a dangerous sense. As yet, you are graciously and mercifully dealt with."

After various members of the court had followed in the same strain, supporting the legality of Benevolences, and denouncing as sowers of sedition and traitors all who questioned the right to levy them, a day was appointed for condemning the defendant to punishment, and then hearing him. This was looked forward to with great interest; and Lord Chancellor Ellesmere, who was dying, expressed a wish that the delivery of the sentence might be the last act of his official life. Fine, pillory, and perpetual imprisonment were expected by St. John without dismay.

But, before the day arrived, his prison doors were thrown open to him. He was told that Government dropped the prosecution, in the hope that indulgence would bring him to a right mind, and that the authoritative declaration of the law by the Court of Star Chamber would for ever after prevent attacks on the inalienable prerogatives of the Crown. The real motive for this apparent lenience was never explained. The proceeding had no effect on the obdurate mind of St.

<sup>1</sup> 2 St. Tr. 899. Bacon was so delighted with this speech, that he sent a copy of it to the King, saying, "I persuade myself I spoke it with more life."

John but to make him more cautious. He never forgave the Court the first assault, and, hoping before he died to see his country free, he resolved to bide his time.

He remained quiet during the rest of this reign and the commencement of the next, but he was returned to the House of Commons as member for the county of Bedford in Charles's third parliament, and thenceforth he was the life and soul of the country party. Still he made no display. He was nothing of a rhetorician; he hardly ever spoke in debate, and when he did open his mouth, it was only to utter a few pithy sentences. But he met the popular leaders in consultation; he furnished them with precedents, he drew their addresses and resolutions, and he gave them discreet counsel, which they valued and followed.

Although he had been mainly instrumental in carrying the "Petition of Right," and extorting the royal assent to it in due form, and the Court, aware of his influence, would have been well pleased to have punished him after the parliament was dissolved, it was found impossible to include him in the prosecution instituted against Sir John Eliot, Denzil Hollis, and other patriots, for making seditious speeches in parliament.

But he anxiously watched the expedients now adopted to introduce despotism and to reconcile men's minds to the loss of liberty. One of these was to circulate a book, entitled "A Proposition for his Majesty's Service, to bridle the Impertinence of Parliaments." This had been written by Sir Robert Dudley at Florence, and recommended the establishment in England of Louis XI.'s system of fortifications, garrisons, passports, and taxes, whereby he had completely put down the meetings of the States General in France, and had rendered himself absolute in that kingdom. St. John having procured a copy of it, showed it to the Earl of Bedford, Selden, and other friends, and was preparing an answer to it denouncing the profligate design which it disclosed, when the King and his ministers, to ward off the disgrace that was about to be heaped upon them, pretended that they highly disapproved of the book, and actually preferred an information in the Star Chamber against

the Earl of Bedford, Selden, and St. John, for composing and publishing a seditious libel, entitled "A Proposition for his Majesty's Service, to bridle the Impertinence of Parliaments."

This cause coming to a hearing, "a great presence of nobility being in court,"<sup>1</sup> the Attorney General with gravity opened the charge, and explained how the defendants were clearly guilty, because the book was libelous, and they had not only read it, but had shown it to each other, which, in point of law, amounted to a *publication*; whereas it was the duty of every one who met with a libel, without reading it through, immediately to lay it before the Secretary of State, or some other magistrate, so that its circulation might be stopped and the author brought to punishment. But, before Mr. Attorney had concluded his oration, the Lord Keeper Coventry, who was presiding, declared that the Queen was just brought to bed of a son (afterwards Charles II.); and that it having pleased the *Great Justice of Heaven* to bless his Majesty and his kingdom with a hopeful prince, the great joy and long expectation both of the King and kingdom, his most sacred Majesty directed the Court to proceed no further with this prosecution, but that the book should be burnt by the hands of the common hangman, as "seditious and scandalous both to his Majesty and the state."<sup>2</sup> Lord Clarendon says, "It being quickly evident that the prosecution would not be attended with success, they were all, shortly after, discharged."<sup>3</sup>

St. John felt no gratitude for being again released from impending peril, but vowed the destruction of a Government which could form such culpable plans, and resort to such unworthy artifices to conceal them. He was the confidential adviser of those who were prosecuted by the Government, but as yet he never appeared for any of them in court, and it was supposed that, although a very sensible man, he had no forensic talent.

At last, ship-money came up. He was counsel for Hampden, and he delivered the finest argument that had ever been heard in Westminster Hall. Having writ-

<sup>1</sup> 3 St. Tr. 397.

<sup>2</sup> Sic. 3 St. Tr. 397.

<sup>3</sup> Rebellion, i. 287.

ten a very learned opinion, in which he demonstrated the illegality of this imposition, and upon which payment of it had been refused,—having drawn the demurrer to the information filed in the Exchequer to recover the famous 20s.,—and evidently understanding the subject better than any man in England, Hampden placed entire confidence in his ability, notwithstanding his want of practice, and required him to plead as his leading counsel in the Court of Exchequer Chamber, where the case was to be heard before all the judges.

His argument, which lasted two whole days,<sup>1</sup> may now be perused with interest. We are chiefly struck with the calm, deliberate, business-like tone which pervades it. He always speaks respectfully of the just prerogatives of the Crown, and abstains from any triumph when he has exposed the fallacies of his antagonists: but, by a review of the principles of the English constitution, and of the statutes passed upon the subject from Saxon times to the "Petition of Right," he demonstrates that, while an ordinary hereditary revenue belonged to the King, extraordinary supplies could only be obtained by a parliamentary grant; that if any power of taxing the subject had ever belonged to the King, it had been solemnly renounced and abrogated; that the demand upon the county of Buckingham to furnish the means for fitting out a ship of war was an entirely novel invention, and that if such a demand could be made as often as the King should say it was necessary, the property of all his subjects was held at his pleasure. Although newspaper reporting was still unknown, there was then a communication of intelligence by means of coffee-houses, clubs, and news-letters, more rapid and general than we should at present think possible without the instrumentality of the press; and in a few weeks the fame of this speech

<sup>1</sup> Although the length of speeches at the bar has certainly grown much of late years, it is some comfort to know that our ancestors sometimes suffered under greater tediousness than has ever been inflicted on the present generation. St. John, for the defendant, having taken two whole days of the time of the Court; Sir Edward Littleton, the Solicitor General, took for the Crown three; Mr. Holborne for the defendant took four; and Sir John Banks, the Attorney General, for the Crown, took three. We are not told how long the Judges spoke in giving their opinions; but from their enormous lengthiness, they must have occupied many days.—3 St. Tr. 826-1315.



was spread all over the kingdom, producing a general resistance to the tax, which had hitherto been resisted by Hampden alone. St. John, who had been little known beyond a small circle of private friends and political associates, was now celebrated by all mouths, and was regarded as the great legal patron of the oppressed. Lord Clarendon, after observing that "he had not been taken notice of for practice in Westminster Hall till he argued the case of ship-money," is obliged to acknowledge, although with a sneer, that "this argument gave him much reputation, and called him into all courts and to all causes where the King's prerogative was most contested;" adding this very graphic little sketch of his appearance, manners, and habits:—"He was a man reserved and of a dark and clouded countenance, very proud, and conversing with very few, and those men of his own humor and inclinations."<sup>1</sup>

Of course, his practice was now chiefly in the Star Chamber, which was attended with more *clat* than profit, and was by no means safe; for the advocate of a supposed libeller was regarded as "an accomplice after the fact." On the mere suspicion that he was concerned in drawing Burton's answer, St. John's chambers in Lincoln's Inn were searched, and all his papers were carried off.<sup>2</sup>

Hyde, Hollis, Whitelock, Hampden, and the other friends with whom St. John was associated, while they strongly condemned the system of government which had been established, were all attached to the monarchy, and, as yet, only wished that parliaments should be restored, and that abuses should be corrected. But at this era, if not earlier, it is certain that St. John himself had become a determined republican, and that he thought there was no security for freedom but in a democratic revolution. To this he looked forward with eagerness: he regretted, or he joyfully hailed, events as they seemed to retard or favor it; and he exerted all his own energy and prudence to insure the ultimate success of what he denominated the "good cause." His own personal sufferings from a violation of the law, although they preyed much upon his mind, had been slight, and

<sup>1</sup> Rebellion, i. 287.

<sup>2</sup> Strafford's Letters, 85.



could afford little apology for schemes which might introduce public confusion ; but before we condemn him with very great severity, we must recollect that parliaments had now be suspended for nearly eleven years, contrary to a statute requiring the King to call a parliament at least once a year,—that there was a fixed determination against ever calling another parliament in England,—that other taxes as well as ship-money had been imposed and levied by the royal authority alone,—that a power was assumed of legislating on all subjects by royal proclamation,—that sentences of unprecedented cruelty had been inflicted upon those who stood up in defence of the constitution,—that this system of government had been established immediately upon the “Petition of Right” being added to the statute-book,—and, above all, that the following doctrine was openly avowed, and acted upon,—“all statutes which encroach upon the essential prerogatives of the Crown are void.” While monarchy existed, all remedy seemed hopeless.

For a long time, despotism (then called by the cant name of “Thurrough”) was triumphant, and it would have been permanently established in England but for the indiscreet attempt to introduce episcopacy into Scotland. With rapture did Sir John observe the insurrection in that country,—the march of a Scottish army to the south,—the flight of English troops before the invaders, and the necessity to which the King was reduced of again calling a parliament. He himself was returned to Totness.

He took little part in the debates of the “Short Parliament,” which met on the 13th of April, 1640, and was dissolved on the 2d day of the following month. He was at first alarmed by observing the loyalty and moderate disposition of the members, but was much reassured by the rashness and violence of the King’s advisers. He inflamed the dispute respecting the priority to be given to supply, or to grievances ; and he was suspected of being in collusion with Sir Harry Vane the elder, who, being then in the King’s service as Secretary of State, prevented an accommodation which had nearly been brought about, by declaring that “no supply would be accepted if it were not in the proportion and

manner proposed in his Majesty's message." On the day of the fatal dissolution, as we are informed by the noble historian, "it was observed that, in the countenances of those who had most opposed all that was desired by his Majesty, there was a marvelous serenity: nor could they conceal the joy of their hearts; for they knew enough of what was to come, to conclude that the King would shortly be compelled to call another parliament; and they were sure that so many unbiassed men would never be elected again." To show who the person was to whom he chiefly referred, he gives us this most interesting dialogue:—

"Within an hour after the dissolving, Mr. Hyde met Mr. St. John, who had naturally a great cloud in his face, and very seldom was known to smile, but then had a most cheerful aspect, and seeing the other melancholic, as in truth he was from his heart, asked 'what troubled him?'—who answered, 'that the same that troubled him, he believed troubled most good men; that in such a time of confusion, so wise a parliament, which alone could have found remedy for it, was so unseasonably dismissed:' the other answered with a little warmth, 'that all was well, and that IT MUST BE WORSE BEFORE IT COULD BE BETTER, and that this parliament never could have done what was necessary to be done.'<sup>1</sup>

Clarendon subsequently brings a charge of treachery against St. John, along with Pym and Hampden, for defeating the measures which ought to have been taken against the Scotch; but does not support it by any sufficient evidence.<sup>2</sup>

As St. John had foreseen, it soon became necessary to call another parliament; and the members returned to it were much more to his mind. He again represented the borough of Totness.

When the Long Parliament met, he still avoided oratorical display, but soon disclosed to the observing his "dark, ardent, and dangerous character."<sup>3</sup> He drew the Resolutions against ship-money; and he was a member of the secret committee appointed to frame the articles

<sup>1</sup> Rebellion, i. 218.

<sup>2</sup> Ibid. 223.

<sup>3</sup> Hume. "Here was known the dark, ardent, and dangerous character of St. John."

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MERCHANTS INN, CHARLTON LANE.

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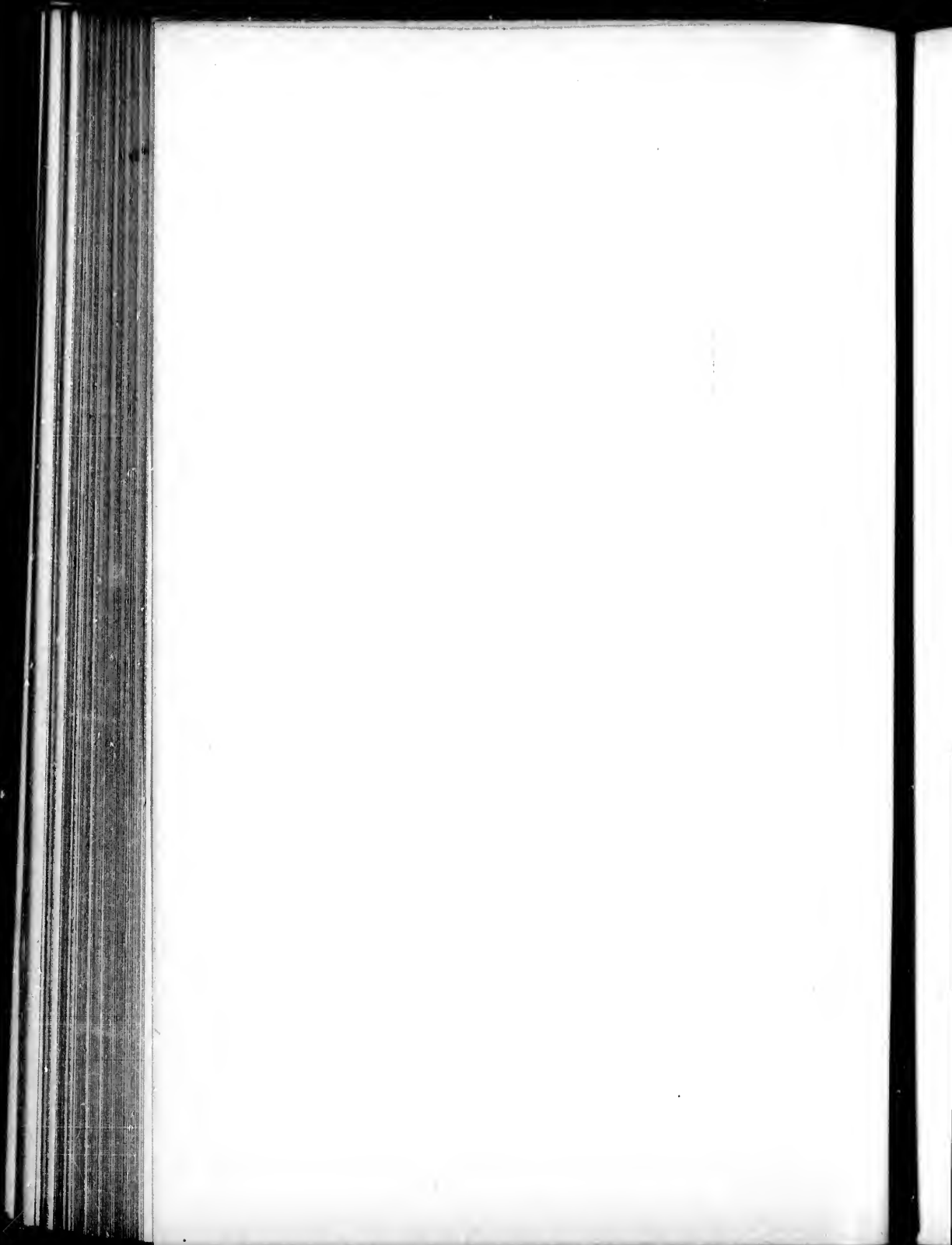
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SERGEANTS' INN, CHANCERY LANE.



of impeachment against the Earl of Strafford, along with Pym, Hampden, Hollis, Digby, Whitelock, Stroud, Earle, Selden, Maynard, Palmer, and Glyn.<sup>1</sup> Whitelock, distinguished for moderation, was put into the chair; but St. John was by far the most active of the whole in devising the charges, and in collecting evidence to support them.

Charles I., to save the life of his favorite, now contemplated a change of his ministers; and an arrangement was actually made for the introduction of the most influential of the popular leaders into office. The Earl of Bedford was to be Lord Treasurer; Pym, Chancellor of the Exchequer; Hollis, Secretary of State; Lord Say, Master of the Wards; Hampden, tutor to the Prince of Wales; and Oliver St. John, Solicitor General. Lord Clarendon says, that this last appointment was recommended by the Earl of Bedford, "which his Majesty readily consented to; hoping that, being a gentleman of honorable extraction (if he had been legitimate), he would have been very useful in the present exigence to support his service in the House of Commons, where his authority was then great; at least, that he would be ashamed ever to appear in any thing that might prove prejudicial to the Crown."<sup>2</sup>

At this time there was a move in the law by the flight of Lord Keeper Finch,—when the great seal was delivered to Sir Edward Littleton; Bankes was made Chief Justice of the Common Pleas; and Herbert was promoted to be Attorney General. On the 29th day of January, 1641, a patent actually passed, constituting Oliver St. John, Solicitor General; and he took the oath of allegiance, and the oath of office, by which he swore to give faithful advice to the King, to plead for him in all causes, and to suffer nothing to be done to his detriment. The Earl of Bedford, who had conducted the negotiation, dying soon after, it went off, and none of the other appointments took place. St. John, however, remained Solicitor General, "and he became immediately possessed of that office of great trust; and was so well qualified for it, at that time, by his fast and rooted malignity against the Government, that he lost no credit with his

<sup>1</sup> Whitelock, 39.

<sup>2</sup> Rebellion, i. 326.

party, out of any apprehension or jealousy that he would change his side,—and he made good their confidence; not in the least degree abating his malignant spirit, or dissembling it; but with the same obstinacy opposed every thing which might advance the King's service when he was Solicitor, as ever he had done before."<sup>1</sup>

How such an office should be held by one in active and open hostility to the Government, it puzzles us, who live in quiet and regular times, to understand. The King remained at Whitehall for more than a twelvemonth after;—and during all this time there must have been business for a law officer to transact with the ministers of the Crown and with his colleague. Herbert, the Attorney General, was in the King's entire confidence, and was even made the instrument of his fatal folly in impeaching the five members of the House of Commons of high treason. St. John, their bosom friend and confederate, meanwhile was called "MR. SOLICITOR," was hurrying the King's minister to the scaffold, was plotting the measures which he thought best to produce civil war, and looked forward to the Anglican republic as the consummation of his wishes.

He actually thirsted for the blood of Strafford; and he was resolved to gratify his appetite, in violation of all law, human and divine. Probably he had worked himself up into a delusive belief that he was actuated by a regard to the public good; but he seems to have been impelled by personal spite, arising from some unrevealed affront. The great delinquent who had deliberately planned the subversion of public liberty deserved to be severely punished, and some virtuous men were even of opinion that he ought to expiate his offense with his life; but all except St. John were for allowing him a fair trial. Had it not been for St. John he would have been acquitted, and an entirely different turn would have been given to the history of England.

<sup>1</sup> Ibid. 327. He was immediately elected a Bencher of Lincoln's Inn :—  
"At a Council held the 29<sup>th</sup> of Jan<sup>y</sup> 1640(1). At this Councell Oliver St. Johns Esq<sup>r</sup>. his late Ma<sup>ty</sup> Sollicitor genrall is called to the Bench and is to be Published at the Moote this night."

The following year he was Treasurer. It appears from the books of the Society that he attended the Councils regularly from this time till he was made Chief Justice in 1648.



While the prosecution was carried on according to the forms of an impeachment, he who was guiding it in all its details, and making the ostensible actors move as he directed them, found it more convenient to remain himself in the background; and Pym, Glyn and Whitelock were much more conspicuous, both in addressing the Lords and in examining the witnesses; but when, after the defendant's masterly appeal to his judges against the attempt to take away his life by new and unknown laws, and the admirable argument of Lane, his counsel, showing that none of the facts proved, or even alleged against him, amounted, in point of law, to high treason, he was on the point of being acquitted,—St. John thought it necessary to take the matter entirely into his own hands. He therefore required that the impeachment should be dropped, and that a bill of attainder should be substituted for it, whereby the forms of law and the principles of justice might more easily be violated. Selden, who had supported the impeachment,—Holborne, who had so zealously assisted in arguing the question of ship-money,—and several other enlightened lawyers of his party, strongly opposed this course; but, by sophistical speeches which St. John himself delivered, and by procuring others to excite the passions of the mob, he succeeded, with little difficulty, in carrying the bill through the House of Commons. How was he to obtain for it the consent of the Lords, who were ready to acquit on the articles of impeachment? He resorted to the ingenious expedient of making himself counsel for the bill at the bar of the Upper House,—without having any opponent. For this purpose he proposed a conference between the two Houses, which was agreed to,—and he acted as the sole manager for the Commons. In this capacity he delivered a speech the most disgraceful ever heard before any tribunal professing to administer criminal justice. Knowing that there was to be no reply, he grossly misrepresented former precedents, and misconstrued the famous statute of Edward III. respecting treason, which, he said, was only binding on the inferior courts, but allowed parliament still to punish as treasonable any acts which they might think deserved the punishment of treason. But he felt that his reasoning on

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this point was weak, and that his only chance of success was by taking advantage of the odium under which his destined victim then labored. He thus alludes to the objection that he proposed to take away the life of the Earl of Strafford by an *ex post facto* law:—

“But, my Lords, it hath often been inculcated, that ‘lawmakers should imitate the Supreme Lawgiver, who commonly warns before he strikes: The law was promulgated before the judgment of death for gathering the sticks: *no law, no transgression*.’”

He gives this answer of unparalleled atrocity,—which, if Milton had put it into the mouth of one of his fallen angels, would have been thought too diabolical:—

“My Lords, the rule of law is, *Frustra legis auxilium invocet, qui in legem committit*. The proper law for such a case is the *lex talionis*: he that would not have had others have a law, why should he have any himself? Why should not that be done to him that himself would have done to others? It is true we give laws to hares and deers, because they be beasts of 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. The warrener sets traps for polecats and other vermin, for preservation of the warren. Proceeding by bill, every man is guided by his conscience, and, without any evidence at all being given, may award the deserved punishment.”

“Upon the close of Master St. John’s speech,” says the old report, “the House adjourned, nor was there one word spoken but by Master St. John—only the Lord Lieutenant, by a dumb eloquence, *manibus ad sidera tensis*, held up his hands towards heaven and made his reply with a deep silence.”

The following day Strafford petitioned to be heard by his counsel, but on the suggestion of St. John he was told that the House of Commons must have the last word. Upon a division the bill was carried by a majority of twenty-six to ten; and Charles being induced, against his conscience and his vow, to give it the royal assent, the vengeance of St. John was satiated.”<sup>1</sup>

He is said to have “contracted an implacable dis-

<sup>1</sup> 3 St. Tr. 1382-1536; Rebellion, i. 360.

pleasure against the Church party, from the company he kept." To gratify this he now drew, with his own hand, a bill "for the utter eradication of bishops, deans and chapters; with all chancellors, officials, and all officers and other persons belonging to either of them." He would not, however, move it himself, but, *more suo*, prevailed on a foolish baronet called Sir Edward Deering, a man of levity and vanity, easily led by a little flattery, to present it to the House,—supplying him with an apt quotation:

"Cuncta prius tentanda, sed immedicabile vulnus  
Ense recidendum est, ne pars sincera trahatur."

The mover spoke from the gallery, and, as he thought, with great effect; but a strong objection was made to the first reading of the bill, and the real author of it was obliged to start up in its defense. He disingenuously argued, "that the title of the bill, although disapproved of, was no argument against reading it a first time; that the title might be false, and that this bill, for aught any one knew to the contrary, or at least for aught he and many others knew, might contain enactments for establishing bishops, and granting other immunities to the Church." The bill was read a first time,—and being afterwards altered into a bill to prevent bishops from sitting in the House of Lords, or holding any secular office, it passed both Houses, and received the royal assent.<sup>1</sup>

Open hostilities being at last contemplated, Mr. Solicitor drew another bill "for the settling the militia of the kingdom, both by sea and land, in such persons as Parliament should nominate," and got it brought forward by Sir Arthur Haslerig, whom he was said "to use as Noah did the dove out of the ark, to try what footing there was." The House seemed inclined to throw it out, as a "matter of sedition," without suffering it to be read, not without some reproach to the person who moved it, till the King's Solicitor declared that "he thought that passion and dislike very unseasonable before the bill was read,—that it was the highest privilege of every member to make any motion which in his conscience he thought advantageous for the kingdom,—that something was neces-

<sup>1</sup> Rebellion, i. 288.

<sup>2</sup> Ibid. 368.

sary to be done for regulating the command of the militia, which as yet was left undetermined by the law, and, if the power were too great for any subject, in a subsequent stage of the bill it might be devolved upon the Crown." The bill was therefore read a first time. On a subsequent occasion the measure was strongly opposed by Mr. Hyde, who contended "that the power of the militia unquestionably resided in the King, along with the right of making war and peace; and that, as no defect of power had ever appeared under the old law, we might reasonably expect the same security for the future;" with which, he says, "the House seemed well pleased, till the King's Solicitor, and the only man in the House of his learned counsel, stood up and said—'I should be right glad if there were such power in the King (whose rights as his sworn servant I am bound to defend). The gentleman who spoke last seems to imagine so; but, for my part, I know there is not; the question is not about taking away power from the King which is vested in him (which it would be my duty to oppose): we have to inquire whether there be such a power in him, or anywhere else, as is necessary for the preservation of the King and the people. I take upon me with confidence to affirm that there is a defect of such power, which Parliament ought to supply.'" But he failed for once; his artifice was too transparent, and he so far shocked the remaining loyalty of the House that the Bill was allowed to drop, although it was afterwards renewed in the shape of an ordinance when the King's assent was not required for the making of Laws.<sup>1</sup>

In the beginning of the following year, Charles leaving Whitehall and going to the north of England to prepare for war, the parliamentary leaders took measures for having the train-bands called out in the City of London, and for securing some garrisons in the provinces. Notwithstanding an ordinance of the two Houses for these purposes, several of the party had qualms about the oath of allegiance which they had taken, but Mr. Solicitor

<sup>1</sup> Rebellion, i. 430, 514, 516, 604. Clarendon adds, "The Solicitor General, who had obliged himself by a particular oath to defend his Majesty's rights, and in no case to be of counsel to give advice to the prejudice of the Crown, was the chief instrument to devise and contrive all the propositions and acts of undutifulness towards him."—(Pp. 499, 500.)

showed them that these proceedings were perfectly legal and constitutional law :—

“ He argued, that the Lords and Commons, in case of the King’s minority, sickness, or absence, had done the same in other times: as when Henry III. died, and his son Edward I. was in the Holy Land, and came not home in almost two years after his father’s death, yet, in the meantime, the Lords and Commons appointed lieutenants of the several counties, and made several ordinances which are in force at this day. So are the ordinances made by them in the minority of Henry VI., and the ordinances in the minority of Edward VI., and in other times. That the King was now absent, and having called his parliament at Westminster, was himself gone as far from them as York, and had, before he came thither and since, appeared with warlike forces about him to the terror of the parliament; and that they had not the least purpose or intention of any war with the King, but to arm themselves for their necessary defense.”

On these grounds the Parliament passed a vote that “ the ordinance for the safeguard of the kingdom is no whit prejudicial to the oath of allegiance, but is to be obeyed as other fundamental laws, and that the King’s commands for lieutenancy over the respective counties issued without the concurrence of the two Houses, are illegal and void.”

St. John, to set a good example, himself accepted a commission as deputy lieutenant from the Parliament, and began to assist in raising and drilling men; but he soon found that he had not much military genius, and that he could better serve the “ good cause” by continuing to wear the gown.<sup>1</sup>

He was placed upon the Committee of the House of Commons which, during the adjournment of the House, had all power committed to it, and which, in truth, constituted the executive government. After the death of Pym, who was the first chairman, St. John had the greatest influence, and was looked up to by the public, till the *prestige* of military glory gave the ascendancy to Cromwell.

The parliamentary party had been thrown into a state

<sup>1</sup> Whitelock, 57. 59.

of consternation by the flight of Lord Keeper Littleton to York with the great seal. The most superstitious veneration was felt by all lawyers except St. John for this bauble, and for want of it, the administration of justice had been suspended for a twelvemonth without any expedient having been proposed to supply its place. In the following Hilary term came out a satirical pamphlet, entitled "St. Hilary's Tears, shed upon all Professors of the Law, from the Judge to the Pettifogger." At last Mr. Solicitor proposed an ordinance for making a new great seal in exact imitation of the one in possession of his Majesty, so that by affixing it to their acts they might continue to carry on the government in the King's name. This was violently opposed upon the clause in the statute 25 Edward III. which enacts that "to counterfeit the King's great seal shall be high treason;" and although it was carried through the House of Commons, the ordinance was rejected by the Lords, who thought that such a step would be an entire renunciation of their allegiance.

The King, judging it full time to prevent the person who now openly attempted the subversion of the monarchy from appearing to be clothed with any authority by the Crown, caused a patent to pass under the great seal, at Oxford, superseding Oliver St. John as Solicitor General, and appointing Sir Thomas Gardiner, the ejected Recorder of London, in his stead.<sup>1</sup> This was met by an ordinance which made void all patents that had passed or should pass the great seal in the King's possession "since the time it ceased to attend the parliament;" and St. John continued to style himself "Mr. Solicitor" till he was raised to be Attorney General. Meanwhile he carried a resolution of the House of Commons, independently of the Lords, that a new great seal should be made; and, by throwing out hints that their Lordships might be voted useless, he prevailed upon them to agree to an ordinance for using their new great seal, and for delivering it to six commissioners—two peers and four commoners—who were to exercise all the powers of Lord Chancellor. He himself, with his designation of "Solicitor General to the King's Majesty," was nomi-

<sup>1</sup> Dugd. Chron. Ser.

nated the first of the commissioners who represented the Commons. Accordingly, he was sworn in with much solemnity, taking the oath of office in the ancient form, and again swearing "to be faithful, and bear true allegiance, to his majesty King Charles I., and him to defend from all treasons and traitorous conspiracies whatsoever."

In Hilary Term, 1544, he took his seat in the Court of Chancery as a Lord Commissioner, and continued to hold this employment for nearly three years, till he was obliged to resign it in consequence of Cromwell's "Self-denying Ordinance," by which all members of parliament except himself were disqualified for offices, civil or military. St. John received £1,000 for his trouble, together with the privilege of ever after sitting within the bar in all courts of justice.<sup>1</sup>

When the conferences were to be held at Uxbridge, St. John was named one of the parliamentary commissioners; but a great difficulty arose about his designation in the commission, and safe conduct. He had been at first styled "Solicitor-General to the King." Charles acquiesced, but in his own commission he named Sir Thomas Gardiner, and described him as "our Solicitor General." To this and similar designations of royal commissioners the Parliament strongly objected, as giving effect to patents under the great seal since it had been carried off by Lord Keeper Littleton. At last it was agreed that the commissioners on both sides should be enumerated simply by their christian and surnames. "Plain Oliver St. John" (as he was now called) took an active part in the conferences which followed, and the command of the militia still being the great bone of contention, he strenuously denied that it belonged constitutionally to the King. While some of his colleagues sincerely tried to bring about an accommodation, he inflamed the animosity between the contending parties, and caused a rupture which proved the prelude to the King's imprisonment and death.<sup>2</sup>

<sup>1</sup> Whitelock, 71, 77; Rebellion, ii. 610, 611; Lives of Chancellors, vol. iii. ch. lxviii.

<sup>2</sup> Rebellion, ii. 890. Lord Clarendon represents St. John as a spy upon the rightly disposed commissioners, and says, though most of the rest did

To reward him for his zeal, the office of Attorney General was conferred upon him by the Parliament, although it was legally held by Sir Edward Herbert, who had been appointed to it before the troubles began, and had always followed the King's head-quarters.<sup>1</sup>

After the royalists had been completely worsted, the political consequence of St. John lamentably declined, and he felt his position very uncomfortable. He had professed himself a Presbyterian, he had sat as a member in the famous Assembly of Divines at Westminster, and he had subscribed the Solemn League and Covenant. But the Presbyterians showing a strong hankering after monarchy if they could have a "Covenanted King," he was now more inclined to join the Independents. Unfortunately, however, the leaders of this sect were the Lord General Cromwell and his brother officers, who slighted all *pequins*, and were determined to rule by the sword.

For two or three years St. John acted irresolutely,—waiting for events, and hoping that Cromwell might fall in the field, or might lose his ascendancy,—when he expected to be himself acknowledged the head of a republic. Such ambitious projects melted away as the power of the great military chief was consolidated; and the aspiring democrat, who had hoped to make himself greater than any King of England, saw that he must either retire from public life altogether, or consent to act a very subordinate part under a military dictator. The latter course he preferred; *first*, because with all his high qualities, he labored under a sordid passion for money; and *secondly*, because he wished still to keep up a connection with political partisans who might one day rally round him. Not being able successfully to oppose Cromwell, he deemed it more prudent to appear to yield to him submissively, and entirely to disarm his jealousy. He therefore henceforth contented himself with assiduously performing the functions of a law officer of the Crown, prosecuting, in the King's name, those who too indiscreetly testified their zeal for the King's authority.

heartily desire a peace, even upon any terms, yet none of them had the courage to avow the receding from the most extravagant demands."

<sup>1</sup> Whitelock, 88.



The most difficult task imposed upon him was to punish Judge Jenkins, the honest Welshman who resolutely set at defiance the parliamentary Commissioners of the Great Seal, and would acknowledge no authority which did not emanate from the king.<sup>1</sup>

At last Mr. Attorney St. John became very tired of such work, which he thought sadly unsuitable for one fit to govern an empire. His only resource was to go upon the bench, where he would be free from any present annoyance, and might quietly watch the political horizon. The administration of justice had gone on regularly in the King's name, two puisne judges sitting in each of the superior common law courts, but the chiefships had been several years vacant. Heath, Chief Justice of the King's Bench, had been removed by an ordinance; Banks, the Chief Justice of the Common Pleas, died in 1644; and Lane, whom Charles had made Chief Baron at Oxford, had accepted the titular office of Lord Keeper. St. John represented to Cromwell that, as the negotiations with the King, who was a prisoner in the Isle of Wight, might now be considered for ever closed, and a vote against addressing him or further recognizing his authority was in contemplation, it would be fit, with a view to the measures which might be necessary to extinguish the monarchy in form as well as substance, that the high magistracies, which the people had been in the habit of regarding with reverence, should be occupied by men entirely to be confided in. At the same time he hinted that, although he was known to prefer politics to law, he might be prevailed upon, for the public good, to submit for a time to the dull and irksome business of Westminster Hall. Cromwell, well pleased with the prospect of finding harmless employment for such a restless spirit, entirely acquiesced in the proposal, and offered that he should be made Chief Justice of the King's Bench. This dignity he declined under the pretext of humility, but probably from the apprehension that it was very likely, from engaging him in all state trials, to bring him into frequent collision with the ruling powers. With his concurrence, it was arranged that Rolle, who was a profound lawyer and nothing else,

<sup>1</sup> Whitelock, 255; 4 St. Tr. 942.

should hold the highest office; that Sergeant Wilde, who had been an active member of the Long Parliament, should be appointed Chief Baron of the Exchequer; and that he himself should have the "cushion of the Common Pleas," which, both for ease and profit, still had great charms in the eyes of calculating lawyers.

An ordinance for this purpose having passed, the new Chief Baron was first sworn in, as he was already a Sergeant; and thus Lord Commissioner Whitelock began a long address to him:

"Mr. Sergeant Wilde,—The Lords and Commons in Parliament taking notice of the great inconvenience in the course of justice for want of the proper and usual number of Judges in the high courts at Westminster, whereby is occasioned delay, and both suitors and others are the less satisfied, and being desirous and careful that justice may be administered *more Majorum*, and equal right done to all men according to the customs of England, they have resolved to fill up the benches with persons of approved fidelity and affection to the public; and of piety, learning, and integrity; and having found, by long experience among themselves, that you, Mr. Sergeant Wilde, are a person thus qualified, and very well deserving from the Commonwealth, they have thought fit to place you in one of the highest seats of justice, and have ordained you to be Lord Chief Baron of this Court."

A call of Sergeants immediately followed, St. John being at the top of the list; and thus the Lord Keeper began his address to them:—

"Mr. Sergeant St. John, and the rest of you gentlemen who have received writs to be Sergeants-at-law,—It hath pleased the Parliament, in commanding these writs to issue forth, to manifest their constant resolution to continue and maintain the old settled form of government and laws of the kingdom, and to provide for the supply of the High Courts of Justice with the usual number of Judges, and likewise to bestow a particular mark of favor upon you as eminent members of our profession."

Three days afterwards, Mr. Sergeant St. John was sworn in, and took his seat as Chief Justice of the Com-

mon Pleas; but there was no speechifying on this occasion.' It would have been very curious to have had an authentic exposition of his sentiments when such a great crisis was impending.

He was scarcely warm in his seat, which he expected to yield him entire repose, when the resolution was taken to exhibit the Sovereign holding up his hand as a culprit at the bar of a criminal court. It has generally been said that St. John disapproved of this proceeding—which is probable enough—from his conviction that it must lead to the permanent supremacy of Cromwell—although not from any scruples about royal irresponsibility, or the sacredness of an anointed head. But I find no contemporary statement of anything that passed between him and those who had vowed Charles's death, till the bloody deed was done. I believe that he, and all the other common law judges, refused to allow their names to be introduced among those who were to constitute the "High Court of Justice," and, if they were asked to attend as *assessors*, they had refused, for none of them were present at the trial in any capacity.

On the 31st of January, 1649, Westminster Hall was in a state of dreadful perplexity. Lawyers are so much under the dominion of form, that all writs and commissions having hitherto issued in the name of "Charles I. by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith," &c., to whom the oath of allegiance continued to be taken, the Judges—who believed themselves to be loyal men—had continued to hold their offices, and, receiving their fees and salary, to decide without much scruple all civil and criminal cases which came before them. But when Charles I. had actually been beheaded, an ordinance had passed to make the proclamation of Charles II. high treason, and the House of Lords had been abolished as useless, the delusion could be fostered no longer. Six of them—Bacon, Browne, Bedingfield, Creswell, Trevor, and Atkins—refused to sit again; but the other six—Rolle, St. John, Wilde, Jermyn, Pheasant, and Yates—sent in their adhesion, "provided that by act of the Commons the fundamental laws be not abolished." Ac-

† Whitelock, 348-356.

cordingly new commissions were made out to them under the great seal of the Commonwealth, and there was an "order for altering the Judges' oaths—formerly in *name of the King*, now to be *in the people*." The others confined themselves to their judicial duties, but St. John became a member of the executive council, and was deeply absorbed in politics. He actually continued Chief Justice of the Common Pleas till the Restoration, a period of twelve years; but I do not discover the report of any case decided by him during this long interval, and I suspect that, leaving the business of the court to be done by his juniors, his thoughts were chiefly occupied with considering how the overwhelming power of Cromwell might be curtailed, and how his own might be advanced.

When an army was sent to invade Scotland, where the authority of Charles II. as a "Covenanted King" was recognized, and Fairfax, who was himself a sincere Presbyterian, refused to command it, St. John was one of the committee deputed to remove his scruples, and seems earnestly to have tried to succeed;—while others played the game of Cromwell, who was now intriguing to be appointed generalissimo of all the parliamentary forces. Whitelock has left a very ample report of the conference on this occasion:—

*Lord General Fairfax*: "I need not make to you, or to any that know me, any protestation of the continuance of my duty and affection to the Parliament, and my readiness to serve them in anything wherein my conscience will give me leave." *St. John*: "I pray, my Lord, be pleased to acquaint us with your particular objections against this journey." *Lord General*: "You will give me leave, then, with all freeness to say to you, that I think it doubtful whether we have a just cause to make an invasion upon Scotland. With them we are joined in the national league and covenant." *St. John*: "But, my Lord, that league and covenant was first broken by themselves, and so dissolved as to us."

All this reasoning was vain; and Cromwell, gaining his object, fought the battles of Dunbar and Worcester, and made himself Lord Protector.

<sup>1</sup> Whitelock, 378.

Meanwhile he wished to get St. John out of the way, and an ordinance passed the House of Commons appointing him ambassador to Holland. This mission was exceedingly distasteful to the Lord Chief Justice; for it was not only to remove him from the scene where, on any unlucky chance happening to Cromwell, he hoped to act the first part, but he was to be exposed to great personal danger. In Holland, although a republican form of government existed there, the cause of the English Commonwealth was very unpopular; and Dorislaus, their first ambassador, had been assassinated at the Hague without any sincere effort being made to bring his murderers to justice. A hope was entertained that on the death of William, the second Prince of Orange, who had married a daughter of Charles I., there might be a more friendly feeling towards English republicans. But Ascham, another parliamentary ambassador, had been assassinated by the royalists at Madrid; and St. John, dreading a similar fate, presented a petition that he might be excused, alleging his important judicial duties at home, his infirm health, and the insalubrity of the climate. But his timidity was derided, and upon a division his petition was dismissed by a large majority.<sup>1</sup> He was allowed £10,000 to pay his expenses, and forty attendants to protect him.

Accordingly he made his public entry into the Hague, with a retinue and parade becoming the representative of a powerful nation; but the populace saluted him with groans and hisses; and the royalists were not only resolved to insult him on every occasion, but to offer violence to his person. Edward, a son of the Queen of Bohemia, publicly called him *a rogue* and *a dog*; and the Duke of York, with the Princess Henrietta on his arm, meeting him by accident near a turnstile at Verhout, there was a struggle who should pass first,—upon which the Prince snatched the ambassador's hat off his head, and threw it in his face, saying "Learn, parricide! to respect the brother of your King." The ambassador replied,—“I regard neither you nor the person of whom

<sup>1</sup> Journals, 1651, Jan. 21, 23, 28. Here the Parliament closely imitated the tyranny of the Stuarts, who were in the habit of punishing obnoxious individuals by a foreign mission.

you speak, but as a race of fugitives." Swords were then drawn, and it was only by the interference of the spectators that fighting was prevented. Afterwards there was an attempt made to break into St. John's house, by ruffians who had a rope with them, with which they meant to strangle him. On various pretenses the States General refused to grant any redress, and put off from time to time the matters that were to be negotiated.

St. John returned abruptly, vowing revenge,—and he was not a man to let his resentment pass off in empty words. He delivered to the Parliament an inflamed account of the manner in which the English nation had been wronged in his person. Next he pointed out a plan by which ample punishment might be inflicted on the offending parties. Hitherto the Dutch had been the great carriers for the English as well as other European nations;—and he proposed an ordinance to enact "that no goods, the produce of Asia, Africa or America, should be imported into this country in ships which were not the property of English subjects; and that no goods, the produce or manufacture of any part of Europe, should be imported unless in English ships, or ships of the country where such goods were produced or manufactured." The ordinance was quickly passed, and being confirmed by an act of parliament on the Restoration, the famous Navigation Laws, supposed to be the result of the calm deliberations of our ancestors, arose from a personal affront offered to one of our republican ambassadors.<sup>1</sup>

St. John was next employed as a commissioner to induce the Scotch to agree to a legislative union with England. He had to encounter not only the pride of national independence, but a deep distrust of those who had thrown off the solemn league and covenant, and the dread of a measure which "tended to draw with it a subordination of the Kirk to the State in the things of Christ." However, he convened at Dalkeith the representatives of the counties and boroughs, with full powers to treat for the entire incorporation of the two countries. A great majority were induced by him to

<sup>1</sup> Whitelock, 487, 491, 492; New Parl. Hist. iii, 364; Ludlow's Mem. 133, 250; Memoirs of the Cromwell Family, ii. 19.

give their consent; and afterwards there were chosen, at Edinburgh, twenty-one deputies to arrange the conditions with English commissioners at Westminster. Under his auspices conferences were afterwards held there, and this proceeding laid the foundation of the Parliament, for the whole island, which Cromwell afterwards summoned.

While in Scotland, St. John was likewise of great service in assisting the introduction into that country of English Judges, who, although jeered at as "kithless loons," administered justice so satisfactorily as almost to reconcile the natives to a foreign yoke.<sup>1</sup>

After the battle of Worcester, when Cromwell, secretly wishing to be proclaimed Oliver I., said to a meeting of members of parliament and officers whom he assembled, that "now the old King being dead, and the son being defeated, he held it necessary to come to a settlement of the nation;" Desborough having declared for a republic; St. John is supposed to have said, "It will be found that the government of this nation, without something of monarchical power, will be very difficult to be settled so as not to shake the foundation of our laws, and the liberties of the people." Whitelock represents St. John, whom he hated, as having been a tool of Cromwell; but if St. John actually took this side, I suspect that it was to lure Cromwell on to his ruin. Most of the lawyers were sincerely for a mixed monarchical government—but St. John remained a stern democrat; and although, to keep his places, he was ready to conform to what he disliked, he would never have actively assisted in restoring the government of ONE even with a charge of dynasty.<sup>2</sup>

About this time he was elected Chancellor of the University of Cambridge, having shown a disposition to protect human learning against the attacks of the fanatics, who declared that no books were worthy of being read except the books of the Old and New Testament, excluding the Apocrypha. He was likewise instrumental in preserving some of our venerable ecclesiastical structures from the ruin which then threatened them. "The Cathedral at Peterborough was left in a state of desola-

<sup>1</sup> Whitelock, 517, 552.

<sup>2</sup> Ibid. 516, 487.



tion by a party of the parliamentary troops under Cromwell, and so it continued until Oliver St. John, Ch. J. of C. P., on his return from Holland, obtained it of the parliament, and gave it as a parochial church for the use of the townsmen, their proper parish church being gone much to decay."<sup>1</sup>

The Lord Chief Justice St. John continued to represent Totness in the House of Commons, the republicans of the 17th century having no objection to the union of judicial and political functions in the same individual. But, after the dissolution of the Long Parliament, and the establishment of the Protectorate, seeing no chance for democracy, he appears to have taken very little part in public affairs. His enemies say that "though so greatly attached to his darling commonwealth, yet he chose to retain his places under every form of government. The reason of this was his avarice, which got the better of his political sentiments. They in power knew his love for wealth, and gratified him accordingly; he had the granting of all pardons to the delinquent loyalists, which amounted to the enormous sum of £40,000, nor did he scruple accepting bribes for places under Oliver."<sup>2</sup>

I am unable to corroborate or to contradict these grave charges against him. He certainly was not a member of Barebone's parliament, which met in 1653; nor does his name appear in the list of the House of Commons on the reformed model which met in 1654, nor in that which Cromwell called in 1656. We, therefore, do not know what part he took when the crown was formally tendered to the Protector, but he seems at last to have relented in favor of hereditary power of honors, for in the year 1657 he accepted a peerage, and actually took his seat in Oliver's House of Lords as Lord St. John.<sup>3</sup> However, he was still silent and sulky, looking forward to better times.

He thought that these had arrived when, on the death of Oliver, the sceptre was transferred to the feeble hand of Richard. His patent was renewed as Chief Justice,<sup>4</sup>

<sup>1</sup> Bridges' Northamptonshire, 548.

<sup>2</sup> See Noble's *Memoirs of the Cromwell Family*, ii. 22.

<sup>3</sup> Whitelock, 666; 3 *Parl. Hist.* 1518.

<sup>4</sup> *Ibid.* 678, 683.



he procured himself to be elected a member of the Council of State, and he was in hopes to rule either as minister of the new Protector, or as the president of a pure republic, which had been so long looked for in vain. But he was again disappointed, for Richard instantly fell into universal contempt, and, military violence alarming all parties, the restoration of the exiled royal family was evidently at hand. St. John saw that this event would not only for ever dissipate his republican dreams, but would be very dangerous to him individually; and he made a resolute struggle against it. When the Rump was restored, he again took his seat as member for Totness, by virtue of his election nearly twenty years before: but his reception now was very different from what it had been in the same assembly when he was urging on the impeachment of Strafford, the overthrow of the Church, and the usurpation of military power. The vote having passed for a dissolution of the Long Parliament and the calling of a Convention, he retired to his country-house, Long-Thorpe, in Northamptonshire; and, the Cavaliers beginning to vow vengeance against the most obnoxious of the Roundheads, he shut himself up in a place of concealment. Although he had not actually sat as one of the late King's judges, it was truly said that no one had more effectually promoted the catastrophe of the King's death.

He owed his safety to Thurloc, who had been his clerk, whom he recommended to Cromwell, and who, having enjoyed great power under the Protectorate as Secretary of State, was now in favor from having materially promoted the Restoration. It was said that a large bribe contributed to his deliverance; but this is a mere surmise without any authority.<sup>1</sup> From the proposed indemnity twenty were to be excepted, whom it was determined to bring to the scaffold. General Ludlow, in his Memoirs, says, "The news of this resolution being carried to Charles II. by the Duke of York, the Duke of Buckingham, and Monk, he only expressed his joy; and when they told him that the Chief Justice St. John's had narrowly escaped, he wished he had been added

<sup>1</sup> Noble's Family of Cromwell, ii. 28.

<sup>2</sup> It is curious to observe that in the seventeenth century there were many

also: of which particulars I received information by a person of honor, then present, immediately after they parted."<sup>1</sup>

But his life was spared only on condition that he was never to accept any civil, ecclesiastical, or military office, on pain of being liable to the penalties of treason. A free pardon was offered to him if he would assist in bringing the regicides to justice, but he spurned such baseness. He went abroad under pretense of traveling for his health; and, still afraid of the Cavaliers, who repeatedly attempted to assassinate Ludlow and other exiled republicans, he took the name of Montague, and lived several years in great seclusion, first at Utrecht and then at Augsburg. In 1669 he ventured to return to his native country, and he lived quietly at Long-Thorpe till the 31st day of December, 1673, when he expired. He was supposed to have reached the 75th year of his age.

His real character may best be known by the designation generally applied to him in his own time,—“THE DARKLANTHORN MAN.” From his proud, reserved, and morose disposition, he made himself so unpopular that there was a general disposition to aggravate his misconduct, and we must receive the stories circulated against him with considerable suspicion.

He did very little for the improvement of jurisprudence; for although he effectually resisted the absurd schemes at once to abolish the Court of Chancery, and to substitute the law of Moses for the common law of England,—absorbed in his ambitious schemes he took no interest in the wise legal reforms which were carried on by Hale, Whitelock, and other enlightened Commonwealth lawyers. Beginning the world without a shilling, he died disgracefully rich, so as to countenance the charges brought against him of cupidity and corruption.

He is often mentioned as a cousin of Oliver Cromwell—but this relationship was only by marriage. His first wife was a daughter of Sir James Altham, maternally descended from the Cromwells. By her he had several sons, and a daughter, Joanna, who was married

proper names which were promiscuously spelt, and must have been pronounced, without and with the finals;—as *St. John, St. Johns; Rolle Rolles; Hale, Hale s; &c. &c.*

<sup>1</sup> Mem. 356.

to Sir Walter St. John, of Tregoze in Wiltshire, and was the grandmother of the celebrated Henry St. John, Viscount Bolingbroke.<sup>1</sup>

He had another daughter, Elizabeth, who being about to be united to a Huntingdonshire squire, the Chief Justice, according to the then existing law, not only gave her away, but himself performed the nuptial ceremony which made them man and wife.<sup>2</sup>

When Oliver St. John and Oliver Cromwell had respectively reached their fortieth year, the former was by far the more eminent person. He had not only distinguished himself at the bar, but he was the chief adviser of the great political party opposed to arbitrary government, who, although depressed for eleven years, were ere long to gain the ascendancy; while the future PROTECTOR, after a licentious youth, was obscurely spending his middle age in the country, occupied with feeding cattle and draining marshes. When the troubles began, St. John preserved his superiority, and swayed the deliberations of the Long Parliament,—Cromwell, from his uncouth appearance and embarrassed oratory, being to all, except to a discerning few, a man of no mark or likelihood. Even after the praying colonel of horse had led on his psalm-singing troopers to victory at Edgehill and Marston Moor, the dark, designing lawyer, holding the great seal and presiding in the committee for the management of public affairs at Westminster, still kept military in subordination to civil authority, and hoped to make the most renowned captains who had appeared on the side of the Parliament instruments of his own aggrandizement. The "Self-denying Ordi-

<sup>1</sup> Mallet, in his *Life of Bolingbroke*, says, "His grandfather, Sir Walter St. John, marrying one of the daughters of L. C. J. St. John, who, as all know, was strongly attached to the republican party, Henry was brought up in his family, and consequently imbibed the first principles of his education amongst the Dissenters." He afterwards goes on to trace his contempt for all religions to the fanaticism and hypocrisy which he witnessed among the Presbyterian clergy under his great-grandfather's roof at Long-Thorpe.

<sup>2</sup> Extract from the Parish Register of Enfield:—"The truly worthy John Bernard of Huntingdon, within the county of Huntingdon Esqre single man, and Mrs. Elizabeth St. John daughter of the Right Honble Oliver St. John Ch. Justice of C. P., was married before said father and by him declared man and wife Feby 26, 1655-6, coram testibus non paucis venerabilibus et fide dignis."

nance" was the death-struggle. If Cromwell had perished amidst the perils to which he was then exposed, St. John might have been Lord Protector instead of pining with envy for the rest of his days. He was little inferior to his rival in natural ability, and was far superior to him in intellectual acquirements. Nor would any scruples have obstructed his rise to sovereign sway, for he only loved a republic as he expected to rule it, and at the call of ambition he was always ready to change the religious faith which he professed. It did not suit his purpose to take part in the death of Charles I., but he was the murderer of the Earl of Strafford. Although it is fortunate for the liberties of England that the Parliament triumphed over Charles I., and St. John greatly contributed to this triumph, we cannot honor his memory as a true patriot, for he was crafty, selfish, cruel and remorseless.





## CHAPTER XIV.

### LIFE OF LORD PRESIDENT BRADSHAW.

**M**Y collection of biographical sketches of common law Judges, of the first rank, would be imperfect were I to pass over him who presided at the most interesting trial which ever took place in England, although he was called LORD PRESIDENT instead of LORD CHIEF JUSTICE,

“When Bradshaw bullied in a broad-brimm'd hat.”

He was born at Marple-hall, in Cheshire, and was the younger son of a respectable family, which had been settled there for many generations. I know nothing of his career till I find him a barrister of Gray's Inn, of considerable but obscure practice, and Judge of the Sheriff's Court in the City of London. Although well versed in his profession, he was a very dull man; and no one imagined that he could rise higher than the dignity which he had then acquired. His name was introduced into the commission of *oyer and terminer* at the Old Bailey, and, to ease the Judges, he was employed to try assaults and petty larcenies; but no highwayman or burglar would have submitted, without deep murmuring, to his jurisdiction.<sup>1</sup> He professed himself to be, and was, a very violent republican. He failed in an attempt to obtain a seat in the Long Parliament; but he was loud and active in supporting the parliamentary cause in the City

<sup>1</sup> Prisoners look very much to the rank of those who may pass sentence of death upon them. A Sergeant of great experience going the Oxford Circuit in the room of Lord Chief Justice Abbot, who was suddenly taken ill, a man capitally convicted, being asked if he had anything to say why sentence of death should not be passed upon him, exclaimed, “Yes; I have been tried before a *Journeyman Judge*.”

of London. For this reason he was appointed junior counsel for the Commonwealth, and assisted in state prosecutions instituted against royalists.<sup>1</sup>

The cruel sentence passed by the Star Chamber, in the year 1638, upon John Lilburn, by which he was to be pilloried, whipped, and imprisoned for life, being brought before the House of Lords, Bradshaw was assigned him as his counsel, and succeeded not only in getting a reversal of the sentence, but a compensation of £3,000 for his client, to be raised out of the sequestered estates of delinquents.<sup>2</sup>

When, under the "Self-denying Ordinance," the original set of the Commissioners of the Commonwealth's Great Seal were to be removed, a vote passed the House of Commons that Bradshaw should be one of the new commissioners; but this was overruled by the Lords, of whose jurisdiction he had been in the habit of speaking disrespectfully.<sup>3</sup> Soon after, he was appointed Chief Justice of Chester.<sup>4</sup> He still went on distinguishing himself for his zeal in favor of the new régime, and his loud expression of impatience for the entire abolition of monarchy.

At the great move in legal offices shortly before the King's trial, the House of Commons, which was now exercising the functions of all the officers of the Crown, ordered that there should be a new call of Sergeants, and "that Mr. Bradshaw, of Gray's Inn, be of the number." On the day of the solemnity, Lord Commissioner Whitelock, who was a much more moderate politician, advised him to be like his predecessor, celebrated by Chaucer,—

"A Sergeant-at-law, wary and wise."<sup>5</sup>

When the ordinance to constitute the HIGH COURT OF JUSTICE was first introduced in the House of Commons, Sergeant Bradshaw was named in it as an *assistant* only, but in a further stage of its progress he was promoted to the rank of *Commissioner*. It had been hoped that *clat* would have been given to the approaching trial by Whitelock, Lord Keeper of the Great Seal,—Rolle, Lord Chief Justice of the King's Bench,—St.

<sup>1</sup> Whit. 106.

<sup>4</sup> *Ibid.* 238.

<sup>2</sup> 3 St. Tr. 1315-1370.

<sup>5</sup> *Ibid.* 342-353.

<sup>3</sup> Whit. 224.

John, Lord Chief Justice of the Common Pleas,—or Wilde, Lord Chief Baron of the Exchequer, acting as Lord President of this tribunal, which was framed after the fashion of that invented by Queen Elizabeth for the condemnation of Mary Queen of Scots; but they all positively refused to take any part in a proceeding so contrary to the established forms of criminal procedure; although, if a bill of indictment had been found against Charles Stuart by a grand jury, and he had been arraigned and made to hold up his hand before a petty jury, in the usual form, some of them, probably, would not have hesitated, in the King's name, to try him and to pass sentence upon him. Bradshaw, either from wishing that he might escape the service altogether, or that in his absence his merits might be more freely discussed, did not attend the first meeting of the Commissioners held for arranging the preliminaries of the trial.

On the 10th of Jan., 1649, "John Bradshaw, Sergeant-at-law, a commissioner of this court, was chosen President; who being absent, Mr. Say, one of the commissioners then present, was appointed president *pro tempore*, until the said Sergeant Bradshaw should attend the said service."<sup>1</sup> "On the 12th of Jan., Sergeant Bradshaw, upon special summons, attended this court, and being, according to former order, called to take his place of President of the said court, made an earnest apology for himself to be excused; but therein not prevailing, in obedience to the desires and commands of this court he submitted to their order, and took his place accordingly. Thereupon the court ordered that he should have the title of LORD PRESIDENT, as well without as within the said court—against which title he pressed much to be heard to offer his exceptions, but was overruled."<sup>2</sup> Such is the official minute of the appointment of President. Lord Clarendon says,—

"To that office *one* BRADSHAW was chosen; a lawyer of Gray's Inn, not much known in Westminster Hall, though of good practice in his chamber, and much employed by the fractious. He was a gentleman of an ancient family in Cheshire, but of a fortune of his own making. He was not without parts, and of great inso-

<sup>1</sup> Minutes of the Court.

<sup>2</sup> *Ibid.*



lence and ambition. When he was first nominated, he seemed much surprised, and very resolute to refuse it; which he did in such a manner, and so much enlarging upon his own want of abilities to undergo so important a charge, that it was very evident he expected to be put to that apology. And when he was pressed with more importunity than could have been used by chance—with great humility he accepted the office, which he administered with all the pride, impudence, and superciliousness imaginable. He was presently invested in great state, and many officers and a guard assigned for the security of his person, and the Dean's house in Westminster given to him for ever for his residence and habitation; and a good sum of money, about £5,000, was appointed to be presently paid to him, to put himself in such an equipage and way of living as the dignity of the office which he held would require. And now the Lord President of the High Court of Justice seemed to be the greatest magistrate in England."<sup>1</sup>

It is said that "Mr. Sergeant Bradshaw, the President was afraid of some tumult upon such new and unprecedented insolence as that of sitting judge upon his King; and therefore, besides other defense, he had a thick big-crowned beaver hat, lined with plated steel, to ward off blows."<sup>2</sup>

We have a very full report of the whole trial; and, after perusing it, I must say that the charge brought against Bradshaw of wanton brutality on this occasion is considerably exaggerated. The *act* of sitting in trial upon

<sup>1</sup> Rebellion, iii. 373.

