JOHN CAMPBELL

ATROCIOUS JUDGES : LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION

John Campbell

Atrocious Judges : Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression

«Public Domain»

Campbell J.

Atrocious Judges : Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression / J. Campbell — «Public Domain»,

© Campbell J.
© Public Domain

Содержание

Atrocious Judges : Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression

ADVERTISEMENT

The text of the following Book of Judges has been derived from Lord Campbell's *Lives of the Chief Justices, and Lives of the Chancellors*, with only a few verbal alterations for the sake of connection, some transpositions, the omission of some details of less interest to the American reader, and the insertion of a few paragraphs, enclosed in brackets, thus [ ].

Most biographers have been arrant flatterers. Lord Campbell is a distinguished member of that modern school, which holds that history is of no dignity nor use, except so far as it is true; and that the truth is to be told at all hazards and without reserve. Hitherto social and political position, obtained no matter by what means, has in general secured not only present but future reputation. It can hardly fail to be a serious check upon those who struggle for distinction to understand, that, however they may cheat or dazzle their contemporaries, they must expect to encounter from posterity a Rhadamantine judgment.

The object of the present work, prepared as it is in the interest of justice and freedom, and designed to hold up a mirror to magistrates now sitting on the American bench, in which "to show virtue her own feature, scorn her own image, and the very life and body of the time his form and pressure," will, I hope, induce Lord Campbell to pardon the liberty I have ventured to take with his writings.

R. H.

Boston, *November 20, 1855*.

INTRODUCTION

Hume observes, in his History of England, that "among a people who lived in so simple a manner as the Anglo-Saxons, the judicial power is always of greater importance than the legislative." The same comparison will hold good even in communities far more advanced in civilization than the Anglo-Saxons. It has indeed been well said that the great end of the complicated machinery of the existing British government is to get twelve men into a jury box. It might even be laid down as a general principle that the freedom or servitude of a people will mainly depend upon the sort of administration of justice which they have – especially of criminal justice.

The whole course of British history will serve to justify this observation, since it has not been so much by the aid of mercenary soldiers, as by the assistance of lawyers and judges, that tyranny has sought to introduce itself into that country. It is in the history of the English courts, still more than in the history of the English Parliament, that we are to trace the origin and growth of those popular rights and of that idea of public liberty, propagated from England to America, and upon which our Anglo-American free institutions are mainly founded.

The origin of British liberty, by an ancient, constant, and affectionate tradition, has uniformly been traced back to the times of the Anglo-Saxons. It was, however, by judicial, far more than by legislative institutions, that among those progenitors of ours private rights and public liberty were guarantied.

The smallest political subdivision among the Anglo-Saxons was the tything, (*teothing*,) consisting of ten families, the members of which were responsible for the good conduct of each other. The head man of this community, denominated tything-elder, (*teothing ealdor*,) seems to have acted as a kind of arbitrator in settling disputes about matters of a trifling nature; but whether he had actually a court for administering justice does not appear. Next in order came the hundred, (*hundrede*,) or, as it was called in the north of England, the *wapentake*, in its original constitution consisting of ten tythings, or a hundred families, associated together by a similar bond of mutual responsibility. Its head man was called the hundred's elder, (*hundredes ealdor*,) or simply reeve, (*gerefa*,) that being the generic term for the officer of any district, or indeed for any officer.[1] This gerefa, along with the bishop of the diocese, acted as the presiding officer of the hundred court, which met once at least every month, and had both civil and criminal jurisdiction, and cognizance also of ecclesiastical causes, which were entitled to precedence over every other business.

There was besides a shire or county court (*shir-gemot*) held twice every year, or oftener if occasion required, convened by the sheriff, (*shir-reeve*,) or, as he was sometimes also called, the alderman, (*ealdor-man*,) who presided over it, assisted by the bishop. Here causes were decided and business was transacted which affected the inhabitants of several of the hundreds.

The highest court of all was that of the king, the Wittenagemot, (*witan-gemot*,) in which he himself was present, attended by his councillors, or *witan*. This body, which united the functions of a legislative, judicial, and executive council, had no fixed times or place of meeting, but was held as occasion required, wherever the king happened to be. As to its judicial functions, it was in general only a court of extraordinary resort; it being a rule of the Anglo-Saxon law that none should apply for justice to the king unless he had first sought it in vain in the local courts.[2]

Hence the hundred and county courts occupied by far the most conspicuous position in the Anglo-Saxon judicial polity. The Anglo-Saxon shires, it may be observed, having been originally

---

[1] The German *graf*, for which the Latin *comes* (in English, *count* or *earl*) was employed as an equivalent, is a form of the same word. The law Latin for sheriff is *vice-comes*, a name given, it would appear, after the title of earl or count had become hereditary, to the officer who still continued to be elected by the people for the official functions originally discharged by the earl.

[2] See Forsyth's *History of Trial by Jury*, ch. iv. sec. 4.

principalities, nearly, if not altogether, independent, but gradually united into one kingdom, were rather tantamount to our Anglo-American states than to our counties, of which the Saxon hundreds may be taken as the equivalent; the tythings corresponding to our Anglo-American townships; while (to carry out the parallel) the central authority of the king and the wittenagemot may be considered as represented by our federal system generally.

But though the reeve and the bishop presided in the local Anglo-Saxon courts, it was rather in the character of moderators than of judges; that latter function being performed by the freeholders of the county, all of whom, not less than the bishop and the reeve, had the right and were bound to give their attendance at these courts.

"Suits," says Hume,[3] "were determined in a summary manner, without much pleading, formality, or delay, by a majority of voices;[4] and the bishop and alderman had no further authority than to keep order among the freeholders, and interpose with their opinion."

These county courts, though traces of them are to be found in all the old Teutonic states of Europe, became ultimately peculiar to England. None of the feudal governments of continental Europe had any thing like them; and Hume, with his usual sagacity, has remarked that perhaps this institution had greater effects on the political system of England than has yet been distinctly pointed out. By means of this institution, all the freeholders were obliged to take a share in the conduct of affairs. Drawn from that individual and independent state, so distinctive of the feudal system, and so hostile to social order and the authority of law, they were made members of a political combination, and were taught in the most effectual manner the duty and advantages of civic obedience by being themselves admitted to a share of civic authority. Perhaps, indeed, in this Anglo-Saxon institution of hundred and county courts we are to seek the origin of that system of local administration and self-government still more fully carried out in America than in England, by which English and Anglo-American institutions are so strongly distinguished from those of Europe, and in the judicious combination of which with a central administration, for matters of general concern, British and American liberty, as a practical matter, mainly consists.

One of the first procedures of the Norman Conqueror, by way of fixing his yoke upon the shoulders of the English people, was gradually to break down and belittle this local administration of justice. He did not venture, indeed, to abolish institutions so venerable and so popular, but he artfully effected his purpose by other means. He began by separating the civil and ecclesiastical jurisdictions. The bishops, according to a fashion recently introduced on the continent, were authorized to hold special courts of their own. These courts were at first limited to cases in which ecclesiastical questions were involved, or to which clergymen were parties but by the progress of an artful system of usurpations, familiar to the courts of all ages and nations, they gradually extended their authority to many purely lay matters, under pretence that there was something about them of an ecclesiastical character. It was under this pretence that the English ecclesiastical courts assumed jurisdiction of the important matters of marriage and divorce, of wills, and of the distribution of the personal property of intestates – a jurisdiction which they still retain in England, and which, though we never had any ecclesiastical courts in the United States of America, has left deep traces upon our law and its administration as to these subjects.

In establishing these separate ecclesiastical courts, the Conqueror made a serious departure from his leading idea of centralization; and he thereby greatly contributed to build up a distinct theocratic power, which afterwards, while intrenching on the rights of the laity, intrenched also very seriously on the authority of his successors on the throne. But this was a danger which either he did not

[3] History of England, Appendix, I.

[4] The decision of this majority would seem to have been principally determined, if the party complained against denied the charge, by the method of compurgation, in which the oath of the defendant was sustained by that of a certain number of his neighbors, who thereby certified their confidence in him; or, if he could not produce compurgators, and dared to venture upon it, by a superstitious appeal to the ordeal.

foresee – since he possessed, though his next successor relinquished it, the sole power of appointing bishops – or which he overlooked in his anxiety to diminish the importance of the old Saxon tribunals.