<sup>2</sup> Kennett, iii. 181. n. "This hat with a Latin inscription upon it, is now to be seen in the Museum at Oxford."—*Ibid.* In the middle of the seventeenth century, all the common law judges adhered to their *coifs*, or black cloth caps, which they still put on when they pass sentence of death; but the Lord Chancellor, and the Speaker of the House of Commons, wore a round high-crowned beaver hat. The full-bottom wig, and the three-cornered cocked hat, were introduced from France after the Restoration. Barristers' wigs came in at the same time—but very gradually, for the judges at first thought them so coxcombical that they would not suffer young aspirants to plead before them so attired. Who would have supposed that this grotesque ornament, fit only for an African chief, would be considered indispensably necessary for the administration of justice in the middle of the nineteenth century! When I argued the great Privilege Case, having to speak sixteen hours, I obtained leave to speak without a wig; but under the condition "that this was not to be drawn into a precedent."



the King is to be regarded as a great atrocity; but this must not be confounded with the *manner* in which the proceeding was conducted. Assuming a court to be constituted, its authority must be maintained, and the steps must be taken which are necessary for bringing to a conclusion a trial commenced before it. The King's demeanor was most noble; and he displayed such real dignity, such presence of mind, such acuteness, such readiness, such liberality of sentiment, and such touches of eloquence—that he makes us forget all his errors, his systematic love of despotic power, and his incorrigible bad faith. Instead of hurrying him to the scaffold, we eagerly desire to see him once more on the throne, in the hope that misfortune might at last induce him sincerely to submit to the restraints of a constitutional monarchy. But these are feelings which could not properly actuate the mind of a judge the very foundation of whose authority was questioned by the accused. Therefore it could be no aggravation of Bradshaw's crime, in accepting the office of President, that he said, "Sir, you have heard the charge read, and we expect that you will answer it;" or that, upon an explanation being required, he observed that "the authority of the Court could not be disputed." He certainly did, more than once, use language unnecessarily disrespectful, as when he talked of Charles being an "elected King," and exclaimed with a sneer, "Sir, how well you have managed your trust is known; your way of answer is to interrogate the Court, which beseems not you in this condition. How great a friend you have been to the laws and liberties of the people, let all England and the world judge. How far you have preserved the privileges of the people, your actions have spoken it; but truly, Sir, men's intentions ought to be known by their actions: you have written your meaning in bloody characters throughout the whole kingdom." However, on each of the three days when Charles was brought to the bar of the Court, he was courteously requested to plead, and he was never interrupted unless when he denied the authority of the judges to sit there. It is likewise remarkable that Bradshaw abstained from pronouncing with his own mouth the sentence "that the said Charles Stuart, as a tyrant,

traitor, murderer, and public enemy to the good people of this nation, shall be put to death by the severing of his head from his body"—but ordered it to be read by the clerk, and then merely added, "the sentence now read and published is the act, sentence, judgment, and resolution of the whole court;—whereupon Cromwell, Ireton, Lord Grey de Groby, Ludlow, and the other regicides, stood up, as had been previously arranged, in token of their assent.

Bradshaw afterwards, on the 29th of January, presided at a meeting of the Court, when it was resolved "that the *open street before Whitehall* is a fit place for executing the judgment against the King, and that the King be executed on the morrow."<sup>1</sup> Bradshaw, as President, was the first of the fifty-nine who signed the fatal warrant, of which a fac simile may be seen on every book-stall.<sup>2</sup>

His conduct was, I think, still more culpable on several trials that followed before the High Court of Justice. The Duke of Hamilton had fought at Worcester under the command of the King of Scots and by the authority of the Scottish parliament. Being taken in battle, he had been considered, and had been long treated, as a prisoner of war. Now he was arraigned before this tribunal, constituted by an ordinance of the English House of Commons,—on a charge of high treason against the people of England. He pleaded that although he had the English title of Earl of Cambridge, by which he was prosecuted, he was born and continued domiciled in Scotland, obliged to obey the king and parliament of that independent state, and that even in England there was no law by which as an English peer he could be so tried upon such a charge. But the Lord President Bradshaw laid down, that, though born in Scotland, the moment he crossed the border he was subject to the English law, and that by fighting against an army commissioned by the English parliament, he was guilty

<sup>1</sup> It is very extraordinary that a controversy should have arisen as to whether the execution was in front or behind the Banqueting-house, in spite of this order, and contemporaneous prints, which exhibit the scaffold between the windows looking to the west, and show the populace looking up at it from Charing Cross.

<sup>2</sup> 4 St. Tr. 990-1155; Rebellion, iii. 384; Whitelock, 366.

of the crime of high treason. So sentence of death was passed upon him.

Next came four Englishmen, the Earl of Holland, the Earl of Norwich, Lord Capel, and Sir John Owen, taken prisoners by General Fairfax, who had declared to them that their lives should not be in danger. They urged, that in fighting for the King they could not be guilty of high treason; and that, at any rate, the engagement of the parliamentary general was binding. Lord Capel, in particular, claimed as an English peer to be tried by his peers, according to his birthright:—

*Lord President Bradshaw*: “My Lord Capel, let me tell you you are tried before such Judges as the Parliament think right to assign you, and these Judges have already condemned a better man than yourself. As to the defense on the merits, the Parliament had become the supreme power in the state, and to levy war against the Parliament was treason. The proposed promise of General Fairfax was never ratified by the Parliament: and, at most, it could only exempt the prisoners from being tried before a council of war, without precluding any proceeding which might be necessary for the peace and safety of the kingdom.”

They were all convicted. On a petition to the House of Commons for mercy, Owen was pardoned by a large majority, and the Earl of Norwich escaped by the casting voice of the Speaker. But, after a long debate on the Earl of Holland's case, there was a majority of one against him; and the friends of the Duke of Hamilton, and of Lord Capel, found so little support that they did not venture to divide the House. Accordingly, these three noblemen were executed as traitors, this being the first specimen of criminal procedure since the establishment of the new Republic. No state trial under the Stuarts shows such an utter contempt of the conventional forms of law and the eternal principles of justice.<sup>1</sup>

As a recompense for the eminent services of Lord President Bradshaw, an ordinance passed for settling upon him £2,000 a year out of the forfeited estates of

<sup>1</sup> 4 St. Tr. 1155-1236; Rebellion, iii. 402; Whitelock, 386; Ludlow, 247; Burnet's Hamiltons, 385.

malignants,' he was appointed Chancellor of the Duchy of Lancaster,' and he was raised to be a member of the Council of State.'

<sup>1</sup> Whitelock, 420.

<sup>2</sup> Among the records of the office which I have now the honor to hold, I find the ordinance for the appointment of my distinguished predecessor:—

"An Act for the making of John Bradshawe, now Sergeant-at-law, and Lord President of the Council of State, Chancellor of the Duchy and County Palatine of Lancaster.

"Be it enacted by the present Parliament, and by the authority of the same, that John Bradshaw, Sergeant-at-law, Lord President of the Council of State by authority of Parliament, shall be and is hereby nominated, constituted, and appointed Chancellor of the Duchy of Lancaster, and Chancellor of the County Palatine of Lancaster, and Keeper of the respective Seals (appointed by the authority aforesaid) for the said Duchy and County Palatine; to hold, execute, and enjoy the said offices and places, and all powers, jurisdictions, and authorities lawfully belonging to the same; and also to enjoy and receive all such fees, privileges, advantages and profits as are thereunto of right belonging, in as large and ample manner as any former Chancellor of the Duchy and County Palatine of Lancaster, and Keeper of the Seals of the said Duchy and County Palatine, lawfully have held, exercised, and enjoyed the same, until the tenth day of August which shall be in the year of our Lord God 1650. And it is further enacted by the authority aforesaid, that the clerk of the court of the said Duchy do forthwith prepare a patent in the name of *Custodes Libertatis Angliæ Autoritate Parliamenti*, in the usual form *mutatis mutandis*, to pass the seals of the said Duchy and County Palatine of Lancaster for granting of the said offices unto the said Lord President of the Council of State, according to this act. And it is further enacted by the authority aforesaid, that the Commissioners of the Great Seal of England, or any one of them, shall receive into his or their hands the seals appointed by this present Parliament for the said Duchy and County Palatine, which commissioners or any two of them are thereupon to affix the said several seals to the said patent, and to administer to the said Lord President an oath for the due execution of the said places and offices in manner and form following; viz:—

"You shall swear that, to your cunning and knowledge, you shall do equal right and justice, and be indifferent in all matters to all manner of men that pursue and answer before you and the Council of the Duchy of Lancaster for the Commonwealth of England, and that which shall be most for the avail and profit of the Commonwealth, and good rule and governance of the said Duchy, as far as right and conscience will require.'

"And after the said oath administered, the said Commissioners of the Great Seal, or any two of them, are to deliver the said patent and both the said seals of the said Duchy and County Palatine to the said Lord President, to be by him kept as Chancellor of the said Duchy and County Palatine."

There were several other ordinances, acts, and patents, continuing "Lord Bradshaw" in the office till Oliver's death.

The original of the following warrant under the sign manual of Richard is extant:—

"Our will and pleasure is, that you forthwith prepare fit for our signature

<sup>3</sup> Whitelock, 529.

We must, in fairness, allow that he now acted his part with consistency and courage. A friend to pure democracy, he strenuously opposed the efforts of Cromwell to engross all the powers of the state into his own hands, and even on the violent dissolution of the Long Parliament he remained unappalled. Although he had not a seat in that assembly, he availed himself of an opportunity to assert his independence as a member of the Council of State. In the afternoon of the day which saw the "bauble" forcibly removed from the table of the House of Commons, he called a meeting of his colleagues at Whitehall, and he had just taken the chair when the Lord General, entering said,—

"Gentlemen, if ye are here as private individuals, ye are welcome; but if as a Council of State, ye must know that the Parliament is dissolved, and with it also the Council." "Sir," replied Bradshaw, with great spirit, "we have heard what you did at the House this morning, and before many hours all England will know it. But, sir, you are mistaken to think that the Parliament is dissolved. No person under heaven can dissolve them

a bill containing our grant and constitution of our trusty and well beloved John Bradshaw, Sergeant-at-law, of our especial grace, and in consideration of his faithful and acceptable services to the publique, to be Chancellor of the County Palatine of Lancaster of us and of our successors, and also Keeper of the Seal of us and our successors for the said office, provided or to be provided. And also to be Chancellor of the Duchy of Lancaster of us and our successors, and Keeper of the Seal of us and our successors for the said office, provided or to be provided; with our grant unto him the said John Bradshaw of the aforesaid offices respectively, &c. so long as he shall therein well demean himself, &c. Given at Whitehall the 5th day of December, 1658."

The bill was prepared for signature, and was presented to and signed by his Highness Richard Lord Protector; and a patent was accordingly sealed, bearing date the 16th of December, 1658. The draft is indorsed "Lord Bradshaw's Patent of Chancellor of the County and Duchy of Lancaster," and he is therein described as "our trusty and well beloved John Bradshaw, Sergeant-at-law, Chief Justice of Chester, Montgomery, Denbigh, and Flint."

The proceedings of the Duchy Court, during the Chancellorship of "Lord Bradshaw," exhibit great regularity. The business of the Court was considerable, and many very important decrees were pronounced by him, as well in original suits as upon appeal from the Vice-Chancellor.

Some attempts were made during the Commonwealth to abolish the Duchy and County Palatine of Lancaster; but they continued, with all their immunities and privileges, till the Restoration.

but themselves. Therefore take you notice of that.' After this protest he withdrew."<sup>1</sup>

Resistance by physical force to Oliver, become Lord Protector, President Bradshaw found to be impossible; but he refused to acknowledge the usurper's authority, and he eagerly thwarted his measures. He was not admitted to Barebone's parliament, which was nominated by the executive government; but, a new parliament being called in 1554, on the excellent reformed model imitated by Lord Grey, he was returned one of the four members for his native county, and was at the top of the poll.<sup>2</sup> At the commencement of the session—

"Lord President Bradshaw was very instrumental in opening the eyes of many young members who had never before heard their interest so clearly stated and asserted; so that the commonwealth party increased daily, and that of the sword lost ground. Cromwell, being informed of these transactions by his creatures, and fearing lest he should be deposed by the vote of this assembly from the throne which he had usurped, caused a guard to be set on the House early in the morning, and required the members to attend him in the Painted Chamber. There he acquainted them that none should be permitted to sit who did not subscribe to the Government by a single person. So soon as this visible hand of violence appeared to be upon them, most of the eminent asserters of the liberty of their country withdrew themselves, being persuaded they should best discharge their duty to the nation by this way of expressing their abhorrence of his tyrannical proceedings."

Cromwell, afraid of Bradshaw's secret plots, wished to come to an open rupture with him, and, summoning him to Whitehall, required him to take out a new commission for his office of Chief Justice of Chester. *Bradshaw*: "Sir, I require no new commission, and I will take none. I hold the office by a grant from the parliament of England, in the terms *quam diu se bene gesserit*. And whether I have carried myself with that integrity

<sup>1</sup> Whitelock, 554; Leicester's Journal, 139; Hutchinson, 332. Burton's Diary, iii. 98.

<sup>2</sup> 3 Parl. Hist. 1428.

of that.' which my commission exacts from me, I am ready to submit to a trial by twelve Englishmen to be chosen by yourself." He resolved to go his circuit as usual, unless he should be prevented by force; and a collision was expected. "But it was thought more advisable," says Ludlow, "to permit him to execute his office, than, by putting a stop to his circuit, to make a breach with those of the long robe whose assistance was so necessary to the carrying of Cromwell's design."<sup>1</sup>

Bradshaw remained in a state of sulky opposition during the remainder of Oliver's protectorate, refusing a peerage and other lures that were held out to win him over. On the accession of Richard he had again hopes of seeing a democratical republic established. In consequence, he accepted a seat in the Council of State, and he allowed himself to be returned as a member for Cheshire to the new parliament.<sup>2</sup> He rejoiced to find that the Cromwell dynasty was set aside, and for a short time there was a hope for the good cause. The Commonwealth having been again proclaimed, he agreed to be a commissioner of the great seal, with Terryl and Fountain, two violent republicans; and he triumphantly swore to be "true to this Commonwealth, without a single person, kingship, or House of Lords." But in a few weeks he had the mortification to see the supreme power again in the hands of the military, and his health suffered severely from the anguish of his spirit.

At a meeting of the Council, Colonel Sydenham, having tried to justify the violent dispersion of Parliament on the plea that it had been rendered necessary by a particular call of Divine Providence, "the Lord President Bradshaw, who was then present, though by long sickness very weak and much extenuated, yet animated by his ardent zeal and constant affection to the common cause, upon hearing those words, stood up and interrupted him, declaring his abhorrence of that detestable action, and telling the Council that 'being now going to his God, he had not patience to sit there to hear this great name so openly blasphemed;' he thereupon departed to his lodgings, and withdrew himself from public employment."<sup>3</sup>

<sup>1</sup> Mem. 216-220.<sup>2</sup> 3 Parl. Hist. 1531.<sup>3</sup> Ludlow, 277.



He languished till the 31st of October, when he expired—pleased with the thought of being removed to another scene of existence before the irresistible reaction which he deplored had produced the restoration of the Stuart line. In Whitelock's Memorials the entry of his death concludes with these words: "a stout man, and learned in his profession—no friend to monarchy."

The most wonderful testimony in his favor is from Milton, who is said to have been recommended by him to Cromwell for the place of Latin Secretary, and in his "Defensio pro populo Anglicano," thus extols him:—

"John Bradshaw—a name which Liberty herself, in every country where her power is acknowledged, has consecrated to immortal renown—was descended, as is well known, from a distinguished family. The early part of his life he devoted to the study of the laws of his country. Having become a profound lawyer, an eloquent advocate, and a zealous asserter of the rights of the people, he was employed in important state affairs, and frequently discharged with unimpeachable integrity the duties of a Judge. When at length selected by the Parliament to preside at the trial of the King, he did not decline this most dangerous task: to the science of the law he had brought a liberal disposition, a lofty spirit, sincere and unoffending manners; thus qualified, he supported that great and unprecedentedly fearful office, exposed to the threats and to the daggers of innumerable assassins, with so much firmness, such gravity of demeanor, such presence and dignity of mind, that he seemed to have been formed and appointed immediately by the Deity himself, for the performance of that deed which the Divine Providence had long before decreed to be accomplished in this nation; and so far has he exceeded the glory of all former tyrannicides, as it is more humane, more just, more noble, to pass a lawful sentence upon a tyrant, than to put him to death like a wild beast. Ever eager to discover merit, he is equally munificent in awarding it. Delighted to dwell on the praises of others, he studiously suppresses his own."<sup>1</sup>

<sup>1</sup> "Est Joannes Bradscianus (quod nomen libertas ipsa, quæcunque gentium colitur, memorie sempiternæ celebrandum commendavit) nobili familia, ut satis notum est, ortus; unde patriis legibus addiscendis primam ætatem sedulo impendit: dein consultissimus causarum et disertis-



His death before the Restoration saved him from the fate which befell other regicides. But, contrary to the sentiment that "English vengeance wars not with the dead," an act of parliament was passed to attain him; and both Houses made an order "that the carcasses of Oliver Cromwell, John Bradshaw, and Henry Ireton, (whether buried in Westminster Abbey, or elsewhere,) be with all expedition taken up, and drawn upon a hurdle to Tyburn, and there hanged up in their coffins upon the gallows there some time, and after that buried under the said gallows." A contemporary historian gives the following account of the ceremony:—

"Thursday, January 30, 1660-1, the odious carcasses of Oliver Cromwell, John Bradshaw, and Henry Ireton, were taken out of their graves, drawn upon sledges to Tyburn, and, being pulled out of their coffins, there hanged at the several angles of the triple tree till sunset; then taken down, beheaded, and their loathsome trunks thrown into a deep hole under the gallows. Their heads were afterwards set upon poles on the top of Westminster Hall."

As a pendant to the well-known story that Charles I.'s head had been substituted for Cromwell's, and underwent this indignity, a narrative was given to the world that the remains of President Bradshaw, being carried to America before the Restoration, were deposited in that Land of Liberty; and the following inscription is to be read on a cannon at Annapolis:—

*simus patronus, libertatis et populi vindex acerrimus, et magnis reipublicæ negotiis est adhibitus, et incorrupti judicis munere aliquoties perfunctus. Tandem uti Regis judicio presidere vellet a senatu rogatus, provinciam sanè periculosissimam non recusavit. Attulerat enim ad legum scientiam ingenium liberale, animum excelsum, mores integros ac nemini obnoxios; unde illud munus, omni propè exemplo majus ac formidabilius tot sicariorum pugionibus ac minis petitus, ità constantèr, ità gravitèr, tantà animi præsentia ac dignitate gessit atque implevit, ut ad hoc ipsum opus, quod jam olim Deus edendum in hoc populo mirabili providentiâ decreverat, ab ipso numine designatus atque factus videretur; et tyrannicidarum omnium gloriam tantùm superaverit, quantò est humanius quantò justius ac majestate plenus tyrannum, judicare, quàm injudicatum occidere. Bene merentes quoscunque nemo citius aut libentius agnoscit, neque majore benevolentia prosequitur; alienas laudes perpetuò prædicare, suas tacere solitus."*

<sup>1</sup> *Gesta Britannorum*, by Sir George Wharton. London, 1667.

"Stranger!  
 Ere thou pass, contemplate this cannon;  
 nor regardless be told,  
 that near its base lies deposited the dust of  
 JOHN BRADSHAW,  
 who, nobly superior to selfish regards,  
 despising alike the pageantry of courtly splendour,  
 the blast of calumny,  
 and the terror of regal vengeance,  
 presided in the illustrious band of heroes and patriots  
 who fairly and openly adjudged  
 CHARLES STUART,  
 tyrant of England,  
 to a public and exemplary death;  
 thereby presenting to the amazed world,  
 and transmitting down through applauding ages,  
 the most glorious example  
 of unshaken virtue, love of freedom,  
 and impartial justice,  
 ever exhibited on the blood-stained theatre  
 of human action.  
 Oh! Reader!  
 pass not on until thou hast blessed his memory;  
 and never—never forget  
 THAT REBELLION TO TYRANTS  
 IS OBEDIENCE TO GOD."





## CHAPTER XV.

CHIEF JUSTICES OF THE KING'S BENCH FROM THE  
RESTORATION TILL THE APPOINTMENT OF  
SIR MATTHEW HALE.

AT the restoration of Charles II. it was considered necessary to sweep away the whole of the Judges from Westminster Hall, although, generally speaking, they were very learned and respectable, and they had administered justice very impartially and satisfactorily.<sup>1</sup> Immense difficulty was found in replacing them. Clarendon was sincerely desirous to select the fittest men that could be found, but from his long exile, he was himself entirely unacquainted with the state of the legal profession, and, upon making inquiries, hardly any could be pointed out whose political principles, juridical acquirements, past conduct, and present position entitled them to high preferment. The most eminent barristers on the royalist side had retired from practice when the civil war began, and the new generation which had sprung up had taken an oath to be faithful to the Commonwealth. One individual was discovered. Sir Orlando Bridgman—eminent both for law and for loyalty. Early distinguished as a rising advocate, he had sacrificed his profits that he might assist the royal cause by carrying arms, and, refusing to profess allegiance to those whom he considered *rebels*, he had spent years in seclusion,—still devoting himself to professional studies, in which he took the highest delight. At first, however, it was thought that he could not properly be placed in a

<sup>1</sup> Their decisions are still of as much authority on legal questions as those of courts sitting under a commission from the Crown; and they were published with the sanction of the Chancellor and all the Judges in the reigns of Charles II. and James II.

higher judicial office than that of Chief Baron of the Exchequer,—and the Chiefships of the King's Bench and Common Pleas were allowed to remain vacant some months, *puisnics* being appointed in each court to carry on the routine business.

At last a Chief Justice of England was announced,—SIR ROBERT FOSTER; and his obscurity testified the perplexity into which the Government had been thrown in making a decent choice. He was one of the very few survivors of the old school of lawyers which had flourished before the troubles began; he had been called to the degree of Sergeant-at-law so long ago as the 30th of May, 1636, at a time when Charles I., with Strafford for his ministers, was ruling with absolute sway, was imposing taxes by his own authority, was changing the law by proclamation, and hoped never again to be molested by parliaments. This system was condemned and opposed by the most eminent men at the English bar, but was applauded and supported by some who conscientiously thought that all popular institutions were mischievous; and by more who thought that court favor gave them the best chance of rising in the world. Foster is supposed to have defended ship-money,—the cruel sentences of the Star Chamber,—the billeting of soldiers to live at free quarters, and other flagrant abuses,—as well from a sincere love of despotism as from a desire to recommend himself to those in power.

At the time when tyranny had reached its culminating point, he was appointed a Puisne Judge of the Court of Common Pleas. Luckily for him, Hampden's case had been decided before his appointment, and he was not impeached by the Long Parliament. When the civil war broke out, he followed the King; and afterwards assisted in attempting to hold a Court of Common Pleas at Oxford, but sat alone, and his tribunal was without advocates or suitors. An ordinance passed the House of Commons for removing him from his office, and on account of his excessive zeal in the royal cause, he was obliged to compound for his estate by paying a very large fine.

After the King's death, he continued in retirement till the Restoration. He is said to have had a small

chamber in the Temple, and, like Sir Orlando Bridgman and Sir Jeffrey Pelman, to have practiced as a chamber counsel, chiefly addicting himself to conveyancing.

The first act of the Government of Charles II. was to reinstate Foster in his old office. There was a strong desire to reward his constancy with fresh honors; but he was thought unfit to be raised higher, and the office of Chief Justice of the King's Bench could not be satisfactorily filled up.

Only six Common Law Judges had been appointed when the trials of the regicides came on. Foster, being one of them, distinguished himself for his zeal; and, when they were over, all scruples as to his fitness having vanished, he, who a few months before, shut up in his chamber that he might escape the notice of the Round heads, never expected anything better than to receive a broad piece for preparing a conveyance according to the recently invented expedient of "lease and release," was constituted the highest Criminal Judge in the kingdom.

He presided in the Court of King's Bench for two years. Being a deep black-letter lawyer, he satisfactorily disposed of the private cases which came before him, although he was much perplexed by the improved rules of practice introduced while he was in retirement, and he was disposed to sneer at the decisions of Chief Justice Rolle, a man in all respects much superior to himself. In state prosecutions he showed himself as intemperate and as arbitrary as any of the Judges who had been impeached at the meeting of the Long Parliament.

To him chiefly is to be imputed the disgraceful execution as a traitor of one who had disapproved of the late King's trial; who was included in the present King's promise of indemnity from Breda;<sup>3</sup> in whose favor a petition had been presented by the Convention Parlia-

<sup>1</sup> "M. T. 12 C. II. Memorandum que le premier jour de cest terme Sir Robert Foster, un des Justices del common Bank, feut jure Chiefe Justice del Banco Regis. Il prisant les seremens del allegiance et supremacy generlerant (come lauter Justices font) queux seremens fueront lege a luy hors del Rolle mesme et nemy hors del livre le Seigneur Chancellor seaut sur le Banke et Foster esteant en le Court et nemy al barr."

<sup>3</sup> Charles II., in his *Declaration* from Breda, had promised that he should "proceed only against the immediate murderers of his royal father."

ment; who was supposed to be expressly pardoned by the answer to that petition;<sup>1</sup> but who had incurred the inextinguishable hatred of the Cavaliers by the part he had taken in bringing about the conviction of the Earl of Stafford.<sup>2</sup> Sir Henry Vane the younger, after lying two years in prison, during which the shame of putting him to death was too strong to be overcome, was at last arraigned for high treason at the King's Bench bar. As he had actually tried to save the life of Charles I., the treason charged upon him was for conspiring the death of Charles II., whose life he would have been equally willing to defend. The indictment alleged this overt act, "that he did take upon him the government of the forces of this nation by sea and land, and appointed colonels, captains, and officers." The Crown lawyers admitted that the prisoner had not meditated any attempt upon the natural life of Charles II., but insisted that, by acting under the authority of the Commonwealth, he had assisted in preventing the true heir of the monarchy from obtaining possession of the government, and thereby, in point of law, had conspired his death, and had committed high treason. Unassisted by counsel, and browbeaten by Lord Chief Justice Foster, he made a gallant defense; and, besides pointing out the bad faith of the proceeding after the promise of indemnity and pardon held out to him, contended that, in point of law, he was not guilty, on the ground that Charles II. had never been in the possession of the government as King during any part of the period in question; that the supreme power of the state was then vested in the Parliament, whose orders he had obeyed; that he was in the same relation to the exiled heir as if there had been another King upon the throne; and that the statute of Henry VII., which was only declaratory

<sup>1</sup> In answer to the address of the two Houses of the Convention Parliament to spare the lives of Vane and Lambert, the Lord Chancellor reported, "His Majesty grants the desire of the said petition;"—the ancient form of passing acts of parliament. The ultra-Cavalier House of Commons which followed desired Vane's death, but could not alter the law or abrogate the royal promise.

<sup>2</sup> Burnet says, "The putting Sir Henry Vane to death was much blamed, yet the great share he had in the attainder of the Earl of Strafford, but, above all, the great opinion there was of his parts and capacity to embroil matters again, made the Court think it necessary to put him out of the way."

of the common law and of common sense, expressly provided that no one should ever be called in question for obeying, or defending by force of arms, a king *de facto*, although he had usurped the throne. He concluded by observing that the whole English nation might be included in the impeachment.

*Foster, C. J.* : "Had there been another king on the throne, though an usurper, you might have been exempted by the statute from the penalties of treason. But the authority you recognized was called by the rebels either 'Commonwealth' or 'Protector,' and the statute takes no notice of any such names or things. From the moment that the martyred Sovereign expired, our lord the King that now is must be considered as entitled to our allegiance, and the law declares that he has ever since occupied his ancestral throne. Therefore obedience to any usurped authority was treason to him. You talk of the sovereign power of Parliament; but the law knows of no sovereign power except the power of our sovereign lord the King.' With respect to the number against whom the law shall be put in force, that must depend upon his Majesty's clemency and sense of justice. To those who truly repent he is merciful; but the punishment of those who repent not, is a duty we owe both to God and to our fellow men."

A verdict of *guilty* being returned, the usual sentence was pronounced; but the King, out of regard to his own reputation, if not to the dictates of justice and mercy, was very reluctant to sanction the execution of it till Chief Justice Foster, going the following day to Hampton Court to give him an account of the trial, represented the line of defense taken by the prisoner as inconsistent with the principals of monarchical government, and said that the supposed promises of pardon were by no means binding, "for God, though oftentimes

<sup>1</sup> Sir Henry Vane, in an account of his case which he has left us, says, "On the day of my arraignment an eminent person was heard to say, 'I had forfeited my head by what I had said that day before ever I came to my defense: what that should be I know not, except my saying in open court 'sovereign power of Parliament;' but whole volumes of lawyers' books pass up and down the nation with that title, 'SOVEREIGN POWER OF PARLIAMENT.'"—6 St. Tr. 186. This "eminent person" was most likely the Chief Justice of the Court of King's Bench.



promising mercy, yet intends his mercy only for the penitent." The King, thus wrought on, notwithstanding his engagement to the contrary, signed the death-warrant, and Vane was beheaded on Tower Hill, saying with his last breath, "I value my life less in a good cause than the King does his promise." Mr. Fox, and other historians, consider this execution "a gross instance of tyranny," but have allowed Chief Justice Foster, who is mainly responsible for it, to escape without censure.<sup>1</sup>

The arbitrary disposition of this Chief Justice was strongly manifested soon after, when John Crook and several other very loyal Quakers were brought before him at the Old Bailey for refusing to take the oath of allegiance:—

*Foster, C. J.* : "John Crook, when did you take the oath of allegiance?" *Crook* : "Answering this question in the negative is to accuse myself, which you ought not to put me upon. '*Nemo debet seipsum prodere.*' I am an Englishman, and I ought not to be taken, nor imprisoned, nor called in question, nor put to answer but according to the law of the land." *Foster, C. J.* "You are here required to take the oath of allegiance, and when you have done that, you shall be heard." *Crook* : "You that are Judges on the bench ought to be my counsel, not my accusers." *Foster, C. J.* : "We are here to do justice, and are upon our oaths; and we are to tell you what is law, not you us. Therefore, sirrah, you are too bold!" *Crook* : "*Sirrah* is not a word becoming a judge. If I speak loud, it is my zeal for the truth, and for the name of the Lord. Mine innocence makes me bold." *Foster, C. J.* : "It is an evil zeal." *Crook* : "No, I am bold in the name of the Lord God Almighty, the everlasting Jehovah, to assert the truth and stand as a witness for it. Let my accuser be brought forth." *Foster, C. J.* : "Sirrah, you are to take the oath, and here we tender it you." *Crook* : "Let me be cleared of my imprisonment, and then I will answer to what is charged against me. I keep a conscience void of offense, both towards God and towards man." *Foster, C. J.* : "Sirrah, leave your canting." *Crook* : "Is this canting, to speak the words of the Scripture?" *Foster, C. J.* :

<sup>1</sup> 6 St. Tr. 119-202.



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"It is canting in your mouth, though they are St. Paul's words. Your first denial to take the oath shall be recorded; and on a second denial, you wear the penalties of a *præmunire*, which is the forfeiture of all your estate, if you have any, and imprisonment during life." *Crook*: "I owe dutiful allegiance to the King, but cannot swear without breaking my allegiance to the King of Kings. We dare not break Christ's commandments; who hath said, SWEAR NOT AT ALL; and the apostle James says, 'Above all things, my brethren, swear not.'"

Crook in his account of the trial, says, "The Chief Justice thereupon interrupting, called upon the executioner to stop my mouth, which he did accordingly with a dirty cloth and a gag." The other Quakers following Crooks' example, they were all indicted for having a second time refused to take the oath of allegiance; and, being found guilty, the Court gave judgment against them, of forfeiture, imprisonment for life, and moreover, that they were "out of the King's protection,"—whereby they carried about with them *caput lupinum*, and might be put to death by any one as noxious vermin.<sup>1</sup>

The last trial of importance at which Chief Justice Foster presided was that of Thomas Tonge and others, charged with a plot to assassinate the King. General Ludlow says that this was got up by the Government to divert the nation from their ill humor, caused by the sale of Dunkirk; the invention being "that the divers thousands of ill-affected persons were ready under his command to seize the Tower and the City of London; then to march directly to Whitehall in order to kill the King and Monk, with a resolution to give no quarter,—and after that to declare for a Commonwealth."<sup>2</sup> The case was proved by the evidence of supposed accomplices, which was held to be sufficient without any corroboration. The Chief Justice seems to have been very infirm and exhausted; for thus he summed up:—

"My masters of the jury, I cannot speak loud to you; you understand this business, such as I think you have not had the like in your life: my speech will not give me leave to discourse of it. The witnesses may satisfy all honest men: it is clear that they all agreed to subvert

<sup>1</sup> 6 St. Tr. 201-226.

<sup>2</sup> Memoirs.

the government, and to destroy his Majesty; what can you have more? The prisoners are in themselves inconsiderable; they are only the out-boughs; but if such fellows are not met withal, they are the fittest instruments to set up a Jack Straw and a Wat Tyler; therefore you must lop them off, as they will encourage others. I leave the evidence to you; go together."

The prisoners, being all found guilty, the Chief Justice thus passed sentence upon them,—

"You have committed the greatest crime against God, our King, and your country, and against every good body that is in this land; for that capital sin of high treason is a sin inexpressible, and, indeed, hath no equal sin as to this world. Meddling with them that are given to change, hath brought too much mischief already to this nation; and if you will commit the same sin, you must receive the same punishment, for happy is he who by other men's harms takes heed."

They were all executed, protesting their innocence.<sup>1</sup>

The Chief Justice went a circuit after this trial, in the hope that country air would revive him. However, he became weaker and weaker, and, although much assisted by his brother Judge, he with great difficulty got to the last assize town. From thence he traveled by slow stages to his house in London, where, after languishing for a few weeks, he expired, full of days, and little blamed for any part of his conduct as a Judge, however reprehensible it may appear to us, trying it by a standard which he would have thought only fit to be proposed by rebels.<sup>2</sup> He was brought up among lawyers who deemed all resistance to power treasonable or seditious, and his zeal against those who professed liberal opinions may be excused when we consider the excesses which he had seen committed under pretense of a love of freedom. His cruelty to the poor Quakers admits of least apology; but it should be remembered that, till the Revolution of 1688, religious toleration was neither practiced nor professed by any dominant faction; and if the Quakers, by the spread of fanaticism, had got the upper hand there can be no doubt that they would have absolutely forbidden all Christians to take an oath, and would per

<sup>1</sup> 6 St. Tr. 225-274.

<sup>2</sup> 1 Sid. 153.

haps have punished with the penalties of *præmunire* the offense of using the names of months or days taken from the heathen mythology.

It has been said that "he was in a distinguished manner serviceable to the public in punishing the felonies and other outrages which proceeded from an old disbanded army, and in restraining the over-great mercy of the King in his frequent pardons granted to such sort of criminals."

On the death of Sir Robert Foster, Lord Clarendon thought that he might fairly do a job for an aged kinsman, of respectable if not brilliant reputation; and he appointed SIR ROBERT HYDE Chief Justice of the King's Bench. They were cousins-german, being grandsons of Lawrence Hyde, of West Hatch, in the county of Wilts, and nephews of Sir Nicholas Hyde, Chief Justice of the King's Bench in the commencement of the reign of Charles I. The Hydcs were the most distinguished race of the robe in the 16th century. Robert's father was likewise a lawyer of renown, being Attorney General to Anne of Denmark, Queen of James I., and he had twelve sons, most of whom followed their father's profession. Robert seems to have been a very quiet man, and to have got on by family interest and by plodding. Although Edward, the future Chancellor, played such a distinguished part during the troubles,—first as a moderate patriot, and then as a liberal conservative,—Robert, the future Chief Justice, was not in the House of Com-

<sup>3</sup> Echard, p. 812 a; Peck's *Desiderata Curiosa*, vol. ii. p. 543.

I ought to have mentioned that Sir Robert Foster was the youngest son of Sir Thomas Foster, Knt., one of the Justices of the Court of Common Pleas in the time of King James I. He was called to the bar by the Society of the Inner Temple, and was "Summer Reader" of that house, 7 Charles I. He was buried at Egham, in Surrey. On a gravestone on the north side of the channel there are these words:—"Here lyeth buried the body of Sir Robert Foster, Knt., late Lord Chief Justice of the King's at Westminster, who deceased the 4th of October, 1663." Above, on the north wall, is a monument of alabaster, with a bust of the Judge in his robes and cap; over him these arms: 1st and 4th argent, a cheveron vest between three bugle horns, sable; 2d and 3d argent on a bend sable, three martlets or; and below is this inscription:—"Memoriæ sacrum Robertus Foster miles filius minimus natu Thomæ Foster militis, unius Justiciarior. de Communi Banco tempore Domini Regis Jacobi, ac ipsemet Justiciarius de eodem Banco Regnantibus Carolo Primo et Carolo secundo, denique Banci Regis Justiciarius capitalis, obit 4to die Octobris anno D'ni millesimo sexcentesimo sexagesimo tertio; ætatis suæ 74."—*Manning: Surry*, p. 245.

mons, nor did he enlist under the banner of either party in the field. Just before the civil war broke out, he was called to the degree of Sergeant-at-law, and he continued obscurely to carry on his profession during all the vicissitudes of the twenty eventful years between 1640 and 1660.

At the Restoration he was made a Puisne Judge of the Common Pleas, and, acting under Chief Justice Bridgman, he acquitted himself creditably.<sup>1</sup>

When he was installed Chief Justice of the King's Bench, Lord Chancellor Clarendon himself attended in court, and thus addressed him:—

“It's a sign the troubles have been long, that there are so few Judges left, only yourself; and after so long suffering of the law and lawyers, the King thought fit to call men of the best reputation and learning, to renew the reverence due and used to the law and lawyers; and the King, as soon as the late Chief Justice was dead, full of days and of honors, did resolve on you as the ancientest Judge left; and your education in this Court gives you advantage here above others, as you are the son of an eminent lawyer as any in his days, whose felicity was to see twelve sons, and you one of the youngest a Sergeant, and who left you enough, able to live without the help of an elder brother. For your integrity to the Crown, you come to sit here. The King and the kingdom do expect great reformation from your activity. For this reason, the King, when I told him Chief Justice Foster was dead, made choice of you. Courage in a judge is as necessary as in a general; therefore you must not want this to punish sturdy offenders. The genteel wickedness of dueling, I beseech you inquire into; the carriers of challenges, and fighters, however they escape death, the fining and imprisoning of

<sup>1</sup> It is curious to observe that upon the Restoration the Judges were at first appointed for life, although the old form *durante bene placito* was soon restored. The following is Hyde's patent as a Justice of C. P.:—“*Carolus Secundus, &c., Sciatis quod constituimus delectum et fidelem nostrum Robertus Hyde, servientem ad legem unum Justiciariorum nostrorum de Banco, habendum quam diu se bene gesserit in eodem, &c.*”—(1 Sid. 2.) “*Memorandum que le darrein vacation puis le circuit, Sir Robert Foster le Chief Justice del Banc Regis mor. Et cest terme Sir Robert Hyde un des Justices del. Co. Ba. fuit fait Chief Justice del Banco Regis.*”—(1 Sid.)

them will make them more dread this Court than the day of judgment."

*Hyde, C. J.*: "I had ever thought of the advice of the wise man, 'not to seek to be a judge, nor ask to sit in the seat of honor,' being conscious of my own defects and small learning. But, seeing his Majesty's grace, I shall humbly submit, and serve him with my life with all alacrity and duty. Sins of infirmity I hope his Majesty will pardon and for willful and corrupt dealings I shall not ask it. I attended in Coke's time as a reporter here; and as he said when he was made Chief Justice I say now, 'I will behave myself with all diligence and honesty.'"

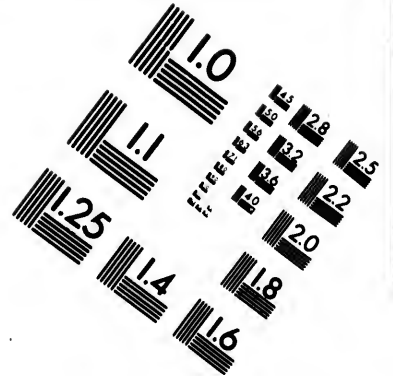
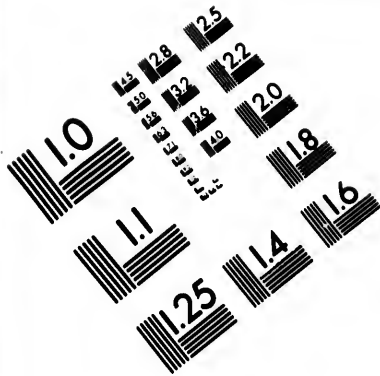
This Chief Justice was much celebrated in his day for checking the licentiousness of the press. A printer named John Troyn, having printed a book entitled "Phœnix, or the Solemn League and Covenant," containing passages which were said to reflect upon the King, was arraigned before him at the Old Bailey on an indictment for high treason. The prisoner being asked how he would be tried, said, "I desire to be tried in the presence of that God who is the searcher of all hearts, and the disposer of all things."

*Hyde, L. C. J.*: "God Almighty is present here, but you must be tried by him and your peers, that is, your country, or twelve honest men." *Prisoner*: "I desire to be tried by God alone." *Hyde, L. C. J.*: "God Almighty looks down and beholds what we do here, and we shall answer severely if we do you any wrong. We are careful of our souls as you can be of yours. You must answer in the words of the law." *Prisoner*: "By God and my country."

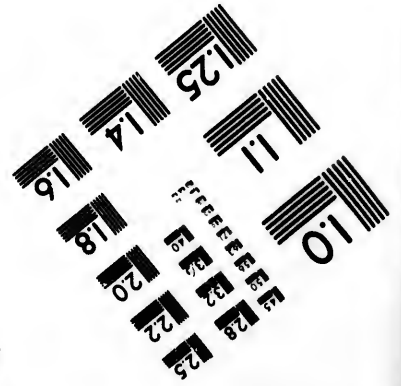
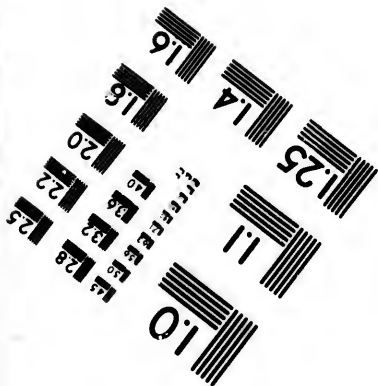
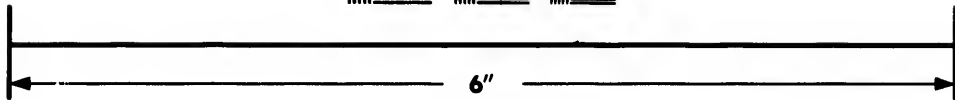
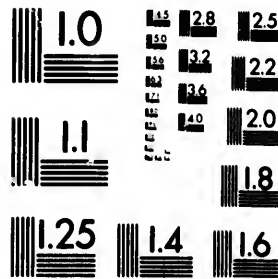
It was proved clearly enough that he had printed the book, and some passages of it might have been considered libelous—but there was no other evidence against him, and he averred that he had unconsciously printed the book in the way of his trade.

*Hyde, L. C. J.*: "There is here as much villainy and slander as it is possible for devil or man to invent. To rob the King of the love of his subjects, is to destroy him in his person. You are here in the presence of Al-





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mighty God, as you desired; and the best you can now do towards amends for your wickedness, is by discovering the author of this villainous book. If not, you must not expect, and, indeed, God forbid! there should be any mercy shown you." *Prisoner*: "I never knew the author of it." *Hyde, L. C. J.*: "Then we must not trouble ourselves. You of the jury, there can be no doubt that publishing such a book as this is as high treason as can be committed, and my brothers will declare the same if you doubt."

The jury having found a verdict of guilty, the usual sentence was pronounced by Lord Chief Justice Hyde, and the printer was drawn, hanged, and quartered accordingly.<sup>1</sup>

The next trials before his Lordship, although the charge was not made capital (as he said it might have been), were equally discreditable to him. Several booksellers were indicted for publishing a book which contained a simple and true account of the trial of the Regicides, with their speeches and prayers.

*Hyde, L. C. J.*: "To publish such a book is to fill all the King's subjects with the justification of that horrid murder. I will be bold to say no such horrid villainy has been done upon the face of the earth since the crucifying of our Saviour. To print and publish this is sedition. He that prints a libel against me as Sir Robert Hyde, and he that sets him at work, must answer it; much more when against the King and the state, *Dying men's words*, indeed! If men are as villainous at their death as in their lives, may what they say be published as the words of dying men? God forbid! It is the King's great mercy that the charge is not for high treason."

The defendants, being found *guilty*, were sentenced to stand several hours in the pillory, and to be imprisoned for life.<sup>2</sup>

In the fervor of loyalty which still prevailed, such doctrines and such sentences were by no means unpopular; and while Chief Justice Hyde was cried up as an eminent Judge by the triumphant Cavaliers, the dejected Roundheads hardly ventured to whisper a com-

<sup>1</sup> 6 St. Tr. 513.

<sup>2</sup> 6 St. Tr. 514-564.

plaint against him. To the great grief of the one party, and, no doubt, to the secret joy of the other, who interpreted his fate as a judgment, his career was suddenly cut short. On the 1st of May, 1663, as he was placing himself on the bench to try a dissenter who had published a book recommending the "comprehension," that had been promised by the King's Declaration from Breda, while apparently in the enjoyment of perfect health, he dropped down dead.<sup>1</sup>

In consequence of this melancholy event, Lord Clarendon was again thrown into distress by the difficulty of filling up the office of Chief Justice of the King's Bench, and he allowed it to remain vacant seven months. Only five years had yet elapsed since the Restoration, and no loyal lawyer of eminence had sprung up. At last the Chancellor thought he could not do better than promote SIR JOHN KELYNGE, then a *puisne*, to be the head of the Court. The appointment was considered a very bad one; and some accounted for it by supposing that a liberal contribution had been made towards the expense of erecting "Dunkirk House," which was exciting the admiration and envy of the town,—while others asserted that the collar of S. S. had been put around the neck of the new legal dignitary by the Duchess of Cleveland. I believe that judicial patronage had not yet been drawn into the vortex of venality, and that Clarendon, left to the freedom of his own will, preferred him whom he considered the least ineligible candidate. But we cannot wonder at the suspicions which were generally entertained, for Sir John Kelynge's friends could only say in his favor that he was a "violent Cavalier," and his enemies observed that "however fit he might have been to *charge* the Roundheads under Prince Rupert, he was very unfit to *charge* a jury in Westminster Hall."

I can find nothing of his origin, or of his career, prior to the Restoration; and I am unable to say whether, like some loyal lawyers, he had actually carried arms for

<sup>1</sup> 2 Sid. 2; 1 Keb. 861; 1 Sid. 275; Sir Thomas Raymond, 139; Sir R. C. Hoare's Wiltshire, ii. p. 144.

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the King, or, like others, he had continued obscurely to practice his profession in London. The first notice I find of him is by himself, in the account which he has left us of the conferences of the Judges at Sergeants' Inn, preparatory to the trial of the Regicides, when he says he attended that service as junior counsel for the Crown. He might have been employed from a notion that he would be useful in solving the knotty points likely to arise,<sup>1</sup> or (what is quite as likely), without any professional reputation, he might have got a brief by favor, in a case which was to draw the eyes of the whole world upon all engaged in it.

When the trials came on, he was very busy and bustling, and eagerly improved every opportunity of bringing himself forward. Before they were over, he took upon himself the degree of Sergeant-at-law, and, to his unspeakable delight, he was actually intrusted with the task of conducting the prosecution against Colonel Hacker, who had commanded the guard during the King's trial and at his execution. He learnedly expounded to the jury that the treason consisted in "compassing and imagining the King's death," and that the overt acts charged of *condemning him* and *executing him* were only to be considered evidence of the evil intention. He then stated the facts which would be proved by the witnesses, and concluded by observing:—

"Thus did he keep the King a prisoner, to bring him before that Mock Court of Injustice; and was so highly trusted by all those miscreants who thirsted for the King's blood, that the bloody warrant was directed to him to see execution done. Nay, gentlemen, he was on the scaffold, and had the axe in his hand." *Hacker*: "My Lords, to save your Lordships trouble, I confess that I was upon the guard, and had a warrant to keep the King for his execution." (The original warrant being shown to him, he admitted it.) *Kelynge*: "After you

<sup>1</sup> Among these was "whether the act of severing the head of Charles I. from his body could be alleged to have been committed in his own lifetime," and "whether it should be laid as against the peace of the late or of the present King?" Judge Mallet made the confusion more confounded by maintaining that by the law of England a day is indivisible; and that as Charles II. certainly was our lawful King during a part of that day, no part of it had been in the reign of Charles I.

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had that warrant brought to you, did you, by virtue of it, direct another warrant for the execution of the King, and take his sacred Majesty's person from the custody of Colonel Tomlinson?" *Hacker* : "No, sir!" *Kelynge* : "We shall prove it."

Colonel Tomlinson was then examined, and detailed the circumstances of the execution, showing that Colonel Hacker had conducted the King to the scaffold under the original warrant,—what had been taken for a fresh warrant being a letter written by him to Cromwell, then engaged in prayer for the King's deliverance with General Fairfax.

*Kelynge* : "We have other witnesses, but the prisoner hath confessed enough. We have proved that he had the King in custody, and that at the time of the execution he was there to manage it. What do you say for yourself?" *Hacker* : "Truly, my Lord, I have no more to say for myself but that I was a soldier and under command. In obedience to those set over me I did act. My desire hath ever been for the welfare of my country." *L. C. Baron* : "This is all you have to say for yourself?" *Hacker* : "Yes, my Lord." *L. C. Baron* : "Then, Colonel Hacker, for that which you say for yourself that you did it by command, you must understand that no power on earth could authorize such a thing. Either he is guilty of compassing the death of the King, or no man can be said to be guilty."

Of course he was convicted and executed.<sup>1</sup>

Sergeant Kelynge was soon after promoted to be a King's Sergeant; and in that capacity took a prominent part in the trial of Sir Henry Vane, who, not being concerned in the late King's death, was tried for what he had subsequently done in obedience to the Parliament, then possessed of the supreme power of the state. To the plea that his acts could not be said to be against the peace of Charles II., who was then in exile, Kelynge admitted that if another sovereign, although an usurper, had mounted the throne, the defense would have been sufficient; but urged that the throne must always be full, and that Charles II., in legal contemplation, occupied it while *de facto* he was wandering in foreign lands,

<sup>1</sup> 5 St. Tr. 947-1363.

and ambassadors from all the states of Europe were accredited to Oliver, the Lord Protector.<sup>1</sup>

Kelynge having suggested this reasoning, which was adopted by the Court, and on which Vane was executed as a traitor, he was, on the next vacancy, made a Puisne Judge of the King's Bench. When he was to take his seat Lord Chancellor Clarendon attended in that court, and thus addressed him:—

“ Mr. Sergeant Kelynge: The King's pleasure is to call you to be a Judge in this high court of law—not in the usual circumstance of death or vacancy, but in the place of one living. This is the great gift of God unto kings to judge the people, and the King cannot delegate a greater part of his prerogative than by granting commission to a subject to judge his fellows. There is no more misbecoming thing for a Christian man than seeking to be thus like God, to dispose of the blood of his subjects; but I absolve you, Mr. Sergeant, from any thing of this kind; you could have no thoughts of it till I brought the King's pleasure to you, and then you received it only with such alacrity as was fit for his service. This the King did in sight of your great ability and sufferings and assurances of constancy in his service; and therefore the people will have great cause to thank his Majesty. If this cannot introduce a love and veneration in the people of the Government, nothing but desolation can be expected.”

*Kelynge*: “ Although I cannot but return hearty thanks for so great favors, yet when I look on this supreme court and its jurisdiction I am much daunted. My twenty years' silence may have contributed to my inability, although not to hinder my industry. I acknowledge the effluxes of his Majesty's favor to be only by your Lordship's goodness, from which I beg that his Majesty may know with much gratitude and humility I submit myself to his pleasure.”<sup>2</sup>

While Kelynge was a Puisne Judge, he made up, by loyal zeal and subserviency, for his want of learning and sound sense; but, from a knowledge of his incompetency, there was a great reluctance to promote him on the death of Lord Chief Justice Hyde. Sir Matthew Hale was pointed out as the fittest person to be placed at the head

<sup>1</sup> 6 St. Tr. 119-202.

<sup>2</sup> 1 Keble, 526.

of the common law; but Lord Clarendon had not the liberality to raise to the highest dignity one who had sworn allegiance to the Protector, and there being no better man whom he could select, who was free from the suspicion of republican taint, he fixed upon the "violent Cavalier."

Luckily there were no speeches at his installation. On account of the dreadful plague which was then depopulating London, the courts were adjourned to Oxford, "There, Kelynge, Puisne Judge, was made Chief Justice, and, being sworn at the Chancellor's lodgings, came up privily and took his place in the logic school, where the Court of King's Bench sat. The business was only motions—to prevent any concourse of people. In London died the week before, 7165 of the plague, besides Papists and Quakers."<sup>1</sup>

The new Chief Justice even exceeded public expectation by the violent, fantastical, and ludicrous manner in which he comported himself. His vicious and foolish propensities broke out without any restraint, and, at a time when there was little disposition to question any who were clothed with authority, he drew upon himself the contempt of the public and the censure of Parliament.

He was unspeakably proud of the collar he wore as Chief Justice, this alone distinguishing him externally from the puisnies, a class on whom he now looked down very haughtily. In his own report of the resolutions of the Judges prior to the trial of Lord Morley for murder, before the House of Lords, he considers the following as most important:—

"We did all, una voce, resolve that we were to attend at the trial in our scarlet robes, and the Chief Judges in their collars of S. S.—*which I did accordingly.*"<sup>2</sup>

There having been a tumult in an attempt by some apprentices to put down certain disorderly houses in Moorfields, which were a great nuisance to the neigh-

<sup>1</sup> 1 Keble, 943; Sir T. Raym, 139. "M. T. 1665. En ceo term Sir Io Kelynge Justice de Banco Regis fuit fait Chief Justice la en lieu de Hyde. Mes Ieo ne fui al Oxford pr. reason del strictness del lieu et danger de la secon."—(1 Sid. 275.)

<sup>2</sup> 6 St. Tr. 769.

borhood, and cries that no such houses should be tolerated, Chief Justice Keyluge, considering this "an *ac-croachment* of royal authority," directed those concerned in it to be indicted for HIGH TREASON; and, the trial coming on before him at the Old Bailey, he thus laid down the law to the jury:—

"The prisoners are indicted for levying war against the King. By levying war is not only meant when a body is gathered together as an army, but if a company of people will go about any public reformation, this is high treason. These people do pretend their design was against brothels; now for men to go about to pull down brothels, with a captain, and an ensign, and weapons,—if this thing be endured, *who is safe?*" It is high treason because it doth betray the peace of the nation, and *every subject is as much wronged as the King*; for if every man may reform what he will, no man is safe; therefore the thing is of desperate consequence, and we must make this for a public example. There is reason we should be very cautious; we are but newly delivered from rebellion, and we know that that rebellion first began under the pretense of religion and the law; for the Devil hath always this vizard upon it. We have great reason to be very wary that we fall not again into the same error. Apprentices in future shall not go on in this manner. It is proved that Beasely went as their captain with his sword, and flourished it over his head, and that Messenger walked about Moorfields with a green apron on the top of a pole. What was done by one was done by all; in high treason all concerned are principals."

So the prisoners were all convicted of high treason; and I am ashamed to say that all the Judges concurred in the propriety of the conviction except Lord Chief Baron Hale, who, as might be expected, delivered his opinion that there was no treason in the case, and treated

<sup>1</sup> There must here have been a titter among the junior members of the bar in contemplation of the perils to which the reverend sages of the law had been exposed. I remember when a celebrated house in Chandos Street was burned down in the night, and several lives were lost, it happened that term began next day, and, all the Judges being assembled at the Chancellor's Lord Chief Justice Macdonald (I suppose having lately read this judgment of Chief Justice Kelynge) exclaimed, "It gives me heart-felt pleasure, my dear brethren to see you all here quite safe."



it merely as a misdemeanor.' Such a proceeding had not the palliation that it ruined a personal enemy, or crushed a rival party in the state, or brought great forfeitures into the Exchequer; it was a mere fantastic trick played before high heaven to make the angels weep.

When Chief Justice Kelynge was upon the circuit, being without any check or restraint, he threw aside all regard to moderation and to decency. He compelled the grand jury of Somersetshire to find a true bill contrary to their consciences,—reproaching Sir Hugh Wyndham, the foreman, as the head of a faction, and telling them "that they were all his servants, and that he would make the best in England stoop."

Some persons were indicted before him for attending a conventicle; and, although it was proved that they had assembled on the Lord's Day with Bibles in their hands, *without Prayer-books*, they were acquitted. He thereupon fined the jury 100 marks a-piece, and imprisoned them till the fines were paid. Again, on the trial of a man for murder, who was suspected of being a dissenter, and whom he had a great desire to hang, he fined and imprisoned all the jury because, contrary to his direction, they brought in a verdict of *manslaughter*. Upon another occasion, (repeating a coarse jest of one whom he professed to hold in great abhorrence,)—when he was committing a man in a very arbitrary manner, the famous declaration in Magna Charta being cited to him, that "no freeman shall be imprisoned except by the judgment of his peers, or the law of the land," the only answer given by my Lord Chief Justice of England was to repeat, with a loud voice, Cromwell's rhyme, "MAGNA CHARTA—MAGNA ———A!!!"

At last, the scandal was so great that complaints against him were brought by petition before the House of Commons, and were referred to the grand committee of justice. After witnesses had been examined, and he himself had been heard in his defense, the committee reported the following resolutions:—

"1. That the proceedings of the Lord Chief Justice in the cases referred to us are innovations in the trial of men for their lives and liberties, and that he hath used

<sup>1</sup> 6 St. Tr. 879-914.

<sup>2</sup> Ante, p. 89.



arbitrary and illegal power which is of dangerous consequence to the lives and liberties of the people of England.

"2. That, in the place of judicature, the Lord Chief Justice hath undervalued, vilified, and condemned MAGNA CHARTA, the great preserver of our lives, freedom, and property.

"3. That the Lord Chief Justice be brought to trial, in order to condign punishment in such manner as the House shall judge most fit and requisite."

The matter assuming this serious aspect, he petitioned to be heard at the bar of the House in his own defense. Lord Chief Baron Atkyns, who was then present, says, "he did it with that great humility and reverence, that those of his own profession and others were so far his advocates that the House desisted from any farther prosecution." His demeanor seems now to have been as abject as it had before been insolent, and he escaped punishment only by the generous intercession of lawyers whom he had been in the habit of browbeating in the King's Bench.<sup>1</sup>

He was abundantly tame for the rest of his days; but he fell into utter contempt, and the business of the Court was done by Twisden, a very learned judge, and much respected, although very passionate. Kelynge's collar of S.S. ceased to have any charms for him; he drooped and languished for some terms, and on the 9th of May, 1671, he expired, to the great relief of all who had any regard for the due administration of justice. No interest can be felt respecting the place of his interment, his marriages, or his descendants.

I ought to mention, among his other vanities, that he had the ambition to be an author; and he compiled a folio volume of decisions in criminal cases, which are of no value whatever except to make us laugh at some of the silly egotisms with which they abound.<sup>2</sup>

<sup>1</sup> Siderfin, 338; 6 St. Tr. 992-1019; Lord Campbell's Speeches, 175, 337

<sup>2</sup> Such is the propensity to praise the living and the dead who fill or have filled high judicial offices, that we have the following notice of the death of Sir John Kelynge, as if he had been a Hale, a Holt, or a Mansfield:—"May 10th, 1671. This day died Sir John Keeling, Knt., Lord Chief Justice of the King's Bench, about two of the clock of the morning, being the first day of Easter Term. He died much lamented for his great integrity and worth, after a long weakness and decay."—*Echard* p. 878 b.; *Peck's Desid. Cur.* 549.

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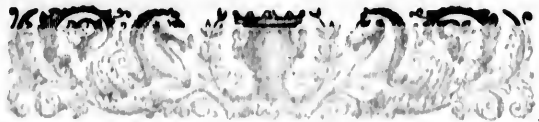
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SIR MATTHEW HALE.



## CHAPTER XVI

MEMOIR OF LORD CHIEF JUSTICE HALE, FROM HIS BIRTH  
TILL THE RESTORATION OF CHARLES II.

WE pass from one of the most worthless of Chief Justices to one of the most pure, the most pious, the most independent, and the most sacred—from Kelynge to Sir Matthew Hale. Imperfections will mark every human character, and I have not to exhibit a raw comparison, or a set of lines, but a steady perseverance in the pursuit of a noble and a laudable individual to be an object of admiration to his contemporaries, and have made him to be recorded by succeeding generations as a model of public and private virtue. I cannot be satisfied, therefore, with giving merely a slight sketch of the more remarkable passages of his life; and it will be my fault if his whole career, from his cradle to his grave, is not found both interesting and instructive.

He had the advantage of being born in the middle rank of life, receiving a liberal education, and depending on his own exertions for distinction. We know nothing of his paternal ancestor higher than his grandfather, who made a considerable fortune, for those days, as a clothier, at Wotton-under-edge, in Gloucestershire, and divided it equally among his five sons. Robert, the second of these, was educated for the bar, and married Joan, the daughter of Matthew Poyntz, Esq., of Alderley, a branch of the noble family of the Poyntzes of Acton. The subject of the present memoir was the only child of this marriage, and was born at Alderley, in Gloucestershire, on the 1st of November, 1609. He, Mr. Robert Hale, lived penuriously on a small estate



SIR MATTHEW HALL.