Both the civil and criminal authority of the local courts was greatly curtailed. Their jurisdiction in criminal cases was restricted to small matters, and even as to questions of property was limited to cases in which the amount in dispute did not exceed forty shillings; though, considering the superior weight of the shilling at that time, the greater comparative value in those ages of the precious metals, and the poverty of the country, this was still a considerable sum.

The general plan for the administration of justice of the Anglo-Norman government was a court baron in each of the baronies into which the kingdom was now parcelled out, to decide such controversies as arose between the several vassals or subjects of the same barony. Hundred courts and county courts still continued from the Saxon times, though with restricted authority, to judge between the subjects of different baronies; and a court composed of the king's great officers to give sentence among the barons themselves. Of this court, which ultimately became known as *Curia Regis*, (King's Court,) and sometimes as *Aula Regis*, (King's Hall,) because it was held in the hall of the king's palace, and of its instrumentality in extending the royal authority, Hume[5] gives the following account: "The king himself often sat in his court, which always attended his person: he there heard causes and pronounced judgment; and though he was assisted by the advice of the other members, it is not to be imagined that a decision could easily be obtained contrary to his inclination or opinion.[6] In the king's absence, the chief justiciary presided, who was the first magistrate of the state, and a kind of viceroy, on whom depended all the civil affairs of the kingdom.[7] The other chief officers of the crown, the constable, marshal, seneschal, or steward, chamberlain, treasurer, and chancellor, were members, together with such feudal barons as thought proper to attend, and the barons of the exchequer, who at first were also feudal barons appointed by the king. This court, which was sometimes called the King's Court, sometimes the Court of Exchequer, judged in all causes, civil and criminal, and comprehended the whole business which is now shared out among four courts – the Chancery, the King's Bench, the Common Pleas, and the Exchequer.

"Such an accumulation of powers was itself a great source of authority, and rendered the jurisdiction of the court formidable to all the subjects; but the turn which judicial trials took soon after the conquest served still more to increase its authority, and to augment the royal prerogatives. William, among the other violent changes which he attempted and effected, had introduced the Norman law into England, had ordered all the pleadings to be in that tongue, and had interwoven with the English jurisprudence all the maxims and principles which the Normans, more advanced in cultivation, and naturally litigious, were accustomed to observe in the administration of justice.

"Law now became a science,[8] which at first fell entirely into the hands of the Normans, and even after it was communicated to the English, required so much study and application that the laity of those ignorant ages were incapable of attaining it, and it was a mystery almost solely confined to the clergy, and chiefly to the monks.

"The great officers of the crown, and the feudal barons who were military men, found themselves unfit to penetrate into these obscurities; and though they were entitled to a seat in the

---

[5] History of England, Appendix, II.

[6] We may observe that even at present, whether in England or America, though the depositaries of the legislative and executive authority (which in those times the king was) sit no longer openly and personally on the bench, it still remains no easy matter, in cases in which they take an interest, to obtain in either country a judicial decision contrary to the inclination of these two authorities.

[7] In the king's absence – and the Anglo-Norman kings were often absent on visits to their continental dominions – this chief justiciary acted in all respects as the king's substitute, no less in military than in civil affairs, those who held it being selected quite as much for warlike prowess as for judicial skill. Such was the case with Ranulphus de Granville, chief justiciary of Henry II., A. D. 1180-1191, whose treatise in Latin, *On the Laws and Customs of the Kingdom of England*, is the oldest book of the common law. He went with Richard I. on the third crusade, and was killed at the siege of Acre.

[8] It might rather be said, a scholastic art, in which forms and words became matters of much greater consideration than substantial justice, and in which technical rules were substituted for the exercise of the reasoning faculties.

supreme judicature, the business of the court was wholly managed by the chief justiciary and the law barons, who were men appointed by the king, and entirely at his disposal. This natural course of things was forwarded by the multiplicity of business which flowed into that court, and which daily augmented by the appeals from all the subordinate judicatures of the kingdom. For the great power of the Conqueror established at first in England an authority which the monarchs in France were not able to attain till the reign of St. Louis, who lived near two centuries after: he empowered his court to receive appeals both from the courts of barony and the county courts, and by that means brought the administration of justice ultimately into the hands of the sovereign.[9]

"And lest the expense or trouble of the journey to court should discourage suitors and make them acquiesce in the decision of the inferior judicatures, itinerant judges were afterwards established, who made their circuits through the kingdom and tried all cases that were brought before them. By this expedient the courts of barony were kept in awe, and if they still preserved some influence it was only from the apprehensions which the vassals might entertain of disobliging their superior by appealing from his jurisdiction. But the county courts were much discredited and as the freeholders were found ignorant of the intricate principles and forms of the new law, the lawyers gradually brought all business before the king's judges, and abandoned that convenient, simple, and popular judicature."

The innovations of the Conqueror and his successors having reduced the old local Anglo-Saxon tribunals to comparative insignificance, the whole judicial authority, except that which had been seized upon by the ecclesiastical courts, remained for a hundred and fifty years after the conquest concentrated in the Aula Regis. But as Norman and Saxon became thoroughly intermixed, with the first faint dawn of modern English liberty the judicial power thus thoroughly centralized became again subdivided and distributed, though in a manner very different from that of the Saxon times.

The Anglo-Norman kings of England were perpetually on the move: the only way of disposing of the products of the landed estates which scattered over England afforded the main part of the royal revenue, was to go thither with the royal household and consume it on the spot. Wherever the king went, the Aula Regis followed, occasioning thereby great inconvenience and delay to suitors. This was complained of as a grievance, and the barons who extorted Magna Charta from their reluctant sovereign insisted, among other things, that *Common Pleas*, that is, civil suits between man and man, should be held in some certain place. It was in this provision of Magna Charta that originated the English Court of Common Pleas, which became fixed at Westminster Hall, the place of session of the Aula Regis when the king was in the vicinity of London. This Court of Common Pleas, or Common Bench as it was sometimes called, seems to have been at first but a mere committee of the Aula Regis; and the disintegration of that tribunal, thus begun, was, on the accession of Edward I. in 1272, completed by its resolution into three or rather five distinct tribunals.

Of these new courts, that which more immediately represented the Aula Regis was the Court of King's Bench, which still continued to follow the king and to be held in his presence. In the language of its process, such is still supposed to be the case; but like the other English courts, it has long since been fixed at Westminster Hall, and admits nobody to participate in its proceedings save its own members – a chief justice, who, though of inferior position in point of precedence, may be considered as in some respects the successor of the chief justiciary, which office was now abolished – and three or four puisne judges, the number having varied at different times.

The Court of Common Pleas was now also organized like the King's Bench, with a chief justice and three or four puisne judges. As this court had exclusive jurisdiction of civil suits, (except those relating to marriage, divorce, wills, tithes, and the distribution of the personal property of intestates, which had been usurped by the ecclesiastical courts,) *Pleas of the Crown*, that is, the

[9] Not merely were these appeals introduced, but process was invented by which suits commenced in these local courts might, before they were finished, be removed into the king's courts, by the writ of *pone* and others.

criminal jurisprudence of the realm, (except prosecutions for heresy, of which the ecclesiastical courts claimed jurisdiction,) and also the hardly less important duty of superintending the other tribunals, even the Common Pleas itself, and keeping them within their due limits, was assigned to the King's Bench.

To a third court, that of Exchequer, of which, besides a chief baron and three or four puisne barons, the treasurer and the chancellor of the exchequer originally formed a part, were assigned all cases touching the king's revenue, and especially the collection of debts due to him, in which light were regarded not only all fines, forfeitures, and feudal dues, but the imposts and aids occasionally granted by Parliament.

There was also a Court of Chivalry or "Honor Court," presided over by the constable and marshal, and having jurisdiction of all questions touching rank and precedency; and another, over which the steward of the household presided, to regulate the king's domestic servants; but these courts, which have long since vanished, could never be considered as having stood on a par with the three others, the judges of which esteemed themselves the grand depositaries of the knowledge of the common or unwritten law of England; that is, of such customs and forms as had obtained the force of law previous to the existence of the regular series of statutes beginning with Magna Charta. Indeed, these judges of England, as they were called, were in the habit of meeting together in the Exchequer Chamber, for the purpose of hearing arguments on law points of importance or difficulty, adjourned thither for their consideration, and which they decided by a majority of their whole number present, thus presenting down to the recent abolition, or rather modification, of the Court of Exchequer Chamber, a shadow, as it were, of the ancient Aula Regis.