## CHAPTER XVI.

### LIFE OF LORD CHIEF JUSTICE HALE, FROM HIS BIRTH TILL THE RESTORATION OF CHARLES II.

WE pass from one of the most worthless of Chief Justices to one of the most pure, the most pious, the most independent, and the most learned—from Kelynge to Sir Matthew Hale. Imperfections will mark every human character; but I have now to exhibit a rare combination of good qualities, and a steady perseverance in good conduct, which raised an individual to be an object of admiration and love to all his contemporaries, and have made him to be regarded by succeeding generations as a model of public and private virtue. I cannot be satisfied, therefore, with giving merely a slight sketch of the more remarkable passages of his life; and it will be my fault if his whole career, from his cradle to his grave, is not found both interesting and instructive.

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which he had purchased with his patrimony, assisted by the fortune of his wife. He might have obtained great success in his profession, but he had given it up from scruples of conscience, being much shocked with legal fictions—above all, with “giving color in pleading, which, as he thought, was to tell a lie.”<sup>1</sup>

While the future Chief Justice was only in his fifth year, he had the misfortune to lose both his parents; and he became the ward of his kinsman, Mr. Kingscot, of Kingscot, who was of an ancient family, but was a noted Puritan. By this gentleman he was put to school with a clergyman of the same rigid principles, who is called by the orthodox Anthony Wood “one Mr. Staunton, the scandalous vicar of Wotton-under-Edge.”<sup>2</sup> The intention was that young Hale should not only be imbued with a proper horror of the rites and ceremonies of the Anglican discipline, which those inclined to the Genevese denominated “flat popery,” but that he should himself be bred a divine, and should actively engage as a minister in propagating the true reformed faith. In consequence, religious impressions were now made upon him which never were effaced. For a time, as we shall find, he frequented stage plays, and, despising all peaceful pursuits, he prized only military glory. But when these illusions had passed away, his manners and his modes of thinking were strongly tinctured, to his dying day, by his early training under a Puritanical teacher.

While at school he had a high reputation for diligence, and here he must have formed the studious habits which, amidst great temptations, and after some youthful errors, secured his advancement and his fame.

He was not sent to the University till he was sixteen. Then he was entered of Magdalene Hall, Oxford, and placed under the tuition of Obadiah Sedgwick, who, though a noted Puritan, was deeply imbued with classical learning. In the next generation the Puritans in general undervalued human learning, but in the early part of the 17th century they could exhibit a greater number

<sup>1</sup> Burnet's *Life of Hale*, p. 2. This is a mysterious contrivance to enable a defendant to refer the validity of his title to the judges instead of the jury, by introducing an untrue allegation respecting an entry under a pretended title, which does not deceive or injure any one.—3 Bl. Com. 309.

<sup>2</sup> Athen.

both of eminent mathematicians and of distinguished scholars the whose who under Laud wished to approximate to Rome.

Our undergraduate, simple in his attire, and rather ascetic in all his habits, devoted himself very steadily, for some terms, to the writings of Aristotle and Calvin, being regular in his attendance, not only in chapel, but at prayer-meetings in private houses,—till a strolling company of actors coming to Oxford, “he was so much corrupted by seeing many plays that he almost wholly forsook his studies.” All of a sudden, there seemed to be a complete transformation of his character. “He loved fine clothes, and delighted much in company; and, being of a strong and robust body, he was a great master at all those exercises that required much strength. He also learned to fence and handle his weapons, in which he became so expert that he worsted many of the masters of those arts.” A troop of sycophants, eager to minister to his vanity, surrounded him; but he escaped from their coils, without being ruined in his fortune or becoming a misanthrope. His fencing-master having said to him, “I can teach you no more, for you are now better at my trade than myself,” he answered, “I promise to give you the house you live in, as my tenant if you can break my guard and hit me: now do your best, for I will be as good as my word.” The fencing-master, being really much superior to him in skill, after a little skirmishing, struck him a palpable hit on the head. Mr. Hale performed his promise, and unhesitatingly gave him the house, “not unwilling at that rate to learn so early to distinguish flattery from truth.” We are told that, amidst all his dissipation, he “still preserved his purity and a great probity of mind.” But at this time, from the company which he kept and the occupations which he followed, he abandoned all notion of being a clergyman, and he resolved to be a soldier. Whilst under this martial ardor, it so happened that the tutor of his college was proceeding to the Low Countries as chaplain to the renowned Lord Vere. Hale, hearing of his destination, was about to accompany him, that he might *trail a pike* under the Prince of Orange

<sup>1</sup> Burnet's Life of Sir Matthew Hale, p. 3.



His relations tried to dissuade him from this enterprise, advising him, if he had contracted a distaste for the Church, to follow the profession of his father. But he answered,—

"Tell not us of issue male,  
Of simple fee and special tale,  
Of feoffments, judgments, bills of sale,  
And leases ;

"Can you discourse of hand-grenadoes  
Of sally-ports and ambuscadoes,  
Of counterescarps, and palizadoes,  
And trenches?"

Thus the pious and reverend Judge might have turned out a "Captain Dalgettie," passing as a mercenary from the service of one military leader to that of another, learning to swear strange oaths and to carouse "potations pottle-deep."

From this fate he was saved by an unjust attempt to deprive him of a part of his patrimonial estate, and the commencement of a law suit against him. Before setting off for the continent, he went to London to give instructions for his defense. His leading counsel was the learned Sergeant Glanville, with whom he had many consultations, and to whom he confided all his plans. This great lawyer succeeded in giving Hale's enthusiasm a new direction; and, pointing out the imminent danger to his religion and morals, as well as to his life, from a military career, and the good he might do as well as the honor and riches he might acquire, by following the profession of the law, at last induced him to exclaim, "*Cedant arma togæ!*" Accordingly, on the 8th day of November, 1629, "Mattheus Hale, filius unicus et hæres Roberti Hale, generosi," was admitted a member of the Honorable Society of Lincoln's Inn, to which he was to become a bright ornament and a munificent benefactor.<sup>1</sup>

The theatre was the temptation he dreaded, and, believing that he could not enjoy this amusement in moderation, he began with making a vow, which he strictly

<sup>1</sup> The custom for law students to be first entered of an Inn of Chancery before being admitted of an Inn of Court, which had prevailed in Lord Coke's time, seems now to have become obsolete, and the Inns of Chancery were entirely abandoned to the attorneys.

kept, "never to see a stage-play again." Writing to his grandchildren seven-and-forty years after, he warns them against the frequenting of stage-plays, "as they are a great consumer of time, and do so take up the mind and phantasy that they render the ordinary and necessary business of life unacceptable and nauseous;" going on to describe his own case, and how he had conquered his passion for this recreation.

However, he continued to keep company with some of his old associates, and ran a serious risk of being again drawn into idle courses; till, at a merry-making, with other young students, at a village near London, one of the company drank so much as to fall down seemingly dead before them. "This did particularly affect Mr. Hale, who thereupon went into another room, and, shutting the door, fell on his knees, and prayed earnestly to God both for his friend, that he might be restored to life again, and that himself might be forgiven for giving such countenance to so much excess; and he vowed to God that he would never again keep company in that manner, or drink a health, while he lived. His friend recovered, and he most religiously observed his vow till his dying day; and, though he was afterwards pressed to drink healths, particularly the King's, which was set up by too many as a distinguished mark of loyalty, and drew many into great excess after his Majesty's happy restoration, he would never dispense with his vow; though he was sometimes roughly treated for this, which some hot and indiscreet men called obstinacy."<sup>1</sup>

<sup>1</sup> Burnet, p. 5. In those times the command we receive at public dinners, "Gentlemen, charge your glasses, BUMPERS!" and which we can sufficiently satisfy by holding up a glass which has long been empty, and joining in the "hip, hip, hurrah!" with "one cheer more," was then rigidly enforced every man who was not under a vow being compelled to fill a bumper to every toast, and by reversing his glass to show it was drained to the bottom. Sir Matthew Hale, in his advice to his grandchildren says, "I will not have you begin or pledge any health, for it is become one of the greatest artifices of drinking and occasion of quarreling, in the kingdom. If you pledge one health, you oblige yourself to pledge another, and a third, and so onwards; and if you pledge as many as will be drank, you must be debauched and drunk. If they will needs know the reason of your refusal, it is a fair answer that your grandfather that brought you up, from whom, under God you have the estate you enjoy or expect, left this in command with you, that you should never begin or pledge a health"—(p. 166). The expedient of putting little or no wine into the glass never seems to have been thought of.

He now abjured all gay company, and spent sixteen hours a day in study, laying down rules for himself, which are still extant, in his hand-writing, and which show that, amidst all the ardor for the acquisition of knowledge, he never forgot his religious duties.<sup>1</sup> From being a noted fop since the latter part of his residence at Oxford, he was remarkable for the sloveliness of his apparel; of which we have a proof from a danger he encountered of being forced into the wars, after his military mania had entirely subsided. Taking a walk one evening for his health on Tower Hill, and meeting a press-gang, he was supposed, from his appearance, to be in a very low condition of life, and, being strong and well built, he was seized as a fit person for the King's service. He would have been speedily shipped off for the West Indies, had it not been that luckily several students of Lincoln's Inn, who knew him, were passing by, and they vouching that he was of gentle degree, notwithstanding the tattered condition of his doublet and hose, he was set at liberty. He thereupon went to buy cloth for a plain new suit; and, making some difficulty as to price, the draper, who had heard much of his abilities and diligence from other customers, said,—“ You shall have it for nothing, if you will promise me £100 when you become Lord Chief Justice of England.” He answered, “ I cannot with a good conscience wear any man's cloth unless I pay for it.” So he satisfied the draper, and carried away the cloth. They afterwards met, and recounted this conversation, in the reign of Charles II., when the law student had risen to be Chief Justice of England, and the draper to be an alderman of London.

Hale continued to keep terms at Lincoln's Inn above seven years, undergoing labor at which, in our degenerate days, the most industrious would tremble; and before he was called to the bar he had professional knowledge which would furnish a good stock in trade for all Westminster Hall. He not only read over and over again all the Year-Books, and Reports, and law treatises in print, but, visiting the Tower of London, and other antiquarian repositories, he went through a course

<sup>1</sup> Burnet, p. 6. These Rules have been greatly too much praised, beyond their spirit of piety, they have little to recommend them.

of records from the earliest times down to his own, and acquired a familiar acquaintance with the state and practice of English jurisprudence during every reign since the foundation of the monarchy. From his reading and researches he composed what he called a *Common-place Book*; but what may, in reality, be considered a CORPUS JURIS, embracing and methodizing all that an English lawyer, on any emergency, could desire to know.<sup>1</sup>

Nor did he, like the great bulk of English jurists, confine himself to our municipal law; he studied jurisprudence liberally and on principle, not as a mere money-making trade. He devoted himself to the study of the Roman law, saying that "a man could never understand law as a science so well as seeking it there;" and he lamented much that it was so little studied in England.<sup>2</sup>

He was likewise resolved not to be a mere lawyer, his maxim being that "no man could be absolutely master in any profession without having some skill in other sciences." Accordingly, he made great proficiency in arithmetic, algebra, and pure mathematics; he attended much to natural philosophy; he became well versed in anatomy; "and in his sickness he used to argue with his doctors about his distempers like one of their own profession."<sup>3</sup>

All these wonders he accomplished by a thrifty application of his time. None of it was wasted in vain amusements; and his repasts were so temperate, that immediately after them he was fit for any mental exertion. Change of study was his relaxation, and he forgot the fatigue of mastering a case in Plowden or Coke when he set to work on "the Torricellian experiment, and the rarification and condensation of the air." He would not haunt frivolous company, and he avoided epistolary correspondence as an unprofitable consumption of time. Yet he loved to converse with those from whom he

<sup>1</sup> We still have it among his other MSS. in Lincoln's Inn, and I have examined it with admiration. Burnet says, "An eminent Judge of the King's Bench borrowed it of him when he was Lord Chief Baron. He unwillingly lent it, because it had been writ by him before he was called to the bar, and had never been thoroughly revised by him since that time. But the Judge having perused it, said, 'that though it was composed by him so early, he did not think any lawyer in England could do it better except he himself would again set about it.'"

<sup>2</sup> Burnet, p. 8.

<sup>3</sup> Ibid.

might derive solid instruction; and he carried on a friendly intercourse with Selden, the illustrious antiquary, and Vaughan, who was one day, as Chief Justice, to acquire such renown by establishing the independence of juries.<sup>1</sup>

His great patron was Noy, afterwards Attorney General, now a patriot, and distinguished only for his deep learning and liberal accomplishments. Hale went by the name of "Young Noy," and might have found a short cut to fortune, when the patriotic lawyer, who had assisted in carrying the PETITION OF RIGHT, became the slave of an arbitrary Court; but our *débutant* preferred his independence to his interest, and refused to be concerned in manufacturing the writ of "ship-money."

Considering his wonderful proficiency, there can be little doubt that, if he had been so inclined, the usual period then prescribed for remaining *in statu pupillari* at the Inns of Court might have been abridged; but he looked for solid fame rather than early profit or notoriety, and he was not called to the bar till he was in the 28th year of his age.

As soon as he had put on the long robe he was in full business; but he was at first chiefly employed as a consulting or chamber counsel. He had neither a natural flow of eloquence, nor boldness of manner, nor a loud voice. He therefore seems long to have been thought unfit for jury trials, or Star Chamber practice; and, even when retained on demurrers and special verdicts before the Judges in Westminster Hall, he was more eager to supply arguments and authorities to his leaders than to gain *éclat* for himself. When obliged to take the lead, he was an enemy to all eloquence or rhetoric in pleading. He said, "If the judge or jury had a right understanding, it signified nothing but a waste of time and loss of words; and if they were weak and easily wrought on, it was a more decent way of corrupting them by bribing their fancies, and biasing their affections: and wondered much at that affectation of the French lawyers in imitating the Roman orators in their pleadings,—for the oratory of the Romans was occasioned by their popular government, and the factions of the city, so that

<sup>1</sup> *Bushell's Case*, 6 St. Tr. 967.

those who intended to excel in the pleading of causes were trained up in the schools of the Rhetors till they became ready and expert in that luscious way of discourse. He therefore pleaded himself always in few words, and home to the point."

He began with the specious but impracticable rule of never pleading except on the right side—which would make the counsel to decide without knowing either facts or law, and would put an end to the administration of justice. "If he saw a cause was unjust, he for a great while would not meddle further in it but to give his advice that *it was so*; if the parties after that would go on, they were to seek another counselor, for he would assist none in acts of injustice. Yet, afterwards, he abated much of the scrupulosity he had about causes that appeared at first view unjust." He continued to plead with the same sincerity which he displayed in the other parts of his life; and he used to say, "It is as great a dishonor as a man is capable of to be hired, for a little money, to speak or to act against his conscience."

Although he was laughed at by many for his peculiarities, his merit was fully appreciated by the discerning; and in the course of a few years he was at the very top of his profession. Still he was unassuming and courteous. "His modesty was beyond all example; for, where some men who never attained to half his knowledge have been puffed up with a high conceit of themselves, and have affected all occasions of raising their own esteem by depreciating other men, he, on the contrary, was the most obliging man that ever practiced. If a young gentleman happened to be retained to argue a point of 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 were room for it;—and one good word of his was

<sup>1</sup> Burnet, p. 40.

<sup>2</sup> Ibid. p. 46.

<sup>3</sup> Burnet pays him a compliment which shows a very lax state of feeling at the bar in those days:—"He abhorred those two common faults of misreciting evidences, quoting precedents or books falsely, or asserting things confidently, by which ignorant juries or weak judges are too often wrought on." The *over-confidential assertion*, I fear, continues; but I have never known more than one counsel threatened with being obliged to "*cite his cases on affidavit*."

of more advantage to a young man than all the favor of the court."

Such was Hale's reputation, that, when the Long Parliament was about to assemble, both parties in the state were eager to enlist him in their ranks.

His conduct at this crisis has been much commended, but I must say that I think it was cowardly and selfish. If he had approved of the government by prerogative, which had prevailed for eleven years since parliament had been discontinued, it was his duty to have allowed himself to be returned for a treasury borough, and gallantly to have defended the levying of benevolences, the legality of ship-money, and the atrocities of the Star Chamber and Court of High Commission. In his heart he was a lover of liberty and of the constitution: therefore he ought to have accepted the offer of a seat made to him by Pym, Hampden and Whitelock, and to have assisted them in correcting abuses, and bringing delinquents to justice. But he declared himself neutral—saying that "he was resolved to follow the example of Pomponius Atticus, who had passed through a time of as much destruction as ever was in any age or state, without the least blemish on his reputation, and free from any considerable danger, being held in great esteem by all parties, and courted and favored by them." He therefore not only would not serve in parliament, and refused all public employment, but avoided the very talking of news; and Burnet pays him this wretched compliment,—“he was sure never to provoke any by censuring or reflecting on their actions, for many that have conversed much with him have told me they never heard him once speak ill of any person.” Calumny, censoriousness and uncharitableness are to be shunned; but the best interests of society require that bad actions should be censured in private society, as well as punished by the magistrate.

It is said that Hale was “assigned counsel for the Earl of Strafford,”—but he never appeared for him in public with Lane and his other counsel, and, if he was at all concerned in the defense, it could only have been in preparing the answer to the articles of impeachment,

<sup>1</sup> Character of Hale by Lord Nottingham: Burnet, p. 57.



or attending a consultation respecting the mode of opposing the bill of attainder. He certainly was one of the counsel for Archbishop Laud. The able argument of Herne, who was leader, to prove that nothing which the most reverend prisoner had said or done amounted to treason by any known law of the kingdom, was prepared by Hale. Sergeant Wilde contending that all the misdemeanors "accumulatively were tantamount to treason," Herne replied (I know not whether prompted by his junior), "I crave your mercy, good Mr. Sergeant; I never understood before this time that two hundred couple of black rabbits will make a black horse."<sup>1</sup>

Hale was, soon after, counsel for Lord Macguire, one of the leaders of the Irish massacre: and argued against Prynne, with great depth of learning, the question "whether an Irish peer was liable to be tried by a jury in England for high treason committed in Ireland?" The prisoner was convicted and executed, but Hale by his defense acquired such reputation that he was employed in every following state prosecution while he remained at the bar.<sup>2</sup>

The cause of the parliament gaining the ascendancy, Hale signed the SOLEMN LEAGUE AND COVENANT, and served as a member of the famous Assembly of Divines at Westminster who framed the standards of the true Presbyterian faith. At no period of his life did he consider any form of church government essential to the enjoyment of the blessings of the Gospel. The system which he had pledged himself to "extirpate," was only what he called "the rampant exclusiveness of a semi-popish hierarchy,"—and though he stoutly denied the necessity for episcopal ordination, and preferred the Presbyterian polity of the reformed churches abroad, he did not object to a modified episcopacy such as had been proposed by Archbishop Usher, and he never countenanced the wild doctrines of the Independents or Anabaptists.

At the conclusion of hostilities, when Oxford alone stood out for the King, and there was great danger, from the fury of some of the parliamentary leaders, that this city might be laid in ashes, Hale was induced, by his

<sup>1</sup> 4 St. Tr. 315, 577, 586.

<sup>2</sup> Ibid. 702.



affection for his ALMA MATER, to serve as one of the commissioners appointed to treat for its reduction. Accordingly, by his intercession, honorable terms were granted to the royal garrison, and the inestimable treasures contained in the public libraries were preserved. Notwithstanding his low-church tendencies, the members of the University always thought well of him for this good turn, and afterwards sent him to parliament as one of their representatives.

He was now most earnestly desirous to see an accommodation brought about between the King and the Parliament. He remained a decided friend to monarchy, although he was of opinion that the excesses of prerogative ought to be effectually restrained,—and he approved of the terms offered to Charles I. in the treaty of Newport, which he afterwards vainly attempted to make the basis of the restoration of Charles II. But Cromwell and the Independents became possessed of the supreme power, which they were resolved to continue in their own hands, under pretense of establishing the reign of the saints on earth. Henceforth the "Blessed Martyr" showed a constancy of dignity which make us forget his past errors. "When brought to the infamous pageantry of a mock trial, Hale offered to plead for him with all the courage that so glorious a cause ought to have inspired; but was not suffered to appear, because the King refusing, as he had good reason, to submit to the court, it was pretended none could be admitted to speak for him."

Hale, having done his duty to his sovereign, thought that it became him as a good citizen to submit to the government which Providence permitted to be established. Accordingly he took *the engagement* "to be true and faithful to the Commonwealth of England, without a King or House of Lords." This was substituted for the old oath of allegiance, and required only subscription without adjuration; but all persons were obliged to submit to it as a qualification to hold any office or employment, or publicly to exercise any profession.<sup>2</sup> Some

<sup>1</sup> Burnet, p. 11. There has been a controversy whether Hale really was counsel for Charles I., but we may safely believe that he was consulted as to the line of defense to be adopted, and that he advised his royal client resolutely to deny the jurisdiction of the Court.

<sup>2</sup> Scobell's Acts, 2d January, 1649-50.

blind idolators of Hale represent that, refusing to conform, he always declared the exiled heir to the crown alone to be entitled to his obedience.<sup>1</sup> We know the contrary, however, from his own mouth. Appearing before the High Court of Justice as counsel for Christopher Love, he was asked by Lord President Bradshaw "Whether he had taken the engagement?" and he answered, "My Lord, I have done it."<sup>2</sup>

Vaughan followed a different course, ever refusing by act or speech to sanction what he called "rebellion" and "usurpation;" hiding his loyalty amidst the fastnesses of Wales,—never taking a fee from the commencement of the troubles till the Restoration,—and when pressed to plead for those who wished to make use of his abilities, saying "It is the duty of an honest man to decline, as far as in him lies, owning jurisdictions that derive their authority from any power but their lawful prince."<sup>3</sup> On principle, however, it can make no difference for this purpose, whether, upon a revolution, the supreme power is vested in a new sovereign with the ancient title of our chief magistrate, or in a PROTECTOR; and the famous statute of Henry VII. makes us safe while we obey a king *de facto*. Instead of emigrating, or withdrawing from public life, it may be the duty of a good citizen, after having strenuously resisted the revolutionary movement, to adhere to a government which he condemns, and to do his utmost to soften its violence.<sup>4</sup>

Of a piece with Hale's supposed refusal to take the engagement to the Commonwealth, is the story of his having on the execution of Charles I. hid behind the wainscoting of his study his "Pleas of the Crown," to prevent their falling into ill hands, exclaiming, "There will be no more occasion for them until the King shall be restored to his right." In truth, the criminal law of the country remained almost entirely unchanged, and Hale was still constantly conversant with its administration at the bar and on the bench—requiring all the stores of his learning on this subject for his assistance.<sup>5</sup>

He had become, beyond competition, the first advo-

<sup>1</sup> Burnet, p. 16.

<sup>2</sup> 5 St. Tr. 211.

<sup>3</sup> 6 Ibid. 129.

<sup>4</sup> So thought Sir Michael Foster (4th Discourse); and so thought Edmund Burke.

<sup>5</sup> See Burnet, p. 513; Williams's Life of Hale, p. 28.

cate in Westminster Hale, and he led with great boldness the defenses of those who were prosecuted by the Protector for political offenses. He particularly distinguished himself on the trial of the Duke of Hamilton, indicted for high treason because he had invaded England as leader of a Scottish army. The pleas were:—

“ 1. That he was born in Scotland and an alien in England, so as not to be triable here. 2. That he had acted in the name of the King of Scotland, and by the commands of the Parliament of that kingdom, which he was bound to obey. 3. That he had capitulated under articles by which his personal safety was expressly stipulated for.”

But, in spite of unanswerable reasoning, all these were overruled by the High Court of Justice, and the Duke was executed as a traitor.<sup>1</sup>

Hale's leaning towards Presbyterianism made him particularly zealous in defending Christopher Love, although Cromwell had declared that “ he would not march into Scotland till he had the head of this apostle of the Covenant.” For six days was the argument kept up on the pretended overt acts of treason charged, which were all shown to have no support by common law, statute, or ordinance. But on the seventh morning, “ without so much as praying for the King, otherwise than that he might propagate the Covenant, he laid his head upon the block with as much courage as the bravest and honestest man could do in the most pious occasion.”<sup>2</sup>

Hale's last appearance at the bar was in Lord Craven's case. Of this we have no account in the “ Reports;” but Burnet, who had conversed with those who were present, says that “ he then pleaded with such force of argument, that the Attorney General threatened him for appearing against the Government; when he answered, ‘ I am pleading in defense of those laws which you declare you will maintain and preserve, and I am doing my duty to my client—so that I am not to be daunted with threatenings.’ ”<sup>3</sup>

It should likewise be related, that Hale not only was ready to render his best professional assistance to poor

<sup>1</sup> 4 St. Tr. 1155.

<sup>2</sup> Burnet, pp. 11, 12.

<sup>3</sup> Clarendon; 5 St. Tr. 268.

royalists without a fee, but "he also relieved them in their necessities, which he did in a way that was no less prudent than charitable, considering the dangers of that time; for he did often deposit considerable sums in the hands of a worthy gentleman of the King's party, who knew their necessities well, and was to distribute his charity according to his own discretion, without either letting them know from whence it came, or giving himself any account to whom he had given it."

In spite of this independent conduct, the leading men of the Commonwealth had great confidence in Hale, and they invited him to an undertaking which might have been of inestimable benefit to the community. Since the reign of Edward I. there had hardly been any change in the laws or in the modes of administering justice in England, and they had become quite unsuited to the altered circumstances of the country. Whitelock, and other enlightened lawyers who were members of the Long Parliament, were eager for legal reform, but they were thwarted by ignorant enthusiasts, who proposed what was impracticable and absurd; and even Oliver himself, when any objection was made to the abolition of existing processes without the substitution of any others for the protection of property or innocence, complained of a combination of lawyers, whom he abused as the "sons of Zeruah." A very reasonable suggestion was now offered,—that such matters might be much better discussed in private, and that they should be referred to a mixed commission of lawyers and others, who were not members of the House of Commons. There were joined with him the fanatical Hugh Peters, and several psalm-singing military officers, who were for destroying our existing system, "root and branch," and substituting for it the Mosaic law as expounded in Leviticus. However, Hale was supported by a majority of enlightened jurists, and with their assistance he drew up the heads of all the great legal improvements which have since been introduced, and of some for which public opinion is not even yet quite prepared—such as a general registration of deeds affecting real property. Ordinances for carrying on legal proceed-

<sup>1</sup> Burnet, p. 12.

ings in the English language, and for abolishing tenure in chivalry, with all its burdensome incidents, were accordingly passed; but these reforms, being interrupted by the sudden dissolution of the Long Parliament, could not be advantageously resumed during the troubles which followed, and upon the Restoration were viewed with dislike, under the notion that they proceeded from puritans and republicans.<sup>1</sup>

Hale was not returned to Barebone's Parliament, and he must have viewed with alternate grief and mirth the absurd proceedings of its members, till, convinced of their own incapacity, they voluntarily surrendered up their authority.

Cromwell was soon after acknowledged as Lord Protector, holding his office for life, with power to name his successor; and the monarchy might be considered as re-established. Hale approved of this arrangement—although he would have been still better pleased with the recall of the ancient line under conditions to secure public freedom.

At this crisis came an offer of the office of a Judge in the Court of Common Pleas to Hale, who a few months before had been raised to the degree of a Sergeant, the writ for his elevation running in the names of "the Keepers of the Liberties of the people of England." I suspect very much that, for the purpose of conforming as much as possible to Restoration ideas and language, the motives and reasonings on which this very laudable judicial appointment was proposed and accepted, have been a good deal misrepresented. On the one hand, it has been said that Cromwell, observing how stoutly Hale defended all state offenders, had no object but to deprive those whom he wished to prosecute of an able advocate; whereas I see no reason to doubt that the Protector proceeded on the principle "*detur digniori*," selecting for his good qualities the most learned, able and honorable man to be found in the profession of the law. On the other hand, the "scruples" of the Sergeant must have

<sup>1</sup> We have not yet done justice to the moderate and wise men who appeared in England during the Commonwealth. Their prudence contrasts very strikingly with the recklessness which has marked the proceedings of revolutionary leaders in all other countries.

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been considerably exaggerated: "Mr. Hale," says Burnet, "saw well enough the snare laid for him; and though he did not much consider the prejudice it would be to himself to exchange the easy and safer profits he had by his practice for a Judge's place, which he was required to accept of, yet he did deliberate more on the lawfulness of taking a commission from usurpers; but having considered well of this, he came to be of opinion *that it being absolutely necessary to have justice and property kept up at all times, it was no sin to take a commission from usurpers, if he made no declaration of his acknowledging their authority—WHICH HE NEVER DID.*" Now it is quite certain that Hale had previously acknowledged the Commonwealth, "WITHOUT KING OR LORDS," and that he did so still more solemnly when he was sworn into office, and when he made the declaration of fidelity on taking his seat as a member of the House of Commons. If all are "usurpers" who hold supreme power without hereditary right, King William III., Queen Anne, and King George I. are to be inscribed in this class, although Hale would not have hesitated to obey them as lawful sovereigns. I believe that he at this time regarded Cromwell in the same light—for we must judge by his principles and his actions, and not by speeches afterwards conveniently put into his mouth. Some pretend that, to overcome the hesitation and reluctance which Cromwell now encountered, he made the famous declaration, "Well! if I cannot rule by red gowns, I will rule by red coats." But the Lord Chief Justice of the King's Bench, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, with several of the Puisne Judges, had expressed their willingness, on the King's execution, to continue in their offices; the vacancies of those who had resigned had been immediately filled up from among the Sergeants; and there were plenty of candidates for the bench in Westminster Hall, to drive away all apprehension of the introduction of martial law for lack of ermined Judges.

Hale's promotion seems to have taken place in the ordinary fashion, and for several years he regularly performed all the duties of his office, sitting in the Court of

Common Pleas in term time—going the circuits twice a year, and, without any misgivings, trying criminals at the assize towns as well as at the Old Bailey in London. Some time afterwards he abstained from trying prisoners—but this was after he had quarreled with the Government respecting the administration of the criminal law—and both sides were equally willing that he should confine himself to the decision of civil causes:—

“A trial was brought before him at Lincoln, concerning the murder of one of the townsmen who had been of the King's party, and was killed by a soldier of the garrison there; he was in the fields with a fowling-piece on his shoulder, which the soldier seeing, he came to him and said, ‘It was contrary to an order the Protector had made, that *none who had been of the King's party should carry arms,*’ and so he would have forced it from him; but as the other did not regard the order, so being stronger than the soldier, he threw him down, and having beat him, he left him: the soldier went into the town, and told one of his fellow-soldiers how he had been used, and got him to go with him and lie in wait for the man, that he might be revenged on him; they both watched his coming to town, and one of them went to him to demand his gun, which he refusing, the soldier struck at him, and, as they were struggling, the other came behind and ran his sword into his body, of which he presently died. It was in the time of the assizes, so they were both tried; against the one there was no evidence of forethought felony, so he was only found guilty of manslaughter, and burned in the hand; but the other was found guilty of murder: and though Colonel Whaley, that commanded the garrison, came into the court and urged that the man was killed only for disobeying the Protector's orders, and that the soldier was but doing his duty, yet the Judge regarded both his reasonings and his threatenings very little, and therefore he not only gave sentence against him, but ordered the execution to be so suddenly done, that it might not be possible to get a reprieve, which he believed would have been obtained if there had been time enough granted for it.”

I must say that this haste was a very unjustifiable in-

<sup>1</sup> Burnet, p. 13, 14.



terference with the prerogative of mercy lodged, according to the constitution which he had sworn to respect, in the Lord Protector.

On another occasion he defied his Highness, not only with spirit, but with perfect propriety. A government prosecution coming on for trial at the assizes, Hale received information that the jury had not been fairly named. To get at the truth he questioned the sheriff, who said, "I refer all such matters to the under-sheriff." The under-sheriff acknowledged that the jury had been returned by Cromwell. The Judge thereupon cited the statute whereby all juries ought to be returned "by the sheriff or his lawful officer;" and, this not being done, he dismissed the jury, and would not try the cause. When he came back to London the Protector, in a passion, severely censured him, saying, "You are not fit to be a Judge." The only answer was, "Sir, what your Highness has said is indeed very true."

His last disgust as a Criminal Judge was while he was trying some Anabaptists, who had rushed into a church and disturbed a congregation assembled to receive the sacrament, according to the new rubric, after the Genevese fashion. He intended to treat these religionists with severity, though they were much favored by the ruling powers; and he said, "It is intolerable for men who pretend so highly to liberty of conscience to go and disturb others—especially those who have the encouragement of the law on their side." The words were hardly out of his mouth when a *nolle prosequi* was produced, which put a stop to the proceedings before him—upon which he declared that "he would meddle no more with the trials on the Crown side."

Yet, when Penruddock was about to be arraigned before a special commission at Exeter, for high treason in levying war against the Lord Protector,<sup>1</sup> a Government messenger came to Hale's house at Alderley, where he was then enjoying his vacation, and summoned him to attend. He refused to go, exclaiming, "The four terms and two circuits are enough, and the little interval that is between is little enough for my private affairs." Burnet observes that "he thought it was not necessary to

<sup>1</sup> Burnet, 15.

5 St. Tr. 767.



speaking more clearly; but if he had been urged to it, he would not have been afraid of doing it."<sup>1</sup> We must suppose, therefore, that by a silent understanding, with which both parties were well pleased, for their mutual convenience, Hale henceforth abstained from acting as a Criminal Judge under Cromwell; and that he is free from the absurdity of supposing that he might with a good conscience settle the right to an estate of £20,000 a year,—but that he would be impiously acting under an usurper, if he tried a petty larceny, or the obligation on a parish to repair a highway. His conduct would have been more manly if he had continued fearlessly to perform the whole of his duty as an English Judge.

We are now to see Hale as a legislator. The Protector, who was the first to establish an incorporating union between all parts of what we now call THE UNITED KINGDOM, summoned representatives from England, Scotland, and Ireland. He was likewise the first to reform the House of Commons, for he disfranchised the rotten boroughs, and directed that representation should be according to the population and wealth of the constituent bodies. Five members were to be returned for Gloucestershire; and the inhabitants, proud of their countryman, Judge Hale, expressed a strong wish that he would allow himself to be put up as a candidate. He declared that he would not solicit votes, and that he would be at no expense, but that if he were returned he would serve. There being no House of Lords for the Common Law Judges to attend, it was considered that there was no objection to their sitting in the House of Commons. Hale attended at the hustings on the day of election, and was at the head of the poll. We are told that "the Earl of Berkeley defrayed the charges of his entertainment, and girt him with his own sword;" but no account has been left us of his speech, or of the chairing.

When the Parliament met, Hale signed the following test, devised to exclude all those who were disposed to inquire into the validity of the INSTRUMENT OF GOVERNMENT:—

"I do hereby promise and engage to be true and faith-

<sup>1</sup> Burnet, 15.

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ful to the Lord Protector and the Commonwealth of England, Scotland, and Ireland; and shall not propose or give my consent to alter the government as it is settled in one person and a parliament.

No plans of Chartists, Communists, or Socialists in our day can be more extravagant than those then brought forward with perfect sincerity and intense energy by "men resolved to pull down a standing ministry, the law and property in England, and all the ancient rules of this government, and to set up an indigested enthusiastical scheme, which they called the Kingdom of Christ or of his saints, many of them being really in expectation that one day or another Christ would come down and sit among them; and at least they thought to begin the glorious THOUSAND YEARS mentioned in the Revelation." These Hale, from his biblical learning, and his reputation for piety, combated with much success, seeking to soothe them rather than to treat them with abuse or ridicule. "Among the other extravagant motions made this parliament, one was 'to destroy all the Records in the Tower, and to settle the nation on a new foundation.' So he took this province to himself, to show the madness of this proposition, the injustice of it, and the mischiefs that would follow on it; and did it with such clearness and strength of reason, as not only satisfied all sober persons (for it may be supposed that was soon done), but stopped even the mouths of the frantic people themselves."

Cromwell was now aiming at the crown, with its ancient prerogatives, which he would have allowed to be subjected to new checks; and most of the eminent lawyers who then flourished were of opinion that it would be for the public good that he should be gratified, as he must afterwards rule according to known law. This opinion, it is pretty clear, was entertained by Hale, notwithstanding all that was afterwards published of his horror of "usurpers." He could not at once move that OLIVER I. should be proclaimed King, but he proposed "that the legislative authority should be affirmed to be in the parliament of the people of England, and a single person qualified with such instructions as that asserbly

<sup>1</sup> Burnet, 15, 16.

should authorize, in the manner suggested by the republicans. To render this palatable to the executive magistrate, he recommended that the military power (which had been so peremptorily refused to Charles I.) should for the present be unequivocally given to the Protector; and that to avoid the perpetuity of parliament, and other exorbitancies in the claims of supremacy, that officer should be allowed such a co-ordination as might serve for a check in these points."<sup>1</sup>

The republican spirit was yet much too strong to allow the title of King to be endured in the House of Commons,—much less in the army; and there appeared a disposition rather to strip Cromwell of the power already conferred upon him, than to enlarge it;—so that when this Parliament had sat little more than three months, and before it had passed a single act, it was abruptly dissolved.

Hale confined himself to the discharge of his official duties during the remainder of Oliver's Protectorate. When a new Parliament was called in the following year, he declined being returned as a member of the House of Commons,—perhaps from a hint that the House of Lords was likely to be restored, and that the attendance of the Judges would be required there. In this way he was excluded from the conferences in which the crown was formally tendered to Cromwell. Had he assisted at them, I make no doubt that he would have joined with Lord Commissioner Whitelock and the other great lawyers, who pressed his Highness to accept the offer, that the constitutional monarchy might be re-established under a new dynasty. At this time, profound internal tranquillity prevailed; and the name of England was more respected among foreign nations than it had ever been since the reign of Henry V. Hale was grieved by the ascendancy of the sect of the Independents; but he was comforted by the humiliation of the high-Church party; and as a pious man he must have rejoiced to witness the deep sense of religion which prevailed among our ranks, except a few reckless Cavaliers, whose influence seemed for ever extinguished, although they were ere long to be in possession of the whole power of

<sup>1</sup> Godwin, iv. 118, 119.

the state, and their manners were to be copied by the great bulk of the nation.

When Oliver had approached so near the old mode of government as to have a House of Lords which was to be hereditary, he did not name any Common Law Judges as members of it, but he caused them all to be summoned as assessors in the usual form; and at the opening of the session the only innovation was, that instead of placing them on the woolsack in the center of the House, he ranged them, decked in their scarlet robes, on the right hand of the throne, in the seats which had been occupied by the bishops. Here Hale attended, day by day, sometimes being employed to carry messages to the lower House,—till the Protector, finding this experiment a failure, dissolved Parliament in as great a fury as ever Stuart had done, and resolved henceforth to rule by his prerogative, or rather by his army. Notwithstanding all the violence of the major-generals, and the arbitrary sentences of the high courts of justice which assembled to punish political offenses, Hale steadily adhered to him till his death, expressing no scruples as to the lawfulness of his authority.

But although Richard was peaceably proclaimed, and addresses, pledging life and fortune in his cause, poured in upon him from all quarters, it was evident to every one that he was unequal to the task which had devolved upon him, and that his government could not stand. According to royal fashion, it was supposed that the commissions of the judges all expired on the death of the Lord Protector, who had granted them. A new commission was offered to Hale, and he was importuned to accept it—but he answered, "I can act no longer under such authority." His scruples were probably strengthened by observing that the army was much discontented, that several military leaders aspired to the Protectorship, and that plots began to be formed for the restoration of the exiled royal family. He even refused to attend Oliver's funeral, or to wear a suit of mourning sent to him, although the like present was accepted by all others who had been in public employment under the late Protector.

Burnet says that "he lived a private man till the Par-

liament met that called home the King." But this is not correct; for, although he did not resume his practice at the bar, he was returned to Richard's House of Commons as representative for the University of Oxford, and, having again abjured royal authority, he sat regularly in that assembly till it was dissolved.

As he had never been a member of the Long Parliament, and did not belong to the restored Rump, we know nothing of his proceeding during the troublous period which preceded the meeting of the Convention Parliament. Keeping aloof from the Council of State, taking no part in the cabals of Wallingford House, the probability is, that he retired to Alderley, and that he lived quietly there till the elections were about to take place for the Convention Parliament.

There was then a contest between the University of Oxford and his native county,—which of them should have the honor of returning him to the House of Commons.

Thus wrote the Vice Chancellor:—

*"For the Honorable Justice Hale, at his house at Alderley, in Gloucestershire. These :*

"S<sup>r</sup>,—There hath been and still is a great readiness in this place to choose you for one of their burgesses, to sit in the next parliament. But a report (as we suppose without any just ground) hath been spread abroad here within these few days, that you will not accept of our choice. This hath somewhat discomposed and distracted the minds of some here who are otherwise cordially for you. Wherefore, to settle men's thoughts, and to prevent the inconveniences which may also befall us, 'tis humbly desired that you would be pleased positively to express your willingness, if chosen, to accept thereof. Herein you shall (as things are at present with us) greatly promote the interest of this place, and much quiet and oblige many here who honor you; and among them,

Your most humble servant,

"JOHN CONANT, Vice Chan.

"Oxford, April, 2, 1660."

Hale's answer shows a strong desire to be *seated*, but at a considerable apprehension of *falling between two stools*:—

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Vice Chan.

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"Sir,—I have received your letter; and, first of all, I must continue my acknowledgments of the great respects of the University to me in thinking me worthy of such a trust as is communicated by your letter. Touching my resolution in general for serving in this ensuing parliament, this is all I can say, the expectation of the success of this parliament is great, and as I think and foresee that the businesses that are like to be transacted therein are like to be of great concernment to this nation, and therefore of great difficulty and intricacy; and, therefore I may well think any man (as I am) conscious of his own infirmity may desire in his own particular to be excused; yet, inasmuch as there seem to be no engagements to be prefixt to entangle the conscience or to prevent the liberty of those that are chosen to act according to it, I shall not refuse, if I am freely chosen, to serve in it; although I must deal plainly with you, my own particular engagements do much persuade the contrary. But my difficulty at this present rests in this: I have not at all, till this time, heard anything as from the University, touching their resolution; and that is my great strait, that if I shall decline the service of the county in case they fix upon me, I fear I shall be unjust, much disappoint and discontent many; and if I shall decline the choice of the University, I shall seem ungrateful, especially when my last election seems to make me their debtor for ever in the present service; and I know not how to gratify both without a great discourtesy to one in my after relinquishment of either; and the expedient of deferring your choice till the success here were seen, would be too much below that weighty and honorable body of the University, and arrogance in me to expect it, and the choice here falls not before the 18th of this month, which may give too much advantage, it may be, to others' importunities, and leave you too little room after your own choice. The sum is, if I am chosen here, I shall look upon myself as equally concerned for the good of the University as if chosen there. If I am chosen there I shall serve, so it may be, without discontent to my native county. If chosen nowhere, I shall yet endeavor in my private station to serve both; consult the

honor and service of the University, and follow that which is most conducible and suitable to it; and assure yourself that whether I am chosen there or here or nowhere, I am

"Yours and the University's most faithful

"Friend and servant,

"M. HALE.

"Perchance, if the election be not before Tuesday, I may, by conference with some, learn more of the sense and resolution of the country here, and send you notice of it to Oxford.

"Alderley, April 6, 1660."

Accordingly, he withdrew his pretensions to be member for the University, and, after a contest which lasted four days, he was again returned for his native county—being, without solicitation or cost, at the head of the poll; although the *third man*, who was thrown out, "had spent a thousand pounds to procure voices,—a great sum to be employed that way in those days."<sup>1</sup>

Hale had not entered into any communication with Monk or with Hyde, of whose abilities and measures he had but a poor opinion; and he thought that the Restoration, which he now sincerely desired, was to be the act of the Almighty, rather than to be brought about by human means. Thus he wrote, in a paper still extant, entitled "OBSERVATIONS CONCERNING THE PRESENT PROVINCES:"—

"There hath been a most visible concurrence of Divine Providence and Wisdom which seems visibly distinct from the very instrumentality of the immediate actors:—1. Infatuating those that were, for their natural parts, not inferior to any that have been, with less wisdom, more successful. 2. Advancing the success of the advices of men of no great eminency of judgment. 3. Carrying the advices and activities of men beyond their own design to the producing of that they intended not, *as* the setting for Monk to counterwork the designs of Lambert and Vane. 4. In permitting a spirit of jealousy and emulation to arise between men whose common interest lay in the same bottom, whereby they were divided and broken. 5. By mingling casual conjectures in such

<sup>1</sup> Burnet, p. 16.



order and method, that they were each subservient one to another, and to the common cause of restoring the King; the particulars were infinite and eminent, and such as could not fall under counsel or contrivance."

Yet he remembered the maxim, "*Aide toi, le Ciel t'aidera*," and he resolved, with Divine assistance, to exert himself to the utmost, that the coming settlement of the nation should be conducted with a respect both for civil and religious liberty. He was of opinion that a favorable opportunity presented itself for regulating the prerogatives of the Crown, which had been so much abused by the Stuart princes; and he was resolved that the promises made to the Presbyterians by Charles in the Declaration from Breda, and by Hyde in his letters to the leaders of that party, should be carried into full effect under the sanction of an act of parliament. Although, in the fervor of his Presbyterian zeal, he had formally taken the COVENANT, and engaged to extirpate prelacy, he was now rather inclined to that system of church government in a modified form—but he still denied that it existed *jure divino*; and, thinking that it was left by the Divine Founder of the Church to have under him, as its great heavenly head, either one order of Christian ministers, or several, as according to different circumstances might be most for edification, he was anxious to secure the protection of those who adhered to his earlier views, and still thought that prelacy and popery were equally obnoxious. In accomplishing this object he anticipated no serious difficulty, for Monk, the Earl of Manchester, and almost all those who were taking an active part in recalling the King, were Presbyterians, and, in the midst of the loyal frenzy which now raged through the land, the majority of those elected members of the House of Commons were Presbyterians. He was confirmed in this notion by observing that, when the Convention Parliament met, the Liturgy of the Church of England was not allowed to be used, the Speaker still reading a litany prepared for the occasion, and lay members joining in extempore prayer.'

The most urgent matter was to consider the conditions on which the King should be recalled. Charles would

<sup>1</sup> Commons' Journals; 4 Parl. Deb. 141.



have been ready to agree to any that might be asked, short of giving up the power of the sword, or the "militia," as it was called,—for which his father had always struggled in his negotiations with the Long Parliament. However, when his letter to the House of Commons was delivered by Sir John Grenville, it excited such a tempest of loyalty that there was a general wish to invite him over without any conditions whatever, and to surrender the rights and liberties of the people into his hands.

To the immortal honor of Hale, he was not carried away by this enthusiastic feeling, and he firmly stood up to perform a duty which he believed he owed to the Crown as well as to the community; for he had the sagacity to foresee that the dynasty would be endangered if the ear of the restored Sovereign might be poisoned by the flattery of the high prerogative lawyers, which had proved the ruin of his father.

The Parliamentary History takes no notice of this important debate,—but we have the following sketch of it by Burnet:—

"Hale, afterwards the famous Chief Justice, moved that a committee might be appointed to look into the propositions that had been made, and the concessions that had been offered, by the late King during the war, particularly at the treaty of Newport, that from thence they might digest such propositions as they should think fit to be sent over to the King. This was seconded, but I do not remember by whom. It was foreseen that such a motion might be set on foot: so Monk was instructed how to answer it, whensoever it should be proposed. He told the House that there was yet, beyond all men's hope, an universal quiet all over the nation; but there were many incendiaries still on the watch, trying where they could first raise the flame. He said he had such copious information sent him of these things, that it was not fit they should be generally known: he could not answer for the peace either of the nation or of the army, if any delay was put to the sending for the King: what need was there of sending propositions to him? Might they not as well prepare them, and offer them to him when he should come over? He was to bring neither

army nor treasure with him, either to fright or to corrupt them. So he moved that they would immediately send commissioners to bring over the King; and said that he must lay the blame of all the blood or mischief that might follow, on the heads of those who should still insist on any motion that might delay the present settlement of the nation. This was echoed with such a shout over the House, that the motion was no more insisted on. To the King's coming in without conditions, may be well imputed all the errors of his reign."

Hale does not seem to have been afraid of giving offense to the Court by this effort. Conscious of his high qualifications as a Judge, and reflecting on the loyal part he had acted since the death of Oliver, he anticipated that some considerable offer would be made to him. Yet he had not at all set his heart on preferment, and he would have been well pleased to pass the remainder of his days in a private station. Thus he modestly communed with himself, while the King was journeying from Breda:—

"Though we are but inconsiderable flies that sit upon the chariot wheel, we attribute all the dust that is made to *our* weight and contribution; and thereupon fancy up ourselves into an opinion of our merit, and of a most indisputable attendance of great honor and place and fame attending it; when, it may be, there is no such desert as is supposed; or if there be, yet not such observation of it by others; or if there be, yet the many rivals that attend such a change may disappoint me of it; or if it do not, yet the preferment that befalls me is not such as I expected; or if it be, yet it may be I am not suitable and fit for it; or if I am, yet I little consider the trouble and dangers and difficulty that attend it. Possibly it will make me obnoxious to much censure, as if all my former endeavors were basely ordered to my own ends and advantage; or, it may be, it may subject me to the envy and emulation of others, which may in time undermine me; or if there be no such occasion of danger from that ground, yet the state of public affairs has various faces and occasions that may make it necessary to gratify other persons or factions or interests with my removal;

<sup>1</sup> Own Times, i. 122.

or, if it do not, yet the engagement to a place of honor and profit, and the fear of the shame or loss of parting with it, may enslave me to those drudgeries, or, at least, engage me in them that now I look upon as unworthy; or if it do not, yet the very many great difficulties that attend places of honor or profit upon a change, may make my walk in them full of brakes and stones that will perplex and scratch me, if not wholly bemire and entangle me: or if none of all these things befall me, yet great places may rob me of serenity of mind, or withdraw my heart from God by the splendor of the world and multiplicity of secular concerns; or, at least, they most certainly will rob me of my quiet rest, liberty, and the freedom of my opportunities to serve God with entireness and uninterruptedness."<sup>1</sup>

<sup>1</sup> The original manuscript of which this is an extract is very long and tedious. However, he gives in it the following lively contrast between the Roundheads and Cavaliers:—"There was in many of the suppressed party much hypocrisy and dissimulation, much violence and oppression: but there was in them sobriety in their conversation, pretense and profession of strictness of life, prayers in their families, observation of the Sabbath. These were commendable in their use, though it may be they were in order to honor and to disguise bad ends and actions. And I pray God it fall not out with us upon our change that the detestation of their persons and foul actions may transport us to a *contrary* practice of that which was in *itself* commendable, lest we grow loose in religion and good duties, and in the observation of the Sabbath; and lest we despise strictness of life because abused by *them* to base and hypocritical ends." This is a wonderful anticipation of the flood of profaneness and immorality which speedily overran the land. It is rather amusing to find Hale already so decidedly considering himself to belong to the royalists, forgetting how lately he had taken the "Covenant," and the "Engagement to the Commonwealth." He continued, by the true Church-and-King men, to be considered all his life little better than a "fanatic and a republican."—See Roger North's writings, wherever Hale's name is mentioned.





## CHAPTER XVII.

CONTINUATION OF THE LIFE OF SIR MATTHEW HALE  
TILL HE RESIGNED THE OFFICE OF CHIEF  
JUSTICE OF THE KING'S BENCH.

ON the memorable 29th of May, Hale, accompanying Sir Harbottle Grimston, the Speaker, to the Banqueting-House at Whitehall, did obeisance to Charles II., seated on the throne; and had a gracious reception, notwithstanding his motion about "conditions." Three days after, he was again called to the degree of Sergeant-at-law, under a royal writ, his former *coifing* by Cromwell being deemed invalid.<sup>1</sup> But, although always respectful to the Sovereign, he never displayed the slightest anxiety about Court favor, and he continued to do his duty in the House of Commons firmly and consistently.

When the question was debated "whether the Presbyterian Church government, or the Church of England formerly established, should reign?" he expressed respect for the Thirty-nine Articles, but thought they ought not to be put on a footing with the Old and New Testament, and resisted the proposal that subscription to them should be a necessary qualification for holding office in Church or State.<sup>2</sup>

Being specially appointed by the House to prepare and bring in the Indemnity Bill for political offenses during the troubles, he was desirous of confining the exceptions to those who had sat in judgment on the King. In his Diary he had written—

<sup>1</sup> Dugd. Or. Jur. 115.

<sup>2</sup> 4 Parl. Hist. 79. This seems to have been a very tumultuous debate. "The Committee sat an hour in the dark before candles were suffered to be brought in, and then they were twice blown out; but the third time they were preserved, though with great disorder."

"The wise man tells us, 'a man may be *over-just*. As equity may mitigate the security of justice in particular cases, so may and must prudence some public and universal concernments; otherwise, it may become an act of frenzy, not of justice. I speak not of that unexampled villainy against the King's life; wherein, nevertheless, though the punishment must be exemplary, perchance the present necessity may restrain the universality of the punishment, proportionable to the crime in reference to particulars."

Accordingly he exerted himself to save Vane and Lambert, who, in fact, had done little more than himself by acting under the authority of the Commonwealth; and although he was ultimately defeated in this laudable attempt, these two individuals having rendered themselves so very obnoxious to the royalists, he carried the Bill of Indemnity notwithstanding the factious opposition of a considerable number of over-zealous members, who wished, out of revenge, to "smite the fanatics hip and thigh."

On the motion for an address to the King, praying that he would marry a Protestant, Hale said "it was not reasonable to confine his Majesty,—urging how much the peace and good of the nation was bound up in him."<sup>4</sup>

Parliament was adjourned to November to make way for the trial of the Regicides before a special commission at the Old Bailey; and this last speech gave such satisfaction, that Hale was named one of the commissioners.<sup>5</sup> He attended regularly, and concurred in the sentences, without becoming the subject of obloquy as Shaftesbury and Monk did, who sat by his side, and were eager for a conviction, although each of them had actually served in the parliamentary army and had levied open war against the late King. Had Hale sat on the trial of Vane, he would have been liable to severe censure—but he never was called judicially to decide the question on which his own legal guilt or innocence de-

<sup>4</sup> Parl. Hist. 80, 101, 102, 119.

<sup>5</sup> *Ibid.* 119. It is remarkable that wherever he is mentioned in this parliament he is called "Sergeant Hales." In his own time an *r* was very often added to his name.

<sup>6</sup> 5 St. Tr. 986.

ended, viz: "whether a person who obeys a republican government, during the exile of the lawful sovereign, is thereby guilty of high treason."<sup>1</sup>

It was now generally expected that he would be appointed to some high judicial post. He himself—speculating upon the subject, and persuading himself that he wished to avoid promotion, but pretty plainly showing, I think, that he would have been mortified if the offer had not been made to him—wrote in his PRIVATE MEDITATIONS:—

*"Reasons why I desire to be spared from any place of public employment.*

"I. Because the smallness of my estate, the greatness of my charge, and some debts, make me unable to bear it with that decency which becomes it, unless I should ruin myself and family. My estate not above £500 per annum, six children unprovided for, and a debt of £1,000 lying upon me. And besides this, of all things it is most unseemly for a judge to be necessitous. Private condition makes that easier to be borne and less to be observed, which a public employment makes poor and ridiculous. And besides this, it will necessarily lift up the minds of my children above their fortunes, which will be my grief and their ruin.

"II. I am not able so well to endure travel and pains as formerly. My present constitution of body requires now some ease and relaxation.

"III. I have formerly served in public employment under a new, odious interest, which by them that understood not, or observe not, or will willingly, upon their own passions and interest, mistake my reasons for it, may be objected even in my very practice of judicature, which is fit to be preserved without the least blemish or disrepute in the person that exerciseth it.

"IV. The present conjuncture and settlement of affairs, especially relating to administration of justice, is such; the various interests, animosities and questions, so many; the present rule so uncertain, and the difficulties so great, that a man cannot, without loss of himself

<sup>1</sup> This trial came on in the Court of King's Bench, 2nd June, 1662, when Hale was Chief Baron of the Exchequer. 6 St. Tr. 119.

or reputation, or great disobligations, exercise the employment of a judge, whose carriage will be strictly observed, easily misrepresented, and severely censured according to variety of interests. And I have still observed, that almost in all times, especially upon changes, judges have been ever exposed to the calumny and petulance of every discontented or busy spirit.

“ V. I have two infirmities that make me unfit for that employment:—1st. An aversion to the pomp and grandeur necessarily incident to that employment. 2nd. Too much pity, clemency and tenderness in cases of life.

“ VI. [The MS. is here torn and illegible.]

“ VII. I shall lose the weight of my integrity and honesty by accepting a place of honor or profit, as if all my former counsels and appearances were but a design to raise myself.

“ VIII. The very engagement in a public employment carries a prejudice to whatsoever shall be said or done to the advantage of that party that raised a man, as if it were the service due to his promotion; and so, though the thing be never so just, it shall carry no weight but a suspicion of design or partiality.

“ IX. I am sure, in the condition of a private man declining preferment, my weight will be three to one over what it will be in a place of judicature.

“ X. I am able in my present station to serve my King and country, my friend, myself and family, by my advice and counsel.

“ XI. I have of late declined the study of the law, and principally applied myself to other studies, now more easy, grateful and seasonable to me.<sup>1</sup>

“ XII. I have had the perusal of most of the considerable titles and questions of law that are now on foot in England, or that are likely to grow into controversy within a short time; and it is not fit for me, that am pre-engaged in opinion, to have these cases fall under my judgment as a judge.<sup>2</sup>

“ If it be objected that it will look as a sign of the

<sup>1</sup> It was barely two years since he had ceased to be a Judge.

<sup>2</sup> This scruple I do not at all understand, for he had not returned to private practice since the death of Oliver, and it was above seven years since

displeasure of the King against me, or of a disserviceable mind in me towards the King, if I should either be passed over or decline a preferment in this kind, I answer that neither can reasonably be supposed,—

"1. In respect of my present condition as serving in the House of Commons, which excuseth the supposition of either.

"2. His Majesty's good opinion of my fidelity may be easily manifested, and my fidelity and service to him will be sufficiently testified by my carriage and professions.

"But if, after all this, there must be a necessity of undertaking an employment, I desire,—

"1. It may be in such a court and way as may be most suitable to my course of studies and education.

"2. That it may be the lowest place that may be, that I may avoid envy. One of his Majesty's counsel in ordinary, or, at most, the place of a puisne judge in the Common Pleas, would suit me best."

It is doubtful whether, notwithstanding his great judicial reputation, he might not have been allowed to remain a member of the House of Commons, if it had not just then turned out to be exceedingly convenient to the Government to remove him from that assembly.

Lord Clarendon, after all his fair promises to the Presbyterians, had resolved that the Church of England should be restored to the ascendancy it had enjoyed under Archbishop Laud; but, as yet, the bishops were excluded from sitting in the House of Lords, by the act to which Charles I. had duly given his assent before the commencement of the civil war; and it was essentially necessary to humor the Presbyterians, who could still command a majority in the Lower House. For this reason, Baxter, Calamy, and other divines of that persuasion, had been appointed King's chaplains, and Charles had declared in favor of a mitigated episcopacy,—all tests being removed which could not be taken by the

he left the bar. In the early part of his career he had practiced very extensively as a conveyancer, particularly in framing settlements for noble families.—Roger North's *Life of Lord Keeper Guilford*, i. 132.

<sup>1</sup> This was pretty much Archbishop Usher's plan, according to which, although not exactly "*Princeps inter Pares*," the bishop was not to act without the advice of his presbyters; he was to preach every Sunday; and, eschewing secular ambition, he was to devote himself to his spiritual duties.—*4 Parl. Hist.* 152



more rigid Presbyterians, and a comprehensive church establishment being arranged which would equally include Presbyterians and Episcopalians. To consummate this happy union, it was proposed that a Synod should be called, composed equally of the two denominations of Christians. The Presbyterians thought they discovered that the Chancellor, intending to practice a pious fraud upon them, merely wished to amuse them till the Convention Parliament should be dissolved; expecting that, from the growing dislike to whatever savored of Puritanism, after a general election they would be at his mercy. They therefore insisted that their rights should be secured by a bill to be passed by the present parliament, and they carried a motion in the House of Commons that "Sergeant Hale (in whom they placed entire confidence) should prepare and bring in the same." Accordingly, acting with his usual good faith, he laid on the table of the House a bill which embodied the Articles on this subject contained in the Declaration from Breda. Had he remained a member of the House, there can be little doubt that by his exertions it would have passed the House of Commons,—so that it must have been defeated by a vote of the House of Lords, or by the veto of the Crown. In either of these cases, not only would there have been a clamor about broken faith, but the public tranquillity would have been endangered, and the King might again have "gone upon his travels."

Fortunately, at this time the office of Chief Baron of the Court of Exchequer was vacant, by the promotion of Sir Orlando Bridgman to be Chief Justice of the Court of Common Pleas. Clarendon proposed, and the King readily consented that the author of the "Comprehension Bill" should be the new Chief Baron;—for the old doctrine was now clearly recognized and acted upon, that the Common Law Judges, who acted as assessors to the House of Lords, were disqualified to sit in the House of Commons.