Already, previous to this fracture of the Aula Regis into the various courts above named, the legal profession, so far as practice in the lay courts was concerned, had begun to separate itself from the clerical; and places for the education and residence of a class of laymen who began to devote themselves to the study of the common law were established in the vicinity of Westminster Hall. Of these, Lincoln's Inn, founded at the commencement of the reign of Edward II., (about A. D. 1307,) under the patronage of William Earl of Lincoln, who gave up his own hostel or town residence for that purpose, was the earliest, and has always remained the principal. On this model were established before long the Inner and Middle Temple, (so called because a residence of the Knights Templars, forfeited by the dissolution of that order, had been devoted to this purpose,) Gray's Inn, Serjeant's Inn, and the Inns of Chancery.

Such was the origin of the profession of law as it still exists in England and America; of that body of lawyers whence all our judges are taken, arrogating to itself, after the example of the churchmen, of which it originally consisted, a certain mystical enlightenment and superiority, scouting the idea that the laity, as the lawyers too affect to distinguish all persons not of their cloth, – in plain English, *the people*, – should presume to express or to entertain any independent opinion upon matters of law, or that any body not a professional lawyer can possibly be qualified for the comprehension, and much less for the administration, of justice.

In the Anglo-Saxon courts the parties had appeared personally, and pleadings had been oral. The Anglo-Norman practice gave rise to appearance by attorney in all civil cases, and to that system of special written pleadings, prepared by counsel learned in the law, of which the operation was to give the victory to ingenuity and learning rather than to right, and which, after undergoing many modifications, has at length been abolished in many of our Anglo-American states, as an impediment to justice and an intolerable nuisance. Even in conservative England itself, though the system of special pleadings, greatly modified by modern changes, still exists, the recent return, by the examination of the parties, to the old popular system of oral pleading has been attended by the happiest results.

The preparation of these written pleadings, by which we are here to understand not arguments, but allegations of facts relied upon by the respective parties, was engrossed by the serjeants at law,

whose distinguishing badge was a coif or velvet cap – wigs being a comparatively modern invention. To obtain admittance into this order, by which the entire practice of the Court of Common Pleas was engrossed, (that is, originally, the entire practice in civil suits,) and from which the judges were exclusively selected, sixteen years' study was required. The degree of barrister, or, as it was called, of apprentice, might be obtained by seven years' study; and it was to these two classes of serjeants and apprentices that the practice in the courts of Westminster Hall was originally confined.[10] But subsequently there sprang up a third inferior and still more numerous class, called attorneys, a sort of middle-men between the client and his counsel, not permitted to speak in court, for which purpose they must retain a serjeant or barrister, but upon whom was shifted off all the drudgery and responsibility of preparing the case, in which, however, no step of consequence could be taken without the advice of counsel learned in the law, *i. e.*, a serjeant or barrister.[11]

As the law and its practice thus became more and more a mystery, only to be learned by frequenting the courts of Westminster Hall, and by the study of the obscure and ill-prepared reports of their proceedings, which began now to be compiled by official reporters, and published under the name of Year Books, the old local Anglo-Saxon courts fell still more into contempt. Already in the reign of Henry III. the freeholders had been released from their obligation of attendance upon them, and another blow was given to these ancient tribunals when, in the reign of Edward II., the appointment of sheriffs, hitherto chosen by the freeholders, was assumed by the crown; and still another when, in the following reign, the election of conservators of the peace was also taken from the people and assumed by the king. To the magistrates thus appointed by the king the new name of Justices of the Peace was soon afterwards given, and the criminal jurisdiction conferred upon them, whether acting singly as examining and committing magistrates, or met together at the courts of Quarter Sessions, gradually superseded the small remains of criminal authority hitherto left to the old popular tribunals.

Two circumstances, however, combined to transfuse a certain portion of the spirit of these old tribunals into the newly established courts, thus standing in the way of the entire monopoly of the administration of justice at which the lawyers aimed, and securing to the body of the people a certain participation in the most important function of the government, to wit, the administration of justice; which participation, derived from the old Anglo-Saxon customs, and transmitted to our times, constitutes to-day the main pillar of both British and American liberty.