After a little decent resistance, Hale accepted the honor thrust upon him. At his inauguration, of course not a word was said about the "Comprehension Bill;" but the Chancellor expressed his respect for the author of it in a very singular manner, telling him, among other

things, "That if the King could have found out an honest and fitter man for the employment of presiding in the Court of Exchequer, he would not have advanced him to it; and that he had, therefore, preferred him because he knew none that deserved it so well."<sup>1</sup>

This manœuvre succeeded. The second reading of the "Comprehension Bill" came on a few days after, when, in Hale's absence, it was furiously pulled to pieces by Morrice, the Secretary of State, a creature of Clarendon, and was rejected by a majority of 183 to 157.<sup>2</sup> A dissolution soon after took place, and in the next parliament Clarendon was able, without difficulty, not only to restore the bishops to the House of Lords, but to eject 2,000 Presbyterian ministers from livings in the Church of which they were in possession, and to pass the "Act against Occasional Conformity" and the "Five Mile Act," by which the Presbyterians were entirely expelled from the House of Commons, and were subjected to the most grievous prosecution.

Hale, on his promotion, incurred some ridicule by attaching importance to the harmless ceremony of being knighted, instead of quietly submitting to it. From an excess of humility, he desired to avoid what was then considered a distinction, "and therefore, for a considerable time, declined all opportunities of waiting on the King,—which the Lord Chancellor observing, sent for him upon business one day when the King was at his house, and told his Majesty 'there was his modest Chief Baron,'—upon which he was unexpectedly knighted."<sup>3</sup> It must have been a rich treat for the merry monarch to dub the semi-puritanical sage, saying, "RISE, SIR MATTHEW."

A smile at such little infirmities does not prevent us from viewing with admiration and reverence the rules which he now laid down for his conduct as a Judge. They ought to be inscribed in letters of gold on the walls of Westminster Hall, as a lesson to those intrusted with the administration of justice.

*"Things necessary to be continually had in remembrance.*

"1. That in the administration of justice I am in-

<sup>1</sup> Burnet, 17; Kennet Reg. 280; Oldmixon, 488; Neal. ii. 78, 80.

<sup>2</sup> 4 Parl. Hist. 154.

<sup>3</sup> Burnet, 17.

trusted for God, the King, and country; and therefore,

"2. That it be done, 1. uprightly; 2. deliberately; 3. resolutely.

"3. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.

"4. That in the execution of justice I carefully lay aside my own passions, and not give way to them, however provoked.

"6. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions.'

"6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.

"7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.

"8. That in business capital, though my nature prompt me to pity, yet to consider there is a pity also due to the country.

"9. That I be not too rigid in matters purely conscientious where all the harm is diversity of judgment.

"10. That I be not biassed with compassion to the poor, or favor to the rich, in point of justice.

"11. That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.

"12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.

"13. If in criminals it be a measuring cast, to incline to mercy and acquittal.

"14. In criminals that consist merely in words, where no more harm ensues, moderation is no injustice.

"15. In criminals of blood, if the fact be evident, severity is justice.

"16. To abhor all private solicitations, of what kind soever, and by whomsoever, in matters depending.

"17. To charge my servants, 1. Not to interpose in

<sup>1</sup> "And, while on the bench, not writing letters or reading newspapers."

any matter whatsoever; 2. Not to take more than their known fees; 3. Not to give any undue precedence to causes; 4. Not to recommend counsel.

"18. To be short and sparing at meals, that I may be the fitter for business."<sup>1</sup>

I have known laudable resolutions formed by new judges very speedily forgotten; and it is a curious fact in the annals of our profession, that those men who, when at the bar, complained most bitterly of judicial impatience and loquacity, becoming judges themselves, have been most noted for being impatient and loquacious. But Hale strictly and uniformly observed all the rules he had laid down for himself, and might be considered the perfect model of a great magistrate.

He continued Lord Chief Baron of the Exchequer for eleven years, and he is certainly to be considered the most eminent Judge who ever filled this office. Being then promoted to be Chief Justice of England, he gave new dignity to the supreme magistracy, which had been illustrated by Gascoigne, by Fortescue, and by Coke.

That we may take a view of the whole of his judicial career, it may be convenient here to mention that in the year 1671, on the death of Lord Chief Justice Kelynge, although the wicked CABAL was then in full sway,—as his place could not conveniently be sold, or given to a profligate courtier, Lord Keeper Bridgman was allowed to have the disposal of it, and he recommended the man whom the whole nation would have preferred. "All people applauded this choice, and thought their liberties could not be better deposited than in the hands of one that as he understood them well, so he had all the justice and courage that so sacred a trust required."<sup>2</sup>

There was no disappointment; and while Hale sat in the Court of Common Pleas, in the Court of Exchequer, or in the Court of King's Bench, his qualifications as a Judge always shone with lustre in proportion as the occasion called forth their display. He was equally familiar with every branch of English jurisprudence,—the criminal code and the civil code,—the law of real

<sup>1</sup> From the original in Hale's own handwriting. I could only wish that, further, he had given a caution against interrupting counsel, and against loquacity on the bench, with a repetition of Lord Bacon's maxim, "A much-speaking judge is a no-well-tuned cymbal."<sup>2</sup> Burnet, p. 9.

property and the law of personal property—antiquarian lore and modern practice. He likewise had the advantage, so rare in England, of having studied the Institutes, Pandects, and Code of Justinian, with the best commentaries on those immortal compilations. While free from every other passion, he was constantly actuated by a passion to do justice to all suitors who came before him. He was not only above the suspicion of corruption or undue influence, but he was never led astray by ill-temper, impatience, haste, or a desire to excite admiration. Instead of submitting to the dictation of the leader of the bar,—

“One thing was much observed and commended in him, that when there was a great inequality in the ability and learning of the counselors that were to plead one against another, he thought it became him as the Judge to supply that; so he would enforce what the weaker counsel managed but indifferently, and not suffer the more learned to carry the business by the advantage they had over the others in their quickness and skill in law, and readiness in pleading, till all things were cleared in which the merits and strength of the ill-defended cause lay. He was not satisfied barely to give his judgment in causes, but did, especially in intricate ones, give such an account of the reasons that prevailed with him, that the counsel did not only acquiesce in his authority, but were so convinced by his reasons, that many professed that he brought them often to change their opinions; so that his giving of judgment was really a learned lecture upon that point of law. And, which was yet more, the parties themselves, though interest does too often corrupt the judgment, were generally satisfied with the justice of his decisions, even when they were made against them. His impartial justice and great diligence drew the chief practice after him into whatsoever court he came; so as he had drawn the business much after him into the Common Pleas and the Exchequer, it now followed him into the King’s Bench, and many causes that were depending in the Exchequer and not determined were let fall there, and brought again before him in the court to which he was now removed.”<sup>1</sup>

<sup>1</sup> Burnet, pp. 29, 30.

Notwithstanding his great superiority to his brethren on the bench, he never attempted to dictate to them; and, on the contrary, he went into the extreme of not sufficiently guiding them to a just conclusion:—

“He would never suffer his opinion in any case to be known till he was obliged to declare it judicially, and he concealed his opinion in great cases so carefully that the rest of the judges in the same court could never perceive it. His reason was, because every judge ought to give sentence according to his own persuasion and conscience, and not to be swayed by any respect or deference to another man’s opinion; and by this means it happened sometimes that when all the Barons of the Exchequer had delivered their opinions, and agreed in their reasons and arguments, yet he, coming to speak last, and differing in judgment from them, expressed himself with so much weight and solidity, that the Barons have immediately retracted their votes and concurred with him.”

“The only complaint that was ever made of him was *that he did not dispatch matters quick enough*; but the great care he used to put suits to a final end, as it made him slower in deciding them, so it had this good effect, that causes tried before him were seldom if ever tried again.”

“He did not affect the reputation of quickness and dispatch by a hasty and captious hearing of the counsel. He would bear with the meanest, and gave every man his full scope, thinking it much better to lose time than patience. In summing up evidence to a jury, he would always require the bar 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.”

But he remembered that it is the duty of a judge to

<sup>1</sup> *Ibid.* p. 54. It would surely have been better if all their Lordships had had a *caucus*.

<sup>2</sup> Burnet, p. 18.

<sup>3</sup> Burnet, p. 56. I have heard of judges who were rather faulty in this respect, and, for being set right, would revenge themselves by an observation upon the effect of the evidence unfavorable to the counsel who had the temerity to interpose.

render it disagreeable to an advocate to utter nonsense, or what is wholly irrelevant,—

“He therefore held those who pleaded before him to the main hinge of the business, and cut them short when they made excursions about circumstances of no moment,—by which he saved much time, and made the chief difficulties to be well stated and cleared.”

As he had no favorites among counsel, he studied to be free from antipathies; but, from his love of morality and fair practice, he was supposed to bear rather hard on the licentious and crafty, though good-humored, Saunders, afterwards his successor as Chief Justice of the King's Bench;<sup>1</sup> and he caused heavy complaints by refusing to discharge the infamous Sergeant Scroggs when arrested for debt at the gate of Westminster Hall,<sup>2</sup> although Sir George Jeffreys, by flattery and the affectation of religion, is said to have gained some authority over him.<sup>3</sup>

He was not merely by far the best Common Law Judge, but by far the best Equity Judge of his time. Never having been Chancellor or Master of the Rolls, he was the first English lawyer who took a just view of this branch of our jurisprudence, controverting the common notion that it was regulated by no more certain rule than a capricious idea of what was fit in each particular case.

“He did look upon Equity as part of the Common Law, and one of the grounds of it; and therefore, as near as he 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.”<sup>4</sup> He therefore not only disposed admirably of the business on the Equity side of the Court of Exchequer, but he was frequently called into the Court of Chancery as assessor by Lord Chancellor Clarendon and Lord Keeper Bridgman. Even Lord Shaftesbury, when he fantastically grasped the great seal, was soon obliged to rely upon the aid of Sir Matthew Hale, although at

<sup>1</sup> Burnet, p. 40.

<sup>2</sup> Roger North's *Life of Lord Guilford*, ii. 127.

<sup>3</sup> Woolrych's *Life of Jeffreys*, p. 52.

<sup>4</sup> North's *Life of Lord Guilford*, i. 118.

<sup>5</sup> Burnet, p. 55.



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first he presumptuously trusted to his own cleverness, setting all established doctrines at defiance. Lord Nottingham, the father of Equity, worshiped Hale as his great master.

Sir Matthew likewise gained immense credit, after the fire of London, by sitting many months in Clifford's Inn, and, with the assistance of some other judges, deciding all questions that arose about title and boundary, and the obligation to rebuild. The restoration of the city, reckoned one of the wonders of the age, was mainly ascribed to his care, “since there might otherwise have followed such an endless train of vexatious suits, as might have been little less chargeable than the fire itself had been.” His readiness in arithmetic, and his skill in architecture, are said to have then been of signal use to him. For his services on this occasion, the portrait of him was placed in Guildhall, where we now behold it—and he received from the Lord Mayor, as his only further recompense, a silver snuff-box, which is still in the possession of his family.

Although the offer of *epices* by suitors to the judge was not then recognized, the custom of *soliciting* him to do justice was not quite obsolete. A noble Duke once called on Lord Chief Baron Hale, under pretense of giving him information which would better enable him to understand a cause shortly to be tried before him. The Lord Chief Baron, interrupting him, said, “Your Grace does not deal fairly to come to my chamber about such an affair, for I never receive any information of causes but in open court, where both parties are to be heard alike.” The Duke withdrew, and was silly enough to go straightway to the King, and to complain of this as a rudeness not to be endured. His Majesty answered, “Your Grace may well content yourself that it is no worse; and I verily believe he would have used myself no better, if I had gone to solicit him in any of my own causes.”<sup>2</sup>

<sup>1</sup> Ibid. p. 18. Of his architectural taste we may judge from his advising the Duke of Beaufort, when building the magnificent chateau at Badmington, to have only one door to it, which should be commanded by a window in his grace's study, so that no one could enter or leave the dwelling clandestinely.—R. North's *Life of Guilford*, i. 260.

<sup>2</sup> Burnet, p. 20.



However, it must be confessed that Hale carried his hatred of bribery and corruption to a coxcombical length, which exposed him to ridicule. When he bought any articles after he became a Judge, he not only would not try to beat down the price, but he insisted on giving more than the vendors demanded, lest, if they should afterwards have suits before him, they should expect favor because they had dealt handsomely by him. A gentleman in the West of England, who had a deer-park, was in the habit of sending a buck as a present to the Judges of Assize, and did the same when Lord Chief Baron Hale came on the circuit, although a cause in which he was plaintiff was coming on for trial. The cause being called, the following extraordinary dialogue took place in open court:—

*Lord C. Baron*: "Is this plaintiff the gentleman of the same name who hath sent me venison?" *Judge's Servant*: "Yes, please you, my Lord." *Lord C. B.*: "Stop a bit, then. Do not yet swear the jury. I cannot allow the trial to go on till I have paid him for his buck." *Plaintiff*: "I would have your Lordship to know, that neither myself nor my forefathers have ever sold venison, and I have done nothing to your Lordship which we have not done to every judge that has come this circuit for centuries bygone." *Magistrate of the County*: "My Lord, I can confirm what the gentleman says for truth, for twenty years back." *Other Magistrate*: "And we, my Lord, know the same." *Lord C. B.*: "That is nothing to me. The Holy Scriptures says, 'a gift perverteth the ways of judgment;' I will not suffer the trial to go on till the venison is paid for. Let my butler count down the full value thereof." *Plaintiff*: "I will not disgrace myself and my ancestors by becoming a venison-butcher. From the needless dread of *selling* justice, your Lordship *délays* it. I withdraw my record."

So the trial was postponed till the next assizes, at the costs of the man who merely wished to show a usual civility to the representative of the Sovereign.

According to a custom which prevailed, "from time whereof the memory of man runneth not to the contrary," the Dean and Chapter of Salisbury had presented to the Judges of Assize six sugar loaves. Lord Chief Baron

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Hale, when upon the Western Circuit, having received the usual donation, discovered that the Dean and Chapter had a cause coming on before him for trial, and he sent his servant to pay for the sugar loaves before he would allow it to be entered. Those venerable litigants, instead of firing up at the notion of their becoming "grocers," or taunting the Judge, as they might have done, with making them violate the statute of Henry VIII. against "clerical trading," received the money, tried their cause, and obtained a verdict.

On another occasion, there really was a paltry attempt to corrupt him, which he very properly exposed. During the assizes at Aylesbury, one Sir John Croke, who was unjustly prosecuting a respectable clergyman as a robber, for merely entering his house to demand tithes, in the foolish hope of conciliating the Judge, sent to his lodgings two loaves of sugar, which were immediately returned. When the prosecution had blown up, and the prisoner had been acquitted, the Lord Chief Baron called for the prosecutor, but was told that he had made

*Lord C. Baron*: "Is Sir John Croke gone? Gentlemen, I must not forget to acquaint you, for I thought that Sir John Croke had been here still, that Sir John Croke sent me, this morning, two sugar loaves for a present. I did not then know so well as now, what he meant by them; but, to save his credit, I sent his sugar loaves back again. Mr. Clerk of Assize, did you not send Sir John his sugar loaves back again?" *Clerk of Assize*: "Yes, my Lord, they were sent back again." *Lord C. Baron*: "I cannot think that Sir John believes that the King's Justices come into the country to take bribes. I rather think that some other person, having a design to put a trick upon him, sent them in his name. Gentlemen, do you know this hand (showing the gentlemen of the grand jury the letter which accompanied the sugar). *Foreman*: "I fear me it is Sir John's, for I have often seen him write, doing justice business along with him; and your Lordship may see that it is the same with this *mittimus* written and signed by him." *Lord C. B.* (putting the letter back into his bosom): "I intend to

carry it with me to London, and I will relate the foulness of the business, as I find occasions."<sup>1</sup>

Hale is severely criticised as a Judge, though not altogether candidly, by Roger North, the brother and biographer of Lord Keeper Guilford. The Norths, too, had been bred up among the Puritans, but they went over to the ultra high-Church party, and regarded all who did not go to the same length with themselves as schismatics and republicans. Hale had softened them a little by taking kindly notice of Mr. Francis, when a very young barrister on the Northern Circuit.<sup>2</sup> But when Sir Francis was advanced to be a member of the House of Commons, to be Attorney General, and to be Chief Justice of the Common Pleas, and when he persecuted the Dissenters, he looked with envy and enmity at his former patron, whose conduct and reputation formed such a contrast with his own. Before he became Lord Chancellor and a peer, Hale had been taken to a quieter world; yet the Norths continued to bear him a grudge, and to carp at his decisions, his principles, and his manners. With true fraternal sympathy, thus writes Roger:—

"The truth is, his Lordship [Lord Guilford] took early into a course diametrically opposite to that approved by Hale; for the principles of the latter, being demagogical, could not allow much favor to one who rose a monarchist declared. He was an upright judge if taken within himself; and when he appeared, as he

<sup>1</sup> "The Perjured Phanatic," an account of the trial, 2d edition, 1710. The late Baron Graham related to me the following anecdote to show that he had more firmness than Judge Hale. "There was a baronet of ancient family with whom the Judges going the Western Circuit had always been accustomed to dine. When I went that circuit, I heard that a cause in which he was plaintiff was coming on for trial; but the usual invitation was received, and, lest the people might suppose that Judges could be influenced by a dinner, I accepted it. The defendant, a neighboring squire, being dreadfully alarmed by this intelligence, said to himself, 'Well, if Sir John entertains the Judges hospitably, I do not see why I should not do the same by the Jury.' So he invited to dinner the whole of the special jury summoned to try the cause. Thereupon the baronet's courage failed him and he withdrew the record, so that the cause was not tried; and although I had my dinner, I escaped all suspicion of partiality."

<sup>2</sup> When the little gentleman was once struggling through a crowd, in court, Hale said from the bench, "Make way for the little gentleman there, for he will soon make way for himself."—*Life of Guilford*.

often did, and really was, partial, his inclination or prejudice, insensibly to himself, drew his judgment aside. His bias lay strangely for and against characters and denominations, and sometimes the very habits of persons. If one party was courtier and well dressed, and the other a sort of puritan with a black cap and plain clothes, he insensibly thought the justice of the cause with the latter. If the dissenting or anti-court party was at the back of a cause, he was very seldom impartial; and the loyalists had always a great disadvantage before him. And he ever sat hard on his Lordship in his practice in causes of that nature. It is said he was once caught. A courtier who had a cause to be tried before him, got one to go to him as from the King, to speak for favor to his adversary, and so carried his point; for the Chief Justice could not think any person to be in the right that came so unduly recommended. . . . He would put on the show of much valor, as if danger seemed to lie on the side of the Court, from whence either loss of his place (of which he really made no great account), or some more violent, or, as they pretended, arbitrary infliction might fall upon him. Whereas, in truth, that side was safe, which he must needs know, and that all real danger to a judge was from the imperious fury of a rabble, who have as little sense and discretion as justice, and from the House of Commons, who seldom want their wills, and, for the most part, with the power of the Crown, obtain them. Against these powers he was very fearful; and one bred as he was, in the rebellious times, when the government at best was but rout and riot, either of rabble committees or soldiers, may be allowed to have an idea of their tyranny, and, consequently, stand in fear of such brutish violence and injustice as they committed. But it is pleasant to consider that this man's not fearing the Court was accounted valor; that is, by the populace, who never accounted his fear of themselves to have been a mere timidity." Yet the honest biographer is obliged to add, "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 sen-

tences heroic. One of the bankers, a courtier, by name Sir Robert Viner, when he was Lord Mayor of London, delayed making a return to a *mandamus*, and the prosecutor moved for an attachment against him. The Recorder, Howel, appeared, and, to avert the rule for an attachment, alleged the greatness of his magistracy, and the disorder that might happen to the City if the Mayor were imprisoned. The Chief Justice put his thumbs in his ears, as his way was, and 'Tell me of the Mayor of London!' said he, 'tell me of the Mayor of Queenborough!' . . . His Lordship knew him perfectly well, and revered him for his great learning in the history, law, and records of the English constitution. I have heard him say that while Hale 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. His foible was yielding 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. I have known the Court of King's Bench sitting every day from eight to twelve, and the late Chief Justice Hale managing matters of law to all imaginable advantage to the students, and in which he took a pleasure, or rather pride. He encouraged inquiry when it was to the purpose, and used to debate with the counsel, so as the court might have been taken for an academy of sciences, as well as the seat of justice."<sup>1</sup>

The most striking proof of Hale's impartiality, between persons of opposite political parties, and opposite religious persuasions, will be found in a list of cases made out by the Norths, in which he is alleged to have been misled by his prejudices. In all of them, except one, it will be found that he lays down the law correctly. Upon the question involved in that one, after it had been doubted for near two centuries, the House of Lords, a few years ago, were equally divided, and it was decided against Hale's opinion only on the technical rule *semper*

<sup>1</sup> Roger North's *Life of Lord Guilford*, i. 111-115.

<sup>2</sup> *Study of the Laws*, p. 32.

*prosumitur pro negante.* The charge was, that he had heretically countenanced Quakers' marriages, by allowing a special verdict to be taken to try their validity. "This," says Roger North, "was gross in favor of those worst of sectaries; for if the circumstances of a Quaker's marriage were stated in evidence, there was no color for a special verdict; for how was a marriage by a layman, without the liturgy, good? But here, though the right was debated, and could not be determined for the Quakers, yet a special verdict upon *no point* served to baffle the party who would take advantage of the nullity."<sup>1</sup> The truth was, as we know from Bishop Burnet, that a Quaker was sued before Chief Baron Hale for debts owing by the wife, a Quakeress, *dum sola*, after they had long lived together as man and wife, and had a numerous family; and the defendant's counsel contended that there was no marriage between them, since it was not celebrated by a priest in orders, according to the rites of the Church of England. The Judge said he was not willing, by a *nisi prius* decision, to bastardize the children, and directed the jury to find a special verdict, saying, "he thought it reasonable, and consistent with natural right and the precepts of † Gospel, that all marriages made according to the several religious persuasions of the parties, ought to be valid in law."<sup>2</sup> Whether his opinion therefore, was right or wrong, the accusation that he on this occasion showed any undue partiality to Dissenters, is wholly unfounded.

His demeanor in the case of John Bunyan, the author of *THE PILGRIM'S PROGRESS*, shows him paying respect both to the rules of law and to the dictates of humanity. This wonderful man,—who, though bred a tinker, showed a genius little inferior to that of Dante,—having been illegally convicted by the court of quarter sessions,

<sup>1</sup> Life of Guilford, i. 126.

<sup>2</sup> Burnet, p. 44. I am glad to think that this is the common law of Scotland, and is now the statute law of England; but in countries governed by the common law of England on this subject the greatest confusion now prevails, by Hale's doctrine having been overruled. The special verdict was never argued, and the law remained uncertain till the reign of Queen Victoria. In the session of 1847 I introduced and passed a bill to declare valid Quaker marriages which had been contracted prior to the General Dissenters' Marriage Act of 1837, which was only prospective. See 11 & 12 Vic. c. 58

was lying in prison under his sentence, in the jail of Bedford. Soon after the restoration of Charles II., the young enthusiast had been arrested while he was preaching at a meeting in a private house, and, refusing to enter into an engagement that he would preach no more, had been indicted as "a person who devilishly and perniciously abstained from coming to church to hear divine service, and a common upholder of unlawful meetings and conventicles, to the great disturbance and distraction of the good subjects of this realm." At his arraignment, he said, "Show me the place in the Epistles where the Common Prayer Book is written, or one text of Scripture that commands me to read it, and I will use it. But yet, notwithstanding, they that have a mind to use it, they have their liberty; that is, I would not keep them from it. But, for our own parts, we can pray to God without it. Blessed be His name." The Justices considered this tantamount to a plea of *guilty*, and, without referring his case to the jury, the chairman pronounced the following judgment: "You must be had back to prison, and there lie for three months following; and at three months' end, if you do not submit to go to church to hear divine service, and leave your preaching, you must be banished the realm. And if, after such a day as shall be appointed you to be gone, you shall be found in this realm, or be found to come over again without special license from the King, you must stretch by the neck for it; I tell you plainly."

Arbitrary as the laws then were, there was no clause in any statute that would support this sentence; yet Bunyan was imprisoned under it, as he refused to give surety that he would abstain from preaching. Elizabeth, his wife, actuated by his undaunted spirit, applied to the House of Lords for his release; and, according to her relation,<sup>1</sup> she was told "they could do nothing; but that his releasement was committed to the Judges at the next assizes." The Judges were Sir Matthew Hale and Mr. Justice Twisden; and a remarkable contrast appeared between the well-known *meekness* of the one, and *fury* of the other.<sup>2</sup> Elizabeth came before them.

<sup>1</sup> A Relation of the Imprisonment, &c., ed. 1765, p. 44.

<sup>2</sup> The contemporary reporters, in recording Twisden's judgments, begin "Twisden, in *furor*, observed," &c.



and, stating her husband's case, prayed for justice:—

"Judge Twisden," says John Bunyan, "snapt her up, and angrily told her that I was a convicted person, and could not be released unless I would promise to preach no more." *Elizabeth*: "The Lords told me that releasement was committed to you, and you give me neither releasement nor relief. My husband is unlawfully in prison, and you are bound to discharge him."

*Twisden*: "He has been lawfully convicted." *Elizabeth*: "It is false, for when they said, 'Do you confess the indictment?' he answered, 'At the meetings where he preached, they had God's presence among them.'"

*Twisden*: "Will your husband leave preaching? if he will do so, then send for him." *Elizabeth*: "My Lord, he dares not leave off preaching as long as he can speak. But, good my Lords, consider that we have four small children, one of them blind, and that they have nothing to live upon, while their father is in prison, but the charity of Christian people. I myself *smayed* at the news when my husband was apprehended, and, being but young, and unaccustomed to such things, fell in labor; and, continuing in it for eight days, was delivered of a dead child."

*Sir Matthew Hale*: "Alas, poor woman!" *Twisden*: "Poverty is your cloak, for I hear your husband is better maintained by running up and down a-preaching than by following his calling." *Sir Matthew Hale*: "What is his calling?" *Elizabeth*: "A tinker, please you, my Lord; and because he is a tinker, and a poor man, therefore he is despised, and cannot have justice."

*Sir Matthew Hale*: "I am truly sorry we can do you no good. Sitting here, we can only act as the law gives us warrant; and we have no power to reverse the sentence, although it may be erroneous. What your husband said was taken for a confession, and he stands convicted. There is, therefore, no course for you but to apply to the King for a pardon, or to sue out a writ of error; and, the indictment, or subsequent proceedings, being shown to be contrary to law, the sentence shall be reversed, and your husband shall be set at liberty. I am truly sorry for your piti-

<sup>1</sup> A Relation, &c., p. 41.



able case. I wish I could serve you, but I fear I can do you no good."

Bunyan as yet was not distinguished from the great crowd of enthusiasts who were then desirous of rivaling the heroes of Fox's Martyrology,—their favorite manual. Hale, making inquiries about him, was told that he was "a hot-spirited fellow," and actually found that there would be no use in supplying the means of prosecuting a writ of error, as, if set at liberty, he would soon get into worse durance, for at Bedford he was very kindly treated by a humane jailer, and his family were cared for by the Puritans of the town and neighborhood. When the Judges were trumpeted out of Bedford, leaving the tinker still in prison, he was very wroth; and Elizabeth burst into tears, saying, "Not so much because they are so hard-hearted against me and my husband, but to think what a sad account such poor creatures will have to give at the coming of the Lord."

Little do we know what is for our permanent good. Had Bunyan then been discharged and allowed to enjoy liberty, he no doubt would have returned to his trade, filling up his intervals of leisure with field-preaching; his name would not have survived his own generation, and he could have done little for the religious improvement of mankind. The prison-doors were shut upon him for twelve years. Being cut off from the external world, he communed with his own soul; and, inspired by Him who touched Elijah's hallowed lips with fire, he composed the noblest of allegories, the merit of which was first discovered by the lowly, but which is now lauded by the most refined critics; and which has done more to awaken piety, and to enforce the precepts of Christian morality, than all the sermons that have been published by all the prelates of the Anglican Church.<sup>1</sup>

I wish to God that I could as successfully defend the conduct of Sir Matthew Hale in a case to which I most reluctantly refer, but which I dare not, like Bishop Burnett, pass over unnoticed,—I mean the famous trial before him, at Bury St. Edmund's, for witchcraft. I fostered a hope that I should have been able, by strict inquiry, to contradict or mitigate the hallucination

<sup>1</sup> See Southey's *Life of John Bunyan*.

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under which he is generally supposed to have then labored, and which has clouded his fame,—even in some degree impairing the usefulness of that bright example of Christian piety which he left for the edification of mankind. But I am much concerned to say, that a careful perusal of the proceedings and of the evidence shows that upon this occasion he was not only under the influence of the most vulgar credulity, but that he violated the plainest rules of justice, and that he really was the murderer of two innocent women. I would very readily have pardoned him for an undoubting belief in witchcraft, and I should have considered that this belief detracted little from his character for discernment and humanity. The Holy Scriptures teach us that, in some ages of the world, wicked persons, by the agency of evil spirits, were permitted, through means which exceed the ordinary powers of nature, to work mischief to their fellow-creatures. These arts, which were said to have been much practiced in popish times, were supposed to have become still more common at the Reformation. Accordingly, the statute 33 Hen. VIII. c. 8 made all witchcraft and sorcery *felony without benefit of clergy*, and by 1 Jas. I. c. 12. (passed when Lord Bacon was a member of the House of Commons) the capital punishment was extended to "all persons invoking an evil spirit, or consulting, covenanting with, entertaining, employing, *feeding*, or rewarding any evil spirit, or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment. There had been several prosecutions on these statutes in the reigns of James I. and Charles I.,—when convictions had taken place on the confession of the accused;—in the trial of the murderers of Sir Thomas Overbury it had appeared that Mrs. Turner was believed to be a witch, not only by the Countess of Essex, but by the King and all his Court;—and although magic and the black art had lately lost much credit, yet, in the reign of Charles II., a judge who from the bench should have expressed a disbelief in them would have been thought to show little respect for human laws, and to be nothing better than an atheist. Had the miserable wretches, indicted for witchcraft before Sir Matthew Hale, pleaded

*guilty*, or specifically confessed the acts of supernatural agency imputed to them, or if there had been witnesses who had given evidence, however improbable it might be, to substantiate the offense, I should hardly have regarded the Judge with less reverence because he pronounced sentence of death upon the unhappy victims of superstition, and sent them to the stake or the gibbet. But they resolutely persisted in asserting their innocence, and there not only was no evidence against them which ought to have weighed in the mind of any reasonable man who believed in witchcraft, but during the trial the imposture practiced by the prosecutors was detected and exposed.

The reader may like to have a sketch of this last capital conviction in England for the crime of *bewitching*. Indictments were preferred jointly against Amy Duny and Rose Cullender, two wrinkled old women, for laying spells upon several children, and in particular William Durent, Elizabeth Pacy, and Deborah Pacy. The trial began with proof that witnesses, who were to have given material evidence, as soon as they came into the presence of the clerk of assize, were seized with dumbness, or were only able to utter inarticulate sounds. A strong corroboration of the guilt of the prisoners was stated to be, that these witnesses remained in the same cataleptic state till the verdict was pronounced, and were thereupon instantly cured. The bewitching of William Durent rested on the testimony of Dorothy, his mother, who said:—

“About seven years ago, having a special occasion to go from home, I desired Amy Duny, my neighbor, to look to my boy Billy, then sucking, during my absence, promising her a penny for her pains; I desired her not to suckle my child; I very well knew that she was an old woman, and could not naturally give suck, but, for some years before, she had gone under the reputation of a witch; nevertheless, she did give suck to the child, and that very night he fell into strange fits of swooning, and was held in a terrible manner, insomuch that I was terribly frightened therewith, and so continued for divers weeks. I then went to a certain person named Dr. Jacob, who lived at Yarmouth, and had the reputa-

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tion in the country to help children who were bewitched. He advised me to put the child by the fire in a blanket, and if I found anything in the blanket with the child, to throw it into the fire. I did so that same night, and there fell out of the blanket a great toad, which ran up and down upon the hearth. I seized the great toad with a pair of tongs, and thrust it into the fire. Thereupon it made a great and horrible noise; and after a space, there was a flashing in the fire like gunpowder, making a noise, like the discharge of a pistol; and after the flashing and noise, the substance of the toad was gone without being consumed in the fire. The next day there came a young woman, a kinswoman of the said Amy, and told me that her aunt was in a most deplorable condition, having her face, legs, and thighs, all scorched, and that she was sitting alone in the house in her smock without any fire; and please you, my Lord, after the burning of the said toad, my child recovered, and was well again, and is now still living."

With respect to the two girls named Pacy,—Deborah was so cruelly bewitched, that she could not be brought to the assize; but Elizabeth appeared in court, and, although deprived of speech, and with her eyes shut, she played many antics, particularly when, "by the direction of the Judge," Amy Duny touched her. Then the father of the girls proved, that he having refused Amy Duny and Rose Cullender some herrings which they asked for,<sup>1</sup> they were very angry, and, soon after, the girls were taken in a very strange way, and spat up large quantities of pins and twopenny nails (which were produced in court), and declared that Amy Duny and Rose Cullender visited them in the shape of a bee and of a mouse, and tormented them from time to time for many weeks. It was further proved, that the two prisoners being taken up under a Justice's warrant as witches, and their persons being examined, Rose Cullender was discovered to have a secret teat, which she said was the effect of a

<sup>1</sup> Very much like the witch in Macbeth:

"A sailor's wife had chesnuts in her lap.

And mounch'd, and mounch'd, and mounch'd: *Give me, quoth I.*"

But here there was no such provoking language used as "*Aroint thee, witch!*"

strain from carrying water, but which a witness swore had been lately sucked.

Mr. Sergeant Kelynge, who was either joined in the commission as one of the Judges, or acted as *amicus curiæ*, "declared himself much unsatisfied with this evidence, and thought it not sufficient to convict the prisoners; for, admitting that the children were in truth bewitched, yet," said he, "it can never be applied to the prisoners upon the imagination only of the parties afflicted; for if that might be allowed, no person whatsoever can be in safety, for, perhaps, they might fancy another person who might altogether be innocent in such matters."

To strengthen the case, Dr. Brown, of Norwich, supposed to have deep skill in demonology, was called as an *expert*, and after giving it as his clear opinion that the children were bewitched, added, that "in Denmark there had lately been a great discovery of witches, who used the very same way of afflicting persons by conveying pins into them, with needles and nails; and he thought that the Devil, in such cases, did work upon the bodies of men and women by a natural inundation."

An experiment was made by Sergeant Kelynge and several other gentlemen, as to the effect of the witch's touch. Elizabeth Pacy, being conducted to a remote part of the hall, was blindfolded, and in her fit was told that Amy Duny was approaching, when another person touched her hand,—which produced the same effect as the touch of the witch did in court. "Whereupon the gentlemen returned, openly protesting that they did believe the whole transaction of this business was a mere imposture. This put the Court and all persons into a stand."

However, the prosecutors tried to bolster up the case by proof that Rose Cullender, once on a time, being angry because a cart had wrenched the window of her cottage, must, in anger, have bewitched this cart, because it was repeatedly overturned that day, while other carts went smoothly along the road,—and that Amy Duny had been heard to say, "the Devil would not let her rest until she were revenged of one Annie Sandewell, who, about seven or eight years ago, having bought a certain number of geese, was told by Amy Duny that they would

all be destroyed, which accordingly came to pass. The witnesses being all examined,—instead of stopping the prosecution and directing an acquittal, Lord Chief Baron Hale summed up in these words; clearly intimating that, in his opinion, the jury were bound to convict:—

“Gentlemen of the jury, I will not repeat the evidence unto you, lest by so doing, I should wrong it on the one side or on the other. Only this I will acquaint you, that you have two things to inquire after: *first*, whether or no these children were bewitched? *secondly*, whether the prisoners at the bar were guilty of it? That there are such creatures as witches, I make no doubt at all; for, first the Scriptures have affirmed so much; secondly, the wisdom of all nations hath 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 offense. I entreat you, gentlemen, strictly to examine the evidence which has been laid before you in this weighty case, and I earnestly implore the great God of Heaven to direct you to a right verdict. For to condemn the innocent and to let the guilty go free, are both an abomination unto the Lord.”

The jury, having retired for half an hour, returned a verdict of *guilty* against both the prisoners on all the indictments; and the Judge, putting on his black cap, after expatiating upon the enormity of their offense, and declaring his entire satisfaction with the verdict, admonished them to repent, and sentenced them to die.

The bewitched children immediately recovered their speech and their senses, and slept well that night. Next morning, Sir Matthew, much pleased with his achievement, departed for Cambridge, leaving the two unhappy women for execution. They were eagerly pressed to confess, but they died with great constancy, protesting their innocence.<sup>1</sup>

Hale's motives were most laudable; but he furnishes a memorable instance of the mischiefs originating from superstition. He was afraid of an acquittal or of a par-

<sup>1</sup> Trial of the Witches at Bury St. Edmund's 1682; 6 St. Tr. 647-702.

don, lest countenance should be given to a disbelief in witchcraft, which he considered tantamount to a disbelief in Christianity. The following Sunday he wrote a "Meditation concerning the mercy of God in preserving us from the malice and power of Evil Angels," in which he refers, with extreme complacency, to the trial over which he had presided at Bury St. Edmund's.<sup>1</sup>

Although, at the present day, we regard this trial as a most lamentable exhibition of credulity and inhumanity, I do not know that it all lowered Hale in public estimation during his own life; but in the middle of the 18th century it was thus censured by Sir Michael Foster: "This great and good man was betrayed, notwithstanding the rectitude of his intentions, into a lamentable mistake, under the strong bias of early prejudice."<sup>2</sup> The enormous violation of justice then perpetrated has become more revolting as the mists of ignorance, which partially covered it, have been dispersed. How much more should we honor the memory of Hale, if, retaining all his ardent piety, he had anticipated the discovery of Lord Chief Justice Holt, who put an end to witchcraft by directing prosecutions against the parties who pretended to be bewitched, and punishing them as cheats and impostors!<sup>3</sup>

It would be very agreeable to diversify these painful details with some anecdotes of Hale in private life; but we have none of his "Table Talk," while that of his contemporary Selden is so amusing; and we must be contented with his judgments and his writings. He hardly ever went into society, or entertained company at home. He had no dwelling in London, except his chambers in Sergeants' Inn. Soon after he was made Chief Baron he took a cottage at Acton, where he had for his neighbor

<sup>1</sup> This "Meditation" was published in the year 1693, with a preface in which the editor praises it "as an evidence of the judgment of so great, so learned, so profound and sagacious, so cautious, circumspect, and tender a man, in matters of life and death, upon so great deliberation (for he knew by his calendar before hand what cause he was to try, and he well knew the notions and sentiments of the age), and, upon so solemn an occasion, to check and correct the impiety, the vanity, the self-conceitedness, or baseness of such witch advocates as confidently maintain that there are no witches at all."

<sup>2</sup> Preface to Reports, p. vii.

<sup>3</sup> See Hathaway's Case, 14 St. Tr. 630. The statutes against witchcraft were not repealed till 9 Geo. ii c. 5. Bl. Com. iv. 61; 3d Institute, 43.



the celebrated Richard Baxter—now ejected from his office of King's Chaplain, conferred upon him at the Restoration, but not yet persecuted under the "Conventicle" and "Five Mile" Acts. The worthy non-conformist gives us this interesting account of the manner in which they made each other's acquaintance:—

"We sat next seats together at church many weeks; but neither did he ever speak to me nor I to him. At last, my extraordinary friend, Sergeant Fountain, asked me, 'why I did not visit the Lord Chief Baron?' I told him, 'because I had no reason for it, being a stranger to him; and had some against it, viz: that a judge, whose reputation was necessary to the ends of his office, should not be brought within court suspicion or disgrace, by his familiarity with a person whom the interest and diligence of some prelates had rendered so odious.' The Sergeant answered, 'It is not meet for him to come first to you; I know why I speak it; let me entreat you to go first to him.' In obedience to which request I did it; and so we entered into neighborly familiarity. I lived then in a small house, but it had a pleasant garden, which the honest landlord had a desire to sell. The Judge had a mind to the house, but he would not meddle with it till he got a stranger to me to come and inquire of me whether I was willing to leave it? I answered, 'I was not only willing but desirous,' and so he bought it, and lived in that poor house till his mortal sickness sent him to the place of his interment."

It was about this time that Hale, although he had laid down a rule never more to mix with any public affairs, was induced to assist in furthering a plan for bringing about a "comprehension," *i. e.* an extension of the Establishment which should comprehend the Presbyterians, in fulfillment of the Declaration from Breda and the promises made upon the King's restoration. Clarendon, who had been guilty of flagrant perfidy upon this subject, was now in exile; and Sir Orlando Bridgman, who had succeeded him on the woolsack, was friendly to the proposal. The King himself secretly favored the

<sup>1</sup> This means the parish church, which Baxter still frequented, although he occasionally preached to a congregation of his own.

<sup>2</sup> Baxter's Works, i. 95.



Papists—his own co-religionists—and he hoped that something to their advantage might arise from his affecting a love of toleration.

There were several conferences held with a view to this "comprehension," the interests of the Church of England being attended to by Dr. Wilkins, Bishop of Chester,—“a man,” says Burnet, “of as great a mind, as true a judgment, as eminent virtues, and of as good a soul, as any I ever knew;” and those of the Presbyterians by Baxter, of whom it was often observed, that “if he had lived in the early ages of Christianity he would have been one of the fathers of the Church.”

Articles having been, at last, agreed upon, which were substantially the same which Hale, when member for Gloucestershire, had proposed in the Convention Parliament, it was very naturally the wish of both parties that he should be intrusted to reduce them into the form of a bill to be proposed to the two Houses of Parliament at their next meeting. He readily performed the task; and he had only a few alterations to make in the draught which he had prepared at the time when Clarendon dextrously elevated him to the bench. But the bright prospect was soon overcast. Two powerful parties resisted the design of “comprehension,” with equal zeal. The bigoted clergy “thought it below the dignity of the Church to alter laws, and change settlements, for the sake of some whom they esteemed *schismatics*: they also believed it was better to keep them out of the Church than bring them into it, since a faction upon that would arise in the Church which they thought might be more dangerous than the schism itself was.”<sup>1</sup> The Popish party likewise became alarmed at the approaching union of all orthodox Protestants, and were eager that the Dissenters should be still oppressed, so that they might be driven to consent to an *indulgence* which would extend to the professors of the ancient faith. Accordingly, when the House of Commons met, leave was refused to bring in the bill; and, on the contrary, measures were brought forward against *conventicles*, and against *occasional conformity*, which greatly aggravated the sufferings of the Presbyterians,—while a declaration of indulgence

<sup>1</sup> Burnet, p. 25.

sheltered the Roman Catholics, till it excited such a tumult in the nation that the King was obliged to recall it. The firm friendship so contracted continued to subsist between Dr. Wilkins and the Chief Baron, who, "having much business and little time to spare, did, to enjoy the other the more, what he had scarce ever done before; he went sometimes to dine with him, and though he lived in great friendship with some other eminent clergymen, yet there was an intimacy and freedom in his converse with Bishop Wilkins that was singular to him alone."<sup>1</sup>

While caressed by Wilkins, Barrow, Tillotson, and Stillingfleet, the great ornaments of the Establishment, Hale kept up, as long as he could, his intimacy with the venerable leader of the Nonconformists, and, if the law had permitted, would have been delighted to reap the benefit of his ministrations:—

"When I went," says Baxter, "out of the house in which he succeeded me, I went into a greater, over against the church door. The town having great need of help for their souls, I preached between the public sermons in my house, taking the people with me to the church (to common prayer and sermon) morning and evening. The Judge told me he thought my course did the church much service, and would carry it so respectfully to me at my door that all the people might perceive my approbation. But Dr. Reeves could not hear it, and complained against me, and the Bishop of London caused one Mr. Rosse and Mr. Philips, two justices of the peace, to send warrants to apprehend me. I told the Judge of the warrants, but asked him no counsel, nor did he give me any, but with tears showed his sorrow, the only time that I ever saw him weep. So I was sent to the common jail for six months."

After giving an account of his being discharged upon a *habeas corpus*, the magistrates having exceeded the law in his commitment, he goes on to say, "But this imprisonment brought me the great loss of converse with Judge Hale; for the Parliament, in the next act against conventicles, put into it divers clauses suited to my case, by which I was obliged to dwell in another county, and to forsake both London and my former habitation."<sup>2</sup>

<sup>1</sup> Burnet, p 24.

<sup>2</sup> Baxter's Works, i. 105-107

Hale shunned all private intercourse with the profligate Lord Chancellor Shaftesbury, but was on the most friendly terms with Lord Chancellor Nottingham, who afterwards wrote a beautiful character of him, which is introduced into his Life by Bishop Burnet. He still not unfrequently was called in as assessor in the Court of Chancery; and the principles he laid down and illustrated on these occasions materially assisted the FATHER OF EQUITY in converting into a science this great department of our juridical system.

During four years and a half he had been the honored Chief Justice of England; and, although he was well stricken in years, the public still expected long to enjoy the benefit of his services. By early rising, by exercise, and by temperance, notwithstanding his constant application to business and study, (with the exception of one severe illness with which he was visited about a year after he was made Chief Baron),<sup>1</sup> he had enjoyed uninterrupted good health; and his constitution seemed unimpaired. But in the autumn of the year 1675 he was struck by a violent inflammatory attack, which, in two days, endangered his life, and from which he never rallied. In the following Michaelmas Term he found himself so reduced and enfeebled, that he could hardly, though supported by his servants, walk up Westminster Hall, or sit out the arguments at the bar,—which now seemed to him to be dull, flat, and unprofitable.

He cared little about the emoluments or the consequence of his office; and, although there was in those days no retiring pension to fall back upon, he determined to resign. But, as he never took any important step in a hurry, he composed a MEDITATION on the present aspect of his affairs:—

“1st. If I consider the business of my profession, whether as an advocate or as a judge, it is true I do acknowledge, by the institution of Almighty God and the dispensation of His providence, I am bound to industry and fidelity in it. And it is an act of obedience unto

<sup>1</sup>“The chiefest occasion of my sickness I could visibly impute but to a little wet taken in my head in my journey to London.” On his recovery, he wrote a very pious, but very prolix and prosy, “Meditation,” which may be seen at full length in Williams’s Life of Hale, p. 88.

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His will, it carries with it something of religious duty, and I may and do take comfort in it, and expect a reward of my obedience to Him and the good that I do to mankind therein from the bounty and beneficence and promise of Almighty God; and it is true also, that without such employments civil societies cannot be supported, and great good redounds to mankind from them; and in these respects the conscience of my own industry, fidelity, and integrity in them and great comfort and satisfaction to me. But yet I must say, concerning these enjoyments considered simply in themselves, they are very full of cares, anxieties, and perturbations. 2dly. That though they are beneficial to others, yet they are of the least benefit to him that is employed in them. 3dly. They do necessarily involve the party whose office it is in great dangers, difficulties, and calumnies. 4thly. That they only serve for the meridian of this life, which is short and uncertain. 5thly. Though it be my duty faithfully to serve in them while I am called to them, and till I am duly called from them, yet they are great consumers of that little time we have here; which, as it seems to me, might be better spent in a pious contemplative life, and a due provision for eternity. I do not know a better temporal employment than Martha had in testifying her love and duty to our Saviour by making provision for him; yet our Lord tells her, "That though she was troubled about many things, there was only one thing necessary, and Mary had chosen the better part."

"His infirmities increased upon him, and a severe asthma afflicted him night and day. Baxter, describing his appearance at this time, says,—

"... he had death in his lapsed countenance, flesh, and strength."<sup>1</sup>

Perceiving that his days were numbered, he intimated a resolution to resign his office of Chief Justice.

"This drew upon him the importunities of all his friends, and the clamor of the whole town, to divert him from it; but all to no purpose. So he made applications to his Majesty for his '*writ of ease*,' which the King was very unwilling to grant him, offering 'to let him hold his place still, he doing what business he could in his cham-

<sup>1</sup> Works, by Thirlwall, i. 107.

ber;’ but he said, ‘he could not with a good conscience continue in it, since he was no longer able to discharge the duty belonging to it.’ 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.”<sup>1</sup>

He several times made the same application to Lord Nottingham, the Chancellor, but was told by him still to hope for the restoration of his health, and was reminded that his predecessor, Lord Coke, had proved himself capable of serving his country at a much more advanced period of life. The reluctance of the Government to accept his resignation proceeded not only from a sense of his merits, but from the great difficulty which existed at that time of replacing him by a person who might be able to support the arbitrary measures which it was intended hereafter to bring forward. Jeffreys was still a flaming patriot, declaring that “he never should be bought;” and Scroggs’s life was so scandalous, that Charles and his ministers were not yet sufficiently regardless of public opinion to venture on putting him at the head of the criminal law, although they were about to make him a Puisne Judge of the Common Pleas.<sup>2</sup>

Hale at last, with his own hand, wrote a resignation of his office, caused it to be duly enrolled in Chancery, and delivered the original into the hands of the Lord Chancellor,<sup>3</sup> saying that “he made this instrument for two reasons—to show the world his own free concur-

<sup>1</sup> Burnet, p. 32.

<sup>2</sup> Dugd. Or. Jur. 118.

<sup>3</sup> “Omnibus Christi Fidelibus ad quos præsens Scriptura pervenerit, MATTHEUS HALE, Miles, Capitalis Justiciarius Domini Regis ad placita coram ipso rege tenenda assignatus, salutem in Domino sempiternam. Noveritis me præfatum MATTHEUM HALE, Militem, jam senem factum, et variis corporis mei senilis morbis et infirmitatibus diu laborantem et adhuc detentum, hæc charta meâ resignare et sursum reddere Serenissimo Domino nostro CAROLO SECUNDO, Dei gratiâ Angliæ, Scotiæ, Franciæ, et Hiberniæ Regi, Fidei Defensori, &c., prædictum officium Capitalis Justiciarii ad placita coram ipso Rege tenenda, humillime petens quod hoc scriptum irrotuletur de recordo. In cujus rei testimonium huic chartæ meæ resignationis sigillum meum apposui. Dat’ vicesimo primo die Februarii, anno regni dict. Dom. Regis nunc vicesimo octavo.”

I once witnessed a similar ceremony in the year 1834, when the venerable Sir John Bayley executed a resignation of his office of a Baron of the Exchequer in the presence of Lord Chancellor Brougham.

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rence to his removal, and to obviate a scruple whether the Chief Justice of the King's Bench, being placed by writ, was removable like the other judges who were appointed by patent during pleasure." The Chancellor, finding the resignation an accomplished fact, offered no farther resistance, and conducted him to the King, "who parted from him with great grace, wishing him most heartily the return of his health, and assuring 'that he would still look upon him as one of his judges, and have recourse to his advice when his health would permit; and, in the mean time, would continue his pension during his life.'"<sup>1</sup>

An obscure person, of the name of Raynsford, who was expected to give little trouble, and whom it would be easy to get rid of, having, in the dearth of fit men, been selected as Chief Justice of the King's Bench, the Lord Chancellor said, at his installation, "*Onerosum est succedere bono principi*, and you will find it so 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 that was so absolutely a master of the science of the law, and even of the most abstruse and hidden parts of it, that one may truly say of his knowledge in the law what Austin said of St. Hierome's knowledge in divinity—*Quod Hieronimus nescivit nullus mortalium unquam scivit*." The new Chief Justice, though not very original or sublime in his rhetorical figures, was determined not to be outdone in eulogy: "It doth very much trouble me," said he, "that I, who, in comparison of him, am but like a candle lighted in the sunshine, or like a glow-worm at mid-day, should succeed so great a person, that is and will be so eminently famous to all posterity."

<sup>1</sup> Burnet, p. 33. "Pension" means *salary*. As yet there was no Civil List; the whole of the public revenue came into the Exchequer, and the King paid the Judges out of it as he did his menial servants. Sometimes extraordinary grants in time of war were put under the management of parliamentary commissioners, but all salaries or pensions were supposed to come out of the King's own pocket. A retired allowance was a mark of very extraordinary favor. On this occasion Hale wished his to be during pleasure; but Charles, seeing that the object of his bounty could not live many months, insisted upon its being for life.



## CHAPTER XVIII.

### CONCLUSION OF THE LIFE OF CHIEF JUSTICE HALE.

**H**ALE was now to bid a final adieu to London. He had resolved to proceed to Alderley, his friends telling him that his constitution might yet be invigorated by his native air; and he himself being resolved here to prepare himself, in seclusion, for the great change which he knew must be at hand. He took an affectionate leave of his officers and attendants, advising them to see for themselves, as their employment was determined; giving considerable presents to such as were in want, and leaving a token with each of them. His friends all flocked round to take an affectionate leave of him; and never, when seated on his tribunal, the "beheld of all beholders," had he received homage so sincere or so touching.

He traveled, by easy journeys, into Gloucestershire; and in the beginning of March, he reached the village where his eyes had first beheld the light, and where his ashes were to repose. The scenes of his infancy, and the recollection of his youthful sports, for a while revived him; and after saying prayers in the church, and spending some time in private devotion, he had spirits to translate a passage from Seneca's *THYESTES*, which he thought particularly applicable to his present circumstances: Sir Matthew was not unfrequently given to

<sup>1</sup> " Stet quicunque volet, potens,  
Aulæ culmine lubrico :  
Me dulcis saturt quies.  
Obscuro positus loco,  
Lini perfruar otio :  
Nullis nota Quiritibus  
Ætas per tacitum fluat.  
Sic cum transierint mei  
Nullo cum strepitu dies,  
Plebeius moriar senex.  
Illi mors gravis incubat,  
Qui, notus nimis omnibus,  
Ignotus moritur sibi."—*Thyestes*, act ii.





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rhyme, but, considering that he was a man of classical education, and that he must have listened to the versification of Dryden, it is astounding to find his lines not only so prosaic, but so rough, lame, mean, and untunable. They are such as no rhyming mechanic or waiting-maid would now produce. But,—compared with his usual failure,—on this occasion he really seems to have been inspired with the genius of the place; and I willingly copy his translation, to show that a great lawyer may have some remote notion of poetry:—

" Let him that *will*, ascend the tottering seat  
Of courtly grandeur, and become as great  
As are his mounting wishes : so for me,  
Let sweet *repose* and *rest* my portion be.  
Give *me* some mean, obscure recess,—a sphere  
Out of the road of business or the fear  
Of falling lower: where I secretly may  
Myself and dear retirement still enjoy.  
Let not my life or name be known unto  
The grandees of the time, toss'd to and fro  
By censures or applause; but let my age  
Slide gently by; not overthwart the stage  
Of public action,—unheard, unseen,  
And unconcern'd, as if I ne'er had been  
And thus, while I shall pass my silent days  
In shady privacy from the noise<sup>1</sup>  
And bustles of the mad world, then shall I,  
A good old innocent plebeian, die.  
Death is a mere surprise, a very snare,  
To him that makes it his life's greatest care  
To be a public pageant; known to all,  
But, unacquainted with himself, doth fall."

In a few days his malady returned with aggravation, and his breathing became so bad, that he was never able to lie down in his bed, being supported upon it, even in the night, by pillows. But he bore his sufferings with exemplary patience; and any intervals of ease which he

<sup>1</sup> In the Gloucestershire dialect this word is pronounced *naize*, as "enjoy" is pronounced "enjay." Having many years attended the Quarter Sessions as well as the Assizes at Gloucester, I made considerable progress in acquiring the lingo of the county. The judge's name is there pronounced Eel, as they never aspirate *h* at the beginning of a word, and they always change *c* into *ee*. Thus Mr. Bloxham, the clerk of the peace, born near Alderley, in calling the jury, when he came to "David Hale of the same place, baker," hallooed out "Deevid Eeel, of the seem pleece, beeker." I hope it is understood that I praise these verses of a Gloucestershire poet only in comparison with his metrical effusions.



enjoyed, he devoted to piety, and to attempts to benefit his fellow-creatures.

It might have been expected that he would have revised, and given to the world, some of the invaluable law treatises which he had composed; but he entirely neglected them. Indeed, he had never shown any desire to be known as a juridical writer, although he was by no means without the ambition of authorship. But he wished to be admired as a philosopher and a divine. In 1673, he had printed an "Essay touching the Gravitation and Non-gravitation of Fluid Bodies;" and two years after, a treatise entitled "DIFFICILES NUGÆ; or, Observations touching the Torricellian Experiment, and the various Solutions of the same, especially touching the Weight and Elasticity of the Air." There had likewise been published, with his sanction, while he was on the bench, two volumes of "CONTEMPLATIONS," consisting of sermons, homilies, or pious ruminations, written by him on the evenings of the Lord's Day. Now he sent to the press the first volume of a work on which he had been engaged for seven years, entitled, "THE ORIGINATION OF MANKIND." His object was to refute atheists, and to support the Mosaic account of the creation. But before it was published he was beyond the reach of human praise or censure:—

"As the winter came on, he saw with great joy his deliverance approaching; for besides his being weary of the world, and his longings for the blessedness of another state, his pains increased so on him, that no patience inferior to his could have borne them without a great uneasiness of mind; yet he expressed to the last such submission to the will of God, and so equal a temper under them, that it was visible then what mighty effects his philosophy and Christianity had on him in supporting him under such a heavy load. Not long before his death the minister told him 'there was to be a sacrament next Sunday at church, but he believed he could not come and partake with the rest; therefore he would give it to him in his own house.' But he answered, 'No, his Heavenly Father had prepared a feast for him, and he would go to his Father's house to partake of it.' So he made himself be carried thither in his chair, where he received the

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sacrament on his knees with great devotion; which, it may be supposed, was the greater because he apprehended it was to be his last, and so took it as his *viaticum* and provision for his journey."<sup>1</sup>

Such was his reputation for sanctity, that some expected that he would be translated to a better world without tasting death. He knew well that he could only attain to perfect blessedness through the resurrection of the just, but even he believed that the time of his death was mysteriously revealed to him, for in the middle of November he declared that "if he did not die next Friday week, he should live a month longer." The day he named fell out to be the 25th of November; he did not die on that day, although grievously sick, and he languished on till the morning of the 25th of December, Christmas-day, when, as it was supposed, by the special favor of Heaven, to recompense him for the war he had carried on against evil spirits, he expired at cock-crow;—

"Then, they say, no spirit dares stir abroad;  
 No fairy takes, nor witch hath power to charm,—  
 So hallow'd and so gracious is the time."

He continued to enjoy the free use of his reason to the last moment, a blessing which he had often earnestly prayed for during his sickness; and when his voice was so sunk that he could not be heard, those who stood by might perceive, by the almost constant lifting up of his eyes and hands, that he was still aspiring towards that blessed state of which he was speedily to be possessed.

He used to disapprove of the custom of burying in churches as superstitious, saying, "Churches are for the living, church-yards for the dead." Accordingly, on his last return from London, he had pointed out a spot for his own interment, near the grave of his deceased wife; and there his remains were deposited on the 4th day of January following. The intention was that the ceremony should be very private, but, in addition to his own relatives and servants, many rustics attended from the surrounding villages, for they regarded the deceased as a Saint, and they thought there was virtue in touch-

<sup>1</sup> Burnet, p. 35

ing his coffin. In Popish times, miracles would have been worked at his tomb, and he would have been canonized as "St. Matthew of Alderley."

The only ecclesiastical honor conferred upon him was a funeral sermon, by the vicar of Alderley, from Isaiah, lvii. 1. "The righteous perisheth, and no man layeth it to heart: and merciful men are taken away, none considering that the righteous is taken away from the evil to come,"—in which the preacher drew a glowing picture of the virtues of the departed Chief Justice, and expressed a pious confidence "that, now beyond the temptations and troubles of this wicked world, in which the Devil and his angels are constantly plotting destruction to the bodies and souls of men, having a powerful Advocate on his side, he might with pious confidence attend the last assize, and expect a sentence of acquittal from the great and merciful Judge of mankind."

Sir Matthew himself had prepared the following simple epitaph, which was inscribed on a plain marble monument erected to his memory;—

"HIC INHUMATUR CORPUS  
MATTHEI HALE, MILITIS;  
ROBERTI HALE ET JOANNÆ  
UXORIS EJUS FILII UNICI,  
NATI IN HOC PAROCHIA DE ALDERLEY,  
PRIMO DIE NOVEMBRIS,  
A. D. 1609.  
DENATI VERO IBIDEM  
VICESIMO QUINTO DIE DECEMBRIS,  
A. D. 1676.  
ÆTATIS SUÆ LXVII."

In the list of our great magistrates there is no name more venerated than Hale, and I can add nothing to exalt his judicial reputation.

He mixed so little in politics, that he is hardly to be enumerated among our statesmen; but in revolutionary times he must be allowed to have acted a moderate, consistent, and meritorious part.

As a jurist, I doubt whether sufficient justice has yet been done to his memory. Coke had as much professional knowledge, but he considered what he had amassed as a mere *congeries* of arbitrary rules, without principle, system, or dependence. Hale cultivated law as a science,—having distinct objects to which it might

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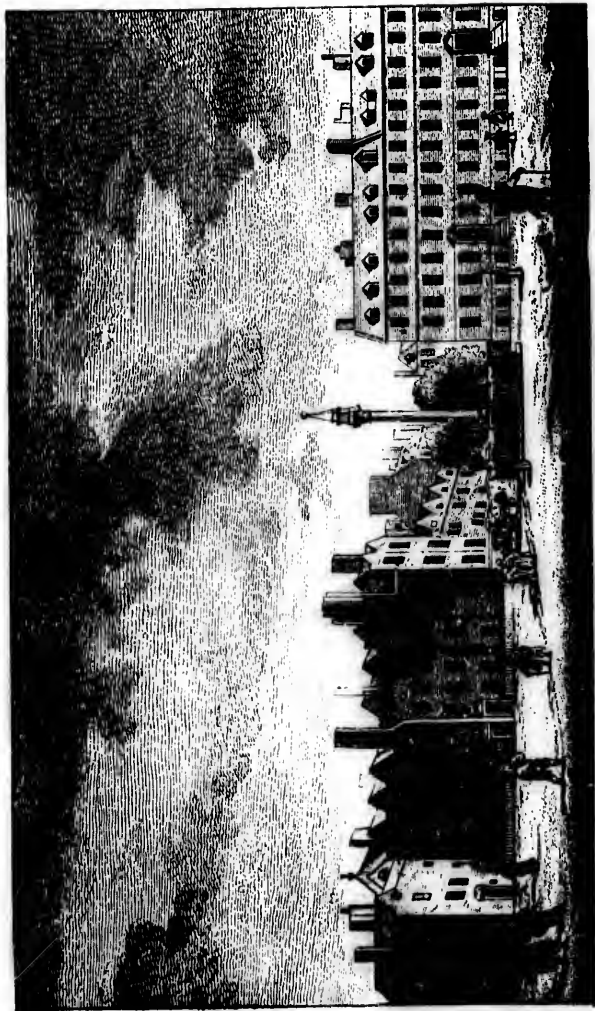
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LINCOLN'S INN IN 1682.  
(Fac-simile of an old engraving.)

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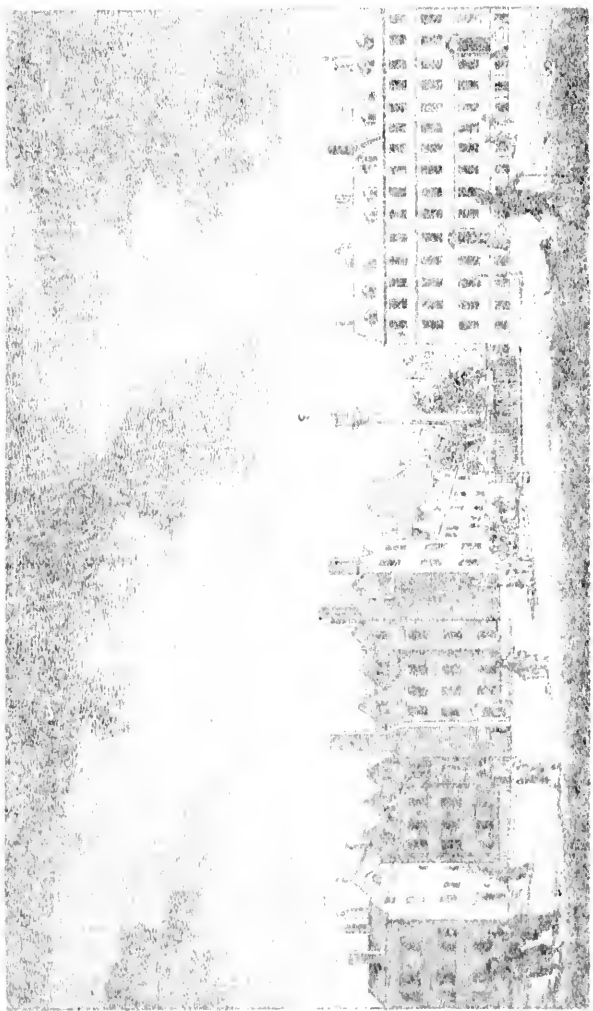
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LINCOLN'S INN IN 1682.  
 (Fac-simile of an old engraving.)





or might not be adapted,—admitting and requiring alterations and amendments, according to the varying circumstances of society. He had a fine head for analysis. and, with a due reverence for existing institutions he recollected the maxim, that “Time is the greatest innovator.” Hence he beautifully methodized the code which he found to be in force, and he gave invaluable instructions as to the manner in which it might be improved. We have from Bishop Burnet the following interesting account of his first attempt in this direction, which shows that the subject had long occupied his thoughts:—

“Some complaining 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 which rendered it very hard to be understood;’ he said, ‘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. Upon this hint 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 endeavors of some of the most eminent of the profession.’”

He actually did publish an “Analysis of the Civil part of our Law,” which supplied Sir William Blackstone with the plan of his immortal COMMENTARIES.\* He likewise left behind him a Tract entitled “Considerations touching the Amendment of the Law,”—to be studied by all law reformers, and by all who think that the law should remain unchanged from generation to generation. Having first pointed out the evils arising from “overhaste and forwardness,” he proceeds to remark on “the over-tenacious holding of laws, notwithstanding apparent necessity for, and safety in, the change:”—

\* Burnet, p. 39.

\* Pronounced by Hargrave “a superstructure raised on the foundation of Lord Hale’s previous Digest.” (Preface to Law Tracts, xii.)



"We must remember," says he, "that laws were not made for their own sakes, but for the sake of those who were to be guided by them; and though it is true that they are and ought to be sacred, yet if they be or are become unuseful for their end, they must either be amended, if it may be, or new laws be substituted, and the old repealed, so it be done regularly, deliberately, and so forth, only as the exigence or convenience justly demands it; and in this respect the saying is true, *Salus populi suprema lex esto*. He that thinks a state can be exactly steered by the same laws in every kind as it was two or three hundred years ago, may as well imagine that the clothes that fitted him when a child should serve him when he was grown a man. The matter changeth, the custom, the contracts, the commerce, the dispositions, educations, and tempers of men and societies, change in a long tract of time, and so must their laws in some measure be changed, or they will not be useful for their state and condition; and besides all this, time is the wisest thing under heaven. These very laws, which at first seemed the wisest constitution under heaven, have some flaws and defects discovered in them by time. As manufactures, mercantile arts, architecture, and building, and philosophy itself, secure new advantages and discoveries by time and experience, so much more do laws which concern the manners and customs of men."

Upon these admirable principles he proceeded when at the head of the Commission for the Amendment of the Law under Cromwell; and on his suggestions chiefly are founded the ameliorations of our code which have illustrated the reigns of William IV. and Queen Victoria. We have not yet a Register of Deeds, but this is not the fault of Hale, for he wrote a book on purpose to recommend it,—in which he triumphantly shows the objection which prevents its adoption—that it would disclose the incumbrances with which estates are charged—to be one of its greatest advantages.

Having completed his "Common-place Book," he, in the early part of his career, wrote many separate law treatises. The one upon which he bestowed most labor, and which has been most frequently quoted, is his "HIS-

<sup>1</sup> Published by Hargrave in his *Law Tracts*.

TORY OF THE PLEAS OF THE CROWN," which is a complete digest of the criminal law as it existed in his day. His "HISTORY OF THE COMMON LAW OF ENGLAND" may be considered a sketch of what might have been expanded into a complete Civil Code. All his MSS. and records he left by his will to the library of Lincoln's Inn, pronouncing them "a rare collection,—a treasure worth having and keeping,—and not fit for every man's view." From this repository the late Mr. Hargrave published, to the great benefit of the community, two very valuable Tracts by Hale,—"*DE PORTUBUS MARIS.*" and "*ON THE JURISDICTION OF THE LORDS' HOUSE OF PARLIAMENT,*"—both of which show a familiarity with our legal antiquities, and powers of distribution and illustration, worthy of the highest admiration.

But he only valued himself for his success in poety,—in philosophy,—and in divinity; and such is the weakness of human nature, that he evidently thought he had secured to himself a lasting reputation in these departments of genius and learning.<sup>1</sup> A collection of hymns, written by him, was published; and Bishop Burnet, who says "he had great vivacity, in his fancy, as may appear from his inclination to poety," praises a Christmas Carol, which thus begins:—

" Blessed Creator I who before the birth  
Of time, or e'er the pillars of the earth  
Were fixt or form'd didst lay that great design  
Of man's redemption, and did'st define  
In thine eternal councils all the scene  
Of that stupendous business, and when

---

<sup>1</sup> Roger North says, "It is most certain his vanity was excessive; which grew out of a self-conversation, and being little abroad. But when he was off from the seat of justice and at home, his conversation was with none but flatterers. He was allowed on all hands to be the most profound lawyer of his time; and he knew it; but that did not serve him, but he would also be a profound philosopher, naturalist, poet and divine, and measured his abilities in all these by the scale of his learning in the law, which he knew how to value; and if he postponed any, it was the law to all the rest; for he was so bizarr 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."—(i. 115.) But Roger confesses that he was influenced by his brother's envy of Hale:—"He was very much concerned to see the generality, both gentle and simple, lawyers and laymen, idolize him, as if there had never been such a miracle of justice since Adam."—(i. 119.)

It shall appear, and though the very day  
Of its epiphany conceal'd lay  
Within thy mind, yet thou wert pleased to show  
Some glimpses of it to men below."<sup>1</sup>

While living in retirement, shortly before the Restoration, he wrote a pamphlet on the "Maintenance of the Poor," in which, in entire ignorance of the elements of political economy, and amiably led away by *communist* doctrines, he proposes that in every parish there should be an association of operatives, who, being supplied with materials, should carry on some manufacture for their common benefit. Refusal to work he would punish, upon a conviction before magistrates; but he is as silent as Louis Blanc, in our day, with respect to the necessary stimulus to exertion where the listless and the laborious were to share equally; and he says not a word about the requisite supply of capital, or the demand for his manufactured produce.<sup>2</sup>

In his latter years he was smitten by the rage for philosophical discovery which prevailed among the founders of the Royal Society. At Acton he had a laboratory, and he engaged in long courses of chemical experiments. The result of these he from time to time gave to the world, in pamphlets, which called forth eulogies from sycophants who surrounded him, but made the judicious grieve. His book on "THE ORIGINATION OF MANKIND" has the merit of containing the refutation of atheism from the mechanism of a watch, of which Paley has availed himself. After supposing one to have been presented in an assembly of Greek philosophers, and giving their various unsatisfactory explanations of its structure and movements, he finally introduces the maker, and puts this speech into his mouth:—

"Gentlemen, you have discovered very much excellency of invention touching this piece of work that is before you, but you are all miserably mistaken; for it was I that made this watch and brought it hither, and I will show you how I made it. I wrought the spring, and the

<sup>1</sup> I must admit that this rather justifies Roger North's criticism:—"He published much in speculative devotion, part prose, part verse; and the latter hobbled so near the style of the other as to be distinguished chiefly by being worse."

<sup>2</sup> See an analysis of this pamphlet in Sir Frederick Morton Eden's *History of the Poor Laws*, i. 214.

fascie, and the wheels, and the balance, and the case, and the table; I fitted them one to another, and placed these several axes that are to direct the motions of the index to discover the hour of the day, of the figure that discovers the phases of the moon, and the other various motions that you see."

But his speculations about the manner in which the heavens and the earth were created, and his geological explanation of the effects of Noah's flood, are by no means edifying.<sup>1</sup> His "CONTEMPLATIONS," and other devotional writings, have passed through many editions, and, I doubt not, have done much good; but I believe that they acquired their celebrity from being the productions of a lawyer of high station, and that if they had come from an ecclesiastic, whether Churchman or Dissenter, they would have attracted little notice. Even Burnet says "they are not so contracted as it is very likely he would have writ them if he had been more at leisure to have brought his thoughts into a narrow compass and fewer words."

Of all his writings, the most popular are his "LETTERS OF ADVICE TO HIS SONS AND HIS GRANDCHILDREN." They are certainly very moral, and may be perused with much advantage; but I must admit that they are very dull and unattractive, and the fashion of using them as a text-book for domestic education, I am sorry to say, has made the hero of this memoir to be regarded as a *great bore* by the rising generation. Thus he addresses his granddaughter *Anne*, whom he describes as of "sanguine but melancholy complexion," and his granddaughters *Mary* and *Frances*, who, were, it seems, "of a sanguine and choleric complexion:"—

"I would have you learn all points of good housewifery, and practise it as there shall be occasion; as spinning of linen, the ordering of dairies, and to see to the dressing of meal, salting and dressing of meat, brewing and baking, and to understand the common prices of corn, meat, malt, wool, butter, cheese, and all other household provisions; and to see and know what stores of all things

<sup>1</sup> This publication seems to have had no success. Roger North says that it is "very remarkable for a childish ignorance of the subject, and that scarce any one ever read or will read it."

necessary for the house are in readiness, what and when more are to be provided; to have the price of linen, cloths, stuffs, and woollen cloth for your necessary use and the use of a family; to cast about to provide all things; to know the condition of your poultry about the house, for it is no discredit to a woman to be a hen-housewife; to cast about how to order your clothes with the most frugality, to mend them when they want, and to buy but when it is necessary, and with ready money; to love to keep at home. A good wife is a portion of herself, but an idle or expensive wife is most times an ill bargain, though she bring a great portion."<sup>1</sup>

Burnet says, "he neglected the study of the tongues; he tells us that he had entirely forgotten his Greek, and I presume that he avoided all dramatic writings in English as profane; but it is wonderful that his familiar acquaintance with the authorized translation of the Bible (that well of English undefiled) did not make his style more nervous and more harmonious. As a writer, however, he pleased the late Lord Ellenborough, who said "he was as competent to express as he was to conceive."<sup>2</sup>

Above all, he was revered in his own time, and has been so ever since, for the example he set of spotless purity and of genuine piety, although it must be confessed that in his ascetic life he fled from social duties, and that he was not entirely free from superstition. He gravely narrates that he was led to the strict observance of the Sabbath-day because, once profaning it by riding a journey, his horse was supernaturally lamed;<sup>3</sup> and he always retained his puritanical dislike to changes of posture during divine service, and even to bowing at the name of Jesus.<sup>4</sup>

<sup>1</sup> Hannah More, in her "Hints towards the character of a Princess," recommends "the occasional committing to memory of a rule of conduct from Sir Matthew Hale." I do not know whether she had the above admonition in her eye.

<sup>2</sup> 5 East, 17

<sup>3</sup> Baxter, in his Preface to "Gouge's Surest and Safest Way of Thriving," 8vo. 1676, says "The Lord Hale hath told me how the strange providences of God, in laming and disabling his horse, and other impeditions in a journey towards London for worldly advantages, did convince him and engage him ever after to spend the day as he hath done."

<sup>4</sup> Baxter says, "His behavior in the church was conformable but *pro-*

He was likewise coxcombical in his own way. "His habit," says Baxter, "was so coarse and plain, that I, who am thought guilty of a culpable neglect therein, have been bold to desire him to lay aside some things which seemed too homely." Then, although he would have no visiting intercourse with the great and the learned, he invited his poorest neighbors to dinner, and made them sit at his own table. He thus rendered his house very disagreeable to his children, who might have turned out well if better society and suitable amusements had been provided for them at home. "All his sons died in the sink of lewdness and debauchery; and if he was to blame in their education, it was owing to much rigor rather than of liberty."<sup>2</sup>

His style of living by no means proceeded from an avaricious or miserly disposition. "He did not take the profits that he might have had by his practice, for in common cases, when those who came to ask his counsel gave him a piece, he used to give back the half, and to make ten shillings his fee in ordinary matters that did not require much time or study." He often acted as an arbitrator, but would never accept any fee for his pains,—saying, "In these cases I am made a judge, and a judge ought to take no money." If they told him that he lost much of his time in considering their business, and so ought to be acknowledged for it, he asked, "Can I spend my time better than to make people friends? Must I have no time allowed me to do good in?" He regularly set apart a tenth part of his gains for the poor, and laid out large sums in charity besides.

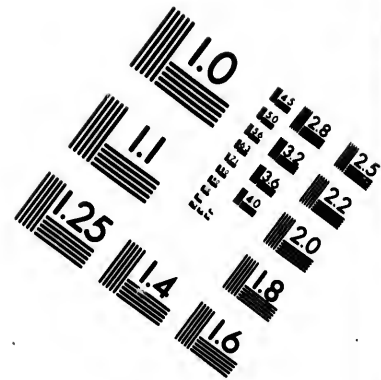
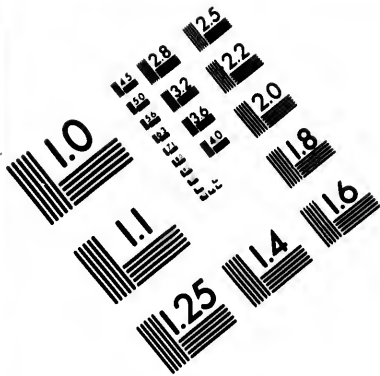
dent," and describes his innocent contrivances to satisfy his conscience without violating the Rubric.—(Relig. Baxter, part iii. p. 181). Although we must regret that he was so narrow-minded on such points, it is creditable to him that he did not—like most Dissenters who, on their rising in the world, have *conformed*—go over furiously to the high-Church party, and persecute his former co-religionists.

<sup>1</sup> Unconscious that he himself tried to attract notice and gain distinction by peculiarity of dress he rebuked any symptoms of his passion in others. He was particularly severe on attorneys who wore swords; and he expressed high displeasure at the young barristers who wore periwigs, which were then beginning to be fashionable,—*apprentices* having hitherto appeared in their natural long locks, and *sergeants* being adorned with the *coif* or black velvet night-cap.—Burnet, p. 52.

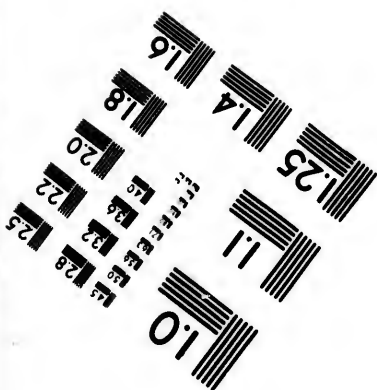
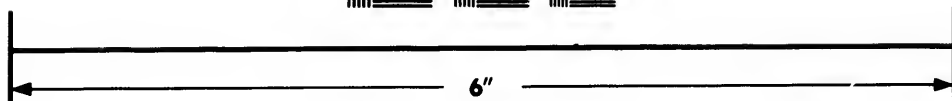
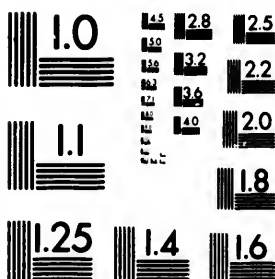
<sup>2</sup> North's Life of Guilford, i. 117.

<sup>3</sup> At this time the client consulted the barrister in person, and paid him the *honorarium* without the intervention of attorney or clerk.





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Accordingly, notwithstanding his extensive business at the bar, and long tenure of office, the whole increase of his estate was from £100 to £900 a year, and this arose chiefly from a large legacy left to him by his friend Selden."

His biographers add a proof of his extreme scrupulousness, which gives us a strange notion of the times in which such conduct was thought to deserve special praise. "Another remarkable instance," says a bishop, who has not the arrogance to say he imitated him, "of his justice and goodness was, that when he found ill-money had been put into his hands, he would never suffer it to be vented again, for he thought it was no excuse for him to put false money in other people's hands because some had put it into his. A great heap of this he had gathered together, for many had so abused his goodness as to mix base money among the fees that were given him."

Sir Matthew Hale was a handsome man, with a strong constitution, which he preserved by short meals and always rising from table with an appetite. I suspect, however, that he indulged to great excess in the use of tobacco, under pretense that, from some peculiarity of constitution, it was necessary to him. Having exhorted his grandchildren to shun this pernicious plant, he says to them, "Herein your grandfather's practice must not be an example to you, nor to any else that is not of his complexion, government, and prudent ordering of himself for your grandfather hath ever been of a cold complexion and constitution, and therefore tobacco hath been his physic, and a great preservative of his health. But your constitutions are hot, dry, and choleric, and it is hurtful for you."

<sup>1</sup> He showed his disinterestedness as one of the executors of this extraordinary man, who had, by his will, left his noble library of 8000 volumes and many costly MSS. to the University of Oxford, but taking offense with that learned body because he was refused the loan of a book without giving security for it, had, by a codicil, left the whole to his executors. The executors thinking this a mere temporary ebullition of spleen, carried into effect the original design.—Ath. Ox. i. pp. xxxvii. xxxviii.

<sup>2</sup> This hoard was at last seized by thieves, who broke into his house and thought they had gained a great prize. They probably did not scruple to circulate it, as it had belonged to a Saint.

<sup>3</sup> Page 150.

His first wife was a daughter of Sir Henry Moore, of Faly, in Berkshire. By her he had ten children, all of whom he outlived except his eldest daughter and his youngest son. When pretty far advanced in life, having been some time a widower, he married the daughter of Mr. Joseph Bishop, of Faly, by whom he had no issue. Roger North says that "she was his own servant maid, and that, for excuse, he said 'There is no wisdom below the girdle.'"<sup>1</sup> Baxter charitably observes, "Some made it a scandal; but his wisdom chose it for his convenience, that in his age he married a woman of no estate, suitable to his disposition, to be to him as a nurse. This good man more regarded his own daily comfort than man's thoughts and talk." The arrangement turned out well, and he speaks affectionately and respectfully of her, both in his will and in his advice to his grandchildren,—whom he committed to her care.

The estate of Alderley is still in the possession of a lineal descendant of Sir Matthew Hale. I remember that this gentleman served the office of High Sheriff for the county of Gloucester when I went the Oxford Circuit, and that he was treated with peculiar respect by the Judges and the bar, from our profound veneration for the memory of his illustrious ancestor.

In writing this memoir, it has been painful to me, in the impartial discharge of my duty, to impute a few errors and defects to him whose infallibility and absolute perfection are considered by many to be essential to the cause of true religion; but I have pleasure in concluding with a sketch of his character, drawn by one who was intimately acquainted with him for many years, and who may be confidently relied upon both for discernment and sincerity. Richard Baxter, with a small pecuniary legacy left him as a token of regard by his old friend, purchased a copy of the great Cambridge Bible, and prefixed to it a print of the Judge, with the following encomium:—

"Sir Matthew Hale, that unwearied student, that prudent man, that solid philosopher, that famous lawyer, that pillar and basis of justice—(who would not have done an unjust act for any worldly price or mo-

<sup>1</sup> Life of North, p. 116.

<sup>2</sup> Relig. Baxter, part iii. p. 176.

tive),—the ornament of his Majesty's government, and honor of England, the highest faculty of the soul of Westminster Hall, and pattern to all the reverend and honorable Judges; that goodly, serious, practical Christian, the lover of goodness and all good men; a lamenter of the clergy's selfishness, and unfaithfulness, and discord, and the sad divisions following hereupon; an earnest desirer of their reformation, concord, and the Church's peace, and of a reformed Act of Uniformity as the best and necessary means thereto; that great contemner of the riches, pomp, and vanity of the world; that pattern of honest plainness and humility, who, while he fled from the honors that pursued him, was yet Lord Chief Justice of the King's Bench, after his long being Lord Chief Baron of the Exchequer; living and dying, entering on, using, and voluntarily surrounding his place of judicature with the most universal love, and honor, and praise, that ever did English subject in this age. or any that just history doth record."





## CHAPTER XIX.

### CHIEF JUSTICES FROM THE RESIGNATION OF SIR MATTHEW HALE TILL THE APPOINTMENT OF JEFFREYS.

ON the resignation of Sir Matthew Hale the times were yet tolerably quiet, and, there being no Government job to be done in the Court of King's Bench, a disposition existed to appoint a respectable man to succeed him; but a great penury of learning and ability was discovered in looking to those, either at the bar or on the bench, whose fitness was canvassed, and, at last, Lord Nottingham, who now held the great seal, decided that he could not do better than promote SIR RICHARD RAYNSFORD, a Puisne Judge of this court, to be Chief Justice. He was a man of good family, fair estate, decent character, and agreeable manners, with a sufficient portion of understanding and learning to keep him above contempt.

Descended from the Raynsfords of Raynsford, in the county of Lancaster, he was of a branch of the family settled at Dullington, in Northamptonshire. He began life as a younger brother, and was bred to the bar at Lincoln's Inn. His relations were strong Cavaliers, and he himself entertained, in his heart, a thorough hatred of Roundheads; but, entering upon his professional career when the Parliament had gained a complete ascendancy over the King, he deemed it more prudent to submit to the ruling powers, and in 1653 he was chosen Deputy Recorder of Northampton; but he neither obtained nor sought any farther preferment till the Restoration. By the death of his elder brother he obtained possession of the patrimonial property, reckoned worth £600 a year, and he was to have been made one of the "KNIGHTS OF THE ROYAL OAK," if that order, which was in contemplation, had been established. Although

he represented the county of Northampton in the Convention Parliament and that which followed, and he was looked upon rather as a country squire than a lawyer, he had a liking for the profession, and he continued to attend the courts and to go the circuit. In 1663 he was made a Baron of the Exchequer, and for six years he sat, almost dumb, listening to profound elucidations of the law from the lips of Lord Chief Baron Hale. It was then convenient that he should be transferred to the King's Bench,<sup>1</sup> where he still maintained his reputation for good sense and discretion. No one having dreamed of his going higher, the news of his appointment as Chief Justice of England caused considerable surprise; but on account of his inoffensiveness and gentlemanlike deportment, there was a general inclination to support him and to speak well of him.

He held his office two years,—till the Popish plot broke out, and the Government deemed it necessary to substitute for him a tool better fashioned for doing the horrid work then on hand to their mind—SIR WILLIAM SCROGGS; who, next to JEFFREYS,—and at a very short distance from him,—is considered the most infamous judge who ever sat on the English bench.

During the Lord Chief Justice Raynsford's time, one case of great public interest arose, and this he disposed of very satisfactorily. The famous Earl of Shaftesbury—having been sent to the Tower by the House of Peers, under a warrant which merely stated that it was “for high contempts committed against the House, without specifying what the offense was—sought to be discharged by a writ of *habeas corpus*, returnable in the King's Bench,—on the ground that the warrant was illegal; and he and his counsel argued very plausibly that every freeman was entitled to know the charge on which he was deprived of his liberty, and that what the Lords construed as a high contempt might, in reality, be an act perfectly innocent, or such as it was the duty of the party imprisoned to do under the obligation of a statute or of the common law.

<sup>1</sup> 2 Keble, 469. On this occasion he took precedence of a King's Bench Puisne, who had been made a judge after him:—“Et donque sans autre ceremony, il seu sure le ba. supra Morton, quia, il fust Baron devenant que Morton fust fait Justice.”—1 *Sid.* 408.

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At this time Shaftesbury was highly obnoxious to Danby, the Prime Minister, who earnestly desired to detain his rival in custody; otherwise, no one can tell how the point of privilege would have been settled. We are bound, however, to suppose that all the Judges of the Court looked only to the just principles on which parliamentary privilege is founded, and to Chief Justice Newdicate's decision in Sir Robert Pye's case during the Commonwealth.

*Raynsford, C. J.*: "This Court has no jurisdiction of the cause, and therefore we cannot take into consideration the form of the return. We ought not to extend our jurisdiction beyond its due limits, and the practice of our ancestors will not warrant us in such an attempt. The consequence would be very mischievous if this Court should deliver a member of the House of Peers or Commons, committed for contempt, for thereby the public business may be retarded; for it may be the commitment was for evil behavior or indecent reflections on other members, to the disturbance of the affairs of Parliament. The commitment in this case is not for safe custody, but in execution of the judgment given by the Lords for the contempt; and, therefore, if he were bailed he would be delivered out of execution. For a contempt *in facie curiæ* there is no other judgment. This Court has no jurisdiction, and therefore the prisoner must be remanded."<sup>1</sup>

So he lay in custody till he was obliged to make an abject apology to obtain his liberation, and he seemed for ever ruined as a public man—when the Popish plot suddenly made him more popular and more powerful than ever.

The shadow of this coming event was the signal for the dismissal of Sir Richard Raynsford—the first instance of such an exercise of the prerogative during the present reign.<sup>2</sup> Although there had been before him four Chief Justices of the King's Bench appointed by Charles II. in rapid succession, the first three had died

<sup>1</sup> 6 St. Tr. 1171.

<sup>2</sup> "T. T. 3 Car. II., *Mundum*. This term Sir Richard Raynsford was removed, and Sir William Scroggs, one of the Justices of the Common Pleas, was made Lord Chief Justice of the King's Bench."—(1 *Vent.* 329.)

in office, and the fourth had voluntarily resigned. Raynsford was very unwilling to retire, but being plainly told that this step was necessary for the King's service, he at last quietly submitted, and as he had no quarrel with the Government, the act of cashiering him was carried through with all becoming delicacy.

He retired to his country house at Dullington, and—having founded almshouses there for the good of his soul, to maintain old men and old women, with an allowance of 2s. weekly to each—he died on the 17th of December, 1679, in the 75th year of his age. A monument was erected to his memory in the parish church, with an inscription from which it might be supposed that he was a greater Chief Justice than Coke, Hale, Holt, or Mansfield. I will give a short specimen of it:—

" Richardi Raynsford Militis  
Nuper de Banco Regis Capitalis Justiciarii, &c.  
Eximii sui seculi decus,  
Quem non cœca sors, at spectata virtus,  
Ad illos quos ornavit honores evexit,  
Quem summa in Deum pietas, in patriam charitas,  
In Regem, in ecclesiam, inconcussa fides,  
In jure nicendo erudita probitas,  
Asylum bonis, flagellum malis," &c., &c.<sup>1</sup>

Never was there a more striking contrast than between Chief Justice Raynsford and his immediate successor. SCROGGS had excellent natural abilities, and might have made a great figure in his profession; but was profligate in his habit, brutal in his manners, with only one rule to guide him—a regard to what he considered his own interest,—without a touch of humanity,—wholly impenetrable to remorse.

It was positively asserted in his lifetime, and it has been often repeated since, that he was the son of a butcher, and that he was cruel as a judge because he had been himself accustomed to kill calves and lambs when he was a boy.

A popular ballad, published at the time when he was pouring forth innocent blood like water, contained these stanzas:—

" A butcher's son's Judge Capital,  
Poor Protestants to enthral,  
And England to enslave, sirs ;

<sup>1</sup> Bridges' Northampton, i. 495.



Lose both our laws and lives we must,  
When to do justice we entrust  
So known an arrant knave, sirs.

" His father once exempted was  
Out of all juries; why? because  
He was a man of blood, sirs.  
And why the butcherly son (forsooth!)  
Should now be judge and jury both,  
Cannot be understood, sirs.

" The good old man, with knife and knocks,  
Made harmless sheep and stubborn ox  
Stoop to him in his fury;  
But the bribed son, like greasy oaph,  
Kneels down and worships golden calf,  
And massacres the jury."<sup>1</sup>

There are many grave prose authorities to the same effect. Roger North, who must have known him familiarly for many years, and highly approved of his principles, says, "This Sir William Scroggs was of a mean extract, having been a butcher's son;"<sup>2</sup> and Sir William Dugdale, supposed to be the most accurate of genealogists, being not only a man of profound antiquarian learning, but at the head of heraldry as GARTER KING AT ARMS, in answer to inquiries on the subject from Wood, the author of the *ATHENÆ*, "Sir William Scroggs was the son of a one-eyed butcher near Smithfield Bars; and his mother was a big fat woman, with a red nose like an ale-wife."<sup>3</sup>

Yet it is quite certain that the usual solution of Scroggs' taste for blood is a pure fiction, for he was born and bred a gentleman. Some said, jocularly, that he was descended from the ancient Welsh family *Kilmaddock* of *Kilmaddocks*,<sup>4</sup> but, in truth, his father was a squire, of respectable family, and good estate, in Oxfordshire. Young Scroggs was several years at a grammar-school, and he took a degree with some credit in the University of Oxford, having studied first at Oriel, and then at Pembroke College. He was intended for the Church, and in quiet times, might have died respected as a pains-taking

<sup>1</sup> This metrical broadside is entitled "Justice of Masquerade."

<sup>2</sup> Life of North, i. p. 296.

<sup>3</sup> *Athenæ*, vol. iv. p. 117. Wood cautions his readers against giving implicit credit to this statement, as Dugdale had a spite against Scroggs, who had refused to pay certain fees to the College of Arnis, which had been demanded of him when he was made a knight.

<sup>4</sup> Kill—mad—ox.

curate, or as Archbishop of Canterbury. But, the civil war breaking out while he was still under age, he enlisted in the King's cause, and afterwards commanded a troop of horse, which did good service in several severe skirmishes. Unfortunately, his morals did not escape the taint which distinguished both men and officers on the Cavalier side.

The dissolute habits he had contracted unfitted him entirely for the ecclesiastical profession, and he was advised to try his luck in the law. He had a quick conception, a bold manner, and an enterprising mind; and prophecies were uttered of his great success if he should exchange the cuirass for the long robe. He was entered as a student at Gray's Inn, and he showed that he was capable, by short fits, of keen application; but his love of profligacy and of expense still continued, and both his health and his finances suffered accordingly.

However, he contrived to be called to the bar; and some of his pot companions being attorneys, they occasionally employed him in causes likely to be won by a loud voice and an unscrupulous appeal to the prejudices of the jury. He practiced in the King's Bench, where, although he now and then made a splashy speech, his business by no means increased in the same ratio as his debts. "He was," says Roger North, "a great voluptuary, his debaucheries egregious, and his life loose; which made the Lord Chief Justice Hale detest him." Thinking that he might have a better chance in the Court of Common Pleas, where the men in business were very old and dull, he took the degree of the coif, and he was soon after made a King's Serjeant. Still, however, he kept company with Ken, Guy, and the high-Court rakes, and his clients could not depend upon him. His visage being comely, and his speech witty and bold, he was a favorite with juries, and sometimes carried off wonderful verdicts; but, when he ought to have been consulting in his chamber in Sergeants' Inn, he was in a tavern or gaming house, or worse place, near St. James's palace. Thus his gains were unsteady, and the fees which he received were speedily spent in dissipation, so that he fell into a state of great pecuniary embarrassment. On one occasion, he

But, the civil age, he enlisted a troop of general severe skirmishers, not escape the officers on the

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was arrested by a creditor in Westminster Hall as he was about to enter his coach. The process being out of the King's Bench he complained to that Court of a breach of his privileges as a Sergeant; but Lord Chief Justice Hale refused to discharge him. He afterwards pleaded his privilege, and brought an action for what he called the illegal arrest, contending that, as a Sergeant-at-law, he could only be regularly sued in the Court of Common Pleas. The Judges decided unanimously against him, Hale observing, "Although Sergeants have a monopoly of practice in the Common Pleas, they have a right to practice, and do often practice at this bar; and if we were to assign one of them as counsel, and he were to refuse to act, we should make bold to commit him to prison."

Meanwhile, Sergeant Scroggs was in high favor with Lord Shaftesbury's enemies, who, on the commitment of that turbulent leader to the Tower for breach of privilege, had gained a temporary advantage over him. Through the agency of Chiffinch, superintendent of the secret intrigues of every description which were carried on at Whitehall, he had been introduced to Charles II., and the merry monarch took pleasure in his licentious conversation. What was of more importance to his advancement, he was recommended to the Earl of Danby, the reigning Prime Minister, as a man that might be useful to the Government if he were made a judge. In consequence, on the 23d of October, 1676, he was knighted, and sworn in a Justice of the Court of Common Pleas. Sir Allan Broderick, in a letter to "the Honorable Lawrence Hyde," written a few days after, says, "Sir William Scroggs, on Monday, being admitted Judge, made so excellent a speech that my Lord Northampton, then present, went from Westminster to Whitehall immediately, and told the King he had, since his happy restoration, caused many hundred sermons to be printed, all which together taught not the people half so much loyalty; therefore, as a sermon, desired his command to have it printed and published in all the market towns in England."

<sup>1</sup> Freeman, 389; 2 Lev. 129; 3 Keb. 424, 439, 440; Roger North's Lives of the Norths, i. 137.

<sup>2</sup> Correspondence of the Earls of Clarendon and Rochester, vol. i. p. 2.

Mr. Justice Scroggs gave himself little trouble with law business that came before the Court; but, in addressing grand juries on the circuit, he was loud and eloquent against the proceedings of the "country party," and he still continued to be frequently in the circle at Whitehall, where he took opportunities not only to celebrate his own zeal, but to sneer at Sir John Raynsford, the Chief Justice of the King's Bench, whose place he was desirous to fill.<sup>1</sup> Chiffinch, and his other patrons of the back-stairs, were in the habit of sounding his praise, and asserting that he was the only man who, as head of the King's Bench, could effectually cope with the manœuvres of Shaftesbury. This unconquerable intriguer, having been discharged from custody, was again plotting against the Government, was preparing to set up the legitimacy of Monmouth, and was asserting that the Duke of York should be set aside from the succession to the throne and prosecuted as a Popish recusant. There had been a reluctance to exercise the prerogative of cashiering judges, which had been dormant during the long reign of Elizabeth, and the abuse of which had caused such scandal in the reigns of James I. and Charles I. But these scruples being once overcome were wholly disregarded. From this time the system recommenced of clearing the bench for political reasons, and it was continued till, the vilest wretch the profession of the law could furnish being Chief Justice of England, his tenure of the office became in some degree independent.<sup>2</sup>

The immediate cause of Raynsford's removal was the desire of the Government to have a Chief Justice of the King's Bench on whose vigor and subserviency reliance could be placed, to counteract the apprehended machinations of Shaftesbury.

On the 31st of May, 1678, Sir William Scroggs was sworn into the office,<sup>3</sup> and he remained in it for a period

<sup>1</sup> In consequence of the intrigues of Puisne Judges desirous of becoming Chiefs in the reigns of Charles II. and James II., the rule was laid down at the Revolution that a Puisne Judge is only to attend one levee on his appointment, and is never again to appear at Court.

<sup>2</sup> Sir Robert Wright, James II.'s last Chief Justice, who presided at the trial of the Seven Bishops.

<sup>3</sup> 1 Vent. 329; Sir Thomas Raynard, 244.

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of three years. How he conducted himself in civil suits is never once mentioned, for the attention of mankind was entirely absorbed by his scandalous misbehavior as a Criminal Judge. He is looked to with more loathing, if not with more indignation, than Jeffreys, for in his abominable cruelties he was the sordid tool of others, and in his subsequent career he had not the feeble excuse of gratifying his own passions or advancing his own interests.

Although quite indifferent with regard to religion, and ready to have declared himself a Papist, or a Puritan, or a Mahometan, according to the prompting of his superiors,—finding that the policy of the Government was to outbid Shaftesbury in zeal for Protestantism, he professed an implicit belief in all the wonders revealed by Titus Oates, in the murder of Sir Edmondbury Godfrey by Papists, and in the absolute necessity for cutting off without pity all those who were engaged in the nefarious design to assassinate the King, to burn London, and to extinguish the flames with the blood of Protestants. He thought himself to be in the singularly felicitous situation of pleasing the Government while he received shouts of applause from the mob. Burnet, speaking of his appointment, says, "It was a melancholy thing to see so bad, so ignorant, and so poor a man raised up to that great post. Yet he, now seeing how the stream ran, went into it with so much zeal and heartiness that he was become the favorite of the people."<sup>1</sup>

The first of the Popish Plot judicial murders—which are more disgraceful to England than the massacre of St. Bartholomew's is to France—was that of *Stayly*, the Roman Catholic banker. Being tried at the bar of the Court of King's Bench, Scroggs, according to the old fashion, which had gone out during the Commonwealth, repeatedly put questions to the prisoner, attempting to intimidate him, or to involve him in contradictions, or to elicit from him some indiscreet admission of facts. A witness having stated that "he had often heard the pris-

<sup>1</sup> Own Times, ii. 69. He thus introduces our hero:—"The Lord Chief Justice at that time was Sir William Scroggs, a man more valued for his good readiness in speaking well than either for learning in his profession or for any moral virtue. His life had been indecently scandalous, and his fortunes were very low."

oner say he would lose his blood for the King, and speak as loyally as man could speak," Scroggs exclaimed, "That is, when he spoke to a Protestant!" In summing up, having run himself out of breath by the violence with which he declaimed against the Pope and the Jesuits, he thus apologized to the jury:—

"Excuse me, gentlemen, if I am a little warm, when perils are so many, murders so secret, that we cannot discover the murderer of that gentleman whom we all know so well.<sup>1</sup> When things are transacted so closely, and our King is in great danger, and religion is at stake, I may be excused for being a little warm. You may think it better, gentlemen, to be warm here than in Smithfield. Discharge your consciences as you ought to do. If guilty, let the prisoner take the reward of his crime, for perchance it may be a terror to the rest. I hope I shall never go to that heaven where men are made saints for killing kings."

The verdict of *guilty* being recorded, Scroggs, C. J., said, "Now, you may die a Roman Catholic; and when you come to die, I doubt you will be found a priest too. The matter, manner, and all the circumstances of the case make it plain; you may harden your heart as much as you will, and lift up your eyes, but you seem, instead of being sorrowful, to be obstinate. Between God and your conscience be it; I have nothing to do with that; my duty is only to pronounce judgment upon you according to law—you shall be drawn to the place of execution, where you shall be hanged by the neck, cut down alive," &c., &c.

The unhappy convict's friends were allowed to give him decent burial; but, because they said a mass for his soul, his body was, by order of Lord Chief Justice Scroggs, taken out of the grave; his quarters were fixed upon the gates of the city, and his head, at the top of a pole, was set on London Bridge. So proud was Scroggs of this exploit, that he had an account of it written, for which he granted an IMPRIMATUR, signed with his own name.<sup>2</sup>

I must not run the risk of disgusting my readers by

<sup>1</sup> Sir E. Godfrey.

<sup>2</sup> 6 St. Tr. 1501-1512. For this he probably received a good sum of money.

a detailed account of Scroggs' enormities on the trials of Coleman, Ireland, Whitebeard, Langhorn, and the other victims whom he sacrificed to the popular fury, under pretense that they were implicated in the Popish Plot. Whether sitting in his own court at Westminster, or at the Old Bailey in the City of London, as long as he believed that Government favored the prosecutions, by a display of all the unworthy arts of cajoling and intimidation he secured convictions. A modern historian, himself a Roman Catholic priest, says, with temper and discrimination, "The Chief Justice Scroggs, a lawyer of profligate habits and inferior acquirements, acted the part of prosecutor rather than of judge. To the informers he behaved with kindness, even with deference, suggesting to them explanations, excusing their contradictions, and repelling the imputation on their characters; but the prisoners were repeatedly interrupted and insulted; their witnesses were brow-beaten from the bench, and their condemnation was generally hailed with acclamations, which the court rather encouraged than repressed."<sup>1</sup>

Meanwhile the Chief Justice went the circuit; and although the Popish Plot did not extend into the provinces, it may be curious to see how he demeaned himself there. Andrew Bromwich, being tried before him capitally, for having administered the Lord's Supper according to the rites of the Church of Rome, thus the dialogue between them proceeded:—

*Prisoner*: "I desire your Lordship will take notice of one thing, that I have taken the oaths of allegiance and supremacy, and have not refused anything which might testify my loyalty." *Scroggs, C. J.*: "That will not serve your turn; you priests have many tricks. What is that to giving a woman a sacrament several times?" *Prisoner*: "My Lord, it was not a sacrament unless I be a priest, of which there is no proof." *Scroggs*: "What! you expect we should prove you a priest by witnesses, who saw you ordained? We know too much of your religion; no one gives the sacrament in a wafer except he be a popish priest: you gave that woman the sacrament in a wafer; *ergo*, you are a popish priest." Thus

<sup>1</sup> Lingard, xii. 161. See 7 St. Tr. 1-591.



he summed up: "Gentlemen of the Jury, I leave it upon your conscience whether you will let priests escape, who are the very pests of Church and State; you had better be rid of one priest than three felons; so, gentlemen, I leave it to you."

After a verdict of GUILTY, the Chief Justice said, "Gentlemen, you have found a good verdict, and if I had been one of you I should have found the same myself." He then pronounced sentence of death, describing what seemed to be his own notion of the Divine Being, while he imputed this blasphemy to the prisoner,—"You act as if God Almighty were some omnipotent mischief, that delighted and would be served with the sacrifice of human blood."

Scroggs was more and more eager, and "ranted on that side more impetuously,"<sup>1</sup> when he observed the Lord Shaftesbury, who, although himself too shrewd to believe in the Popish Plot, had been working it furiously for his own purposes, was taken into office on the formation of Sir William Temple's new scheme of administration, and was actually made President of the Council. But he began to entertain a suspicion that the King had been acting a part against his inclination and his judgment, and, having ascertained the real truth upon this point he showed himself equally versatile and violent by suddenly going over to the opposite faction. Roger North gives the following racy account of his conversion:—

"It fell out that when the Earl of Shaftesbury had sat some short time in the Council, and seemed to rule the roast, yet Scroggs had some qualms in his politic conscience; and 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

<sup>1</sup> 7 St. Tr. 715-730.

<sup>2</sup> Roger North.



fierce against Oates and his plot as ever before he had raved for it."<sup>1</sup>

The first Popish Plot case which came on after this conversation was the trial of Sir George Wakeman, the Queen's physician, against whom Oates and Bedloe swore as stoutly as ever; making out a case which implicated, to a certain degree, the Queen herself. But Chief Justice Scroggs now sneered at the marvelous memory or imagination of Oates; and, taking very little notice, in his summing up, of the evidence of Bedloe, thus concluded:—

"If you are unsatisfied upon these things put together, and, well weighing, you think the witnesses have not said true, you will do well to acquit." *Bedloe*: "My Lord, my evidence is not right summed up." *Scroggs*, *C. J.*: "I know not by what authority this man speaks. Gentlemen, consider of your verdict."

An acquittal taking place, not only were Oates and Bedloe in a furious rage, but the mob were greatly disappointed, for their belief in the plot was still unshaken, and Scroggs, who had been their idol a few hours ago,<sup>2</sup> was in danger of being torn to pieces by them. Although he contrived to escape in safety to his house, he was assailed next morning by broadsides, ballads sung in the streets, and libels in every imaginable shape.

On the first day of the following term, he bound over in court the authors, printers, and singers of some of the worst of them, and made the following speech:—

"I would have all men know, that I am not so revengeful in my nature, nor so nettled with this aspersion, that I could not have passed by this and more; but the many scandalous libels that are abroad, and reflect on public justice as well as upon my private self, make it the duty of my place to defend one, and the duty I owe to my reputation to vindicate the other. This is the properest occasion for both. If once our courts of justice come to be awed or swayed by vulgar noise, it is falsely said that men are tried for their lives or fortunes; they live by chance, and enjoy what they have as the wind

<sup>1</sup> Life of Guilford, i. 297.

<sup>2</sup> "By this zeal in the Protestant cause he gained for awhile an universal applause throughout the whole nation."—*Athena*, iv 116.

blows, and with the same certainty. Such a base fearful compliance made Felix, willing to please the people, leave Paul bound. The people ought to be pleased with public justice, and not justice seek to please the people. Justice should flow like a mighty stream; and if the rabble, like an unruly wind, blow against it, the stream they made rough will keep its course. I do not think that we live in so corrupt an age that a man may not with safety be just, and follow his conscience; if it be otherwise, we must hazard our safety to preserve our integrity. As to Sir George Wakeman's trial, I am neither afraid nor ashamed to mention it. I will appeal to all sober and understanding men, and to the long robe more especially, who are the best and properest judges in such cases, for the fairness and equality of my carriage on this occasion. For those hierling scribblers who traduce me, who write to eat and lie for bread, I intend to meet with them another way, for, like vermin, they are only safe while they are secret. And let those vipers, those printers and booksellers by whom they vend their false and braided ware, look to it; they shall know that the law wants not power to punish a libelous and licentious press, nor I resolution to put the law in force. And this is all the answer fit to be given (besides a whip) to those hackney writers and dull observators that go as they are hired or spurred, and perform as they are fed. If there be any sober and good men that are misled by false reports, or by subtlety deceived into any misapprehension concerning that trial or myself, I should account it the highest pride and the most scornful thing in the world if I did not endeavor to undeceive them. To such men, therefore, I do solemnly declare in the seat of justice, where I would no more lie or equivocate than I would to God at the holy altar, I followed my conscience according to the best of my understanding in all that trial, without fear, favor, or reward, *without the gift of one shilling, or the value of it, directly or indirectly, and without any promise or expectation whatsoever.*<sup>1</sup> Do any think it an even wager, whether I am the

<sup>1</sup> From this asseveration a suspicion arises of pecuniary corruption, but I believe that Scroggs was swayed in this instance by a disinterested love of rascality.

greatest villain in the world or not—one that would sell the life of the King, my religion, and country, to Papists for money? He that says great places have great temptations, has a little if not a false heart himself. Let us pursue the discovery of the plot in God's name, and not baulk anything where there is suspicion on reasonable grounds; but do not pretend to find what is not, nor count him a turncoat that will not betray his conscience nor believe incredible things. Those are foolish men who think that an acquittal must be wrong, and that there can be no justice without an execution."<sup>1</sup>

Many were bound over; but I do not discover more than one prosecution brought to trial,—that against Richard Radley, who was convicted of speaking scandalous words of the Lord Chief Justice Scroggs, and fined £200.

When the Earl of Castlemaine—the complaisant husband of the King's mistress—was brought to trial for being concerned in the Plot, Scroggs was eager to get him off, still despising popular clamor. Bedloe being utterly ruined in reputation, Dangerfield was now marched up, as the second witness, to support Oates. He had been sixteen times convicted of infamous offenses; and, to render him competent, a pardon under the great seal was produced. But the Chief Justice was very severe upon him, saying, in summing up, to the jury, "Whether this man be of a sudden become a saint because he has become a witness, I leave that to you to consider. Now I must tell you, though they have produced two witnesses, the one believed, the other disbelieved, may there be a conviction? I say, no. Let us deal fairly and above board, and so preserve men who are accused and not guilty." The defendant being acquitted, the Chief Justice was again condemned as a renegade.<sup>2</sup>

He further made himself obnoxious to the charge of having gone over to the Papists, by his conduct on the trial of Mrs. Elizabeth Cellier, who, if she had been prosecuted while he believed that the Government wished the Plot to be considered real, would unquestionably have been burnt alive for high treason, but now was the object of his especial protection and favor. The

<sup>1</sup> 7 St. Tr. 687-706.

<sup>2</sup> Ibid. 1067-1112.

second witness against her was Dangerfield, who, when he was put into the box, before any evidence had been given to discredit him, was thus saluted by Chief Justice Scroggs:—

“We will not hoodwink ourselves against such a fellow as this, that is guilty of such notorious crimes. A man of modesty, after he hath been in the pillory, would not look a man in the face. Such fellows as you are, sirrah, shall know we are not afraid of you. It is notorious enough what a fellow this is. I shall shake all such fellows before I have done with them.” *Dangerfield*: “My Lord, this is enough to discourage a man from ever entering into an honest principle.” *Scroggs, C. J.*: “What? Do you, with all the mischief that hell hath in you, think to have it in a court of justice? I wonder at your impudence, that you dare look a court of justice in the face, after having been made appear so notorious a villain. Come, gentlemen of the jury, this is a plain case; here is but one witness in a case of treason; therefore lay your heads together, and say *not guilty*.”

Mrs. Cellier was set at liberty, and Dangerfield was committed to occupy her cell in Newgate.<sup>1</sup>

When holding assizes in the country, he took every opportunity of proclaiming his slavish doctrines. Going the Oxford Circuit with Lord Chief Baron Atkyns, he told the grand jury that a petition from the Lord Mayor and citizens of London to the King, for calling a parliament, was high treason. Atkyns, on the contrary, affirmed “that the people might petition the King, and, so that it was done without tumult, it was lawful.” Scroggs, having peremptorily denied this, went on to say that “the King might prevent printing and publishing whatever he chose by proclamation.” Atkyns mildly remarked, “that such matters were fitter for parliament, and that, if the King could do this work of parliament, we were never like to have parliaments any more.” Scroggs, highly indignant, sent off a despatch to the King, stating the unconstitutional and treasonable language of Chief Baron Atkyns. This virtuous Judge was in consequence superseded, and remained in a private station till he was reinstated after the Revolution.<sup>2</sup>

<sup>1</sup> 7 St. Tr. 1013-1055.

<sup>2</sup> 5 Parl. Hist. 309.

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Before Scroggs was himself prosecuted and dismissed from his office with disgrace, he swelled the number of his delinquencies by an attack on the liberty of the press, which was more violent than any that had ever been attempted by the Star Chamber, and which, if it had been acquiesced in, would have effectually established despotism in this country. Here he was directly prompted by the Government, and it is surprising that this proceeding should so little have attracted the notice of historians who have dwelt upon the arbitrary measures of the reign of Charles II. The object was to put down all free discussion, and all complaints against misrule, by having, in addition to a licenser, a process of *injunction* against printing,—to be summarily enforced, without the intervention of a jury, by fine, imprisonment, pillory, and whipping. There was then in extensive circulation a newspaper called "The Weekly Pacquet of Advice from Rome, or the History of Papacy," which reflected severely upon the religion now openly professed by the Duke of York, and secretly embraced by the King himself. In Trinity Term, 1680, an application being made to the Court of King's Bench on the ground that this newspaper was libelous, Scroggs, with the assent of his brother Judges, granted a rule absolute in the first instance, forbidding the publication of it in future.<sup>1</sup> The editor and printer being served with the rule, the journal was suppressed till the matter was taken up in the House of Commons, and Scroggs was impeached.

The same term, he gave the crowning proof of his servility and contempt of law and of decency. Shaftesbury, to pave the way for the Exclusion Bill, resolved to prosecute the Duke of York as a "Popish recusant." The heir presumptive to the throne was clearly liable to this proceeding and to all the penalties, forfeitures, and disqualifications which it threatened, for he had been educated a Protestant, and, having lately returned from torturing the Covenanters in Scotland, he was in the habit of ostentatiously celebrating the rites of the Ro-

<sup>1</sup> "Die Mercurii proxima post tres septimanas Sanctæ Trinitatis Anno 32 Car. II. Regis, Ordinatum est quod Liber intitulat *The Weekly Pacquet of Advice from Rome, or the History of Pofery*, non ulterius imprimatur vel publicetur per aliquam personam quamcunque." *PER CUR.*—*8 St. Tr.* 108.

ish religion in his chapel in London. An indictment against him was prepared in due form, and this was laid before the grand jury for the county of Middlesex by Lord Shaftesbury, along with Lord Russell, Lord Cavendish, Lord Grey de Werke, and other members of the country party. This alarming news being brought to Scroggs while sitting on the bench, he instantly ordered the grand jury to attend in court. The bailiff found them examining the first witness in support of the indictment; but they obeyed orders. As soon as they had entered the court, the Chief Justice said to them, "Gentlemen of the grand jury, you are discharged, and the country is much obliged to you for your services."

It would have been consolatory to us, in reading an account of the base actions of Scroggs, if we could have looked forward to his suffering on a scaffold like Tressilian, or dying ignominiously in the Tower of London like Jeffreys. He escaped the full measure of retribution which he deserved, but he did not go unpunished.

There were two classes which he had offended, of very different character and power,—the witnesses in support of the Popish Plot, and the Exclusionist leaders. The first began by preferring Articles against him to the King in Council, which alleged, among other things, that at the trial of Sir George Wakeman "he did brow-beat and curb Dr. Titus Oates and Captain Bedloe, two of the principal witnesses for the King, and encourage the jury impaneled to try the malefactors to disbelieve the said witnesses, by speaking of them slightly and abusively, and by omitting material parts of their evidence: That the said Chief Justice, to manifest his slighting opinion of the evidence of the said Dr. Titus Oates and Captain Bedloe in the presence of his most sacred Majesty and the Lords of his Majesty's most honorable Privy Council, did dare to say that Dr. Titus Oates and Captain Bedloe always had an accusation ready against any body: That the said 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 office."

It seems surprising that such charges from such a

quarter, against so high a magistrate, should have been entertained, although he held his office during the pleasure of the Crown. The probability is that, being in favor with the Government, it was considered to be the most dextrous course to give him the opportunity of being tried before a tribunal by which he was sure of being acquitted, in the hope that his acquittal would save him from the fangs of an enraged House of Commons.

He was required to put in an answer to the Articles, and a day was appointed for hearing the case. When it came on, to give greater *clat* to the certain triumph of the accused, the King presided in person. Oates and Bedloe were heard, but they and their witnesses were constantly interrupted and stopped, on the ground that they were stating what was not evidence, or what was irrelevant; and, after a very eloquent and witty speech from the Chief Justice, in the course of which he caused much merriment by comments on his supposed immoralities, judgment was given that the complaints against him were false and frivolous.

But Shaftesbury was not so easily to be diverted from his revenge. On the meeting of Parliament, he caused a motion to be made in the House of Commons for an inquiry into the conduct of Lord Chief Justice Scroggs in discharging the Middlesex grand jury and in other matters. A committee was accordingly appointed, which presented a report recommending that he should be impeached. The report was adopted by a large majority, and Articles of Impeachment were voted against him. These were *eight* in number. The *first* charged in general terms "that the said William Scroggs, Chief Justice of the King's Bench, had traitorously and wickedly endeavored to subvert the fundamental laws, and the established religion and government of the kingdom of England." The *second* was for illegally discharging the grand jury, "whereby the course of justice was stopped maliciously and designedly,—the presentments of many Papists and other offenders were obstructed,—and in particular a bill of indictment against James Duke of York, which was then before them, was prevented from being proceeded upon." The *third* was

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founded on the illegal order for suppressing the Weekly Pacquet newspaper. The three following articles were for granting general warrants, for imposing arbitrary fines, and for illegally refusing bail. The *seventh* charged him with defaming and scandalizing the witnesses who proved the Popish Plot. The *last* was in these words: "VIII. Whereas the said Sir William Scroggs, being advanced to be Chief Justice of the Court of King's Bench, ought, by a sober, grave, and virtuous conversation, to have given a good example to the King's liege people, and to demean himself answerable to the dignity of so eminent a station; yet, on the contrary thereof, he doth, by his frequent and notorious excesses and debaucheries, and his profane and atheistical discourses, daily affront Almighty God, dishonor his Majesty, give countenance and encouragement to all manner of vice and wickedness, and bring the highest scandal on the public justice of the kingdom."

These articles were carried to the House of Peers by Lord Cavendish, who then, in the name of all the Commons of England, impeached Chief Justice Scroggs for "high treason, and other high crimes and misdemeanors."

The articles being read, the accused, who was present, sitting on the Judge's woolsack, was ordered to withdraw. A motion was then made that he be *committed*; but the previous question was moved and carried, and a motion for an address to suspend him from his office till his trial should be over was got rid of in the same manner. He was then called in and ordered to find his bail in £10,000, to answer the articles of impeachment, and to prepare for his trial.

Luckily for him, at the end of three days the parliament was abruptly dissolved. It would have been difficult to make out that any of the charges amounted to *high treason*; but in those days men were not at all nice about such distinctions, and a dangerous but convenient doctrine prevailed, that, upon an impeachment, the two Houses of Parliament might retrospectively declare anything to be treason, according to their discretion, and punish it capitally. At any rate, considering that the influence of Shaftesbury in the Upper House was so



great, and that Halifax and the respectable anti-exclusionists could not have defended or palliated the infamous conduct of Scroggs, had his case come to a hearing, he could not have got off without some very severe and degrading punishment.

Although he escaped a judicial sentence, his character was so blown upon, and juries regarded him with such horror and were so much inclined to go against his direction, that the Government found that he would obstruct, instead of facilitating their designs against the Whig leaders, and that it was necessary to get rid of him. After the dissolution of the Oxford parliament the Court was completely triumphant, and, being possessed for a time of absolute power, had only to consider the most expedient means of perpetuating despotism, and wreaking vengeance on the friends of freedom. Before long, Russell, Sydney, and Shaftesbury were to be brought to trial, that their heads might pay the penalty of the Exclusion Bill; but if Scroggs should be their judge, any jury, whether inclined to Protestantism or to Popery, would probably acquit them.

Accordingly, in the beginning of April, to make room for one who, it was hoped, would have more influence with juries, and make the proceedings meditated against the City of London and other corporations pass off with less discredit, while he might be equally subservient, Sir William Scroggs was removed from his office of Chief Justice of the King's Bench. So low had he fallen, that little regard was paid to his feelings, even by those for whom he had sacrificed his character and his peace of mind; and, instead of a "resignation on account of declining health," it was abruptly announced to him that a *supersedeas* had issued, and that SIR FRANCIS PEMBERTON, who had been a puisne judge under him, was to succeed him as Chief Justice.

His disgrace caused general joy in Westminster Hall, and over all England; for, as Jeffreys had not yet been clothed in ermine, the name of Scroggs was the by-word to express all that could be considered loathsome and odious in a judge.