Contemporaneously with the new organization above described of the courts of common law, the British Parliament had taken upon itself that organization which it still retains – an upper house, (House of Lords,) composed of great nobles and bishops,[12] successor of the Anglo-Saxon Wittenagemote and of the Anglo-Norman Great Council, and a lower house, (House of Commons,) in which met together the elected representatives of the smaller landed proprietors, holding by knight's service immediately of the crown, (knights of the shire,) together with the newly-admitted representatives of the cities and chief towns, (burgesses.) The Parliament thus constituted claimed and exercised, probably as successor of the Wittenagemote, appellate jurisdiction from the decisions of all the courts of law. In the time of Edward III. it was even a common practice for the judges, when any question of difficulty arose in their several courts, to take the advice of Parliament on it before giving judgment. Thus in a case mentioned in the Year Book, 40 Ed. III., Thorpe, chief justice of the King's Bench, went with another judge to the House of Lords, to inquire the meaning and

[10] Originally, and down to a comparatively recent period, the Inns of Court were real schools, "readers" or lecturers being appointed for the instruction of the students, who were only admitted to practice after a sharp examination. Now, the examination is a mere form, and the student seeks instruction where he pleases. Even the nominal term of study has been reduced to five, and in some cases to three years.

[11] This distinction between attorneys and barristers, though still in full vogue in England and in several of the British colonies, is not recognized in the United States, where, indeed, it never had but a feeble and transient existence.

[12] Down to the period of the reformation the abbots of the greater monasteries sat also in this house.

effect of a law they had just passed for amending the system of pleadings;[13] and many other instances occur of the same sort.

This appellate power vesting in Parliament from the decisions of all the courts was the first of the circumstances above alluded to as serving to prevent the monopoly of the administration of justice by the lawyers. But this check with the process of time has almost entirely disappeared. In England this appellate power in Parliament has long since fallen into the hands exclusively of the House of Lords, who themselves in giving judgment are ordinarily only the mouthpiece of the judges called in to give their advice. In what are now the United States of America the same appellate jurisdiction was originally exercised by the colonial assemblies. With us, however, it has entirely vanished under the influence of the idea of a total separation of the legislative, executive, and judicial functions.

The other, and by far the most important check upon the monopoly of the lawyers, was the introduction and gradual perfecting of the trial by jury, by which the more ancient methods – the compurgation and ordeal of the Anglo-Saxons, and the trial by battle, the favorite method of the Anglo-Normans – were entirely superseded. The history of the trial by jury is exceedingly obscure. The petit jury may, however, be traced back to the old Anglo-Saxon method of trial by compurgation, the jury in its origin being only a body of witnesses drawn from the vicinage, who founded their verdict not upon the evidence of witnesses given before them, but upon their own personal knowledge of the matters in dispute.[14]

The grand jury seems to have originated in the old Anglo-Saxon custom imbodied in one of the laws of Ethelred, by which was imposed upon the twelve senior thanes of every hundred the duty of discovering and presenting the perpetrators of all crimes within their district – a custom revived by the constitution of Clarendon, enacted A. D. 1164, by which twelve lawful men of the neighborhood were to be sworn by the sheriff, on the requisition of the bishop, to investigate all cases of suspected criminality as to which no individual dared to make an accusation. At first this accusing jury seems also to have served the purpose of a jury of trial. In what way the grand jury came to be separated from the petit jury, and how the former came to be increased to a number not exceeding twenty-three, of whom at least twelve must concur in order to find an indictment, is a point which still remains for the investigation of legal antiquaries.[15]

The trial by jury, though of the progress of its development little is known, appears to have taken on substantially its existing form, both in civil and criminal cases, nearly contemporaneously with the new organization of the English courts, with the rise of the legal profession as distinct from that of the clergy, and with the commencement of the series of English statutes and law reports – all of which, as well as the existing constitution of the British House of Commons, may be considered as dating from the accession of Edward I., A. D. 1272, or somewhat less than six hundred years ago. In certain cases of great importance this trial took place and still takes place in bank, as it is called; that is, in Westminster Hall, before all the judges of the court in which the suit is pending;[16] but in general, the trial is had in the county in which (if a criminal case) the offence had been committed,

---

[13] If the Lords, says Campbell, were still liable to be so interrogated, they would not unfrequently be puzzled; and the revival of the practice might be a check on hasty legislation. It certainly would be a check upon the practice of courts, now so frequent, of putting an interpretation on statutes totally different from the intentions of those who frame them.