He was allowed a small pension, or retired allowance, which he did not long enjoy. When cashiered, finding

no sympathy from his own profession, or from any class of the community, he retired to a country house which he had purchased, called Weald Hall, near Brentwood, in Essex. Even here his evil fame caused him to be shunned. He was considered by the gentry to be without religion and without honor; while the peasantry, who had heard some vague rumors of his having put people to death, believed that he was a murderer, whispered stories of his having dealings with evil spirits, and took special care never to run the risk of meeting him after dark. His constitution was undermined by his dissolute habits; and, in old age, he was still a solitary selfish bachelor. After languishing, in great misery, till the 25th day of October, 1683, he then expired, without a relation or friend to close his eyes. He was buried in the parish church of South Wealde; the undertaker, the sexton, and the parson of the parish, alone attending the funeral. He left no descendants; and he must either have been the last of his race, or his collateral relations, ashamed of their connection with him, had changed their name,—for, since his death, there has been no Scroggs in Great Britain or Ireland. The word was long used by nurses to frighten children; and as long as our history is studied, or our language is spoken or read, it will call up the image of a base and bloody-minded villain. With honorable principles, and steady application, he might have been respected in his lifetime, and left an historical reputation behind him. "He was a person of very excellent and nimble parts,"<sup>1</sup> and he could both speak and write our language better than any lawyer of the 17th century, Francis Bacon alone excepted. He seems to have been little aware of the light in which his judicial conduct would be viewed; for it is a curious fact that the published Reports of the State Trials at which he presided were all revised and retouched by himself;<sup>2</sup> and his speeches, which fill us with amazement and horror, he expected would be regarded as proofs of his spirit and his genius. Thank Heaven, we have no such men in our

<sup>1</sup> Wood.

<sup>2</sup> One of the charges against him was, that he made a traffic in selling to book-sellers the exclusive right of publishing trials before him. It was said he bargained to receive 150 guineas for the Report of Sir George Wake-man's trial, and 100 guineas more if it was not finished in one day.

generation; it is better for us to contemplate dull, moral mediocrity, than profligate eccentricity, however brilliant it may be.<sup>1</sup>

Scroggs may be considered as having been of some use to his country, by making the character of a wicked judge so frightfully repulsive that he may have deterred many from giving way to his bad propensities.—Dean Swift says, "I have read somewhere of an Eastern king who put a judge to death for an iniquitous sentence, and ordered his hide to be stuffed into a cushion, and placed upon the tribunal for the son to sit on, who was preferred to his father's office. I fancy such a memorial might not have been unuseful to a son of Sir William Scroggs; and that both he and his successors would often wriggle in their seats as long as the cushion lasted."<sup>2</sup>

<sup>1</sup> See 8 St. Tr. 163-224.

<sup>2</sup> Drapier's Letters, No. V. See 2 Shower, 155; 1 Ventris, 329, 354; Macph. State Papers, i. 106.



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## CHAPTER XX.

### LIFE OF LORD CHIEF JUSTICE PEMBERTON.

THE career of our next Chief Justice is more chequered by extraordinary vicissitudes than that of any legal dignitary mentioned in the annals of Westminster Hall. While yet a youth, he had wasted his substance by riotous living, and incurred enormous debts. Without education, without character, without friends, a slave to the worst propensities and habits, he was deprived of his liberty and became the associate of the most profligate of mankind. As the law then stood, there were no means of ever obtaining his liberation without satisfying the demands of his creditors, and there seemed a certainty that he must sink deeper and deeper in misery and in depravity till he expired in his cell. But a prison served him for a school, for a university, and for an inn of court. Here he became an elegant scholar, a profound lawyer, and qualified to run the race of honorable rivalry with those who had taken full advantage of regular tuition and training. By his own exertions, while still a prisoner, he not only maintained himself creditably, but made an arrangement for the discharge of all his pecuniary engagements. Starting at the bar, though he was at first taunted as a "jail-bird," he was soon run after as a distinguished advocate; and he attained the highest honors of his profession. When he was placed on the bench and it might have been thought that his adventures were at an end, the remarkable strokes of adverse and auspicious fortune to which he was destined were only beginning. Thrice he was removed from high judicial situations, which he filled with credit, by the rude hand of arbitrary power. Again and again he recommenced pleading causes for clients in the courts in which

he had presided. After trying Lord Russell, he was counsel for the Seven Bishops. The Revolution brought him no repose. Having been punished by Charles II. and James II., for imputed judicial independence, and supposed leaning to liberal principles, he was sent to Newgate by the Convention Parliament on the charge of favoring despotism and violating the privileges of the House of Commons. His character, likewise, from its varied and delicate lights and shadows, presents an interesting subject for contemplation. We become a little tired of Hale, from his uniform goodness; and we are sure that, on every occasion, Scroggs will show himself sordid and cruel. There being no struggle in the mind of either of them, we may at last regard the one with apathy, and the other with unmixed disgust. Pemberton, when he entered public life, felt a passion for preferment, by which he was sometimes led to do what was wrong. But he had a conscience; when he transgressed the line of rectitude he was visited by remorse; and, though he yielded to compliances which he condemned, yet, rather than recklessly follow the example of some unscrupulous judges who were his contemporaries, he was willing to sacrifice the objects which were dearest to his heart. Thus he might have been addressed:—

. . . . . "Thou wouldst be great;  
Art not without ambition; but without  
The illness should attend it. What thou wouldst highly,  
That wouldst thou holily; wouldst not play false,  
And yet wouldst wrongly win."

He was descended from the Pembertons of Pemberton in the county of Lancaster. His father, who was of a junior branch of that family, had been a merchant in London, and had died while still a young man, leaving a considerable fortune to be divided among five infant children. These were all carried off by the small-pox except Francis, in whom, therefore, the whole property centered. It would have been well for him if his mother had died at the same time, for she was a silly woman, and spoiled him by excessive indulgence. After her husband's death, she took a house in the town of St. Alban's, where she had some relations; and young Frank was put to school there. His parts were

very lively, and he could learn much in a little time; but he was sickly, and, under pretence of nursing him, she kept him almost constantly idle at home. At fifteen he could read and write pretty well, and had picked up a little smattering of Greek and Latin. He was then sent to Emanuel College, Cambridge,<sup>1</sup> and there he remained above four years; but, although he contrived to take the degree of B. A., it was remarked by his tutor, Dr. Benjamin Whitchcote, that, "notwithstanding all the pains taken upon him, from his giddiness, and the difficulty of fixing his attention, when he left Cambridge, he had little more knowledge of books than he brought with him from St. Alban's."

To finish his education it was resolved to send him to an Inn of Court; and on the 14th of October, 1645, he was admitted a member of the Honorable Society of the Inner Temple.<sup>2</sup> There was no expectation of his following the law as a profession; but, the civil war being extinguished, young men of family and fortune again attended "Readings" and "Moots," that they might acquire enough of law to qualify them to manage their estates and to act as Justices of the Quorum.

While at Cambridge, although Pemberton had been idle and listless, his morals had remained uncontaminated; but he now made the acquaintance of a set of young men who initiated him in all sorts of debauchery. Several of them had, for a short time, carried arms for the King, and thought that they could still safely show their hatred of the Roundheads by outvying the licentiousness which had distinguished the Cavaliers when they were serving him in the field. The following year Pemberton was of age, and, according to his father's will, he came into possession of his fortune. This was speedily known to his dissolute companions, some of whom were in great pecuniary difficulties and driven to live upon their wits. Besides taverns, theaters, and other such places of dissipation, they carried him to gaming-houses, engaged him in deep play, and, in the course of eighteen months, stript him of every Carolus

<sup>1</sup> Admitted 12th August 1640.

<sup>2</sup> He is described as son of Radulph Pemberton, of St. Alban's in the county of Herts. Esq.

a little time; nursing him, &c. At fifteen he had picked up a little money. He was then sent to the university where he received a liberal education. He contrived to get a good deal by his tutor, and by standing all his life in business, and the more he left Cambridge the more books than he

to send him to the university in October, 1645, he was elected to the Society of the Clergy. The expectation of his share of the civil war and fortune was, that they should be able to manage the Quorum. He had been educated in the most unbecoming manner of a set of debauchery. He carried arms for the king, and will safely show the license of the Cavaliers when following year to his father's house. This was the case, some of the king's and driven to the theaters, and he carried him to the university, and, in the year of every Carolus

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he had in the world. More than this, they not only led him to contract large debts for clothes, wine, horses, &c., for his own use, but to become surety for them to tradesmen and money-changers. In consequence, his mortgaged lands were foreclosed or taken under *elegits*; judgments being entered upon the bonds and statutes which he gave to his creditors; all his movables were swept away under *fi. fas.*; and at length a relentless Jew, who had lately returned into England, from which the race had been banished since the time of Edward I., sued out a *ca. sa.* against him for a large sum of money borrowed to pay a gaming debt, and shut him up in the Fleet.

He had not been sober for many weeks, and it was some time before he could fully understand where he was and what had befallen him. Amidst the squalor which surrounded him, he was surprised to find loud revelry going forward, and he recognized faces that he had seen in the haunts of vice which he had been in the habit of frequenting. He was obliged to pay the *garnish* which they demanded of him; but he resolutely refused to join in their orgies. He awoke, as it were, from a dream, and was at first almost entirely overpowered by the horrors of his situation. He used afterwards to relate "that some supernatural influence seemed to open his eyes, to support him, and to make a new man of him." He contrived to get a small dismal room for his own use, without a chum, and in this he shut himself up. He tasted nothing but the bread and water which were the prison allowance; and his share of some charitable doles arising from fees on the last day of term, and other such sources, he gave away to others. What we have chiefly to admire is, that he nobly resolved to supply the defects of his education,—to qualify himself for his profession,—to pay his debts by industry and economy,—and to make himself respected and useful in the world. The resolution was formed in a hot fit of enthusiasm, but it was persevered in with cool courage, unflinching steadiness, and brilliant success. He was able to borrow books by the kindness of a friend of his father's who came to visit him. Bitterly regretting the opportunities of improvement which he had neglected

at school and at college, he devoted a certain number of hours daily to the classics and to the best English writers—taking a particular delight in Shakspeare's plays, although the acting of them had ceased, and they were not yet generally read. The rest of his time he devoted to the YEAR-BOOKS, to the more modern Reports, to the Abridgments, and to the compiling of a huge Common-place Book for himself, which might have rivaled Brooke, Rolle, and Fitzherbert. His mode of life was observed with amazement and admiration by his fellow prisoners, who, knowing that he was a Templar, and that he was studying law night and day, concluded that he must be deeply skilled in his profession, and from time to time came to consult him in their own affairs,—particularly about their disputes with their creditors.' He really was of essential service to them in arranging their accounts, in examining the process under which they were detained, and in advising applications to the courts for relief. They, by and by, called him the "Councillor" and the "Apprentice of the law,"<sup>2</sup> and such as could afford it insisted on giving him fees for his advice. With these he bought books which it was necessary that he should always have by him for reference. To add to his fund for this purpose, he copied and drew law papers for the attorneys, receiving so much a folio for his performances. By these means he was even able to pay off some of the smallest and most troublesome of his creditors. Burnet, whose love of the marvelous sometimes betrays him into exaggeration, although his sincerity may generally be relied upon, says that Pemberton "lay *many years* in jail;"<sup>3</sup> but according to the

<sup>1</sup> The Fleet was then by far the most populous civil prison, for it not only contained the debtors of the Court of Common Pleas, but all who were committed by the Court of Chancery.

<sup>2</sup> This used to be the designation of barristers till they were made sergeants.

<sup>3</sup> The passage is curious: "His rise was so particular, that it is worth the being remembered. In his youth he mixed with such lewd company, that he quickly spent all he had, and ran so deep in debt, that he was cast into a gaol, *where he lay many years*; but he followed his studies so close in the gaol, that he became one of the ablest men of his profession."—*Own Times*, ii. 144. Roger North, with much quaintness, adheres closer to the truth in his slight sketch of Pemberton: "This man's morals were very indifferent; for his beginnings were debauched, and his study and first practice in the gaol. For having been one of the fiercest town rakes, and spent more than



best information I have been able to obtain, the period did not exceed five years. He obtained his discharge by entering into a very rational arrangement with his principal creditors. After pointing out to them the utter impossibility of their being ever satisfied while he remained in custody, he explained to them the profitable career which was before him if he could recover his liberty, and he assured them of his determined purpose to pay them all every farthing that he owed them the moment that it was in his power to do so. Accordingly the Jew, after stipulating for compound interest, and taking a fresh security, signed a warrant for entering satisfaction, and, all the detainers being withdrawn, Pemberton could again see the green fields and breathe the pure air of heaven.'

The creditable employment of his time in prison became well known in the Inner Temple Hall, and he was welcomed there very cordially. Imprisonment for debt was by no means so degrading then as we are apt to suppose. Even so late as the reign of George III. a great leader of the Western Circuit was often obliged to avail himself of his privilege to be free from arrest; and I myself have conversed with men who remembered an eminent conveyancer, and an eminent special pleader, both continuing in very extensive business while confined in the King's Bench prison. Pemberton's errors were regarded as more venial from the recollection of his extreme youth when his debts had been contracted, and of the manner in which he had been led astray by bad company.

Having kept the requisite number of terms, and done all his exercises, on the 27th of November, 1654, he was called to the bar.<sup>2</sup> Although inclined to monarchical

he had of his own, his case forced him upon that expedient of a lodging; and there he made so good use of his leisure, and busied himself with the cases of his fellow collegiates, whom he informed and advised so skillfully, that he was reputed the most notable fellow within those walls; and, at length he came out a sharper at the law."—*Guilford*, ii. 123.

<sup>1</sup> At this time there were no "Rules of the Fleet," or district round the prison considered to be part of it; and all committed to it were kept *in salva et areta custodia*. This was not the first instance of legal studies going on within its walls. The famous treatise called *FLETA* was written by a lawyer confined in the Fleet in the reign of Edward I.

<sup>2</sup> Books of Inner Temple—from which it appears that he was called to the

principles, he did not scruple to take the oath "to be true to the Commonwealth," and he practiced successively under the republican Chief Justices Rolle, Glyn, and Newdigate.

His rise into business was rapid. He first got into practice in the Palace Court at Westminster,—next in the Court of King's Bench,—and before he had been seven years at the bar he had discharged all his debts, including principal and compound interest for the Jew—whom he now regarded as his best benefactor.

Soon after the Restoration he became intimate with Sir Jeffrey Palmer, the Attorney General, and was employed as his "Devil" to prepare indictments and argue demurrers. In a few years he was succeeded in this office by North (afterwards Lord Keeper Guilford); but he still held briefs in all state prosecutions as counsel for the Crown. He was allowed to conduct the trial of the apprentices charged with high treason because they had pulled down some disorderly houses in Moorfields, the Attorney General himself being ashamed to appear in it. Pemberton contented himself with a brief statement of the facts, leaving to Lord Chief Justice Kelynge the odium and the ridicule of laying down the law.<sup>1</sup>

In Easter Term, 1672, he was called to the degree of Sergeant-at-law. From this time he seems to have been by far the most distinguished advocate practicing at the English bar. He was leading counsel for the appellants in the famous appeals from the Court of Chancery to the House of Lords, in which members of the House of Commons were respondents.

Now arose a dispute between the two Houses for the possession of his body, which had nearly ended in civil war. In spite of a resolution of the House of Commons that it would be a breach of their privileges for any law-

bench on the 5th February, 1671, and was elected Reader on 21st of January 1674. His arms are in the Inner Temple Hall, with the following inscription:

"Franciscus Pemberton A<sup>r</sup>  
Serviens ad legem. Elect.  
Lect. Quadra A<sup>o</sup> 1674."

I am indebted for this and much other valuable information to the kindness of Mr. Martin, the sub-treasurer of the Inner Temple.

<sup>1</sup> 6 St. Tr. 879; ante, p. 167.

yer to act in these appeals, Sergeant Pemberton, with becoming spirit appeared at the bar of the House of Lords and argued stoutly for his clients. The Commons therefore voted that he had been guilty of a breach of their privileges, and ordered him to be taken into custody by the Sergeant-at-arms; but as soon as the order had been executed, the Lords passed a counter-resolution that it was a breach of their privileges to molest him for doing his duty under their sanction,—and ordered the officer of their house, the Usher of the Black Rod, to set him at liberty. It so happened, that the two champions met in the Court of Requests when the Sergeant-at-arms was conducting Pemberton to safer custody. The Usher of the Black Rod, with his attendants, gave the assault on the Sergeant-at-arms, who fled ignominiously, and Pemberton was the prize of the victors. The Commons, in a fury, passed a violent resolution against the pusillanimity of their officer, and ordered that the man who had defied their power should be immediately recaptured. Sergeant Pemberton, not aware of this proceeding, and thinking that the danger was over, returned next morning to the practice of his profession in the Court of Common Pleas; but Speaker Seymour, who had been deeply mortified by the abasement of the assembly over which he presided, as he walked up Westminster Hall to occupy the chair, spied Sergeant Pemberton wearing his coif and party-colored robes,—ran up to him, seized him, and with the assistance of some messengers who were following in his train, lodged him in Little-Ease, the prison of the House of Commons—from whence he was transferred to the Tower of London. The Lords next made an order on the Lieutenant of the Tower, requiring him to discharge the prisoner, and, when this was disobeyed, resorted to the novel expedient of issuing a writ of *habeas corpus* for bringing his body to their bar. The Commons, on the other hand, resolved “that no person committed by them for breach of privilege ought, by writ of *habeas corpus* or any other authority whatever, be made to appear in the House of Lords; that the writ of *habeas corpus* issued by the Lords for bringing up the body of Sergeant Pemberton was insufficient and illegal; and that they would protect

their Sergeant-at-arms, the Lieutenant of the Tower, and all others who should obey the law by conforming to their orders."

Shaftesbury, who had brought about this quarrel on purpose to prevent the passing of the Test Act, had gained his object. The next step would have been a battle-royal between the members of the two Houses, and, notwithstanding the disparity of numbers on the side of the Lords, they would have had powerful assistance from the mob, who on this occasion approved of their proceedings. As the only means of obviating so great a calamity, the King suddenly put an end to the session by a prorogation, and Sergeant Pemberton was set at liberty. It was allowed that during the whole affair he had conducted himself with perfect propriety, and he now stood very high in public estimation.<sup>1</sup>

Although he felt a great desire for political advancement, he would not enter the House of Commons, and he could not make up his mind to join either of the contending parties. He highly disapproved of the profligate measures of the CABAL, and the succeeding administrations were little more to his mind; but he considered Shaftesbury, the leader of the patriots, as the most unprincipled statesman of the times, and he would sooner have died in obscurity than enlist under his banner. On the contrary, he professed a respect for the Earl of Danby, and he was loud in bestowing praise on Lord Chancellor Nottingham, who had proved himself the reformer, or rather founder, of our Equity code.

With such scruples and such moderation, there seemed as yet little chance of his ever being made a Chief Justice in those violent times; but, enjoying much reputation as a lawyer, and having given no offense to either side, there was little surprise expressed when he was made a Puisne Judge of the King's Bench, and was knighted. The object of his promotion probably was to support the dignity of that Court, which had been very much lowered by the ignorance and brutality of Chief Justice Scroggs.

Sir Francis gave satisfaction both as a Civil and Criminal Judge. In the former capacity, he caused some

<sup>1</sup> 7 St. T. 832.

grumbling among the old stagers by showing, as they alleged, too little respect for precedent and authority; but he was deeply versed in jurisprudence as a science, and he thought it better to be governed by right principle than by a wrong decision. He sat both on the King's Bench and at the Old Bailey, on the trial of the principal persons said to be implicated in the Popish Plot.

Sometimes he gently interfered to mitigate the ferocity of his Chief,—as when he prevailed in having a chair placed for a prisoner at the bar who was unable to stand;<sup>1</sup> and when he got off a bookseller, convicted of publishing a libel, with fine, imprisonment, and pillory, —whom Scroggs wished likewise to have whipped publicly at the cart's tail.<sup>1</sup> But he never took a bold part in seeking to discredit false witnesses and to save innocent lives. He thought that there was some foundation for the story of the Popish Plot, although it might be greatly exaggerated. For this reason, he would not join Scroggs when that miscreant, to please the Government, suddenly wheeled round, and represented Oates and Bedloe as evil spirits, after having hailed them as guardian angels. Thus he gave mortal offense, not only to Scroggs personally, but to the Government, and in less than two years from the time of his appointment he was angrily dismissed.<sup>2</sup>

He returned to the bar, and practiced in the Common Pleas before Lord Chief Justice North. Says Roger,—“However some of his brethren were apt to insult him, his Lordship was always careful to repress such indecencies; and not only protected, but used him with much humanity: for nothing is so sure a sign of a bad breed as insulting over the depressed.”<sup>3</sup>

He immediately recovered his practice, and was in higher estimation than ever. But, with his usual caution, he refrained from taking part in the tremendous

<sup>1</sup> 7 St. Tr. 832.

<sup>2</sup> Burnet says that “he was turned out entirely by Scroggs's means;” but offense was taken by the ministers, that he did not sufficiently run at the Popish Plot, which the King now ventured openly to ridicule.

<sup>3</sup> Life of Guilford, ii. 125. The biographer, with his usual inaccuracy, refers to Pemberton's second return to the bar after Guilford, holding the great seal, had ceased to preside in the Common Pleas

struggle which now arose respecting the exclusion of the Duke of York from the throne; saying, "that it was the part of a good subject to respect hereditary right, and to leave any question for altering hereditary succession to the King and the Parliament."

On his leaving the King's Bench, that court fell into deeper and deeper disrepute; and, that the state prosecutions meditated after the King's triumph, on the dissolution of the Oxford parliament might be carried on with any chance of success, it was indispensably necessary that a new Chief Justice should be substituted in the place of Scroggs. After long deliberation and doubt, it was resolved to offer the place to Sir Francis Pemberton. Much reliance was placed on his gratitude, if he should receive so high a favor; and it was hoped that his fair character might insure him extraordinary weight with juries. On receiving Lord Nottingham's letter, announcing the King's commands, his perplexity was greater than his pleasure. He was not ignorant that Fitzharris's trial for high treason was pending; that it involved an important question of privilege between the Crown and the House of Commons; that it was sure to be followed by others in which the King was passionately eager to succeed; and that the Whigs, against whom they were to be directed, although at present prostrate, were still the heads of a powerful party. He saw at a glance the delicate and difficult situations in which, as the first Criminal Judge of the land, he was sure to be placed; dismissal threatening him on one hand, impeachment on the other. Knowing himself, he dreaded the struggles in his own breast,—his want of moral courage,—and the peril of his doing something dishonorable, of which he might for ever after repent. But to renounce the glory after which he had so long aspired, of having his name enrolled among the Chief Justices of England,—to lose the opportunity of making himself a name as a great magistrate,—to forego the hope of being able to amend the administration of the law, by enlightening and softening the Government, which as it was now strong, might easily afford to be merciful,—while he might be obscurely wrangling at the bar with brother sergeants, to see an unprincipled rival grasp the preferment!—He

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sat down, wrote an acceptance, and on the first day of Easter Term, 1681, he was installed in the office with the usual solemnities.'

He was hardly warm in his seat, when Fitzharris' trial for high treason came on before him; and although he had been promoted chiefly that he might conduct it with partiality, he finished it to the King's entire satisfaction, and without any damage to his own character.

Fitzharris was a consummate scoundrel, who had offered himself as a witness to both parties, who had deceived both parties, and whom both parties had wished to hang;—the courtiers, by indictment for high treason, according to the course of the common law,—the exclusionists, by parliamentary impeachment. At the Oxford Parliament, the impeachment was voted by the Commons, and rejected by the Lords; and two days afterwards came the dissolution.

In the month of April following, the Attorney General prepared a bill of indictment for high treason, to be presented to the grand jury of the county of Middlesex. In charging the grand jury, the Chief Justice said, "You ought not, and cannot, take any notice of any votes of the House of Commons. You are sworn to inquire of the matters given you in charge. By the opinion of all the Judges you are bound to find a true bill, if there be evidence enough before you to prove the charge."

The prisoner having afterwards pleaded the pendency of the impeachment in abatement, by way of showing that the Court of King's Bench had not jurisdiction to try him, and the Attorney General having demurred, the question was argued at prodigious length. One Judge was inclined in favor of the plea, but it was overruled, Pemberton merely saying, "My brother Jones and my brother Raymond agree with me that it is bad."

Upon the merits, a strong case was made out against Fitzharris on his own confessions, for he had pretended to be an accomplice in the Popish Plot, and his scheme had been to make money by falsely accusing himself and others. It was likewise proved against him that he had printed a pamphlet advising that the King should

<sup>1</sup> 2 Shower, 159; 1 Ventris, 354.

be assassinated. He represented that he had been employed as a spy by the Government to distribute it among obnoxious persons, who were to be apprehended with copies of it in their pockets; and he called as his witness the Duchess of Portsmouth, who acknowledged that the King had given him money, although she swore that it was purely as a gratuity. Fitzharris was convicted and executed.

The trial was by no means creditable to any of those who were concerned in it; but I cannot say that any peculiar blame was imputable to Chief Justice Pemberton, for, during the whole proceeding, he perfectly preserved his temper, he laid down no bad law, and he cannot be accused of having perverted the facts. Yet he must have had a suspicion that the case, apparently made out for the Crown, was founded on collusion and artifice; and, although he so managed the trial as to escape public censure, his recollection of it must have caused him a pang for the rest of his days.<sup>1</sup>

In the next important case which was tried before him he cannot be said to have violated the law, but his conduct was discreditable to him and to his country. The most Reverend Dr. Oliver Plunket, titular Archbishop of Armagh, and Primate of the Roman Catholic Church in Ireland, a man of splendid abilities, profound learning, unblemished life, genuine piety, and, what is more to the purpose, of unquestionable loyalty,—who was not only venerated by those of his own religious persuasion, but, having under four successive Lord Lieutenants exerted himself to preserve the peace of the country and to foster English connection, was respected by all enlightened Protestants,—had been accused of being engaged in an Irish Popish Plot, which was invented in imitation of that which had enjoyed such prodigious success in England. Instead of assassinating the King, burning London, &c., on which Oates and Bedloe had often dilated, their associates imputed to the Irish Catholic Primate that he had invited a French army to land at Carlingford, that he had enrolled and trained 70,000 native Irishmen to join it, and that, with the combined force, all Protestants in the

<sup>1</sup> 8 St. Tr. 245-426.



island were to be extirpated, and Ireland was to be created into an independent Catholic State. There were absurdities and impossibilities in this plan so palpable, that no one, with local knowledge upon the subject, could have believed in its existence; and the prelate must have been safe in the hands of any Irish jury. Therefore,—under an English act of parliament, passed in the reign of Henry VIII., which gave a right to try in England high treason committed in any of the dominions of the Crown,—after he had been confined some months in Dublin, he was brought over to London in bonds, and lodged in Newgate. A prosecution for high treason was then commenced against him before the Court of King's Bench at Westminster.

On his arraignment, he pointed out the extreme hardship and injustice of being carried away from his native land, and brought to be tried among strangers, who were not only ignorant of his character, but were very imperfectly acquainted with localities, circumstances, and customs, upon which the credibility of the witnesses against him must greatly depend, and who might have a strong prejudice against him, his country, and his religion:—

*Pemberton, C. J.*: “Mr. Plunket, you shall have as fair a trial as if you were in Ireland. You are here by a statute not made on purpose to bring you into a snare, but an ancient statute, and not without precedents of its having been put in execution before your time; for your own country will tell you of O'Rourke and several others that have been arraigned and condemned here for treason done there. Your trial shall be by honest persons according to the laws which obtain in this kingdom.”

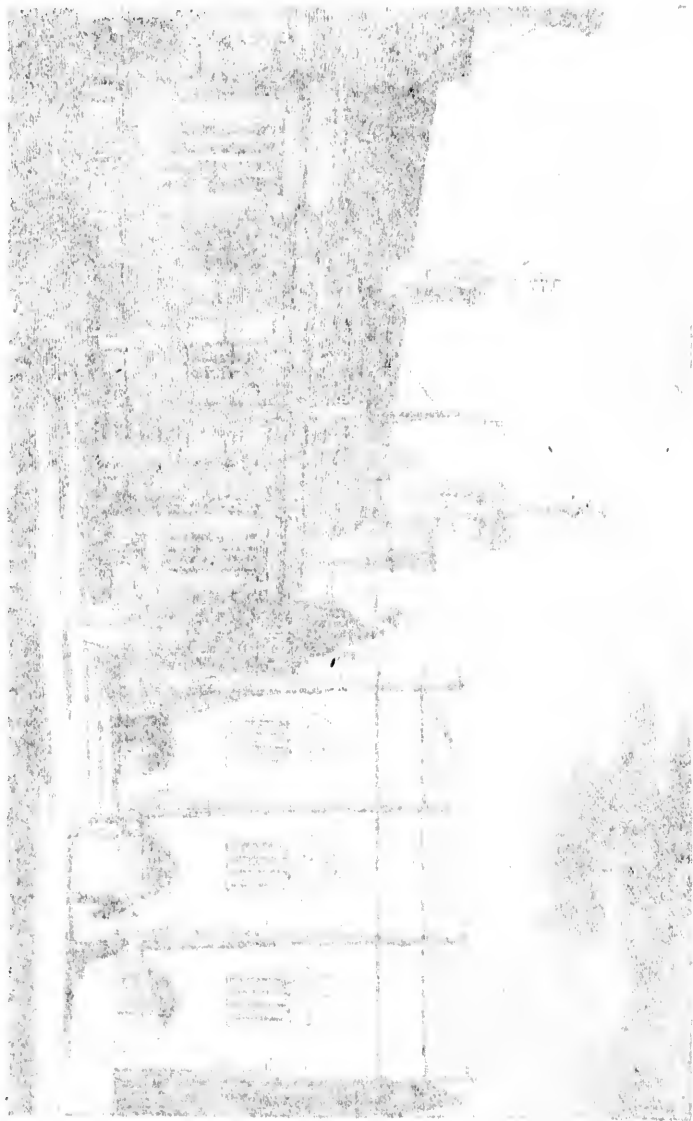
The Archbishop prayed that his trial might be postponed for ten days, because, by reason of adverse winds, his witnesses had not arrived; but he was told by the Chief Justice that a longer time had been allowed him to prepare for trial than was usual in such cases. Thus commenced the address of Sir Robert Sawyer, the Attorney General:—“May it please your Lordships, and you, gentlemen of the jury, the character this gentleman bears, as a primate under a foreign and usurped jurisdiction, will be a great inducement to you to give credit to

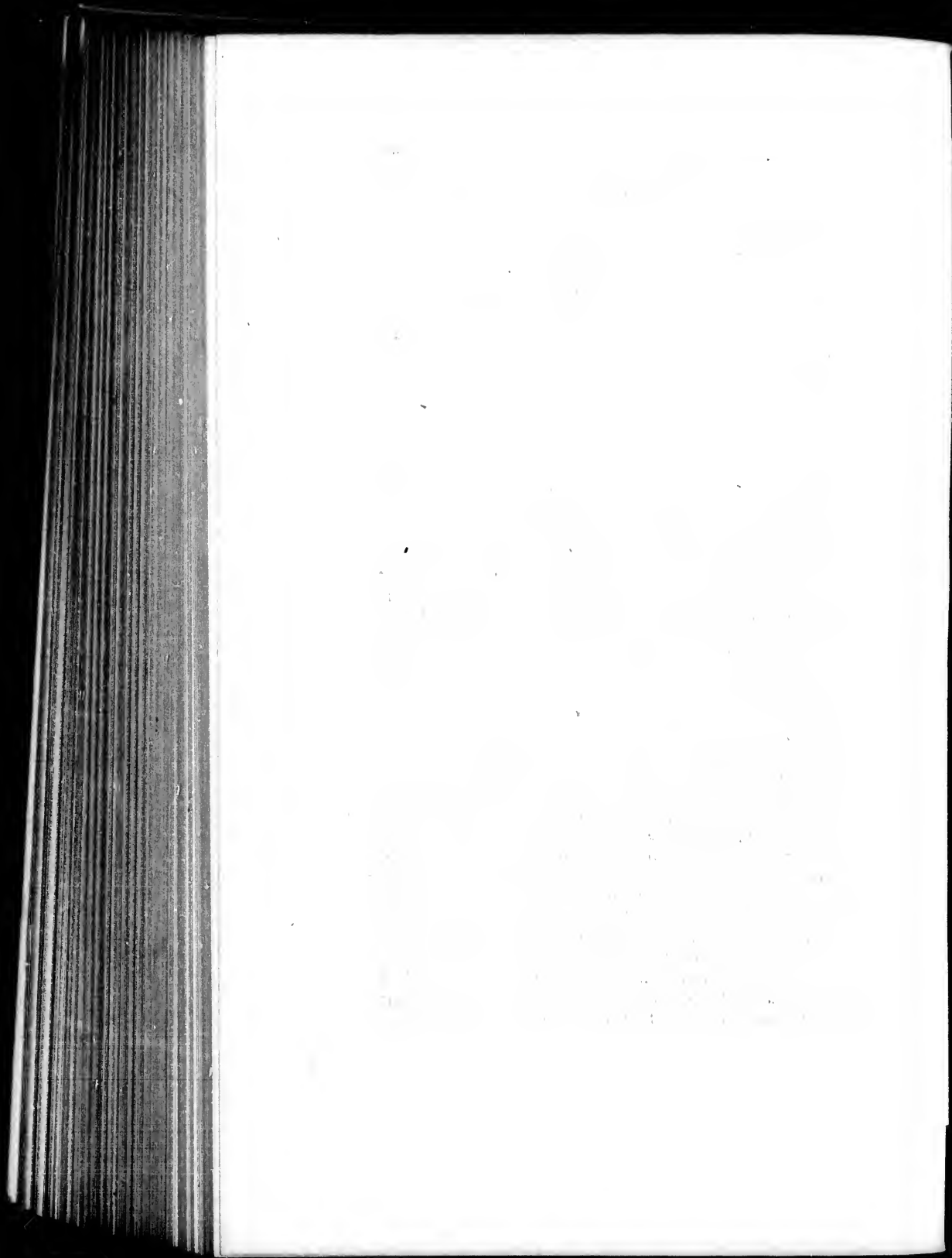
that evidence which we shall produce before you to prove his guilt. He obtained this very preferment upon a promise to raise 60,000 men in Ireland for the Pope's service, to settle Popery there, and to subvert the government." And in the same strain he continued, without any check from the bench. It was in vain that the Archbishop pointed out the utter impossibility of a French army being landed at Carlingford, and the preposterous nature of the charge that he had drilled 70,000 armed men, as he had only used spiritual weapons against impiety and vice. The fatal verdict being recorded, Chief Justice Pemberton thus pronounced sentence:—

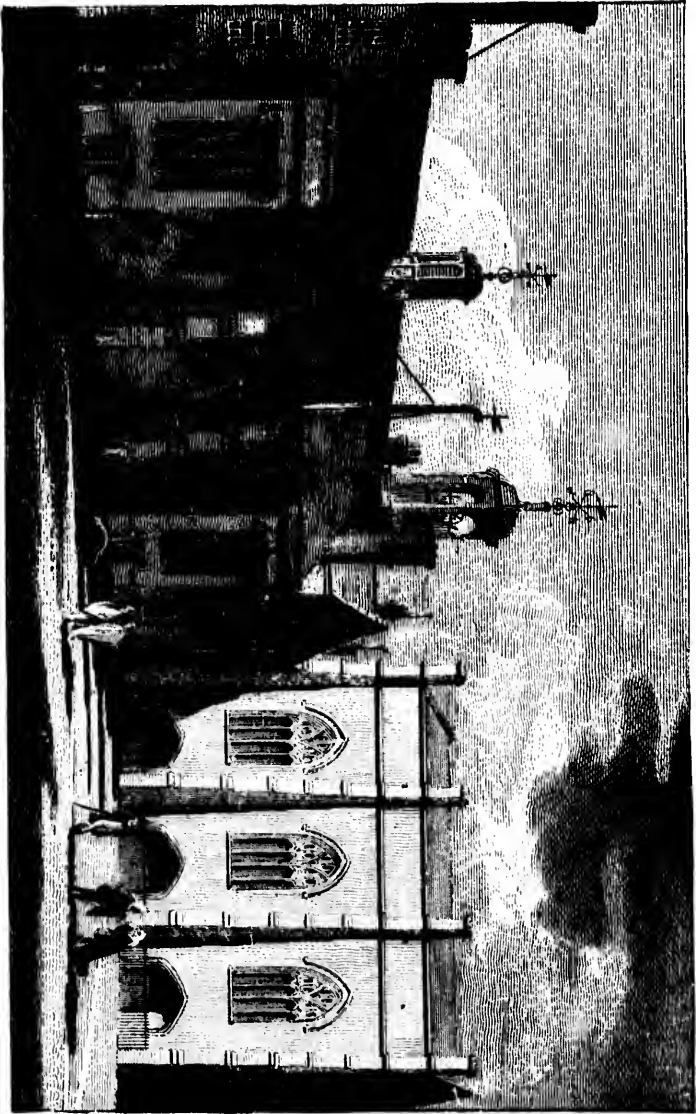
"Look you, Mr. Plunket, you have been here indicted of a very great and heinous crime—the greatest and most heinous of all crimes—and that is, high treason; and, truly, yours is of the highest nature; it is a treason, in truth, against God and your King, and the country where you lived. You have done as much as you could to dishonor God in this case; for the bottom of your treason was, your setting up your false religion, than which there is not anything more displeasing to God or more pernicious to mankind, a religion which is ten times worse than all the heathenish superstitions, the most dishonorable and derogatory to God and his glory of all religions or pretended religions whatsoever, for it undertakes to dispense with God's laws, and to pardon the breach of them; so that, certainly, a greater crime there cannot be committed against God, than for a man to encourage its propagation. I do now wish you to consider, that you are near your end. It seems you have lived in a false religion hitherto; but it is not too late at any time to repent. I trust you may have the grace to do so. In the mean time, there is no room for us to grant you any kind of mercy, though I tell you we are inclined to pity all malefactors." *Archbishop*: "If I were a man such as your Lordship conceives me to be, not thinking of God Almighty or heaven or hell, I might have saved my life, for it has been often offered to me if I would confess my own guilt and accuse others; but, my Lord, I would sooner die ten thousand deaths." *Chief Justice*: "I am sorry to see you persist in the

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LINCOLN'S INN HALL, AND CHAPEL, IN 1800.

(The inside of an old engraving.)



principles of that false religion which you profess." *Archbishop*: "These, my Lord, are principles that God Almighty himself cannot dispense withal." *Chief Justice*: "Well, however that may be, the judgment which we must give you is that which the law prescribes, 'you must go from hence to the place from whence you came, that is Newgate, and from thence you shall be drawn through the city of London to Tyburn; there you shall be hanged by the neck, but cut down before you are dead,' " &c., &c. *Archbishop*: "I hope I may have this favor, for a servant and some few friends now to be with me." *Chief Justice*: "I know nothing to the contrary. But I would advise you to have some minister to come to you, some Protestant minister. We wish better to you than you do to yourself." *Archbishop*: "God Almighty bless your Lordship! And now, my Lord, as I am a dead man to this world, and as I hope for mercy in the next, I was never guilty of any of the treasons laid to my charge, as you will know in due time."

The sacraments having been administered to him according to the rites of his church by a brother convict, the Archbishop was, a few days afterwards, drawn through the streets of London on a hurdle, and, having again protested his innocence and forgiven his enemies, he was put to death with all the revolting cruelties enumerated to him when he received sentence. Protestant zeal only desired one addition to the sacrifice—that the victim should have been decked in full canonicals as Popish Primate of Ireland.<sup>1</sup>

For some unaccountable reason, the Government was incensed against Plunket, and therefore Pemberton convicted him according to the rules of law. Mr. Fox observes, that "the King, even after the dissolution of his best parliament, when he had so far subdued his enemies as to be no longer under any apprehensions from them, did not think it worth while to save the life of Plunket, of whose innocence no doubt could be entertained."<sup>2</sup>

I now come to the most exceptionable passage in the life of Chief Justice Pemberton. While the King was nearly indifferent about Plunket, he was more eager than

<sup>1</sup> 8 St. Tr. 447-500.

<sup>2</sup> Fox's History of James II.

he had ever been in pursuit of any object during his reign,—to bring Shaftesbury to the scaffold; and this he knew would be accomplished as soon as he could get a bill of indictment found against him by a grand jury, for the doomed patriot would then have perished by a partial selection of peers in the Court of the Lord High Steward. To induce the grand jurors to find the bill, Pemberton, although as a lawyer, he was well aware that they ought first to have had a *prima facie* case of guilt made out, thus addressed them:—

“Look ye, gentlemen, I must tell you that which is referred to you is to consider whether there be any reason or ground for the King to call to account those who are accused; if there be probable ground, it is as much as you can inquire into. Where there is no kind of suspicion of a crime, nor reason to believe that the thing can be proved, it is not for the King's honor to call men to account; but a probable cause is enough. As it is a crime to condemn innocent persons, so it is a crime as great to acquit the guilty. That God who requires the one, requires both; and let me tell you, if any of you shall be refractory, and will not find a bill where there is a probable ground for an accusation, you do thereby intercept justice, and make yourselves criminals.’”

Contrary to usage and law, he further ruled that the witnesses on whose evidence the grand jury were to act should be examined in open court; and, in conjunction with North, who outbid him in servility, he resorted to the most unworthy arts of intimidation and cajolery to obtain the finding of a *true bill*; but the juries were still returned by Whig sheriffs, the franchises of the City of London remaining in force. The bill was returned *IGNORAMUS*, and Shaftesbury was saved.’ There is no more striking proof of the depraved state of public morality in those days than that, after such an instance of dastardly compliance with the wishes of the King, Pemberton should still have been considered a judge to be respected, by comparison, for independence and integrity.

Whether he thought that on the last occasion, he had gone too far to please the Government, and now wished to seize the opportunity of putting on a show of impar-



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tiality, I know not but, on the trial of Lord Grey de Werke, indicted before him for carrying off and seducing the Lady Harriet Berkeley, daughter of the Earl of Berkeley—although the King was desirous of a conviction because the defendant was a Whig, Chief Justice Pemberton conducted himself unexceptionably. He properly ruled that the young lady herself was a competent witness; and, in summing up to the jury, he said:—

“The question before you is, whether there was any unlawful solicitation of this lady’s love, and whether there was any inveiglement of her to withdraw herself and run away from her father’s home without his consent, and whether my Lord Grey did frequent her company afterwards? Her mother and sisters make out a strong case to support the indictment; but she denies it all, and I must leave it to you which story you will believe.”

After the trial was over, Pemberton, with great spirit, quelled a riot which arose in Westminster Hall respecting the custody of the Lady Harriet, her father laying hold of her against her will, and she, in collusion with her paramour, pretending that she was married to another man, who claimed her. Swords were drawn, and a conflict was begun, but the Chief Justice sternly rebuked the combatants, and by his interposition tranquillity was restored without effusion of blood.<sup>1</sup>

It might have been supposed that the King and his ministers would have had confidence in Chief Justice Pemberton, but in spite of the zealous assistance he had given in the plan to hang Lord Shaftesbury, he was now removed from his office as untrustworthy. While the charters of the City of London remained by which the citizens were empowered to elect sheriffs, who returned juries both for the City of London and for the County of Middlesex, there was no certainty that the best endeavors of the most obsequious judges to cut off Whig

<sup>1</sup>9 St. Tr. 127-186. Macaulay describes this as “a scene unparalleled in our legal history. The seducer appeared with dauntless front, accompanied by his paramour. Nor did the Whig Lords flinch from their friend’s side even in that extremity. In our time such a trial would be fatal to the character of a public man; but in that age the standard of morality among the great was so low, and party spirit was so violent, that Grey still continued to have a considerable influence, though the Puritans, who formed a strong section of the Whig party, looked somewhat coldly upon him.”—Vol. i. p. 520  
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leaders might not be rendered abortive by a conscientious verdict. A *quo warranto* suit had, therefore, been instituted, for the purpose of having all the charters of the City declared forfeited, so that the King might remodel its constitution in the way best calculated to gain his own ends. This suit had been advised by the subtlest of special pleaders—EDMUND SAUNDERS, and he had drawn the *quo warranto*, and conducted all the proceedings as counsel for the Crown to the stage where it was ripe for being finally argued and determined in the Court of King's Bench. The constitution of the country was supposed to depend upon the result. If the citadel of freedom should be taken in the assault, despotism would be permanently established; but failure would revive agitation, and might render the calling of a parliament indispensable.

Every thing depended on the Chief Justice of the King's Bench. Had the prosecution been well founded, Pemberton would have been very readily trusted with it; but, unfortunately, all lawyers knew that if the slightest regard were paid to the principles of law or to former decisions, there must be judgment in favor of the City of London. The courtiers were aware that Pemberton was not entirely devoid of conscience, and that there were limits to the aberrations from rectitude beyond which he would not trespass. To give him a chance, he was sounded by the Attorney General, in a manner not unusual, respecting the *quo warranto* against the City,—when he returned an ambiguous answer.

The bold resolution was taken to cashier him, and to substitute for him EDMUND SAUNDERS, about whom there could be no misgiving. Notwithstanding Pemberton's merits and past services, he would at once have been reduced to the ranks, but it luckily happened that the inferior office of Chief Justice of the Common Pleas was vacant. Sir Thomas Raymond, in giving an account of his installation, says, "he was placed Chief Justice of the said Court in the room of Sir Francis Pemberton, who was the day before sworn Chief Justice of the Common Pleas at his own desire, for that it is a place (tho' not so honorable) yet of more ease and plenty, as the Lord Keeper said in his speech to Saunders."<sup>1</sup> But, says

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Roger North who had a spite against Pemberton, "the truth is, it was not thought any way reasonable to trust that cause, on which the peace of the Government so much depended, to a chief who never showed so much regard to the law as to his will, and notorious as he was for little honesty, boldness, cunning, and uncontrollable opinion of himself." It may be amusing to read his arguments by which such proceedings were gravely and unblushingly defended:—

"It will be proper to solve a question much tossed about in those days, whether the Court was not to blame for appointing men to places of judgment where great matters of law and of mighty consequence depended to be heard and determined, whose opinions were known before hand. All governments must be entrusted with power, which may be used to good or ill purpose. Here a government is beset with enemies ever watching for opportunities to destroy it, and having a power to choose whom to trust, the taking up men whose principles are not known is more than an even chance that enemies are taken into their bosom. Would they not be sure of men to judge whose understandings and principles were fore-known? What is the use of power but to secure justice? It is a maxim of law, that *fraud is not to be assigned in lawful acts*. If governments secure their peace by doing only what is lawful to be done, all is right. If they suffer encroachments, and at length dissolution, for want of using such powers, what will it be called but stupidity and folly?"<sup>1</sup>

Sir Francis Pemberton, being thus removed from the office of Chief Justice of the King's Bench to make way for one who not only had never been in office before and had not even worn a silk gown, but besides was of the lowest origin and of the most vulgar habits—felt the degradation keenly, and, instead of rejoicing in his slender integrity, expressed regret that he had not been more uniformly complying. But if he was to walk behind Saunders, who had "nine issues in his back," it was some consolation to him that he was to be still "My Lord," and to receive higher emoluments than he could expect at the bar. He was sworn in Chief Justice of the

<sup>1</sup> Life of Guilford, ii. 121.

Common Pleas, at the Lord Chancellor's private house, —to avoid speeches in open court, which might have been very awkward on both sides.<sup>1</sup>

The QUO WARRANTO proceeded. Judgment was given against the City; all its charters, granted by so many sovereigns, were declared to be forfeited; all its privileges were annihilated; and the Government had now the unlimited power of packing juries in London and Middlesex.<sup>2</sup>

But Saunders had lost his life in the wound which he had inflicted on the constitution, and the office of Chief Justice of the King's Bench was again vacant. It might have been restored to Pemberton had there not been another candidate for it, who was destined to throw into the shade all past judicial delinquency.—Some months intervened before the new law arrangements could be completed. In this interval the Rye-house plot was discovered, and, those implicated in it being about to be tried, Pemberton was placed at the head of the Commission, the Government thinking that, notwithstanding his secret resentment, he had motives sufficient to keep him steady in the hope of restitution and the dread of further disgrace.

The case of Colonel Walcot was taken first; and here there was no difficulty, for he had not only joined in planning an insurrection against the Government, but was privy to the design of assassinating the King and the Duke of York, and, in a letter to the Secretary of State, he had confessed his complicity, and offered to become a witness for the Crown. This trial was meant to prepare the public mind for that of Lord Russell, the great ornament of the Whig party, who had carried the Exclusion Bill through the House of Commons, and, attended by a great following of Whig members, had delivered it with his own hand to the Lord Chancellor at the bar of the House of Lords. In proportion to his virtues was the desire to wreak vengeance upon him. But the object was no less difficult than desirable, for he had been kept profoundly ignorant of the intention to offer violence to the royal brothers, from the certainty

<sup>1</sup> Sir Thomas Raymond, 251; Burnet, O. T., ii. 185, 188.

<sup>2</sup> 8 St. Tr. 1039.

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that he would have rejected it with abhorrence; and although he had been present when there were deliberations respecting the right and the expediency of resistance by force to the Government after the system had been established of ruling without parliaments, he had never concurred in the opinion that there were no longer constitutional means of redress,—much less had he concerted an armed insurrection. Notwithstanding all the efforts made to return a prejudiced jury, there were serious apprehensions of an acquittal.

Pemberton, the presiding Judge, seems to have been convinced that the evidence against him was insufficient; and although he did not interpose with becoming vigor, by repressing the unfair arts of Jeffreys who was leading counsel for the Crown, and although he did not stop the prosecution as an independent judge would do in modern times, he cannot be accused of any perversion of law; and, instead of treating the prisoner with brutality, as was wished and expected, he behaved to him with courtesy and seeming kindness.

Lord Russell, on his arraignment at the sitting of the Court in the morning, having prayed that the trial should be postponed till the afternoon, as a witness for him was absent, and it had been usual in such case to allow an interval between the arraignment and the trial, Pemberton said, "Why may not this trial be respited till the afternoon?" and the only answer being the insolent exclamation "Pray call the jury," he mildly added, "My Lord, the King's counsel think it not reasonable to put off the trial longer, and we cannot put it off without their consent in this case."

The following dialogue then took place, which introduced the touching display of female tenderness and heroism of the celebrated Rachel Lady Russell assisting her martyred husband during his trial—a subject often illustrated both by the pen and the pencil.

*Lord Russell*: "My Lord, may I not have the use of pen, ink, and paper?" *Pemberton*: "Yes, my Lord."  
*Lord Russell*: "My Lord, may I not make use of any papers I have?" *Pemberton*: "Yes, by all means."  
*Lord Russell*: "May I have somebody write to help my memory?" *Attorney General*: "Yes, a servant." *Lord*

*Russell*: "My wife is here, my Lord, to do it." *Pemberton*: "If my Lady please to give herself the trouble."

The Chief Justice admitted Dr. Burnet, Dr. Tillotson, and other witnesses, to speak to the good character and loyal conversation of the prisoner, and gave weight to their testimony, notwithstanding the observation of *Jeffreys* that "it was easy to express a regard for the King while conspiring to murder him." In summing up to the jury, after alluding to the witnesses called by the prisoner "concerning his integrity and course of life," he said,—

"Now, the question before you will be, whether, upon this whole matter, you do believe my Lord *Russell* had any design upon the King's life, for that is the material part here. It is given you by the King's counsel as an evidence of this, that he did conspire to raise an insurrection, and to surprise the King's guards, which, say they, can have no other end but to seize and destroy the King. It must be left to you upon the whole matter. You have not evidence in this case as you had in that tried yesterday, of a conspiracy to kill the King at the Rye. There, direct evidence was given of a consult to kill the King, which you have not here. If you believe the prisoner at the bar to have conspired the death of the King, and in order to that to have had the consults the witnesses speak of, you must find him guilty of the treason laid to his charge."

The jury retired, and the courtiers present were in a state of the greatest alarm; for against *Algernon Sydney*, who was to be tried next, the case was still weaker; and if the two Whig chiefs, who were considered already cut off, should recover their liberty, and should renew their agitation a national cry might be got up for the summoning of Parliament, and a new effort might be made to rescue the country from a Popish successor. These fears were vain. The jury returned a verdict of GUILTY, and Lord *Russell* expiated on the scaffold the crime of trying to preserve the religion and liberties of his country.

But *Pemberton* was not to be forgiven the anxiety he had occasioned. Notwithstanding the want of moral courage and the subserviency he had displayed during

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Lord Russell's trial, complaint was truly made that hitherto there never had been an instance of a state offender, whom the Government were desirous of convicting, being treated with so much moderation, and being allowed such a fair chance of escaping. It was determined that Sydney should be tried before a Judge who would make sure work of him, and that as Pemberton had not taken warning by his removal from the office of Chief Justice of the King's Bench, and as he was so irreclaimably irresolute that no dependence could be placed upon him, he should be for ever deprived of all judicial employment. Accordingly a *supersedeas* passed the great seal, by which he was dismissed from the office of Chief Justice of the Common Pleas; Jones, untroubled by scruples, was appointed to succeed him; and Jeffreys, promoted to be Chief Justice of the King's Bench, was the remorseless murderer of Sydney.<sup>1</sup> At the same time Pemberton was expelled from the Privy Council, into which he had been admitted a member when he was made Chief Justice of the King's Bench.

Before I again accompany him to the bar, I ought to say something of his decisions in civil cases while he remained on the bench. Roger North's grudge against him, for having a hankering after honesty and independence, leads him to say "he was a better practitioner than a judge; for he had a towering opinion of his own sense and wisdom, and rather made than declared law: I have heard his Lordship say, that *in making law he had outdone King, Lords, and Commons.*" This jocular boast he very likely made, for it is quite consistent with his having done his duty as an enlightened magistrate. With us, the rules of property fixed by act of parliament bear an infinitesimally small proportion to those fixed by the common law, and the common law is made up of judicial decisions. New combinations of facts are constantly arising and producing new questions of law; the determination of each of these may be considered a new law, for it lays down a rule to be followed in time to come, and the reports of our courts of justice are far more voluminous than the statute book. Pemberton did not publish any of his own judgments, and he was by no

<sup>1</sup> 2 Shower, 318.



means fortunate in having a good reporter, but, making allowance for the inaccuracies and the barbarous dialect of *Ventris*, *Shower*, *Sir Thomas Jones*, and *Sir Thomas Raymond*, he seems to have proceeded generally on sound principles of jurisprudence, and by no means to have been wanting in respect for the authority of his predecessors. The only bad decisions to be laid to his charge are those against the privileges of the House of Commons, for which he was punished by the Convention Parliament, and which it will afterwards be my duty to explain.

He was particularly celebrated as a good *nisi prius* judge. Sir Henry Chauncey says, "He would not suffer lawyers, on trials before him, to interrupt or banter witnesses in their evidence, but allowed every person liberty to speak without fear, that the truth might be better discovered."<sup>1</sup>

Although he was now in his sixtieth year, he resolved the third time in his life to begin to practice at the bar; and, having been several years a Chief Justice, and called LORD PEMBERTON,<sup>2</sup> he became once more *Mr. Sergeant*.

He immediately again got into extensive business, and he was engaged in the most important trials which took place, both civil and criminal, till the landing of the Prince of Orange—a period of five years. He sat usually in the Common Pleas, but he occasionally went into King's Bench, and practiced before Jeffreys, notwithstanding their former squabbles when Pemberton was on the bench and Jeffreys was at the bar.<sup>3</sup>

The grand trial coming on which proximately produced the Revolution, the ex-Chief Justice was counsel for the seven Bishops, along with a strange mixture of counsel of different parties and principles—Sawyer and Finch, who, as Attorney and Solicitor General for Charles II., had prosecuted Russell and Sydney; Pollexfen, the Whig leader of the Western Circuit, who had shared with Jeffreys the obloquy of the "Bloody Assizes;"

<sup>1</sup> See Clutterbuck's *Herts*, i. 82.

<sup>2</sup> The Chiefs were Lords simply by their surnames. Hence we speak at this day of Lord Coke, Lord Hale, and Lord Holt.

<sup>3</sup> 10 St. Tr. 567.



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<sup>1</sup> Macaulay's History



VIEW OF THE BUREAU OF LANDS AND MINES

Levinz, who, returning to the bar when displaced from the bench for a show of independence, was now induced to take a brief against the Crown by a threat of the attorneys that, if he refused it, he should never hold another; Treby, the ex-Recorder of London, who had been turned out when the City was disfranchised; and Somers, hitherto only known for learning and ability by a few private friends,—hereafter to be immortalized as the author of the Bill of Rights, and the chief founder of the constitutional government under which we now live. They forgot all past differences and animosities, and nobly struggled in defense of their illustrious clients. In ex-Chief Justice Pemberton was seen a wonderful union of zeal, discretion, learning, and eloquence, and "through the whole trial he did his duty manfully and ably."

The first point which he made, when the Bishops were brought from the Tower and charged with the information, was,—“that they were illegally in custody, and therefore were not then bound to plead.”

*Pemberton, Sergeant*: “Good my Lord, will you please to hear us a little to this matter?” *L. C. J.*: “Brother Pemberton, we will not refuse to hear you—by no means—but not now; for the King is pleased, by his Attorney and Solicitor General, to charge these noble persons, my Lords the Bishops, with an information.” *Pemberton, Serg.*: “Pray, my Lord, spare us a word: if we are not here as prisoners regularly before your Lordship, and are not brought in by due process, the Court has not power to charge us with the information; therefore we beg to be heard on the question, whether we are legally here before you?”

The objection being overruled, Pemberton offered a plea to be put upon the record “that the defendants, as peers of parliament, were privileged from arrest in such a case;” but this the Court refused to receive, and the Bishops were obliged to plead *not guilty*.

When the jury had been sworn, the charge was opened against the defendants that they had written and published, in the county of Middlesex, a false, malicious, and seditious libel (meaning the respectful Petition

<sup>1</sup> Macaulay's History, i. 379.

which they had presented to the King, praying that his Majesty would recall his order for the clergy to read the Declaration of Indulgence, issued contrary to the Test Act).<sup>1</sup> But the first difficulty was to prove their signatures to the Petition, and an acquittal was about to take place, when the Crown counsel put into the witness-box Mr. Blathwayt, the clerk of the Council, who swore that, when they were summoned before the King, they owned their signatures to the Petition; but Pemberton insisted, in cross-examination, upon having all that had passed between the King and the Bishops fully stated:—

*Williams, S. G.*: "That is a pretty thing, indeed!"  
*Powys, A. G.*: "Do you think you are at liberty to ask our witnesses any impertinent question that comes into your head?" *Pemberton*: "The witness is sworn to tell the truth, and the whole truth, and an answer we must and will have."  
*Powys, A. G.*: "If you persist in asking such a question, tell us, at least, what use you mean to make of it."  
*Pemberton, Serg.*: "My Lords, I will answer Mr. Attorney. I will deal plainly with the Court. If the Bishops owned this paper under a promise from his Majesty that their confession should not be used against them, I hope that no unfair advantage will be taken of them."  
*Williams, S. G.*: "You put on his Majesty what I dare hardly name. Since you are so pressing, I demand for the King that the question may be recorded."  
*Pemberton*: "Record what you will, I am not afraid of you, Mr. Solicitor."

After a long altercation, the questions were allowed to be put; and it appeared from the answers that, although the King had made no express promise that advantage should not be taken of the admission of the Bishops, they had admitted their handwriting on this understanding. The signatures were held to be proved.

<sup>1</sup> The information stated a conspiracy to defame the King, alleging the writing and publication of the libel as the overt act; but notwithstanding this technicality, which is hardly worth noticing, the prosecution was in reality for writing and publishing the libel, and is so treated throughout the whole trial.

<sup>2</sup> At this time, leading questions were not allowed to be put in cross-examination, more than in examination in chief; and I am not sure that the old rule is not the best one—when I consider the monstrous abuse sometimes practiced in putting words into the mouth of a friendly witness, necessarily called by the side he is opposed to.

But a still greater difficulty arose in showing that there had been any publication of the supposed libel in the county of Middlesex:—

*Pemberton, Serg.*: “To say the writing and subscribing of their names is a publication of that paper, is such doctrine truly as I never heard before. Suppose this paper had been in my study subscribed by me, but never went further, would this have been a publication? but the publication must be proved to have been in the county of Middlesex.” *Powys, A. G.*: “Look you; it does lie upon you to prove it was done elsewhere than in Middlesex.” *Pemberton, Serg.*: “Sure, Mr. Attorney is in jest.” *L. C. J.*: “Pray, brother Pemberton be quiet. If Mr. Attorney says anything he ought not to say, I will correct him; but pray do not, you who are at the bar, interrupt one another.”

The Court having finally ruled that there was not sufficient evidence of a publication in Middlesex, the Chief Justice was beginning to direct the jury to find a verdict of acquittal, when Finch, one of the counsel for the Bishops, offered to adduce evidence for the defendants. Pemberton, seeing the gross indiscretion of this proceeding started on his legs, pulled down his junior, and said—

“My Lord, we are contented that your Lordship should direct the jury.” *L. C. J.*: “No! no! I will hear Mr. Finch. The Bishops shall not say of me, that I would not hear their counsel.” *Pemberton, Serg.*: “Pray, good my Lord, we stand mightily uneasy here, and so do the jury. Pray dismiss us.”