[14] Hence the necessity of venue, that is, the allegation in all declarations and indictments of some place in some county where the matter complained of happened, in order to a trial by a jury of the vicinage. In personal actions this necessity of trying a case in the county where the transaction occurred was got rid of by first setting out the true place of the transaction, and then alleging under a *videlicet* a venue in the county where the action was brought, which latter allegation the courts would not allow to be disputed. But in criminal proceedings and real actions the necessity of a trial in the county where the offence was committed or the land lies still continues.The origin of the jury in a body of neighbors who decided from their own knowledge will seem less remarkable when we recollect that by the customs of the Anglo-Saxons all sales of land, contracts, &c., between individuals took place in public at the hundred and county courts, the memory of the freeholders present thus serving in place of written records. See Palgrave's *English Commonwealth*, vol. i. p. 213.

[15] See Forsyth's *Trial by Jury*, ch. x. sec. 1.

[16] Down to the time of Elizabeth *all* cases occurring in Middlesex county, in which Westminster lies, were thus tried in bank.

or (if a civil case) in which the venue is laid, before certain commissioners sent into the counties for that purpose, and who, under the new system, were the successors of the justices in eyre, or itinerant justices, who had formed a part of the ancient Aula Regis. Originally, separate commissions appear to have issued for criminal and civil cases – for the former a commission of oyer and terminer, (to hear and determine,) and of general jail delivery; and for the latter a commission of assize, so called from the name of a peculiar kind of jury trial introduced as a substitute for trial by battle, in real actions, that is, pleas relating to land, villainage, and advowsons. In the times in which land, villains, and the right of presentation to parishes, constituted the chief wealth, these real actions constituted also the chief business of the Common Pleas, which then had exclusive jurisdiction of civil controversies; but to this commission of assize was annexed another, called a commission of *nisi prius*, authorizing the commissioners to try all questions of fact arising in any of the courts of Westminster. This latter commission was so called because the writ issued to the sheriff of the county in which the cause of action was alleged to have originated, to summon a jury to try the case, directed such jury to be summoned to appear at Westminster on a day named, unless before (in Latin, *nisi prius*) that day commissioners should come into the county to try the case there. Hence the term *nisi prius* employed by lawyers to designate a trial by jury before one or more judges, commissioned to hold such trials within certain circuits, but whose directions to the jury, and other points of law decided by them in the course of the trial, are liable afterwards to be reviewed by the whole bench.

Ultimately these commissions for both criminal and civil trials were given to the same persons, who also received a commission of the peace; and the whole territory of England being divided into six circuits, two of the judges, to whom other assessors were added, held assizes twice a year in each county,[17] for the trial of issues found in Westminster Hall – a system closely imitated in all our American states.

But the distribution of authority above described as having been originally made to the different courts of Westminster Hall, into which the Aula Regis was divided, did not long remain undisturbed. Courts have at all times, and every where, exhibited a great disposition to extend their jurisdiction, of which we have already had an example in the authority over marriages, wills, and the personal property of intestates, assumed by the English ecclesiastical courts; and considering the double jurisdiction under which we citizens of the United States live, – that of the federal and that of the state courts, – and the disposition so strongly and perseveringly exhibited by the federal courts to enhance their authority, while the state courts continue to grow weaker and tamer, this is, to us, a subject of no little interest.