But for Finch's foolish interruption, the anticipated acquittal would then have been recorded. At this moment it was announced that the Earl of Sunderland, the Lord President, was coming into court to prove that the Bishops had, in his presence, presented the petition to the King at Whitehall. *L. C. J.*: “Well, you see what comes of interruption.”

After Lord Sunderland's evidence, nothing remained except the question of *libel or no libel?* Pemberton, when on the bench, had concurred with the other judges in the doctrine that this was a question exclusively for the Court, and that the jury had nothing more to con-

sider than whether, in point of fact, the writing alleged to be libelous had been composed and published by the defendants.<sup>1</sup> But in spite of his own ruling, he insisted that, although the Bishops had been proved to have composed and published the Petition, they were entitled to a verdict of *not guilty* from the jury.

"My Lords the Bishops," he said, "are here accused of a crime of a very heinous nature; they are here branded and stigmatized by this information as if they were seditious libelers; when, in truth they have done no more than their duty, their duty to God, their duty to the King, and their duty to the Church. We insist that the kings of England have no power to suspend or dispense with the laws and statutes of this kingdom touching religion; that is what we stand upon for our defense. And we say, that such a dispensing power with laws and statutes strikes at the very foundation of all the rights, liberties, and properties of the King's subjects whatsoever. If the King may suspend the laws of the land which concern our religion, I am sure there is no other law but he may suspend; and if the King may suspend all the laws of the kingdom, what a condition are all the subjects in for their lives, liberties, and properties!—all at mercy. The King's legal prerogatives are as much for the advantage of his subjects as of himself, and no man goes about to speak against them; but, under pretense of legal prerogative, to extend this power of the King to the destruction of all his subjects, would be doing him no true service. These laws are in truth the great bulwark of the reformed religion; they are in truth, that which fence the Church of England, and we have no human protection besides. They were made upon a foresight of the mischief that had and might come by false religions in this kingdom—and were intended to keep them out—particularly to keep out the Romish religion, which is the very worst of all religions.<sup>2</sup> If this Declaration of Indulgence, against which the Bishops made a dutiful representation, should take effect, what

<sup>1</sup> See *Rex v. Harris*, 7 St. Tr. 930.—the case in which, approving of Scroggs's law, he objected to whipping being part of the sentence.

<sup>2</sup> This must have been very distasteful to Mr. Justice Allynbone, sitting before him on the bench, who, although a Papist, had been made a judge of the King's Bench by virtue of this supposed dispensing power.



would be the end of it? All religions are encouraged, let them be what they will—Ranters, Quakers, and the like, nay, even Popery, which was intended by these acts of parliament to be kept out of this nation, as a religion no way tolerable, and not to be endured here. We say this farther, that my Lords the Bishops have the care of the Church by their very function and offices, and are bound to take care to keep out all those false religions which are prohibited and designed to be kept out by the law; and, seeing that this declaration was founded upon a mere pretended power which had been continually opposed and rejected in parliament, they could not comply with the King's commands to read it."

He then went into a historical discussion respecting the *dispensing power*, showing that as often as it had been claimed in matters of religion it had been denied and abandoned. Coming to the last attempt in the reign of Charles II., he was proceeding,—“Afterwards, in 1672, the King was prevailed upon to grant another dispensation, somewhat larger—” *L. C. J.*: “Brother Pemberton, I would not interrupt you, but we have heard of this over and over again already.” Pemberton, perceiving that the jury were strongly with him, dexterously said, “Then, since your Lordship is satisfied of all these things, as I presume you are (else I should have gone on), I have done, my Lord.”

The other counsel exerted themselves with much boldness and vigor, but the victory which followed was chiefly to be ascribed to Pemberton, who having reputably presided as Chief Justice of the Court, was regarded with far more respect by the jury than his infamous successor, Sir Robert Wright, and was still supposed to be laying down the law with judicial authority.

It might have been expected that, having taken so bold a part during this trial, he would have signed the invitation to the Prince of Orange, which was sent off immediately after; but his heart failed him. He was paralyzed by his scruples respecting the sin of rebellion

<sup>1</sup> 12 St. Tr. 183-433. My professional friends may be curious to know what his fees were on this occasion. From the attorney's bill it appears that he received five guineas retainer, twenty guineas with his brief, and three guineas for a consultation. Sir R. Sawyer and Mr. Finch refused to take any fee.

and the perils to which he might subject himself if he should join in any unsuccessful attempt at resistance to arbitrary rule. He therefore continued to devote himself exclusively to his professional pursuits. Even after the Prince of Orange had landed he remained perfectly neutral, and he declined a seat in the Convention Parliament.

When William and Mary were on the throne, and new judges were to be appointed in the room of those who disgraced the bench at the end of the reign of James II., it was expected by many that Pemberton would have been restored along with Atkyns and John Powell, who had been removed for their honesty during the last two reigns; but, although his services in defending the Seven Bishops were duly appreciated, and it was acknowledged that, when compared with Jeffreys and Scroggs, he was a paragon of virtue, it could not be forgotten that from timidity, if not corruption, he had assisted the Government in their design to bring the Earl of Shaftesbury to the block, and that although he had wished to save Lord Russell he had allowed him to be sacrificed. Indeed, the attainder of this illustrious patriot being now reversed by act of parliament as unlawful, there would have been much awkwardness in replacing on the bench the judge by whom it was pronounced. Therefore, when the members of the Cabinet produced their lists of twelve men to preside in the common law courts in Westminster Hall, Pemberton's name was found in very few of them; and in the new judicial arrangement, which gave such general satisfaction, he was entirely passed over.

An inquiry being afterwards instituted into the manner in which judges had recently been tampered with and cashiered, he was examined before the House of Commons, but could or would give very little information on the subject. While others described very amusing scenes at Chiffinch's private room at Whitehall, where they had secret interviews with Charles and James, and were interrogated respecting the dispensing power, the King's prerogative to control the law by proclamations, and the judgment they were prepared to give in cases which were pending, they could get Pemberton to say nothing more than "I was removed out

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of my place without visible cause the first time; neither do I know the reason of my being removed from the King's Bench to the Common Pleas. I was never sent for to Whitehall nor to my Lord Chancellor's. The night before, my Lord said nothing to me, but the next morn- ing I had a *supersedeas*." Whether he had given of- fense by sulkiness I know not, but a resolution was now taken to treat him with great rigor.

Mr. Topham, the Sergeant-at-arms of the House of Commons, presented a petition, setting forth "that sev- eral vexatious actions had been brought against him for executing the orders of the House when Sir Francis Pemberton was Chief Justice of the King's Bench, and that, although he had pleaded that he acted under the authority of the House, he had been cast in damages and costs." The petition was referred to a select committee, who reported that the judgments given against the Ser- geant-at-arms were illegal, and a violation of the privi- leges of Parliament. Sir Francis Pemberton was there- upon ordered to attend at the bar. The treatment which he experienced on this occasion has been severely con- demned; but I must confess that his demeanor was not very straightforward or dignified. The Speaker having informed him that he was sent for to stand on the ground on which he had overruled the plea in *Fay v. Topham*,—in- stead of denying, like Holt, the right of either House of Parliament to interrogate him in this irregular man- ner, or frankly stating what had happened, he equivoca- ted, and the following dialogue grieved his friends:—

*Pemberton*: "Sir, I know nothing of this action. I have been out of the court now six years; I cannot re- member so many thousand actions as were brought at that time. But if you will let me know what the charge is, I do not doubt but I can give you a good account of it."

*Speaker*: "A plea was pleaded that the defendant acted by the authority of this House, and such plea was overruled." *Pemberton*: "This is quite new to me, for I knew not what I was sent for." *Speaker*: "The House desires to know on what ground, in the case of *Fay v. Topham*, you overruled the defendant's plea." *Pember-*

<sup>1</sup> 5 Parl. Hist. 312.

son: "I think he pleaded to the jurisdiction of the Court; and if he did, with submission the plea ought to have been overruled." *Speaker*: "The House doth require your reasons for maintaining this opinion." *Pemberton*: "I will give you my reasons as well as I can; but you cannot expect I should be furnished with such reasons now as I may state upon further consideration. I must premise that I do not think that your privileges are in question. There is no judge who understands himself but will allow the privileges of the House; they are the privileges of the nation, and we are all bound to maintain them as much as any member of the House. But the question is all *de modo*—whether the authority of the House is pleadable to the jurisdiction of the Court, or in bar? And, under favor, I have always taken it that such a defense is not pleadable in abatement. The question is, whether this shall stop the Court, so that they cannot examine into the fact,—and see whether such a warrant was signed by the Speaker, as is alleged. Any man living might plead such a plea."

Time was given to inquire into the pleadings in *Fay v. Topham*, and the ex-Chief Justice was ordered to attend again.

When he next appeared, he insisted that the plea had been to the jurisdiction of the Court; and he added, "We did not question the legality of your orders, but we were to see whether the orders had been given, and whether they had been properly obeyed. If Mr. Topham arrested the plaintiff without any order, or imprisoned him till he paid a sum of money, damages ought to be awarded. If I was mistaken in this case, it was an error of my judgment. My design was to do justice."

The record is not to be found (as it ought to be) in the Treasury of the King's Bench, having been produced on this occasion at the bar of the House of Commons and not returned to the proper custody; but there is every reason to believe that the plea was substantially a plea in bar, and that it had been improperly overruled. Chief Justice Pemberton happened to be then oscillating towards the Government, which was highly incensed against the popular leaders, and entertained a strong

fiction of the plea ought to be allowed. The House doth remain of opinion." *Pemberton* as I can; but I am not satisfied with such a consideration. Your privileges are not understood in the House; they are all bound to obey the authority of the House. The fiction of the plea is always taken in the Court, so that I do not see whether it is as is alleged.

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desire to put down parliamentary privilege. The House of Commons (Maynard, Somers, and other learned and just men, being present) passed a resolution that Sir Francis Pemberton, in giving this judgment, had been guilty of a breach of privilege, and ordered him to be taken into custody. In consequence he was committed to Newgate, and he remained a close prisoner there till the 14th day of March, 1690—a period of eight months—when, the session being at last terminated by a prorogation, he was discharged.

Considering his great eminence as an advocate, the high judicial offices which he had filled, and the noble battle he had waged in the cause of freedom when defending the Seven Bishops, it is impossible not to commiserate his fate. But the leaders of the Convention Parliament have been too rashly blamed for the punishment inflicted upon him. Lord Ellenborough said, in *Burdett v. Abbott*, "It is surprising how a judge could have been questioned and committed to prison, by the House of Commons, for having given a judgment which no judge who ever sat in this place could differ from. It was after the Revolution—which makes such a commitment for such a cause a little alarming. It must be recollected that Lord Chief Justice Pemberton stood under the disadvantage at that period of having been one of the Judges who sat on the trial of Lord Russell. He was a man of eminent learning, and, being no favorite with either party at that time, for he was shortly after that trial removed from his situation, was probably an honest man." And Lord Erskine, having alluded in a debate in the House of Lords to this commitment of Lord Chief Justice Pemberton, exclaimed, with much vehemence, "If a similar attack were made upon my noble and learned friend (Lord Ellenborough) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and bones, and blood." But there can be little doubt that Pemberton, who was ever deficient in moral courage, for the purpose of screening himself, misrepresented the plea; and that, however meritorious his services at other times

<sup>1</sup> 14 East, 104.

<sup>2</sup> 16 Parl. Deb. 851.

may have been, on this occasion he well deserved the punishment inflicted upon him.<sup>1</sup>

On recovering his liberty, he once more returned to the bar; but now, enfeebled by age, and not supposed to have "the ear of the Court," he was very little employed. He had a beautiful villa near Highgate, where he spent the greatest part of his time in seclusion. So late, however, as the year 1696, he was one of the counsel for Sir John Fenwick, and assisted in opposing the bill of attainder by which that unfortunate gentleman was put to death in a manner which would have been condemned in the worst days of the Stuarts.<sup>2</sup> This was the last occasion of Sir Francis Pemberton ever appearing in public.

Soon after, he altogether withdrew from business, and the last three years of his life he entirely devoted to contemplation. He expired on the 10th of June, 1699, in the 74th year of his age, and was buried in Highgate church, where there still stands a monument erected to his memory, with the following inscription:—

"M. S. venerabilis admodum viri D. Francisci Pemberton Eq. nurati, servientis ad legem, e sociis Interioris Templi, necnon sub serenissimo principe Carolo 2<sup>o</sup>. Bancii Regii ac Communis Capitalis Justiciarii, sacre majestati a secretioribus consiliis; vir planè egregius, ad reipublicæ pariter ac suorum dulce decus et præsidium feliciter natus. Patre Radulpho in Agro Hertford. Generoso, ex antiquâ Pembertonorum prosapiâ in Com. Palat. Lancastriæ oriundo."<sup>3</sup>

With a little more firmness of principle, or moral courage, joined to his talents, acquirements, and opportunities, he might have been a great character in English history; but, while he perceived and approved the right course, and never entirely abandoned it, he not unfrequently deviated from it,—so that among his contemporaries he bore the contemned name of a "trimmer," and his reputation with his posterity has been neither pure nor brilliant. The errors of his youth would have been easily forgiven after the noble amends which he made for them, but we cannot praise the excessive caution

<sup>1</sup> See 2 Nels. Ab. 1248; Lord Campbell's Speeches, 206.

<sup>2</sup> 13 St. Tr. 387-758.

<sup>3</sup> Lysons' Envyrons, p. 68; Clutterbuck's Herts, ii. 447. He left several sons behind him; and his descendants were seated at Trumpington, near Cambridge, till the beginning of the present century.

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with which he ever conducted himself that he might not give offense to those in power; and although we feel pity rather than indignation when his virtue falters, he occasionally submitted to compliances, for the purpose of winning and retaining office, which utterly deprives him of our esteem. If anything could have made him appear a respectable judge, it would have been a comparison with the four Chief Justices who succeeded him.





## CHAPTER XXI.

### LIFE OF LORD CHIEF JUSTICE SAUNDERS.

THERE never was a more flagrant abuse of the prerogative of the Crown than the appointment of a Chief Justice of the King's Bench for the undisguised purpose of giving judgment for the destruction of the charters of the City of London, as a step to the establishment of despotism over the land. Sir Edmund Saunders accomplished this task effectually, and would, without scruple or remorse, have given any other illegal judgment required of him by a corrupt Government. Yet I feel inclined to treat his failings with lenience, and those who become acquainted with his character are apt to have a lurking kindness for him. From the disadvantages of his birth and breeding, he had little moral discipline; and he not only showed wonderful talents, but very amiable social qualities. His rise was most extraordinary, and he may be considered as our *legal Whittington*.

"He was at first," says Roger North, "no better than a poor beggar-boy, if not a parish foundling without known parents or relations." There can be no doubt that, when a boy, he was discovered wandering about the streets of London in the most destitute condition—penniless, friendless—without having learned any trade, without having received any education. But although his parentage was unknown to the contemporaries with whom he lived when he had advanced himself in the world, recent inquiries have ascertained that he was born in the parish of Barnwood, close by the city of Gloucester; that his father, who was above the lowest rank of life, died when he was an infant, and that his mother took for her second husband a man of the name of Gregory, to whom she bore several children. We know nothing more respecting him, with certainty, till he pre-



serted himself in the metropolis; and we are left to imagine that he might have been driven to roam abroad for subsistence, by reason of his mother's cottage being leveled to the ground during the siege of Gloucester; or that, being hardly used by his step-father, he had run away, and had accompanied the broad-wheeled wagon to London, where he had heard that riches and plenty abounded.

The little fugitive found shelter in Clement's Inn, where "he lived by obsequiousness, and courting the attorneys' clerks for scraps." He began as an errand-boy, and his remarkable diligence and obliging disposition created a general interest in his favor. Expressing an eager ambition to learn to write, one of the attorneys of the Inn got a board knocked up at a window on the top of a staircase. This was his desk, and, sitting here, he not only learned the *running hand* of the time, but *court hand*, *black letter*, and *engrossing*, and made himself "an expert entering clerk." In winter, while at work, he covered his shoulders with a blanket, tied haybands round his legs, and made the blood circulate through his fingers by rubbing them when they grew stiff. His next step was to copy deeds and law papers, at so much a folio or page—by which he was enabled to procure for himself wholesome food and decent clothes. Meanwhile he not only picked up a knowledge of Norman French, and law Latin, but, by borrowing books, acquired a deep insight into the principles of conveyancing and special pleading. By and by the friends he had acquired enabled him to take a small chamber, to furnish it, and to begin business on his own account as a conveyancer and special pleader. But it was in the latter department that he took greatest delight, and was the most skillful—insomuch that he gained the reputation of being familiarly acquainted with all its mysteries; and although the order of "special pleaders under the bar" was not established till many years after, he was much resorted to by attorneys who wished by a sham plea to get over the term, or by a subtle replication to take an undue advantage of the defendant.

It has been untruly said of him, as of Jeffreys, that he

<sup>1</sup> Life of Guilford, ii. 125.

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began to practice as a barrister without having been ever called to the bar. In truth, the attorneys who consulted him having observed to him that they should like to have his assistance to maintain in court the astute devices which he recommended, and which duller men did not comprehend, or were ashamed of, he, rather unwillingly, listened to their suggestion that he should be entered of an Inn of Court, for he never cared much for great profits or high offices; and, having money enough to buy beer and tobacco, the only luxuries in which he wished to indulge, he would have preferred to continue the huggermugger life which he now led. He was domesticated in the family of a tailor in Butcher Row, near Temple Bar,<sup>1</sup> and was supposed to be rather too intimate with the mistress of the house. However, without giving up his lodging here, to which he resolutely stuck till he was made Lord Chief Justice of England, he was prevailed upon to enter as a member of the Middle Temple. Accordingly, on the 4th of July, 1660, he was admitted there by the description of "Mr. Edmund Saunders, of the county of the city of Gloucester, gentleman." The omission to mention the name of his father might have given rise to the report that he was a foundling; but a statement of parentage on such occasions, though usual, was not absolutely required, as it now is.

He henceforth attended "moots," and excited great admiration by his readiness in putting cases and taking off objections. By his extraordinary good-humor and joviality, he likewise stood high in the favor of his brother Templars. The term of study was then seven years, liable to be abridged on proof of proficiency; and the benchers of the Middle Temple had the discernment and the liberality to call Saunders to the bar when his name had been on their books little more than four years.

We have a striking proof of the rapidity with which he rushed into full business. He compiled Reports of the decisions of the Court of King's Bench, beginning with Michaelmas Term, 18 Charles II., A. D. 1666, when

<sup>1</sup> This was a very narrow dirty lane, which was swept away when the improvements were made between St. Clement's Church and Temple Bar, about forty years ago.

he had only been two years at the bar. These he continued till Easter Term, 24 Charles II., A. D. 1672. They contain all the cases of the slightest importance which came before the Court during that period; and he was counsel in every one of them.

His "hold of business" appears the more wonderful when we consider that his *liaison* with the tailor's wife was well known, and might have been expected to damage him even in those profligate times; and that he occasionally indulged to great excess in drinking, so that he must often have come into court very little acquainted with his "breviat," and must have trusted to his quickness in finding out the questions to be argued, and to his storehouse of learning for the apposite authorities.

But, when we peruse his "Reports," the mystery is solved. There is no such treat for a common lawyer. Lord Mansfield called him the "Terence of reporters," and he certainly supports the forensic dialogue with exquisite art, displaying infinite skill himself in the points which he makes, and the manner in which he defends them; doing ample justice, at the same time, to the ingenuity and learning of his antagonist. Considering the barbarous dialect in which he wrote (for the Norman French was restored with Charles II.), it is marvelous to observe what clear, terse, and epigrammatic style he uses on the most abstruse juridical topics.

He labored under the imputation of being fond of sharp practice, and he was several times rebuked by the Court for being "*trop subtile*," or "going too near the wind;" but he was said by his admirers to be fond of his *craft only in meliori sensu*, or in the good sense of the word, and that, in entrapping the opposite party, he was actuated by a love of fun rather than a love of fraud.<sup>1</sup> Thus he is characterized, as a practitioner, by Roger North:—

<sup>1</sup> I knew such a man in my youth. Having demurred four times successively to a very faulty declaration, assigning only one blunder for cause of demurrer each time, the author of the declaration sent him a challenge as for a personal insult; when he merely returned for answer,—“Dear Tom, I fight only in *Banco Regis*. Why should you not suppose that I might be as dull as yourself, and that it took me some time to find out the blunders which had escaped you? When I came to one which was decisive, there I stopped, presuming that what followed might be all right. Your loving friend, E. L.”

“Wit and repartee in an affected rusticity were natural to him. He was ever ready, and never at a loss, and none came so near as he to be a match for Sergeant Maynard. His great dexterity was in the art of special pleading, and he would lay snares that often caught his superiors, who were not aware of his traps. And 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 vittily ward off, so that no one was much offended with him. But 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.”

He did not, like Scroggs and Jeffreys, intrigue for advancement. He neither sought favor with the popular leaders in the City, nor tried to be introduced into Chiffinch's “spie office” at Whitehall. “In no time did he lean to faction, but did his business without offense 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.” He was in the habit of laughing both at Cavaliers and Roundheads; and, though nothing of a Puritan himself, the semi-popish high-churchmen were often the objects of his satire.

His professional, or rather his special pleading, reputation forced on him the advancement which he did not covet. Towards the end of the reign of Charles II., when the courts of justice were turned into instruments of tyranny, (or, as it was mildly said, “the Court fell into a steady course of using the law against all kinds of offenders,”) Saunders had a general retainer from the Crown, and was specially employed in drawing indictments against Whigs, and *quo warrantos* against Whigish corporations.<sup>1</sup> In Crown cases he really considered the King as his client, and was as eager to gain the day

<sup>1</sup> Life of Guilford, ii. 127.

<sup>2</sup> *Ib.* 128.

<sup>3</sup> He had discontinued his Reports, partly from want of leisure, and partly from disliking to report the decisions of such judges as Raynsford and Scroggs.

for him by all sorts of manœuvres, as he had ever been for a roguish Clement's Inn attorney. He it was who suggested the mode of proceeding against Lord Shaftesbury for high treason; on his recommendation the experiment was made of examining the witnesses before the grand jury in open court,—and he suggested the subtlety that “the usual secrecy observed being for the King's benefit, it might be waived by the King at his pleasure.” When the important day arrived, he himself interrogated very artfully Mr. Blathwayt, the clerk of the Council, who was called to produce the papers which had been seized at Lord Shaftesbury's house in Aldersgate-street, and gave a treasonable tinge to all that passed. The IGNORAMUS of his indictment must have been a heavy disappointment to him; but the effort which he made gave high satisfaction to the King, who knighted him on the occasion, and from that time looked forward to him as a worthy Chief Justice.'

Upon the dissolution of the Oxford Parliament and the rout of the Whig party, it being resolved to hang Fitzharris, Saunders argued with uncommon zeal against the prisoner's plea that there was an impeachment depending for the same offense; and concluded his legal argument in a manner which seems to us very inconsistent with the calmness of a dry legal argument: “Let him plead *guilty* or *not guilty*: I rather hope that he is *not guilty* than he is *guilty*: but if he be *guilty*, it is the most horrid venomous treason ever spread abroad in any age. And for that reason your Lordships will not give countenance to any delay.”

I find him several times retained as counsel against the Crown; but upon these occasions the Government wished for an acquittal. He defended the persons who were prosecuted for attempting to throw discredit on the Popish Plot,<sup>3</sup> he was assigned as one of the counsel for Lord Viscount Stafford,<sup>4</sup> and he supported the application made by the Earl of Danby to be discharged out of custody.<sup>5</sup> On this last occasion he got into a violent altercation with Lord Chief Justice Pemberton. The

<sup>1</sup> 8 St Tr. 779.  
<sup>2</sup> 7 Ib. 1242.

<sup>3</sup> Ib. 271.  
<sup>4</sup> 11 Ib. 835.

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report says that "Mr. Saunders had hardly begun to speak when the Lord Chief Justice Pemberton did reprimand the said Mr. Saunders for having offered to impose upon the Court. To all which Mr. Saunders replied, that he humbly begged his Lordship's pardon, but he did believe that the rest of his brethren understood the matter as he did." The Earl of Danby supported this statement, and Saunders had a complete triumph over the Chief Justice.'

Pemberton was soon removed from the office of Chief Justice of the King's Bench, and Saunders sat in his place.

In spite of the victory which the King had gained over the Whigs at the dissolution of his last parliament, he found one obstacle remain to the perpetuation of his despotic sway in the franchises of the City of London. The citizens (among whom were then included all the great merchants, and some of the nobility and gentry) were still empowered to elect their own magistrates; they were entitled to hold public meetings; and they could rely upon the pure administration of justice by impartial juries, should they be prosecuted by the Government. The Attorney and Solicitor General, being consulted, acknowledged that it passed their skill to find a remedy; but, a case being laid before Saunders, he advised that something should be discovered which might be set up as a forfeiture of the City charters, and that a *QUO WARRANTO* should be brought against the citizens, calling upon them to show by what authority they presumed to act as a corporation. Nothing bearing the color even of irregularity could be suggested against them except that, on the rebuilding and enlarging of the markets after the great fire, a by-law had been made, requiring those who exposed cattle and goods to contribute to the expense of the improvements by the payment of a small toll; and that the Lord Mayor, Aldermen, and Commonalty of the City had, in the year 1679, presented a petition to the King lamenting the prorogation of parliament in the following terms: "Your petitioners are greatly surprised at the late prorogation, whereby the prosecution of the public justice

\* II St. Tr. 831.

of the kingdom, and the making of necessary provisions for the preservation of your Majesty and your Protestant subjects, have received interruption."

Saunders allowed that these grounds of forfeiture were rather scanty, but undertook to make out the BY-LAW to be the usurpation of a power to impose taxes without authority of Parliament, and the PETITION a seditious interference with the just prerogative of the Crown.

Accordingly, the QUO WARRANTO was sued out, and, to the plea setting forth the charters under which the citizens of London exercised their privileges as a corporation, he drew an ingenious replication, averring that the citizens had forfeited their charters by usurping a power to impose taxes without authority of Parliament, and by seditiously interfering with the just prerogative of the Crown. The written pleadings ended in a demurrer, by which the sufficiency of the replication was referred, as a question of law, to the judgment of the Court of King's Bench.

Saunders was preparing himself to argue the case as counsel for the Crown, when, to his utter astonishment, he received a letter from the Lord Keeper announcing his Majesty's pleasure that he should be Chief Justice. He not only never had intrigued for the office, but his appointment to it had never entered his imagination; and he declared, probably with sincerity, that he would much sooner have remained at the bar, as he doubted whether he could continue to live with the tailor in Butcher Row, and he was afraid that all his favorite habits would be dislocated. This arrangement must have been suggested by cunning lawyers, who were distrustful of Pemberton, and were sure that Saunders might be relied upon. But Roger North ascribes it to Charles himself; not attempting, however, to disguise the corrupt motive for it. "The King," says he, "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 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.*"<sup>1</sup>

<sup>1</sup> Life of Guilford. ii. 129.



On the 23d of January, being the first day of Hilary Term, 1683, Sir Edmund Saunders appeared at the bar of the Court of Chancery, in obedience to a writ requiring him to take upon himself the degree of Sergeant-at-law; and distributed the usual number of gold rings, of the accustomed weight and fineness, with the courtly motto "PRINCIPI SIC PLACUIT." He then had his coif put on, and proceeded to the bar of the Common Pleas, where he went through the form of pleading a sham cause as a Sergeant. Next he was marched to the bar of the King's Bench, where he saw the Lord Keeper on the bench, who made him a flowery oration, pretending "that Sir Francis Pemberton, at his own request, had been allowed to resign the office of Chief Justice of that Court, and that his Majesty, looking only to the good of his subjects, had selected as a successor him who was allowed to be the fittest, not only for learning, but for every other qualification." The new Chief Justice, who often expressed a sincere dislike of *palaver*, contented himself with repeating the motto on his rings, "PRINCIPI SIC PLACUIT;" and, having taken the oaths, was placed on the bench, and at once began the business of the Court.<sup>1</sup>

In a few days afterwards came on to be argued the great case of *The King v. The Mayor and Commonalty of the City of London*. Finch, the Solicitor General, appeared for the Crown; and Treby, the Recorder of London, for the defendants. The former was heard very favorably; but the latter having contended that, even if the By-law and the Petition were illegal, they must be considered only as the acts of the individuals who had concurred in them, and could not affect the privileges of the body corporate—an *ens legis*, without a soul, and without the capacity of sinning,—Lord Chief Justice Saunders exclaimed:—

"According to your notion, never was one corporate act done by them; certainly, whatsoever the Common Council does, binds the whole; otherwise it is impossible for you to do any corporate act, for you never do, and never can, convene all the citizens. Then you say your Petition is no reflection on the King, but it says that

<sup>1</sup> Shower, 264; Sir Thomas Raymond, 478.



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by the prorogation public justice was interrupted. If so, by whom was public justice interrupted? Why, by the King! And is it no reflection on the King, that, instead of distributing justice to his people, he prevents them from obtaining justice? You must allow that the accusation is either true or false. But, supposing it true that the King did amiss in proroguing Parliament, the Common Council of London neither by charter nor prescription had any right to control him. If the matter were not true (as it is not), the Petition is a mere calumny. But if you should justify the presenting of the Petition, how can you justify the printing of it, whereby the Mayor, Aldermen and citizens of London do let all the nation know that the King, by the prorogation of Parliament, hath given the public justice of the nation an interruption? Pray, by what law, or custom, or charter, is this privilege of censure exercised? You stand forth as 'chartered libertines.' As for the *impeccability* of the corporation, and your doctrine that nothing which it does can affect its being, strange would be the result if that which the corporation does is not the act of the corporation, and if, the act being unlawful and wicked, the corporation shall be unpunishable. I tell you I deliver no opinion now,—I only mention some points worthy of consideration. Let the case be argued again next term."

In the ensuing term the case was again argued by Sawyer, the Attorney General, for the Crown, and Pollexfen for the City,—when Lord Chief Justice Saunders said, "We shall take time to be advised of our opinion, but I cannot help now saying what a grievous thing it would be if a corporation cannot be forfeited or dissolved for any crime whatsoever. Then it is plain that you oust the King of his *Quo Warranto*, and that, as many corporations as there are, so many independent commonwealths are established in England. We shall look into precedents, and give judgment next term."

When next term arrived, the Lord Chief Justice Saunders was on his deathbed. His course of life was so different from what it had been, and his diet and exercise so changed, that the constitution of his body could not sustain it, and he fell into an apoplexy and palsy

from which he never recovered.<sup>1</sup> But, before his illness, he had secured the votes of his brethren.

The judgment of the Court was pronounced by Mr. Justice Jones, the senior Puisne Judge, who said,—

“Several times have we met and had conference about this matter, and we have waited on my Lord Saunders during his sickness often; and, upon deliberation, we are unanimously of opinion that a corporation aggregate, such as the City of London, may be forfeited and seized into the King’s hands, on a breach of the trust reposed in it for the good government of the King’s subjects;—that to assume the power of making by-laws to levy money, is a just cause of forfeiture;—and that the Petition in the pleadings mentioned is so scandalous to the King and his government, that it is a just cause of forfeiture. Therefore, this Court doth award that the liberties and franchises of the City of London be seized into the King’s hands.”

This judgment was considered a prodigious triumph, but it led directly to the misgovernment which in little more than five years brought about the Revolution and the establishment of a new dynasty. To guard against similar attempts in all time to come, the charters, liberties, and customs of the City of London were then confirmed, and for ever established, by act of parliament.<sup>2</sup>

Saunders was Chief Justice so short a time, and this was so completely occupied with the great QUO WARRANTO Case, that I have little more to say of him as a Judge. We are told that “while he sat in the Court of King’s Bench he gave the rule to the general satisfaction of the lawyers.”<sup>3</sup>

We have the account of only one trial before him at *nisi prius*,—that of *Pilkington, Lord Grey de Werke, and others*, for a riot. Before the City of London was taken by a regular siege, an attempt had been made upon it by a *coup de main*. The scheme was to prevent the regular election of sheriffs, and to force upon the City the two Court candidates, who had only a small minority of electors in their favor. In spite of violence used on their behalf, the poll was going in favor of the liberal can-

<sup>1</sup> Life of Guilford, ii. 129.

<sup>2</sup> Shower, 275; 8 St. Tr. 1039-1358.

<sup>3</sup> Life of Guilford, ii. 129.

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THE GREAT QUO WARRANT





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didates, when the Lord Mayor, who had been gained over by the Government, pretended to adjourn the election to a future day. The existing sheriffs, who were the proper officers to preside, continued the poll, and declared the liberal candidates duly elected. Nevertheless, the Court candidates were sworn in as sheriffs, and those who had insisted on continuing the election after the pretended adjournment by the Lord Mayor, were prosecuted for a riot. They pleaded *not guilty*, and, a jury to try them having been summoned by the new sheriffs, the trial came on at Guildhall before Lord Chief Justice Saunders. He was then much enfeebled in health, and the excitement produced by it was supposed to have been the cause of the fatal malady by which he was struck a few days after.

The jury being called, the counsel for the defendants put in a *challenge to the array*, on the ground that the supposed sheriffs, by whom the jury had been returned, were not the lawful sheriffs of the City of London, and had an interest in the question:—

*L. C. J. Saunders*: "Gentlemen, I am very sorry you should have so bad an opinion of me, and think me so little of a lawyer, as not to know that this is but trifling, and has nothing in it. Pray, gentlemen, do not put these things upon me." *Mr. Thompson*: "I desire it may be read, my Lord." *L. C. J. Saunders*: "You would not have done this before another judge; you would not have done it if Sir Matthew Hale had been here. There is no law in it." *Mr. Thompson*: "We desire it may be read." *L. C. J. Saunders*: "This is only to tickle the people." The challenge, however, was read. *Jeffreys*: "Here's a tale of a tub, indeed!" *L. C. J. Saunders*: "Aye, it is nothing else, and I wonder that lawyers should put such a thing upon me." *Mr. Thompson*: "My Lord, we desire this challenge should be allowed." *L. C. J. Saunders*: "No, indeed, won't I. There is no color for it." *Mr. Thompson*: "My Lord, is the fact true or false? If it be insufficient in point of law, let them demur." *Jeffreys*: "'Robin Hood on Greendale stood'!!! I pray for the King that it may be overruled." *Mr. Thompson*: "My Lord, I say where a sheriff is interested in point of title, he is no

person in law to return a jury. The very title to the office is here in question." *L. C. J. Saunders*: "Mr. Thompson, methinks you have found out an invention, that the King should never have power to try it even so long as the world stands. Who would you have the process go to?" *Mr. Thompson*: "To the coroner." *L. C. J. Saunders*: "My speech is but bad; let me know what objection is made, and if I can but retain it in my memory, I don't question but to give you satisfaction. The sheriffs who returned the jury are sheriffs *de facto*, and their title cannot thus be inquired into. Wherever the defendant thinks it may go hard with him, are we to have a trial whether the sheriffs be sheriffs or no? What you are doing may be done in every cause that may be trying." *Mr. Thompson*: "My Lord, we pray a bill of exceptions." *Jeffreys*: "This discourse is only for discourse sake. Swear the jury." *L. C. J. Saunders*: "Aye, swear the jury."

So far, he was right in point of law; but, when the trial proceeded upon the merits, to suit the purposes of the Government and to obtain a conviction he laid down doctrines which he must have well known to be indefensible respecting the power of the Lord Mayor to interrupt the poll by an adjournment, and the supposed offense of the electors in still continuing the election, they believing that they were exercising a lawful franchise. Finally, in summing up to the jury, he observed:—

"But they pretend that the sheriffs were the men, and that the Lord Mayor was nobody; that shows that it was somewhat of the Commonwealth seed that was like to grow up among the good corn." [Here, the report says, *the people hummed and interrupted my Lord*. He thus continued.] "Pray, gentlemen, that is a very indecent thing; you put an indignity upon the King. Pray, gentlemen, forbear; such demeanor does not become a court of justice. When things were topsy-turvy I can't tell what was done, and I would be loth to have it raked up now. These defendants tell you that they believed they were acting according to law, but ignorance of the law is now no excuse, and you will consider whether they did not in a tumultuary way make a



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riot to set up a magistracy by the power of the people? Gentlemen, it hath been a long trial, and it may be I have not taken it well; my memory is bad, and I am but weak: I don't question but your memories are better than mine. Consider your verdict, and find as many guilty as you think fit."

The jury having been carefully packed, the defendants were all found guilty, and they were heavily fined; but, after the Revolution, this judgment was reversed by the legislature.<sup>1</sup>

During Lord Chief Justice Saunders' last illness the Ryehouse Plot was discovered, and it was a heavy disappointment to the Government that no further aid could be expected from him in the measures still contemplated for cutting off the Whig leaders and depressing the Whig party. His hopeless condition being ascertained, he was deserted and neglected by all his Whitehall patrons, who had lately been so attentive to him, and he received kindness only from humble dependents and some young lawyers, who, notwithstanding all his faults, had been attached to him from his singular good humor.

A few minutes after ten o'clock in the forenoon of Tuesday, the 19th of June, 1683, he expired in a house at Parson's Green, to which he had unwillingly transferred himself from Butcher Row when promoted to be Chief Justice.<sup>2</sup> His exact age was not known, but he was not supposed to be much turned of fifty, although a stranger who saw him for the first time would have taken him to be considerably more advanced in life. Of his appearance, his manners, and his habits, we have, from one who knew him intimately, the following graphic account, which it would be a sin to abridge or to alter:—

"As to his person, he was very corpulent and beastly;—a mere lump of morbid flesh. He used to say '*by his troggs* (such an humorous way of talking he affected) *none could say he wanted issue of his body, for he had nine in his back.*' He was a fetid mass that offended his neighbors at the bar in the sharpest degree. Those whose ill-fortune it was to stand near him were con-

<sup>1</sup> 9 St. Tr. 187-298.

<sup>2</sup> 3 Mod. 25.

fessors, and in summer time almost martyrs. This hateful decay of his carcass 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; and that *home* was a tailor's house, in Butcher Row, called his lodging, and the man's wife was his nurse or worse; but by virtue of his money, of which he made little account, though he got a great deal, he soon became master of the family; and, being no changeling, he never removed, but was true to his friends and they to him to the last hour of his life. With all this, he had a goodness of nature and disposition in so great a degree that he may be deservedly styled a *philanthrope*. He was a very *Silenus* to the boys, as in this place I may term the students of the law, to make them merry when ever they had a mind to it. He had nothing of rigid or austere in him. If any near him at the bar grumbled at his stench, he ever converted the complaint into content and laughing with the abundance of his wit. As to his ordinary dealing, he was as honest as the driven snow was white; and why not, having no regard for money or desire to be rich? And for good nature and condescension, there was not his fellow. 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. Once, after he was in the King's business, he dined with the Lord Keeper, and there he showed another qualification he had acquired, and that was to play jigs upon an harpsichord, having taught himself with the opportunity of an old virginal of his landlady's; but in such a manner, not for defect but figure, as to see him was a jest."

I have not to give a relation of peers, baronets, or knights, descended from this Chief Justice, as he was never married, but he has nevertheless contributed to the "Grandeur of the Law" by his REPORTS, which are

<sup>1</sup> Life of Guilford, ii. 126-129; and see Granger, iii. 367.

so entertaining as well as instructive that they have instilled into many a taste for juridical study, notwithstanding its imagined dryness, proving our science to be—

“Not harsh and crabbed, as dull fools suppose,  
But—a perpetual feast of nectar'd sweets,  
Where no crude surfeit reigns.”<sup>1</sup>

Notwithstanding his carelessness about money, he left considerable property behind him. This he disposed of by a will, dated 23d of August, 1676,—republished 2d of Sept. 1681, and proved by sentence of the Prerogative Court on the 14th of July, 1683,—whereby he gives to Mary Gutheridge his lease of the Bishop's land, “which will come to her by special occupancy as being my heir at law;” and he bequeaths legacies to his father and mother Gregory, his sister Frances Hall, his old aunt Saunders, and his cousin Sarah Hoare. Among other charitable bequests, he leaves to the poor of the parish of Barnwood, in the county of Gloucester, where he drew his first breath, the sum of £20 to be distributed at the discretion of his father Gregory if he shall be living. His friends Nathaniel Earle and Jane his wife (the master and mistress of the house in which he lodged in Butcher Row) he appoints his executor and executrix and residuary legatees, “as some recompense for their care of him, and attendance upon him, for many years.”<sup>2</sup>

His armorial bearings, which must have been granted to him when he was knighted, have been discovered by the diligence of that skillful antiquary, Mr. Pulman, Deputy Usher of the Black Rod; and, with those of the other Chief Justices, from the earliest times, now ornament the splendid library of the House of Lords in the new palace at Westminster.

<sup>1</sup> The editions of these Reports by the late Sergeant Williams, and by the present most learned Judges, Mr. Justice Patterson and Mr. Justice Vaughan Williams, illustrated by admirable notes, may be said to embody the whole common law of England, scattered about, I must confess, rather inmethodically.

<sup>2</sup> Will in C. P. C. Reg, 147, Drax.



## CHAPTER XXII.

### CHIEF JUSTICES FROM THE DEATH OF SIR EDMUND SAUNDERS TILL THE REVOLUTION.

ON the sudden death of Saunders, there was much perplexity as to the appointment of his successor. His want of political principle and his immoralities had been to a certain degree counterbalanced by his profound knowledge of the law, his mildness of disposition, and his popular manners. The candidate eagerly pressing forward his claims, and supported by the most unscrupulous courtiers, was notoriously destitute of public or private virtue,—knew nothing of his profession beyond what he had picked up in Old Bailey practice,—was brutally offensive in his deportment to all who were opposed to him; and, acting as a subordinate judge, had, on various occasions, set at defiance the rules of decency and the dictates of humanity. Even Charles II. himself—who, in making appointments, did not stand upon trifles as far as character was concerned, and who had been pleased to see sitting in his council Shaftesbury, who boasted of being, next to himself, the most profligate man in England—shuddered at the approach of Jeffreys, saying, “That man has no learning, no sense, no manners, and more impudence than ten carted street-walkers.”

Meanwhile, the trials arising out of the Rye-house Plot were coming on, and vengeance was to be taken on the Whigs for their vigorous and often successful opposition to the measures of the Court since the Sovereign of England had degraded himself into a viceroy of France. Good hopes had been entertained of Pemberton for presiding Judge, as he had received a severe warning against his occasional displays of independence by being removed from the King's Bench to the Com-

mon Pleas, with hints of the further punishment that might await him if he should not be more zealous in the public service. But he had nearly allowed Lord Russell to escape; and it was foreseen that, notwithstanding his timidity, he must necessarily direct the acquittal of Sydney, against whom there was no case, without making an old MS. essay on the speculative principles of government, found among his papers, an overt act of high treason. "Work was to be done which could be trusted to no man who revered law, or was sensible of shame."<sup>1</sup> Accordingly there was placed in the supreme seat of justice, knowingly and designedly, one of the most infamous wretches who ever wore the human form, and whose atrocities, when elevated to power, were not more revolting than might have been expected from his established character and past conduct. "All people were apprehensive of very black designs when they saw Jeffreys made Lord Chief Justice, who was scandalously vicious, and was drunk every day; besides a drunkenness of fury in his temper that looked like enthusiasm."<sup>2</sup>

It would now be my duty to trace the extraordinary career of this monster from his birth in an obscure Welsh village, to his death in the Tower of London, if I had not already done so in my "LIVES OF THE CHANCELLORS." Subsequent researches suggest little addition to the facts I have already narrated concerning him and no mitigation of the sentence of infamy which I have pronounced upon him. As a further proof of his contempt of decency on the bench, I may mention that on the trial of the learned and pious divine, Richard Baxter, after exclaiming, in his own naturally violent tone, "This is an old rogue, a schismatical knave, a hypocritical villain; he hates the liturgy; he would have nothing but long-winded cant without book," the Lord Chief Justice suddenly turned up his eyes, clasped his hands, and began to sing through his nose, in imitation of what he supposed to be Baxter's style of praying, "LORD, WE ARE THY PEOPLE! THY PECULIAR PEOPLE!! THY DEAR PEOPLE!!!"<sup>3</sup>

<sup>1</sup> Macaulay, i. 452.

<sup>2</sup> Burnet, O. T., ii. 231.

<sup>3</sup> 10 St. Tr. 1315; Life of Baxter, ch. xiv.

I ought to have dwelt more upon his venality during the "Bloody Assizes," for of the 841 prisoners whose lives were spared, and who were transported as slaves to the colonies, many were sold on his own account, and, long as was the voyage, and sickly, he calculated that from the state of the slave market, after all charges were paid, they would average £15 a head.<sup>1</sup> But the proceeds of all these sales did not fetch him so much as a single pardon. Most of the men accused of joining Monmouth were from the lower ranks of life, and, except in the sale of their persons, they could be turned to little profit, for they could muster only a very small bribe to be let off, and, if convicted and executed, their forfeited property was seldom more than a flock of geese or a fitch of bacon. The Chief Justice was therefore delighted to find that he had got in his toils Edward Prideaux, who had inherited broad lands from his father, an eminent lawyer in the time of the Commonwealth, and who, without having been in arms, was suspected of favoring the rebellion. Although no witnesses could be got to swear against this gentleman, he wisely agreed to pay £15,000 for his liberation. With this ransom Jeffreys became the purchaser of a large estate, the name of which the people changed to *Aceldama*, as being purchased with the price of innocent blood.<sup>2</sup>

I ought, likewise, to have stated, as another instance of his unexampled cruelty, that, after his return from the west, and receiving the great seal, on the very day on which Alderman Cornish was hanged and beheaded in Cheapside, he caused Elizabeth Gaunt to be burned alive at Tyburn, for having piteously given shelter to a fugitive who betrayed her. She was a Sister of Charity: her life had been passed in relieving the unhappy of all religious denominations, and she was well known as a constant visitor of the jails in the hope of enlightening and reforming their unhappy inmates. She met her fate with great composure; leaving behind her a paper in which, after describing what she had suffered from the ferocity of her jailer, and others who had oppressed her,

<sup>1</sup> Original Letters in the State Paper Office: Sunderland to Jeffreys, Sept. 14, 1685; Jeffreys to the King, Sept. 19, 1685.

<sup>2</sup> Commons' Journals, Oct. 9, Nov. 10, Dec. 26, 1690; Oldmixon, 706.

she complained of "the tyranny of him, the great one of all, to whose pleasure she and so many other victims had been sacrificed—declaring that in as far as they had injured herself she forgave them, but, in that they were implacable enemies of that good cause which would yet revive and flourish, she left them to the judgment of the King of Kings."<sup>1</sup>

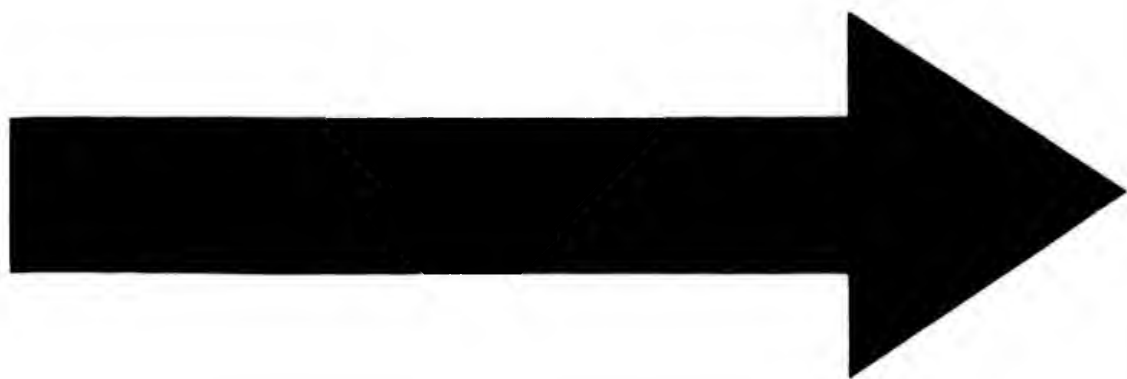
To show that the memory of his cruelties remained in the country in which they were most conspicuously exhibited, so as to raise a desire to visit them on his descendants to the third generation,—I should likewise wish to add the anecdote that when he had been many years dead, and his name and title was extinct, the Countess of Pomfret, returning into the west of England, having been discovered to be his granddaughter, was insulted by the popish priests, and could not venture to proceed to the scene of the "Bloody Assizes."

It has been objected to me, that I have done injustice to Jeffreys, by representing that he readily acquiesced in all James's measures for overturning the religion and liberties of his country, whereas he condemned many of them. This charge against me is founded merely on proofs of the hypocrisy and duplicity of the great delinquent. He did pretend to some, who were in opposition to the Court, that his Protestant conscience was shocked by the scheme of bringing in Popery; but at the same time he put the broad seal to the Declaration of Indulgence, and, sitting in the illegal Court of High Commission, he abetted all the proceedings for converting Magdalene College, Oxford, into a Popish seminary. "The two French agents, who were then resident in London, had very judiciously divided the English Court between them. Bonrepaux was constantly with Rochester; and Barillon lived with Sunderland. Lewis was informed in the same week by Bonrepaux that the Chancellor was entirely with the Treasurer, and by Barillon that the Chancellor was in league with the Secretary." Again: Jeffreys gave out to one party that he high'y

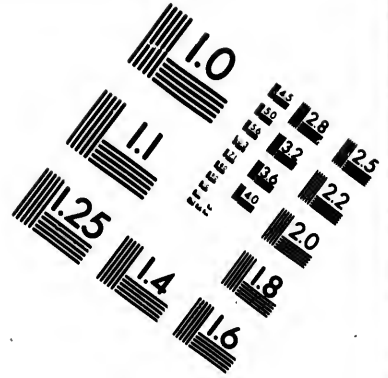
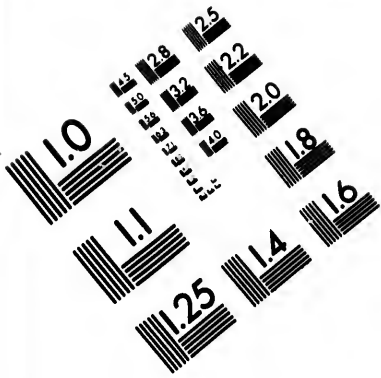
<sup>1</sup> 11 St. Tr. 381-455; Burnet, O. T., i. 649.

<sup>2</sup> Granger, "Jeffreys."

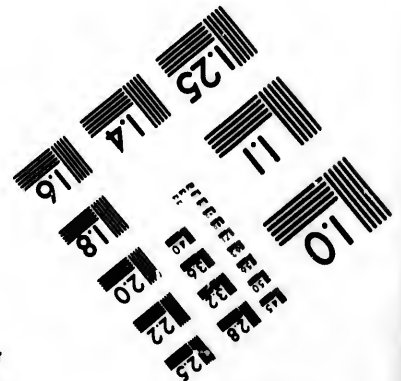
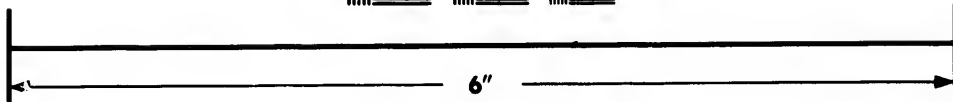
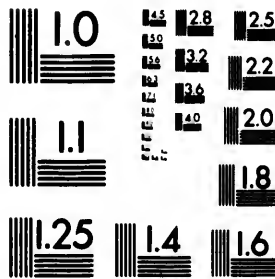
<sup>3</sup> Macaulay, ii. 67, cites Beresby's Memoirs; Luttrell's Diary, Feb. 4, 1684; Barillon, Feb. 4; Bonrepaux, Jan. 28, Feb. 4.







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disapproved of the proceedings against the Sever Bishops, while it is quite certain that he declared in council, "The Government would be disgraced if such transgressors were suffered to escape, as was proposed by Sunderland, with a mere reprimand,"<sup>1</sup> and that he strenuously recommended the criminal information on which they were brought to trial—"counting with certainty on a conviction which would induce the right reverend defendants to save themselves from ruinous fines and long imprisonments by serving, both in and out of parliament, the designs of the Sovereigns."<sup>2</sup>

Jeffreys held the office of Chief Justice of the King's Bench rather more than two years, having been reappointed to it on the death of Charles II. by James II., who had been his early patron, and to whom he was more and more endeared as his inhuman disposition was more and more developed. Being created a peer, and introduced into the Cabinet, he soon undermined, by his superior vigor and servility, the influence of the Lord Keeper Guilford, and, having broken the heart of that mean-spirited but not unamiable man, his "campaign in the west" was rewarded with the great seal.

A month was occupied in considering who should succeed him as Chief of the King's Bench. Although Monmouth had been executed, and the blood of rebels had flowed till the feelings of all classes were outraged, and even the vengeance of James himself was satiated, the due filling up of the office was considered a matter of the last importance to the Government. The plan to change the religion of the country was now formed, and this was to be carried into effect by judicial decision rather than by military violence. The King expected to accomplish his object by extending what was called the "dispensing power" to all the laws of the realm, although it had been hitherto confined to common penal statutes, which were enforced by a pecuniary mulct. Where was a man to be found who, as head of the Common Law

<sup>1</sup> Journal of second Lord Clarendon, June 24, 1668; 12 St. Tr. 195.

<sup>2</sup> This has been placed beyond all doubt by the original despatches of the French and Dutch Ministers examined by Mr. Macaulay. Barillon, <sup>May 24,</sup> 1688; Citers, July 11; Adda, <sup>May 30,</sup> June 11. <sup>June 2,</sup>

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Judges, would himself declare, and would induce a ma-  
 jority of his brethren to join with him in declaring, that  
 the King had the power contended for,—or, in other  
 words, that, like the despotic princes on the Continent,  
 he was above the law? That man was SIR EDWARD  
 HERBERT! Of his steadiness on this question no doubt  
 could be entertained—but when his appointment was  
 recommended, two objections presented themselves:  
 1st. That he was quite ignorant of his profession; 2dly.  
 That he was conscientious in his opinions, and of strictly  
 honorable principles in private life. The former was  
 easily surmounted from his known zeal in support of the  
 prerogative; and though it was anticipated that some  
 inconvenience might arise from his vicious habit of ab-  
 staining from what he believed to be wrong, hopes were  
 entertained that, from his ultra-Tory notions, he would  
 not boggle at any thing which might be required of him.  
 Upon the whole, the opinion at Whitehall was, that, for  
 the King's service, a safer choice could not be made.  
 Accordingly, on the 11th of October, 1685, Sir Edward  
 Herbert took his seat as Chief Justice of the Court of  
 King's Bench, and I am called upon to give a sketch of  
 his life.

He was the youngest son of that Sir Edward Herbert  
 whom I have commemorated as holding the great seal  
 of England while in exile with Charles II.<sup>1</sup> During the  
 Commonwealth, the children of the titular Lord Chan-  
 cellor remained in England with their mother; and,  
 after his death at Paris, in 1657, they were reduced to  
 great indigence. Edward was admitted on the founda-  
 tion of Winchester School, and was elected from thence  
 a probationer fellow to New College, Oxford. He was  
 idle and volatile, but much liked for his warmth of heart  
 and gentlemanly demeanor. He inherited a strong ab-  
 horrence of Roundheads, and he considered the Whigs  
 as the same republican party under another name.  
 From his earliest recollection to his latest breath, he  
 looked upon the five members of the House of Com-  
 mons whom his father, when Attorney General, had  
 impeached of high treason by order of Charles I., as not  
 less guilty than the regicides who had sat in the high

<sup>1</sup> Lives of the Chancellors, vol. iii. ch. lxxiii.

court of justice; and he thought it of essential importance for the public good that the Crown should be armed with sufficient power to put down and to punish all who were inclined to sedition or schism.

With this bias on his mind, he began the study of the law in the Middle Temple, and, setting down all the arbitrary decisions of judges for sound law, and all the violent acts of the executive government for good constitutional precedents, while he imputed everything that he met with on the other side to faction and popular delusion, he brought himself to the belief that the kings of England were absolute at all points, with a very few exceptions; and that, although they might find it convenient to consult a parliament, they might rule, if they chose, by their own authority. But his knowledge of law was superficial, and was confined almost exclusively to cases connected with politics.

Under Charles II. there was a disposition to do as much as possible for the Herberts, on account of the sufferings of their father in the royal cause; and the two elder sons were pushed on in the army and navy: but there was much difficulty in making any provision for Edward, who was called a lawyer, but was wholly unacquainted with the first principles of pleading and conveyancing; and, never having been intrusted with a brief by a private client, could not, without serious risk, be allowed to appear in the King's business in Westminster Hall. It was thought, however, that any thing would do for Attorney General in Ireland, where they have never been very exact in legal formalities. Accordingly, he was sent over there, and for several years was supposed to execute the duties of the office decently well under the Duke of Ormond, the popular Lord Lieutenant. A residence in Dublin was then considered distant banishment. The transit from thence to London was often attended with great peril and delay, and intelligence was interchanged between the two islands very irregularly. He therefore longed for a return to *civilized life*, for which he had a keen relish; and, having laid by a little money, he resigned the Irish Attorney Generalship, and came to push his fortune at Whitehall. Still pretending to practice at the bar, he

received a silk gown. The English attorneys were as shy of employing him as when he wore bombazin; but his connections, his principles, and his agreeable manners nevertheless obtained him favor at Court. He succeeded Sir George Jeffreys as Chief Justice of Chester; and soon after, on the promotion of Sir John Churchill to be Master of the Rolls, he was appointed Attorney General to the Duke of York, and was knighted. Now he was often consulted on constitutional questions by his royal master, the heir presumptive; who, much pleased with the answers returned, set him down as fit to fill the highest offices in the law. He was particularly firm respecting the dispensing power; and notwithstanding the doubts upon the subject indicated by high prerogative lawyers, such as Lord Clarendon, Lord Keeper Bridgman, Lord Chancellor Nottingham, and Lord Keeper Guilford—maintained that the royal assent was given to bills passed by the two Houses of Parliament on the implied condition that the King might suspend the operation of the law when necessary for the public safety; and that, this power being essentially inherent in the Crown, no statute could take it away, or abridge it. He was of the school of political speculators which produced Filmer, Lestrangle, and Brady,—maintaining that the Crown is the only legitimate source of authority; that the House of Commons, having been created by the Crown, is subordinate to the Crown; and that, as it may still be prorogued or dissolved, as well as summoned, by the Crown, the Crown is entitled to exercise a paramount control over all its acts. He sometimes made a distinction between the King's power over common law and statute law; but, although he was known not to be without some scruples which might be troublesome, his friends said they would all melt away before his burning loyalty.

<sup>1</sup> Clarke, in his life of James II., mainly rests his justification of that monarch's conduct on the authority of Herbert. Speaking of the Test Act, he says, "One great inducement not to boggle at dispensing with it, was his calling to mind that in the late King's time, after his return from Scotland, and that he began to be much employed in his business, Mr. Herbert, then Ch. Justice of Chester, told him, that if he desired to re-enter into his former employment, he could make it appear that it was in the King's power to dispense with the Test Act."

He is not once mentioned in the Reports; he had never led any important cause, or argued any important point of law, in an English court; and, although he regularly attended the King's Bench in term time, it was for society rather than for business. He was considered a sort of *dilettante lawyer*, and probably he himself thought not of a higher office than that of Chief Justice of Chester, which only occupied a few days of his time twice a year. It is quite certain that he never solicited, or in any way intrigued for, the office of Chief Justice of the King's Bench, so that he was greatly astonished when it was offered to him. He did not hesitate to accept it when he was told that the King required his services.

There is no record of the ceremony of his installation. The merits and sufferings of his father must have constituted the staple of the Chancellor's address to him; and his answer must have been confined to the expression of gratitude for the unexpected dignity, and sincere good intentions in the fulfilment of his new duties.<sup>1</sup>

The profession and the public, without nicely scanning his legal qualifications, were pleased to see mildness, equanimity, and sobriety again adorning the seat of justice, lately disgraced by fierceness, violence, and drunkenness. Even those who most highly disapproved of his politics were disposed to speak kindly of him. Says Burnet, "He was a well bred and virtuous man, generous and good natured, although an indifferent lawyer. He unhappily got into a set of very high notions with relation to the King's prerogative. His gravity and virtues gave him great advantages; chiefly his succeeding such a monster."<sup>2</sup>

He was sworn a member of the Privy Council, but he was never admitted into the Cabinet.

In the private cases which came before him he was entirely guided by the opinion of the Puisne Judges; and, by discretion, and speaking only as he was prompted, he made a very respectable appearance, and the vulgar called him a great Judge.

The first political case in which an opinion was re-

<sup>1</sup> See 2 Shower, 434; 3 Modern Reports, 71.

<sup>2</sup> Burnet, O. T., ii. 362, 363.

quired from him was the prosecution of Lord Delamere for high treason ; and, as the prerogative of the Crown was not concerned in the question submitted to him, he displayed on this occasion moderation and diffidence. The noble lord, the object of the prosecution, had, when a member of the House of Commons, given mortal offence to Jeffreys, who now sat as his judge, and was eager to convict him. The trial took place before the Lord High Steward and a select number of Peers,—the Judges attending as assessors. The whole day being spent in giving evidence for the Crown, the noble prisoner applied for an adjournment till next morning, before opening his defence. Jeffreys determined, if possible, to sentence him to be hanged, beheaded, and quartered before going to sleep ; but, desirous to keep up appearances, and to throw upon others the odium of the precipitation which he desired, said he would willingly comply with the request if the law would allow of an adjournment, which much doubting, he would put the question to the Judges. His real inclination being well known to them, he expected (what *he* would have pronounced under the like circumstances) a flat negative upon the power of adjournment. But Lord Chief Justice Herbert said,—

“ The Judges presume to acquaint your grace that this is a matter wholly new to them, and that they know not, upon recollection of all that they can remember to have read, either that this matter was done or questioned. Had it received a determination, and been reported in our books, our duty would have been to contribute all our reading and experience for the satisfaction of this great Court ; but being a new question, and the precedent being to make a rule respecting the powers and privileges of the Peers for the time to come, we cannot venture to resolve it. In the case of the trial of a peer in parliament, there have been adjournments from day to day ; but whether it makes a difference that here the Lord High Steward sits judge, and the Peers-triers are in the nature of a jury, we submit to your Grace's consideration. In an inferior court the jury, once sworn, are not allowed to separate, from the fear of corruption ; but that reason seems to fail here, the prisoner being to



be tried by his peers, that are men of unsuspected integrity, and give their verdict upon their honor."

The Peers upon this, were for adjourning, but Jeffreys in a rage said "that the court was his, and that, he sitting as sole judge in it, they had no right to regulate its proceedings." He then gave a decided judgment that he could not and would not adjourn, and he ordered the prisoner to go on with his defense, saying that "by law the trial must finish before they separate." Nevertheless, he was disappointed of his prey, for Lord Delamere made an admirable defense, and the Peers, sympathizing with him on account of the harsh treatment he had received, unanimously acquitted him.<sup>1</sup>

Soon after came on the grand question with a view to which Herbert had been appointed Chief Justice, and he fully answered the expectation which had been formed of him.

Judicially to establish the dispensing power, a sham action was brought by the coachman of Sir Edward Hales against Sir Edward Hales, his master. The defendant, although a Roman Catholic, had been appointed Lieutenant of the Tower of London; and the declaration alleged that, contrary to the provisions of the Test Act, he had exercised the duties of the office without having made the declaration against transubstantiation or taken the oath of supremacy. By way of justification, he pleaded, "that after the grant of the office, the King, by letters-patent under the great seal, *notwithstanding* any statutes or laws in that behalf, *dispensed* with his making the declaration against transubstantiation and with his taking the oath of supremacy, as well as with his receiving the sacrament according to the rites of the Church of England." The plaintiff demurred, admitting the dispensation and praying judgment upon its validity. Thus the existence of the dispensing power was regularly raised on the record, and was to be solemnly decided.

The Chief Justice, although he had no doubts himself, found it a more difficult task than he had anticipated to prevail upon the other Judges to agree with him. According to the usual custom of those days, be-

<sup>1</sup> 11 St. Tr. 510-599.

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fore the case was argued in court he assembled all the Judges to deliver their opinion upon it. To his unspeakable surprise, there were four Judges who declared that the King had no power to dispense with a statute which Parliament had enacted for the preservation of the established religion of the country. Their opposition was the less suspected because they were all four steady Tories, although not of such extravagantly high prerogative principles as Herbert himself; and they had all four sat on the trials of Alderman Cornish and Elizabeth Gaunt, where there had been an extraordinary compliance with the wishes of the Government. Their contumacy being reported to the King, he summoned them into his presence, and conversed with them at Whitehall, but could make no impression upon any of them either by soft or angry language. He thought he might safely calculate upon their supporting him in any violation of the constitution; but he forgot that where religion mixes in a controversy it is impossible to foretell with certainty what will be the conduct of any individual or of any body of men. "Jones, the Chief Justice of the Common Pleas, a man who had never before shrunk from any drudgery, however cruel or servile, now held, in the royal closet, language which might have become the lips of the purest magistrates in our history."<sup>1</sup> Being told that he must either give up his opinion or his place, "For my place," he answered, "I care little; I am old and worn out in the service of the Crown; but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give." *King*: "I am determined to have twelve lawyers for judges who will be all of my mind as to this matter." *C. J. Jones*: "Your Majesty may find twelve *judges* of your mind, but hardly twelve *lawyers*." James always piqued himself on being a man of his word, and Jones had his *quietus* next morning. With him were dismissed Montagu, Chief Baron of the Exchequer, and two puisnies, Neville and Charlton. Four new judges were appointed, who had taken the royal test by declaring their belief in the unlimited, illimitable, and eternal nature of the dispensing power.

<sup>1</sup> Macaulay, ii. 82.

One of them was the brother of the author of "Paradise Lost," and of the "Defense of the People of England for putting Charles I. to death." Sir Christopher Milton, recommended by Herbert, was in all respects a striking contrast to John, as he was not only a favorer of Popery, and a friend to arbitrary power, but the dullest of mankind.<sup>1</sup>

Some delay still arose in carrying the case to a hearing, for Sawyer, the Attorney General, who had brought Russell and Sydney to the block, refused to argue this sham demurrer in favor of an attempt "to annul the whole statute law from the accession of Elizabeth." Heneage Finch, the Solicitor General, following his example, was turned out of office; and time was required for the mean-spirited Powys, who succeeded him, to prepare for his dirty work.

At last the farce was acted, Northey taking the part of counsel for the plaintiff, and pretending to argue that the dispensation was no bar to the action; while the new Solicitor General urged that the King's prerogative was and is as much the law of England as any statute, and that, although the King cannot prejudice private right, the power of dispensing with all public statutes was inseparably annexed to his crown.

At the close of the argument, Herbert, C. J., said, with much gravity, that "the Court would take time to consider," and on a subsequent day he delivered the following judgment:—

"This is a case of great consequence, but of as little difficulty as ever any case was that raised so great an expectation. If the King cannot dispense with this statute, he cannot dispense with any penal law whatsoever. There is no law but may be dispensed with by the supreme lawgiver. The laws of God may be dispensed with by God himself, as appears by God's command to Abraham to offer up his son Isaac. So, likewise, the law of man may be dispensed with by the legislator. A law may be either too wide or too narrow; the wisest lawgiver cannot foresee all the consequences of a

<sup>1</sup> Although not reconciled to Rome, he came so near her, that he would not communicate with the Church of England. Echard, iii, 797; Kennet, iii. 451.

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law, and therefore there must be a power somewhere able to dispense with it. We have consulted our brethren who have met and conferred on the subject at Sergeants' Inn, and, with one exception, they all agree with us in the opinion that the kings of England are absolute sovereigns; that the laws of England are the King's laws; that the King has power to dispense with any of his laws as he sees necessity for it; that the King is the sole judge of that necessity; and that this is not a trust invested in or granted to the King by the people, but the ancient sovereign power and prerogative of the kings of England, which never yet was taken from them, nor can be by parliament or any human means. My brother Street, indeed, is of opinion that the King, notwithstanding his general dispensing power, cannot validly grant the dispensation pleaded by the defendant; but that is the opinion of one single judge against the opinion of eleven. We therefore give judgment for the defendant."<sup>1</sup>

Without the privity of Herbert, who was too honorable a man to have countenanced such trickery, Street, who was known to be the most servile Judge on the bench, who would have been instantly turned adrift if he had been sincerely opposed to the dispensing power, but who cared as little for religion as for law, had been ordered to dissent, for the purpose of leading the public to believe that the Judges, left to the freedom of their own will, had decided for the Crown by a vast majority, without being entirely unanimous. So infamous a wretch was Street, that, at the Revolution, on the strength of this collusive dissent, he attempted to make court to King William; but, his real baseness being exposed, he met with a mortifying rebuff.<sup>2</sup>

<sup>1</sup> St. Tr. 1165-1193.

<sup>2</sup> "Dec. 27, 1688. Tuesday, in the morning, I went to St. James' with Judge Street to present him to the Prince; but I was told the Prince was busy, and I could not get admittance. While I was in the outward room, my Lord Coote came to me and told me he was sorry to see me patronize Street. He did not join in the judgment for the dispensing power; but he is a very ill man. I have given the Prince a true character of him; and therefore I desire your Lordship will not concern yourself any more for him."—*Diary of Henry, Earl of Clarendon.*

However, when Judge Street died, a splendid marble monument was erected to his memory, with an inscription which asserts that he was the only honest Judge in the reign of James II.; and thus concludes:—

Upon this judgment Sir Robert Atkyns, then an ousted Judge (afterwards made Chief Baron of the Exchequer), having published a very severe commentary, Chief Justice Herbert published a pamphlet in his own vindication,—in which he produced what he called his authorities, and, in answer to the personal reflections upon himself, observed,—

“ I can truly say that I never heard of this action till it was actually brought. If it be a feigned action, the law is as well settled in a feigned action as in a true. There are feigned actions directed out of Chancery every day, and why may not the King direct such an action to be brought to satisfy himself whether he hath such a power? If there were indirect means used to obtain opinions, I stand upon my innocence, and challenge all the world to lay anything of that kind to my charge. My part was only to give my own opinion; and if I have drawn weak conclusions from what I find in our books, how can I be charged as a criminal? But I never gave a judgment with so many authorities to warrant it as in Sir Edward Hale's case. If it was to keep my judge's place, I then became the worst man in the world, only to keep that which most men know my friends found great difficulty in persuading me to accept.”

King James was delighted beyond measure with the judgment, and with the defense of it; and, lauding himself for his sagacity in selecting such a Chief Justice, and taking personally to himself all the credit of the

“ . . . faithful found;  
Among the faithless, faithful only he;  
Among innumerable false, unmoved,  
Nor number, nor example, with him wrought,  
To swerve from truth, or change his constant mind,  
Though single.”—*Granger*.

<sup>1</sup> Whatever we may think of Herbert and his doctrine respecting the dispensing power, they have both had warm admirers. Clarke describes him, in his life of James II., as “ a man of eminent learning and known integrity, sufficient to free him without further proof from the censure of partiality;” and says that “ for his further vindication, he published his reasons with some of the many citations and examples he might have brought from the law books, which put the matter so far beyond dispute, that all the erudition of his adversaries or malice of his detractors could never furnish them with the least color of a reply.”—2 *Clarke's James II.*, p. 82, et seq.

appointment, he passed such compliments and lavished such blandishments on Herbert, that Jeffreys was jealous, and reports were spread that the great seal would soon be transferred to a new Chancellor.<sup>1</sup>

By way of preliminary to the restoration of Popery as the religion of the state, there soon came out a "Declaration of Indulgence," by which all sects of Christians were to be allowed to profess their faith without being subject to any disability, forfeiture, or penalty; and Herbert, sincerely thinking this a lawful exercise of the royal prerogative, delighted the King more than ever, not only by pronouncing in favor of its legality, but by actually assisting in giving effect to it. "Since the Church party could not be brought to comply with the design of the Court, applications were now made to the Dissenters; and all on a sudden the churchmen were disgraced, and the Dissenters were in high favor. Chief Justice Herbert went the Western Circuit after Jeffreys' bloody one. And now all was grace and favor to them. Their former sufferings were much reflected on and pitied. Every thing was offered that could alleviate their sufferings. Their teachers were now encouraged to set up their conventicles again, which had been discontinued, or held very secretly, for four or five years, and intimations were given that the King would not leave them or their meetings to be disturbed."

Burnet, from whom we have this account, adds, "Jeffreys was much sunk at Court, and Herbert was the most in favor. But now Jeffreys, to recommend himself, offered a bold and illegal advice." This was to revive the Court of High Commission, whereby the clergy who should oppose the introduction of Popery might be deprived of their livings and punished for their contumacy. The author of this scheme was for a

<sup>1</sup> Lord Clarendon, in a letter to the Earl of Rochester, dated Dublin Castle, June 3, 1686, says, "A story had reached Dublin, that my Lord Chancellor is in very little credit; that my Lord Ch. Justice Herbert had exposed him upon the bench by laying open his briberies and corruptions (as they are called) in the West, with which the King is extremely offended, insomuch that it is said he will not be long in his place."—*Corresp. of Clarendon and Koch*, p. 426.

<sup>2</sup> O. T. ii. 326, 327.

<sup>3</sup> *Ib.* 367, 370.

time dearer than ever to his master,<sup>1</sup>—but before long there were again thoughts of removing him as the brutality of his conduct and his manners threw discredit on the Government; and Jeffreys himself, who was always alarmed by rivals, had once more serious dread of being supplanted by Herbert. But, all of a sudden, Herbert was disgraced, and Jeffreys was firmly established in power.

This change was produced by a point of law, on which, strange to say! the Chief Justice of the King's Bench, supposed to be slavishly obsequious, gave an opinion most highly distasteful to the owner of the dispensing power.

The plan was formed of ruling by a standing army. But, without a parliament, how was this army to be kept in a proper state of discipline? In time of war, or during a rebellion, troops in the field were subject to martial law, and they might be punished, by sentence of a court martial, for mutiny or desertion. But the country was now in a state of peace and profound tranquillity; and the common law, which alone prevailed, knew no distinction between citizen and soldier; so that, if a life-guardsmen deserted, he could only be sued for breach of contract, and if he struck his officer he was only liable to an indictment or an action of battery. While the King's military force consisted of a few regiments of household troops, with high pay, desertion was not to be apprehended, and military offenses were sufficiently punished by dismissal from the service. But James found it impossible to govern the numerous army which he had collected at Hounslow without the assistance of martial law,—and he contended that, without any act of parliament, he was at all times entitled, by virtue of his prerogative, to put martial law in force against military men, although it could only be put in force against civilians when war or rebellion was raging in the kingdom.

The question first arose at the Old Bailey, before Sir John Holt, then Recorder of London, and he decided

<sup>1</sup> "The Court being established, Jeffreys was made perpetual President—*sine qua non*—to guard against the influence of Herbert, who was named a member of it."—*ib.*

against the Crown, as might have been expected; for, while avoiding keen partizanship in politics, he had been always Whiggishly inclined. James thought he was quite secure by appealing to the ultra-Tory, Lord Chief Justice Herbert. To the utter amazement of the King and the courtiers, this honorable, although shallow, magistrate declared that, without an act of parliament, all laws were equally applicable to all his Majesty's subjects, whether wearing red coats or gray. Being taunted with inconsistency in respect of his judgment in favor of the dispensing power, he took this distinction, "that a statute altering the common law might be suspended by the King, who is really the lawgiver, notwithstanding the form that he enacts, 'with the *assent* of the Lords Spiritual and Temporal, and Commons;' but that the common law cannot be altered by the King's sole authority, and that the King can do nothing contrary to the common law, as that must be considered coeval with the monarch."

James, with the infatuated obstinacy which was now driving him to destruction, set this opinion at defiance; and, encouraged by Jeffreys, caused a soldier to be capitally prosecuted, at the Reading assizes, for deserting his colors. The judges presiding there resorted to some obsolete, inapplicable act of parliament, and were weak enough to lay down the law in the manner suggested to them by the Chancellor, so that a conviction was obtained. To give greater solemnity and *clat* to the execution, the Attorney General moved the Court of King's Bench for an order that it might take place at Plymouth, in sight of the garrison from which the prisoner had run away. But Herbert peremptorily declared that the Court had no jurisdiction to make such an order, and prevailed on his brother Wythens to join with him in this opinion. Mr. Attorney *took nothing by his motion*, but the recreant Chief Justice and the recreant Puisne were both next morning dismissed from their offices, to make way for the most sordid wretches to be picked up in Westminster Hall—Sir Robert Wright and Sir Richard Allibone, a professed papist.<sup>1</sup> Burnet, who has since

<sup>1</sup> *Rex v. William Beale*, 3 Mod. 124. We shall find that they unscrupulously made the order. "Even previous to these removes and changes, the



been generally followed, represents that these removals took place on the eve of the trial of the Seven Bishops, and with a view to their conviction; but, in truth, the Second Declaration of Indulgence, out of which this celebrated prosecution arose, was not issued till a twelve-month afterwards, and no human being had then imagined that the venerable fathers of the Anglican Church were to be arraigned at the bar of a criminal court for defending their religion in accordance both with human and divine laws.<sup>1</sup>

In consideration of Herbert's past services, in enabling the King to appoint the members of his own religion to all civil offices under color of judicial decision,—instead of being at once reduced to the ranks, he was transferred to the office of Chief Justice of the Common Pleas, where it was thought he could do little harm.

His notions of loyalty prevented him from making any complaint of an act done in the exercise of an undoubted prerogative of the Crown, and he quietly submitted to his fate. Jeffreys took care that he should be cut off from the chance of returning favor by having him forbidden to come to Whitehall; and as he was confined to the obscure duties of his office in considering dry questions of real property law, we read little more respecting him during the remainder of this reign.

Being sadly deficient in professional knowledge, and his puisnies, Street, Jenner, and Lutwyche, being almost equally incompetent, the decisions of the Common Pleas while he presided there are not reported; and we are not even amused by his blunders, which are said to have been many and grievous. He still supported the Government in as far as he thought he honestly could, and, in the summer circuit of 1688, "he declared the intention of the King to call a parliament in November at the farthest, recommending the choice of such members as would comply with the King's wishes in repealing the penal laws and tests."<sup>2</sup>

Court was gratified, and the people shocked, with the execution of two deserters, one of whom was hanged in Covent Garden, and the other on Tower Hill."—*Ralph*, 961.

<sup>1</sup> Burnet's Own Times, ii. 466.

<sup>2</sup> Rutt's Life of Calamy, i. 335, n.

At the investigation instituted, when too late, to contradict the story that James's son (afterwards known by the name of the Old Pretender) was a suppositious child, brought into the Queen's bedchamber in a warming pan, Herbert attended as a privy councillor, and was of considerable service in conducting the examinations, which might have convinced all reasonable persons of the genuineness of the birth.<sup>1</sup>

The most honorable part of his career remains to be described. At the Revolution he did not, like Marlborough and others who had been loaded with Court favors, turn against his old master; nor did he, like some of James's councillors, who had remained true to him till he fled, attempt to make peace with the new Government. Forgetting the harsh usage which he had experienced, and conscientiously believing in the divine right of kings, he renounced his country, and followed into exile him whom he still considered his legitimate sovereign,—although his own brothers were William's staunchest supporters, and could easily have obtained his pardon on his making any concession to the new Government.

After the battle of the Boyne, when James finally settled at St. Germaine's, and formed his mock ministry there, he got a new great seal fabricated by an engraver at Paris. This he delivered to Sir Edward Herbert, with the title of "Lord Chancellor of England;" and the first use made of it was to affix it to a patent creating him Lord Portland, Baron Portland of Portland in the county of Dorset. He, no doubt, hoped to return, a second Clarendon, to enjoy in his native land the office granted to him while a banished man: but he was destined, like his own father, to be never more than a titular Chancellor, and to end his days in exile. Forty-one years after the death of his father, at Paris, he died there, and was interred in the same cemetery.

As he had so openly taken part with the Jacobites, he was expressly excepted from the Act of Indemnity passed by King William and Queen Mary; but this step was taken with reluctance, and, in the debates which led to it, strong testimony was borne to his good qualities:—

<sup>1</sup> 12 St. Tr. 123.

*Mr. Hawles*: "If I would consult my affection, this is a gentleman I would have pardoned. I know him an honest gentleman. If I would plead for any of them, it should be for him. But since the penalty of death is passed over, yet I would have a punishment, though a mild one, and except him." *Sir Robert Cotton*: "Herbert did not come up to other judges, and order soldiers to be hanged for deserting their colors in time of peace." *Mr. Kendal*: "I hope you will consider Lord Chief Justice Herbert for the sake of a noble person, his brother, who lately had your thanks for good services in the cause of our liberties." *Mr. Holt*: "I had my education in Winchester College with Lord Chief Justice Herbert. I have discoursed this point of *dispensation* with him, and I can say it was his own true opinion; for he aimed at nothing of preferment, and he went not so far as King James would have had him." However, it was resolved without a division, "that Sir Edward Herbert be excepted out of the bill of indemnity, in respect of his having illegally decided that the King could dispense with the statutes of the realm."<sup>1</sup>

He left no issue, and his title of *Portland* was given to the branch of the illustrious family of Bentinck settled in England. It is a curious fact that he, the youngest of the family, alone adhered to the Cavalier principles of old Sir Edward; for the eldest brother, who rose to be a General in the army, fell fighting for King William in the battle of Aghrim, — while Arthur, the other brother, the famous Admiral Herbert (subsequently Earl of Torrington), after having resolutely opposed the suspension of the Test Act, favored the landing of the Prince of Orange, and was greatly instrumental in accomplishing the Revolution.<sup>2</sup>

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I now come to the last of the profligate Chief Justices of England, for since the Revolution they have all been men of decent character, and most of them have adorned the seat of justice by their talents and acquirements as well as by their virtues. SIR ROBERT WRIGHT, if ex-

<sup>1</sup> 5 Parl. Hist. 336.

<sup>2</sup> Bu:net, ii. 365, 491, 510, 627; Wood's Fasti, "Chief Justice Herbert."

celled by some of his predecessors, in bold crimes, yields to none in ignorance of his profession, and beats them all in the fraudulent and sordid vices.

He was the son of a respectable gentleman who lived near Thetford, in Suffolk, and was the representative of an ancient family long seated at Kolverstone, in Norfolk; he enjoyed the opportunity of receiving a good education at Thetford Free Grammar School, and at the University of Cambridge; and he had the advantage of a very handsome person and agreeable manner. But he was by nature volatile, obtuse, intensely selfish,—with hardly a particle of shame, and quite destitute of the faculty of distinguishing what was base from what was honorable. Without any maternal spoiling, or the contamination of bad company, he showed the worst faults of childhood, and these ripened, while he was still in early youth, into habits of gaming, drinking, and every sort of debauchery. There was a hope of his reformation when, being still under age, he captivated the affections of one of the daughters of Dr. Wren, Bishop of Ely, and was married to her. But he continued his licentious course of life, and, having wasted her fortune, he treated her with cruelty.

He was supposed to study the law at an Inn of Court, but when he was called to the bar he had not imbibed even the first rudiments of his profession. Nevertheless, taking to the Norfolk Circuit, the extensive influence of his father-in-law, which was exercised unscrupulously in his favor, got him briefs, and for several years he had more business than North (afterwards Lord Keeper Guilford), a very industrious lawyer, who joined the circuit at the same time. "But withal," says Roger, the inimitable biographer, "he was so poor a lawyer that he could not give an opinion upon a written case, but used to bring such cases as came to him to his friend Mr. North, and he wrote the opinion on a paper, and the lawyer copied it and signed under the case as if it had been his own. It run so low with him, that when North was at London he sent up his cases to him and had opinions returned by the post; and in the mean

MS. in Coll. Armor., furnished to me by my friend Mr. Pulman.

time he put off his clients upon pretense of taking more serious consideration."<sup>1</sup>

At last the attorneys found him out so completely that they entirely deserted him, and he was obliged to give up practice. By family interest he obtained the lucrative sinecure of "Treasurer to the Chest at Chatham," but by his voluptuous and reckless course of life he got deeper and deeper in debt, and he mortgaged his estate to Mr. North for £1500, the full amount of its value. From some inadvertence, the title-deeds were allowed to remain in Wright's hands, and, being immediately again in want, he applied to Sir Walter Plummer to lend him £500 on mortgage, offering the mortgaged estate as a security, and asserting that this would be the first charge upon it. The wary Sir Walter thought he would make himself doubly safe by requiring an affidavit that the estate was clear from all incumbrances. This affidavit Wright swore without any hesitation, and he then received the £500. But the money being spent, and the fraud being detected, he was in the greatest danger of being sent to jail for debt, and also of being indicted for swindling and perjury.

He had only one resource, and this proved available. Being a clever mimic, he had been introduced into the circle of parasites and buffoons who surrounded Jeffreys, at this time Chief Justice of the King's Bench, and used to make sport for him and his companions in their drunken orgies, by taking off the other judges, as well as the most eminent counsel. One day, being asked why he seemed to be melancholy, he took the opportunity of laying open his destitute condition to his patron, who said to him, "As you seem to be unfit for the bar, or any other honest calling, I see nothing for it but that you should become a judge yourself." Wright naturally supposed that this was a piece of wicked pleasantry, and, when Jeffreys had declared that he was never more serious in his life, asked how it could be brought about, for he not only felt himself incompetent for such an office, but he had no interest, and, still more, it so happened, unfortunately, that the Lord Keeper Guilford, who made the judges, was fully aware of the unaccount-

<sup>1</sup> *Life of Guilford*, ii. 173.

able lapse of memory into which he had fallen when he swore the affidavit for Sir Walter Plummer, that his estate was clear from incumbrances, the Lord Keeper himself being the first mortgagee. *Jeffreys, C. J.*: "Never despair, my boy, leave all that to me."

We know nothing more of the intrigue with certainty, till the following dialogue took place in the royal closet. We can only conjecture that in the meanwhile Jeffreys, who was then much cherished at Court, and was impatient to supersede Guilford entirely, had urgently pressed the King that Wright might be elevated to the Bench as a devoted friend of the prerogative, and that, as the Lord Keeper had a prejudice against him, his Majesty ought to take the appointment into his own hands. But we certainly know that, a vacancy occurring in the Court of Exchequer, the Lord Keeper had an audience of his Majesty to take his pleasure on the appointment of a new Baron,—and that he named a gentleman at the bar, in great practice and of good character, as the fittest person to be appointed, thinking that Charles would not assent with his usual easy indifference,—when, to his utter amazement, he was thus interrogated: "My Lord, what think you of Mr. Wright? Why may not he be the man?" *Lord Keeper*: "Because, Sir, I know him too well, and he is the most unfit person in England to be made a judge." *King*: "Then it must not be." Upon this, the Lord Keeper withdrew, without having received any other notification of the King's pleasure; and the office remained vacant.

Again there is a chasm in the intrigue, and we are driven to guess that Jeffreys had renewed his solicitation,—had treated the objections started to Wright as ridiculous,—and had advised the cashiering of the Lord Keeper if he should prove obstinate. The next time that the Lord Keeper was in the royal presence, the King, opening the subject of his own accord, observed, "Good, my Lord, why may not Wright be a judge? He is strongly recommended to me; but I would have a due respect paid to you, and I would not make him without your concurrence. Is it impossible, my Lord?" *Lord Keeper*: "Sir, the making of a judge is your Majesty's choice, and not my pleasure. I am bound to put the seal

as I am commanded, whatever the person may be. It is for your Majesty to determine, and me, your servant, to obey. But I must do my duty by informing your Majesty of the truth respecting this man, whom I personally know to be a dunce, and no lawyer; who is not worth a groat, having spent his estate by debauched living; who is without honesty, having been guilty of willful perjury to gain the borrowing of a sum of money. And now, Sir, I have done my duty to your Majesty, and am ready to obey your Majesty's commands in case it be your pleasure that this man be a judge." The King thanked the Lord Keeper without saying more, but next day there came a warrant under the sign manual for creating the King's "trusty and well-beloved Robert Wright" a Baron of his Exchequer, and orders were given for making out the patent in due form.

Meanwhile, Jeffreys gave an instance of that grotesque buffoonery with which he loved to intermix his most atrocious actions. He wished to proclaim to the world, as a proof of his ascendancy, that he had promoted Wright to be judge in spite of the Lord Keeper. Therefore, while the Lord Keeper was sitting on the bench, Jeffreys, arrayed in his costume as Chief Justice, entered Westminster Hall, and in the midst of a vast crowd of barristers and strangers walked up towards the Court of Chancery, which was then open to the hall: "he then beckoned to Wright to come to him, and, whispering in his ear, he flung himself off, holding out his arms towards the Lord Keeper, as much as to say, 'in spite of that man above there, thou shalt be a judge.'" His Lordship "saw all this, as it was intended he should, and it caused him some melancholy."<sup>1</sup> But, rather than give up the great seal, his Lordship affixed it to Wright's patent; and the detected swindler, knighted and clothed in ermine, took his place among the twelve judges of England.

"Some may allege that I bring forward circumstances too minute; but I fancy myself a picture-drawer, and I am to give the same image to a spectator as I have of the thing itself, which I desire should be here represented. History is, as it were, the portrait or lineament, and not

<sup>1</sup> Life of Guilford, ii. 175, 176.

the bare index or catalogue, of things done; and without the *why* and the *how*, all history is jejune and unprofitable."<sup>1</sup> Therefore I should like to explain the motive of Jeffreys for such an appointment. He could not possibly have received a bribe for it, Wright not having a shilling in the world to give him; and it did not lead to the shedding of blood, whereby a natural taste of his might be gratified;—but he perhaps wished to have upon the bench a man whom he considered more obnoxious to censure than himself; or he might simply look to the gratification of his vanity, by showing his influence to be so great that, in spite of the Lord Keeper, he could elevate to be a Baron of the Exchequer a man whom no one else would have proposed for a higher office in the law than a *bound-bailiff*.<sup>2</sup> People were exceedingly shocked when they saw the seat of justice so disgraced; but this might be what he intended; and one of his first acts, when he himself obtained the great seal, was to promote his *protege* from being a Baron of the Exchequer to be a Judge of the Court of King's Bench.

Wright continued to do many things which caused great scandal, and, therefore, was dearer than ever to his patron, who would have discarded him if he had shown any symptoms of reformation. He accompanied General Jeffreys as aide-de-camp in the famous "campaign in the West:"—in other words, he was joined in commission with him as a Judge in the "bloody assize," and, sitting on the bench with him at the trial of Lady Lisle and the others which followed, concurred in all his atrocities.<sup>3</sup> He came in for very little of the bribery,—Jeffreys, who claimed the lion's share, tossing him by way of encouragement one solitary pardon, for which a small sum only was expected.

But on the death of Sir Henry Beddingfield he was

<sup>1</sup> Life of Guilford, 178.

<sup>2</sup> I have heard it repeated as a saying of a departed statesman, who long ruled over Scotland, that "a minister gains much more by appointing a worthless than a worthy man to a public office, for in the latter case only a few can hope for favor, whereas in the former the great mass of the population consider themselves within reach of the government patronage, and in consequence are eager to support you."

<sup>3</sup> Granger's expression is, "He had his share in the Western massacre."—p. 311.



made Chief Justice of the Common Pleas; and very soon afterwards, the unexpected quarrel breaking out between Sir Edward Herbert and the Government about martial law and the punishment of deserters,—the object being to find some one who by no possibility could go against the Government, or hesitate about doing anything required of him, however base or however bloody, Wright was selected as Chief Justice of the King's Bench. Unluckily we have no account of the speeches made at any of his judicial installations, so that we do not know in what terms his learning and purity of conduct were praised, or what were the promises which he gave of impartiality and of rigorous adherence to the laws of the realm.

On the very day on which he took his seat on the bench he gave good earnest of his servile spirit. The Attorney General renewed his motion for an order to execute at Plymouth the deserter who had been capitally convicted at Reading for deserting his colors.<sup>1</sup> The new Chief Justice, without entering into reasons, or explaining how he came to differ from the opinion so strongly expressed by his predecessor, merely said "Be it so!" The puisnies now nodded assent, and the prisoner was illegally executed at Plymouth under the order so pronounced.<sup>2</sup>

Confidence was entirely lost in the administration of justice in Westminster Hall, for all the three Common Law courts were at last filled by incompetent and corrupt Judges. Pettifogging actions only were brought in them, and men settled their disputes by arbitration or by taking the opinion of counsel. The reports during the whole reign of James II. hardly show a single question of importance settled by judicial decision. Thus having no distinct means of appreciating Chief Justice Wright's demerits as a judge in private causes, we must at once follow him in his devious course as a political judge.

The first occasion on which, after his installation, he drew upon himself the eyes of the public was when he was sent down to Magdalene College, Oxford, for the purpose of turning it into a popish seminary. Upon a

<sup>1</sup> Ante, p. 81.

<sup>2</sup> *Rex v. William Beale*, 3 Mod. 124, 125.

vacancy in the office of president, the fellows, in the exercise of their undoubted rights, had elected the celebrated Dr. Hough, who had been duly admitted into the office; and the preliminary step to be taken was to annul the election, for the purpose of making way for another candidate named by the King. There were associated with Wright, in this commission, Cartwright, Bishop of Chester, who was ready to be reconciled to Rome in the hope of higher preferment, and Sir Thomas Jenner, a Baron of the Exchequer, a zealous follower in the footsteps of the Chief Justice of the King's Bench. Nothing could equal the infamy of their object except the insolence of their behavior in trying to accomplish it. They entered Oxford escorted by three troops of cavalry with drawn swords, and, having taken their seats with great parade in the hall of the college, summoned the fellows to attend them. These reverend and gallant divines appeared, headed by their new president, who defended his rights with skill, temper and resolution; steadily maintaining that, by the laws of England, he had a freehold in his office, and in the house and revenues annexed to it.

"My Lord, I do declare here, in the name of myself and the fellows, that we submit to the visitation as far as it is consistent with the laws of the land and the statutes of the college, and no further." *Wright, C. J.*: "You cannot imagine that we act contrary to the laws of the land; and as to the statutes the King has dispensed with them. Do you think we come here to break the laws?" *Hough*: "It does not become me, my Lords, to say so; but I will be plain with your Lordships. I find that your commission gives you authority to alter the statutes. Now I have sworn to uphold and obey them: I must admit no alteration of them, and by the grace of God never will." He was asked whether one of the statutes of the Founder did not require mass to be said in the college chapel; but he answered "not only was it unlawful, but it had been repealed by the act of parliament requiring the use of the Book of Common Prayer." However, sentence was given, that the election of Hough was void, and that he be deprived of his office of president. *Hough*: I do hereby protest against

all your proceedings, all you have done, or shall hereafter do, in prejudice of me and my right, and I appeal to my sovereign lord the King in his courts of justice." "Upon which (says a contemporary account), the strangers and young scholars in the hall gave a *hum*, which so much incensed their Lordships, that the Lord Chief Justice was not to be pacified, but, charging it upon the President, bound him in a bond of £1,000, and security to the like value, to make his appearance at the King's Bench bar on the 12th of November; and, taking occasion to pun upon the President's name, said to him, 'Sir, you must not think to *huff* us.' He then ordered the door of the President's house to be broken open by a blacksmith; and a Fellow observing, "I am informed that the proper officer to gain possession of a freehold is the sheriff with a *posse comitatus*," Wright said, "I pray who is the best lawyer, you or I? Your Oxford law is no better than your Oxford divinity. If you have a mind to a *posse comitatus*, you may have one soon enough."

Having ejected Hough, he issued a mandate for expelling all the contumacious Fellows, and insured the expulsion of James from his throne, the Commissioners returned in triumph to London.<sup>1</sup>

Wright was likewise a member of the Ecclesiastical Court of High Commission, of which Jeffreys was president, and he strenuously joined in all the judgments of that illegal and arbitrary tribunal, which, with a *non obstante* had been revived in the very teeth of an existing act of parliament. He treated with ridicule the scruples of Sancroft, the Archbishop of Canterbury, and others who refused to sit upon it, and he urged the infliction of severe punishment on all who denied its jurisdiction.

Although he was not a member of the Cabinet he usually heard from the Chancellor the measures which had been resolved upon there, and he was ever a willing tool in carrying them into effect.

When the clergy were insulted, and the whole country was thrown into a flame, by the fatal Order in Council for reading the "Declaration of Indulgence" in all

<sup>1</sup> 12 St. Tr. 11-14.

churches and chapels on two successive Sundays, he contrived an opportunity of declaring from the bench his opinion that it was legal and obligatory. Hearing that the London Clergy were almost unanimously resolved to disobey it, he sent a peremptory command to the priest who officiated in the chapel of Sergeants' Inn to read the Declaration with a loud voice; and on the famous Sunday, the 20th of May, 1688, he attended in person, to give weight to the solemnity. However, he was greatly disappointed and enraged to find the service concluded without any thing being uttered beyond what the rubric prescribes. He then indecently, in the hearing of the congregation, abused the priest as disloyal, seditious, and irreligious, for contemning the authority of the Head of the Church. The clerk ingeniously came forth to the rescue of his superior, and took all the blame upon himself by saying that "he had forgot to bring a copy," and the Chief Justice, knowing that he had no remedy, was forced to content himself with this excuse.<sup>1</sup>

The Seven Bishops being committed to the Tower, and prosecuted for a conspiracy to defame the King and to overturn his authority, because they had presented a petition to him praying that they might not be forced to violate their consciences and to break the law, Wright, the lowest wretch that had ever appeared on the bench in England, was to preside at the most important state trial recorded in our annals. The reliance placed upon his abject subserviency no doubt operated strongly in betraying the Government into this insane project of treating as common malefactors the venerable fathers of the Protestant Church, now regarded by the whole nation with affectionate reverence. The consideration was entirely overlooked by the courtiers, that, from the notorious baseness of his character, his excessive zeal might be revolting to the jury, and might produce an

<sup>1</sup> The two clergymen who were most applauded on this occasion were—the bold one, who, refusing to obey the royal mandate, took for his text, "Be it known unto thee, O King, that we will not serve thy Gods, nor worship the golden image which thou hast set up;" and the humorous one, who having said, "My brethren, I am obliged to read this Declaration, but you are not obliged to listen to it,"—waited till they were all gone, clerk and all, before the reading of the Declaration began.

acquittal. It is supposed that a discreet friend of the Government had given him a caution to bridle his impetuosity against the accused, as the surest way of succeeding against them; for, during the whole proceeding, he was less arrogant than could have been expected, and it is much more probable that his forbearance arose from obedience to those whom he wished to please, than from any reverence for the sacred character of the defendants or any lurking respect for the interests of justice.

They were twice placed at the bar before him; first when they were brought up by the Lieutenant of the Tower to be arraigned, and afterwards when a jury was impaneled for their trial. On the former occasion the questions were whether they were lawfully in custody, and were then bound to plead? The Chief Justice checked the opposing counsel with an air of impartiality, saying, "Look you, gentlemen, do not fall upon one another, but keep to the matter in hand." And, before deciding for the Crown, he said, "I confess it is a case of great weight, and the persons concerned are of great honor and value. I would be as willing as any body to testify my respects and regards to my Lords the Bishops, if I could see anything in their objections worth considering. For here is the question, whether the fact charged in the warrant of commitment be such a misdemeanor as is a breach of the peace? I cannot but think it is such a misdemeanor as would have required sureties of the peace, and if sureties were not given a commitment might follow." He was guilty of gross injustice in refusing leave to put in a plea in abatement; but he thus mildly gave judgment:—"We have inquired whether we may reject a plea, and, truly, I am satisfied that we may if the plea is frivolous; and this plea containing no more than has been overruled already, my Lords the Bishops must now plead *guilty* or *not guilty*."

When the trial actually came on, he betrayed a partiality for which, in our times, a judge would be impeached; but, compared with himself, so decorous was he, that he was supposed to be overawed by the august audience in whose presence he sat. It was observed

that he often cast a side glance towards the thick rows of earls and barons, by whom he was watched, and who, in the next parliament, might be his judges. One bystander remarked that "he looked as if all the peers present had halters in their pockets."

The counsel for the Crown having, in the first instance, failed to prove a publication of the supposed libel in the county of Middlesex, and only called upon the Court to suppose or presume it, the Chief Justice said—"I cannot suppose it; I cannot presume anything. I will ask my brothers their opinion, but I must deal truly with you; I think there is not evidence against my Lords the Bishops. It would be a strange thing if we should go and presume that these Lords did it when there is no sort of evidence to prove that they did it. We must proceed according to forms and methods of law. People may think what they will of me, but I always declare my mind according to my conscience." He was actually directing the jury to acquit, and the verdict of *not guilty* would have been instantly pronounced, when Finch, one of the counsel for the Bishops, most indiscreetly said they had evidence on their side to produce. The young gentleman was pulled down by his leaders, who desired the Chief Justice to proceed. And now his Lordship showed the *cloven foot*, for he exclaimed, "No, no, I will hear Mr. Finch. Go on: my Lords the Bishops shall not say of me that I would not hear their counsel. I have been already told of being counsel against them, and they shall never say I would not hear counsel for them. Such a learned man as Mr. Finch must have something material to offer. He shall not be refused to be heard by me, I assure you. Why don't you go on, Mr. Finch?"

At this critical moment it was announced that the Earl of Sunderland, the President of the Council,—who was present in the royal closet when the Bishops presented their petition to the King at Whitehall,—was at hand, and would prove a publication in Middlesex. The Chief then said, with affected calmness, but with real exultation, "Well! you see what comes of the interruption. I cannot help it; it is your own fault." There being a pause while they waited for the arrival of the

Earl of Sunderland, the Chief Justice, addressing Sir Bartholomew Shower, one of the counsel for the Crown, whom he had stopped at an early stage of the trial, and against whom he had some private spite, he observed with great insolence, "Sir Bartholomew, now we have time to hear your speech, if you will. Let us have it."

At last the witness arrived, and, proving clearly a publication in Middlesex, the case was again launched, and, after hearing counsel on the merits, it was to be left to the determination of the jury.

The Chief Justice, thinking to carry it all his own way, was terribly baffled, not only by the sympathy of the audience with the Bishops, which evidently made an impression on the jury, but by the unexpected honesty of one of his brother judges, Mr. Justice John Powell, who had been a quiet man, unconnected with politics, and, being a profound lawyer, had been appointed to keep the Court of King's Bench from falling into universal contempt. Sir Robert Sawyer beginning to comment upon a part of the Declaration which the Bishops objected to, "that from henceforth the execution of all laws against nonconformity to the religion established, or the exercise of any other religion, should be suspended," *Wright, C. J.*, exclaimed, "I must not suffer this; they intend to dispute the King's power of suspending laws." *Powell, J.*: "My Lord, they must necessarily fall upon the point; for, if the King hath no such power (as clearly he hath not, in my judgment), the natural consequence will be that this Petition is no diminution of the King's regal power, and so not seditious or libelous." *Wright, C. J.*: "Brother, I know you are full of that doctrine; but, however, my Lords the Bishops shall have no occasion to say that I deny to hear their counsel. Brother, you shall have your will for once; I will hear them: let them talk till they are weary." *Powell, J.*: "I desire no greater liberty to be granted them than what, in justice, the Court ought to grant; that is, to hear them in defense of their clients."

As the speeches for the defendants proceeded, and were producing a great effect upon all who heard them, the Solicitor General made a very irregular remark, accompanied by a fictitious yawn—"We shall be here till

midnight." The Chief Justice, instead of reprimanding him, chimed in with his impertinence, saying, "They have no mind to have an end of the cause, for they have kept it up three hours longer than they need to have done." *Sergeant Pemberton*: "My Lord, this case does require a good deal of patience." *Wright, C. J.*: "It does so, brother, and the Court has had a great deal of patience; but we must not sit here only to hear speeches." In trying to put down another counsel, who was making way with the jury, he observed, "If you say anything more, pray let me advise you one thing—don't say the same thing over and over again; for, after so much time spent, it is irksome to all company, as well as to me."

When it came to the reply of Williams, the renegade Solicitor General, who in his day had been "a Whig and something more," he laid down doctrines which called forth the reprobation of Judge Powell, and even shocked the Chief Justice himself, for he denied that any petition could lawfully be presented to the King except by the Lords and Commons in parliament assembled. *Powell, J.*: "This is strange doctrine. Shall not the subject have liberty to petition the King but in parliament? If that be law, the subject is in a miserable case." *Wright, C. J.*: "Brother, let him go on; we will hear him out, though I approve not of his position." The unabashed Williams continued, "The Lords may address the King in parliament, and the Commons may do it; but therefore that the Bishops may do it out of parliament, does not follow. I'll tell you what they should have done: if they were commanded to do anything against their consciences, they should have acquiesced till the meeting of parliament." (Here, says the Reporter, the people in court hissed.) *Attorney General*: "This is very fine indeed! I hope the Court and the jury will take notice of this carriage." *Wright, C. J.*: "Mr. Solicitor I am of opinion that the Bishops might petition the King; but this is not the right way. If they may petition, yet they ought to have done it after another manner; for if they may, in this reflective way, petition the King, I am sure it will make the government very precarious." *Powell, J.*: "Mr. Solicitor, it would have been too late



to stay for a parliament, for the act they conceived to be illegal was to be done forthwith; and if they had petitioned and not shown the reason why they could not obey, it would have been looked upon as a piece of sullenness, and for that they would have been as much blamed on the other side."

The Chief Justice, to put on a semblance of impartiality, attempted to stop Sir Bartholomew Shower, who wished to follow in support of the prosecution, and, being a very absurd man, was likely to do more harm than good. *Wright, C. J.*: "I hope we shall have done by and by." *Sir B. S.*: "If your Lordship don't think fit, I can sit down." *Wright, C. J.*: "No! No! Go on, Sir Bartholomew—you'll say I have spoiled a good speech." *Sir B. S.*: "I have no good speech to make, my Lord; I have but a very few words to say." *Wright, C. J.*: "Well, go on, sir; go on."

In summing up to the jury, the Chief Justice said:—  
"This is a case of very great concern to the King and the Government on the one side, and to my Lords the Bishops on the other. It is an information against his Grace my Lord of Canterbury and the other six Noble Lords, for composing and publishing a seditious libel. At first we were all of opinion that there was no sufficient evidence of publication in the county of Middlesex, and I was going to have directed you to find my Lords the Bishops *not guilty*; but it happened that, being interrupted in my direction by an honest, worthy, learned gentleman, the King's counsel took the advantage, and, informing the Court that they had further evidence, we waited till the Lord President came, who told us how the Petition was presented by the Right Reverend defendants to the King at Whitehall. Then came their learned counsel and told us that my Lords the Bishops are guardians of the Church, and great peers of the realm, and were bound in conscience to act as they did. Various precedents have been vouched to show that the kings of England have not the power assumed by his present Majesty in issuing the Declaration and ordering it to be read; but concessions which kings sometimes make, for the good of the people, must not be made law; for this is reserved in the King's breast to

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do what he pleases in it at any time. The truth of it is, the dispensing power is out of the case, and I will not take upon me to give any opinion upon it now; for it is not before me. The only question for you is a question of fact, whether you are satisfied that this Petition was presented to the King at Whitchall. If you disbelieve the Lord President, you will at once acquit the defendants. If you give credit to his testimony, the next consideration is, whether the Petition be a seditious libel, and this is a question of law on which I must direct you. Now, gentlemen, anything that shall disturb the government, or make mischief and a stir among the people, is certainly within the case 'De Libellis Famosis;' and I must, in short, give you my opinion, I do take it to be a libel. But this being a point of law, if my brothers have anything to say to it, I suppose they will deliver their opinions."

Mr. Justice Holloway, though a devoted friend of the Government, had in his breast some feeling of shame, and observed,—

"If you are satisfied there was an ill intention of sedition or the like, you should find my Lords the Bishops *guilty*; but if they only delivered a petition to save themselves harmless, and to free themselves from blame, by showing the reason of their disobedience to the King's command, which they apprehend to be a grievance to them, I cannot think it a libel." *Wright, C. J.*: "Look you, by the way, brother, I did not ask you to sum up the evidence (for that is not usual), but only to deliver your opinion whether it be a libel or no." *Powell, J.*: "Truly, I cannot see, for my part, anything of sedition or any other crime fixed upon these reverend fathers. For, gentlemen, to make it a libel, it must be false, it must be malicious, and it must tend to sedition. As to the falsehood, I see nothing that is offered by the King's counsel, nor anything as to the malice; it was presented with all the humility and decency becoming subjects when they approach their prince. In the Petition, they say, because they conceive the thing that was commanded them to be against the law of the land, therefore they do desire his Majesty that he would be pleased to forbear to insist upon it. If there be no such

dispensing power, there can be no libel in the Petition which represented the Declaration founded on such a pretended power to be illegal. Now, gentlemen, this is a dispensation with a witness; it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of any 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 at once allowed of, there will need no parliament; all the legislature will be in the King—which is a thing worth considering—and I leave the issue to God and your own consciences."

Allybone, however, on whom James mainly relied, foolishly forgetting the scandal which would necessarily arise from the Protestant prelates being condemned by a Popish judge for trying to save their Church from Popery, came up to the mark, and, in the sentiments he uttered, must have equaled all the expectations entertained of him by his master:—

"In the first place," said he, "no man can take upon him to write against the actual exercise of the Government, unless he have leave from the Government. If he does, he makes a libel, be what he writes true or false; if we once come to impeach the Government by way of argument, it is argument that makes government or no government. So I lay down, that the Government ought not to be impeached by argument, nor the exercise of the Government shaken by argument. Am I to be allowed to discredit the King's ministers because I can manage a proposition, in itself doubtful, with a better pen than another man? This I say is a libel. My next position is, that no private man can take upon him to write concerning the Government at all, for what has any private man to do with the Government? It is the business of the Government to manage matters relating to the Government; it is the business of subjects to mind only their private affairs. If the Government does come to shake my particular interest, the law is open for me, and I may redress myself; but when I intrude myself into matters which do not concern my particular interest, I am a libeler. And, truly, the attack is the worse if under a specious pretense; for, by that rule, every man

that can put on a good vizard may be as mischievous as he will, so that whether it be in the form of a supplication, or an address, or a petition, let us call it by its true denomination, it is a libel." He then examined the precedents which had been cited, displaying the grossest ignorance of the history as well as constitution of the country; and, after he had been sadly exposed by Mr. Justice Powell, he thus concluded: "I will not further debate the prerogatives of the Crown or the privileges of the subject; but I am clearly of opinion that these venerable Bishops did meddle with that which did not belong to them; they took upon themselves to contradict the actual exercise of the Government, which I think no particular persons may do."

The Chief Justice, without expressing any dissent, merely said, "Gentlemen of the jury, have you a mind to drink before you go?" So wine was sent for, and they had a glass apiece; after which they were marched off in custody of a bailiff, who was sworn not to let them have meat or drink, fire or candle, until they were agreed upon their verdict.

All that night were they shut up, Mr. Arnold, the King's brewer, standing out for a conviction till six next morning, when, being dreadfully exhausted, he was thus addressed by a brother juryman: "Look at me; I am the largest and the strongest of the twelve, and, before I find such a petition as this a libel, here I will stay till I am no bigger than a tobacco-pipe."

The Court sat again at ten, when the verdict of NOT GUILTY was pronounced, and a shout of joy was raised which was soon reverberated from the remotest parts of the kingdom. One gentleman, a barrister of Gray's Inn, was immediately taken into custody in court, by order of the Lord Chief Justice, who, with an extraordinary command of temper and countenance, said to him in a calm voice, "I am as glad as you can be that my Lords the Bishops are acquitted, but your manner of rejoicing here in court is indecent; you might rejoice in your chamber or elsewhere, and not here. Have you anything more to say to my Lords the Bishops, Mr. Attorney?" *A. G.*: "No, my Lord." *Wright, C. J.*: "Then they may withdraw,"—and they walked off, sur-

rounded by countless thousands, who eagerly knelt down to receive their blessing."<sup>1</sup>

Justice Holloway was forthwith cashiered, as well as Justice Powell; and there were serious intentions that Chief Justice Wright should share their fate, as the King ascribed the unhappy result of the trial to his pusillanimity,—contrasting him with Jeffreys, who never had been known to miss his quarry. This esteemed functionary held the still more important office of Lord High Chancellor, and, compared with any other competitor, Wright, notwithstanding his occasional slight lapses into conscientiousness, appeared superior in servility to all who could be substituted for him.<sup>2</sup> Allynbone was declared to be "the man to go through thick and thin;" but, unfortunately, he had made himself quite ridiculous in all men's eyes by the palpable blunders he had recklessly fallen into during the late trial; and he felt so keenly the disgrace he had brought on himself and his religion, that he took to his bed and died a few weeks afterwards.

Thus, when William of Orange landed at Torbay, Wright still filled the office of Chief Justice of the King's Bench. He continued to sit daily in court till the flight of King James,—when an interregnum ensued, during which all judicial business was suspended, although the public tranquillity was preserved, and the settlement of the nation was conducted by a provisional government.<sup>3</sup> After Jeffreys had tried to make his escape, disguised as a sailor, and was nearly torn to pieces by the mob, Wright concealed himself in the

<sup>1</sup> St. Tr. 183, 523.

<sup>2</sup> It was supposed that he was jealous of Williams, the Solicitor General, who had been promised by James the highest offices of the law if he could convict the Bishops. This may account for a sarcasm he leveled at his rival during the trial. Williams, having accounted for a particular vote of the House of Commons in the reign of James II., when he himself was a member and suspected of bribery, said "there was a lump of money in the case." Wright, in referring to this, observed, "Mr. Solicitor tells you the reason, 'there was a lump of money in the case;' but I wonder, indeed, to hear it come from him." Williams, understanding the insinuation, exclaimed, "My Lord, I assure you I never gave my vote for money in my life."

<sup>3</sup> Westminster Hall was closed during the whole of Hilary Term, 1689, and an act was afterwards passed for reviving actions and continuing process (1 W. & M. c. 4).

house of a friend, and being less formidable and less obnoxious (for he was called the "*jackal*," the *lion*"), he remained some time unmolested; but upon information, probably ill-founded, that he was conspiring with papists who wished to bring back the King, a warrant was granted against him by the Privy Council, on the vague charge of "endeavoring to subvert the Government." Under this he was apprehended, and carried to the Tower of London; but after he had been examined there by a committee of the House of Commons, it was thought that this custody was too honorable for him, and he was ordered to be transferred to Newgate. Here, from the perturbation of mind which he suffered, he was seized with a fever, and he died miserably a few days after, being deafened by the cheers which were uttered when the Prince and Princess of Orange were declared King and Queen of England.<sup>1</sup>

His pecuniary embarrassments had continued even after he became a Judge, and, still living extravagantly, his means were insufficient to supply him with common comforts in his last hours, or with a decent burial. His end holds out an awful lesson against early licentiousness and political profligacy. He was almost constantly fighting against privation and misery, and during the short time that he seemed in the enjoyment of splendor he was despised by all good men, and he must have been odious to himself. When he died, his body was thrown into a pit with common malefactors; his sufferings, when related, excited no compassion; and his name was execrated as long as it was recollected.

The Convention Parliament, not appeased by his ignominious death, still wished to set a brand upon his memory. At first there was an intention of attainting him, as well as Jeffreys, who, about the same time, had come to a similar end. In the debate on the Indemnity Act, Sir Henry Capel said:—

"Will you not except the bloody Judges, and those who were of opinion for the dispensing power?" *Mr. Boscowen*: "Although the capital offenders are dead, I would have them attainted. Begin with Chancellor Jef-

<sup>1</sup> Some accounts say that he was dangerously ill of a fever at the time of his removal from the Tower.

freys, reduce his estate to the same condition as when he began to offend, and let his posterity be made incapable to sit in the Lords' House." *Mr. Hawles*: "If you except a man that is dead, you will find the Chancellor very little more guilty than those who supported the dispensing power. The dispensing power was the last grievance, and a bloody sacrifice to the Prince's pleasure."

It was resolved first to specify the offenses which should exclude from the benefit of the Act of Indemnity, and these were agreed upon:—"1. Asserting, advising, and promoting the dispensing power and suspending of laws without consent of parliament. 2. The prosecution of the Seven Bishops. 3. Sitting in the Court of High Commission."—Powell, Atkys, Holloway, and other Judges who had been dismissed, were examined at the bar, and the part that Wright had taken in the illegal proceedings of the last reign was clearly established. Sir Robert Sawyer, then Attorney General, now a member of the House, likewise made some terrible disclosures (which led to his own expulsion) relating to the manner in which the King, the Chancellor, and the Chief Justice had combined to obtain the concurrence of the other Judges in illegal decisions. Finally, Sir Thomas Clarges alone stood up for Wright, saying, "If any fact he hath done amounts to felony or treason, make his estate forfeitable, and I am for it; but where there is no offense in law, I would not have him excepted; and as he has gone to another world, and left no estate behind him, let him rest in peace." But Sir Thomas Littleton closed the debate by observing, in a very fierce tone, "We may not be able to touch his person or his property, but it would be an ill thing for such a man to stand in our chronicles with no mark upon him." So it was resolved "that Sir Robert Wright be excepted."<sup>1</sup>

And surely we have reason to admire the good sense and moderation which characterized the proceedings of the Convention Parliament in this as well as in almost every other deliberation. We are shocked by reading,

<sup>1</sup> 5 Parl. Hist. 260, 263, 278, 308, 312, 318, 324, 334, 339; Stat. 2 W. & M. sess. 1. c. 10; Granger, 311; Macaulay, ii. 275.

in the criminal annals of Scotland, of a skeleton being set up at the bar of a court of justice to receive sentence,—and the insult offered, on the restoration of Charles II., to the remains of Cromwell and Blake, was disgraceful to the English nation; but the simple expression of censure by the legislature of the country upon this deceased delinquent harmonizes with our best feelings, and, without inflicting hardship on any individual, was calculated to make a salutary impression upon future judges. It is lucky for the memory of Wright that he had contemporaries such as Jeffreys and Scroggs, who considerably exceeded him in their atrocities. Had he run the same career in an age not more than ordinarily wicked, his name might have passed into a by-word, denoting all that is odious and detestable in a judge; whereas his misdeeds have long been little known, except to lawyers and antiquaries.

It is a painful duty for me to draw them from their dread abode; but let me hope that, by exposing them in their deformity, I may be of some service to the public. Ever since the reaction which followed the passing of the Reform Bill, there has been a strong tendency to mitigate the errors and to lament the fate of James II. This has shown itself most alarmingly among the rising generation; and there seems reason to dread that we may soon be under legislators and ministers who, believing in the divine right of kings, will not only applaud, but act upon, the principles of arbitrary government.<sup>1</sup> Some good may arise from showing in detail the practical results of such principles in the due administration of justice—the chief object, it has been said, for which man renounces his natural rights, and submits to the restraints of magisterial rule.

I rejoice to think that I am now parting with the last of the monsters who, disguised as judges, shed innocent blood, and conspired with tyrants to overturn all the free institutions which have distinguished and blessed our country. For the purpose of showing the man-

<sup>1</sup> When in the debating societies at Eaton, Oxford, and Cambridge, the question has been put to the vote "whether the Revolution of 1688 was justifiable," it has generally been carried by an immense majority in the negative.

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ner in which the laws had been perverted to the oppression of the subject, I may conclude with asking the reader to take a retrospective glance at the two last Stuart reigns, and to observe that during a period of only twenty-eight years there had been a series of not fewer than eleven Chief Justices of the Court of King's Bench, most of whom had been selected for their supposed subserviency, and several of whom were cashiered because, notwithstanding their eager desire to comply with the wishes of the Government, judgments had been required of them which they could not give without infamy, but which were given by their more infamous substitutes. The other judicial seats had been equally prostituted,—insomuch that although, on the establishment of the constitutional government under William and Mary, there was no indisposition to continue in office any of the old Judges who were decently competent by acquirements and character, it was found necessary to make a complete sweep of all actually officiating in the Court of Chancery, in the Court of King's Bench, in the Court of Common Pleas, and in the Court of Exchequer. Even of the Judges who had been dismissed as refractory, Sir Robert Atkyns and Mr. Justice John Powell alone could with propriety be reappointed. The others, condemned for independence by James II., would have been shunned, from the dread of contamination, by the pure and enlightened men subsequently appointed to adorn the seat of justice, which the least culpable of their predecessors, with unpardonable although with faltering and imperfect profligacy, had disgraced.<sup>1</sup>

<sup>1</sup> The reader may like to see a list of the Judges immediately before and after the Revolution:—

JAMES II.

*Lord Chancellor.*

Lord Jeffreys.

*Master of the Rolls*

Sir John Trevor.

*King's Bench.*

Sir Robert Wright.

Sir Thomas Powell.

Sir Robert Baldock.

Sir Thomas Stringer.

WILLIAM AND MARY.

*Lord Commissioners of the Great Seal.*

Sir John Maynard.

Sir Anthony Keck.

Sir William Rawlinson.

*Master of the Rolls.*

Henry Powle, Esq.

*King's Bench.*

Sir John Holt.

Sir William Dolben.

Sir William Gregory.

Sir Giles Eyre.

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## JAMES II.

*Common Pleas.*

Sir Edward Herbert.  
 Sir Thomas Street.  
 Sir Thomas Jenner.  
 Sir Edward Lutwyche.

*Exchequer.*

Sir Robert Atkyns.  
 Sir Richard Heath.  
 Sir Charles Ingleby.  
 Sir John Rothram.

## WILLIAM AND MARY

*Common Pleas.*

Sir Henry Pollexfen.  
 Sir John Powell.\*  
 Sir Thomas Rokeby.  
 Sir Peyton Ventris.

*Exchequer.*

Sir Robert Atkyns.  
 Sir Nicholas Letchmere  
 Sir Edward Neville.  
 Sir John Turton.

\* Old Judges reappointed.

H—24.