Besides the general love of extending their jurisdiction characteristic of all courts, and indeed only one of the manifestations of the universal passion for power, the English Courts of King's Bench and Exchequer had a special motive for seeking to encroach on the exclusive civil jurisdiction of the Common Pleas. The salaries of the judges were very small – originally only sixty marks, equal to £40 sterling, or about $200 a year; nor was their amount materially increased down to quite recent times; but to this small salary were added fees paid by the parties to the cases tried before them; and the judges of the two other courts were very anxious to share with their brethren of the Common Pleas a part of the rich harvest which their monopoly of civil cases enabled them to reap from that source. Not only did the Court of King's Bench start the idea that all suits in which damages were claimed for injuries to person or property, attended by violence or fraud, came properly within its jurisdiction as "savoring of criminality;" it found another reason for extending its jurisdiction, by suggesting that when a person was in the custody of its officers, he could not, with a due regard to "legal comity," be sued on any personal claim in any other court, since that might result in his being taken out of the hands of their officer who already had him in custody, and was entitled to keep him. If any body had any claim against such a person, (such was the position plausibly set up,) it ought to be tried before

[17] In London and Middlesex four sessions were held a year; in the four northern counties only one.

the court in whose custody he already was. Having thus prepared the way, the Court of King's Bench did not stop here; but by a fiction, introduced into the process with which the suit was commenced, that the defendant was already in the custody of their marshal for a fictitious trespass which he was not allowed to deny, jurisdiction was gradually assumed in all private suits except real actions.

The Court of Exchequer in like manner claimed exclusive jurisdiction of suits for debt brought by the king's debtors, since by neglecting to pay them they might be prevented from paying their debts to the king; and under the pretence, which nobody was allowed to dispute, that all plaintiffs were the king's debtors, that court, too, gave an extent to their jurisdiction similar to that of the King's Bench. The exclusive jurisdiction of real actions, which alone remained to the Common Pleas, by the disappearance of villainage and the great increase of personal property, every day declined in importance; but even this was at last taken from the Common Pleas by the invention of Chief Justice Rolle, during the time of the Commonwealth, of the action of ejectment, which proceeds from beginning to end upon assumptions entirely fictitious, but which by its greater convenience entirely superseded real actions in England and in most of the Anglo-American States.

But while these three common law courts were thus exercising their ingenuity to intrench upon each other's jurisdiction, their pertinacious adherence to powers and technicalities, and their unwillingness, except in matters where the alleged prerogative of the crown was concerned, to do any thing not sanctioned by precedent, led them to refuse justice or relief to private suitors in many crying cases. Such cases still continued to be brought by petition before the king, and by him were referred to his chancellor, who in the earlier times was commonly his confessor, and who since the abolition of the office of chief justiciary had become the first official of the realm. Undertaking in these cases to prevent a failure of justice by rising above the narrow technicalities of the common law, and guided by the general principles of equity and good conscience, the chancellor gradually assumed a most important jurisdiction, which in civil matters ultimately raised his court to a rank and importance above that of all the others. With the advance indeed of wealth and civilization, appeals to chancery became more and more frequent; and if the common law courts had not altered their policy, and adopted upon many points equitable ideas, it seems probable that so far as civil suits were concerned, those courts would long since have been superseded altogether.[18] What indeed of and the practice in the Equity Court entirely into the hands of lawyers bred in Westminster Hall, by whom equity itself was made subservient to precedent, and the whole procedure involved in forms and technicalities even more dilatory and expensive than those of the common law courts.

The same disinclination on the part of these common law courts to go beyond the strict limit of technical routine, led, with the progress of commerce and navigation, to the erection, in the time of Edward III., of the Admiralty Court, mainly for the trial of injuries and offences committed on the high seas, of which, on technical grounds, the courts of common law declined to take jurisdiction. After the foundation of English colonies,[19] branches of this court, to which also was given an exchequer jurisdiction, were established in the colonies, and on that model have been formed our federal District Courts.

While the common law courts, through their preference of technicalities to justice, thus enabled the chancellors to assume a civil jurisdiction by which they themselves were completely overshadowed, driving the Parliament also to the necessity of creating, for both civil and criminal

[18] This history holds out to our state tribunals significant warnings as to the danger to which they are exposed on the part of the federal judges, especially those of the District Courts, who sitting singly on the bench, and with powers enormously and most dangerously extended by recent legislation, have from the unity and concentration of the one-man power, a great advantage over courts liable to be retarded in their action, if not reduced to imbecility by divisions among their members.

[19] The appeal from the English colonial courts to the king in council – the appeal cases being heard and decided by a committee of the privy councillors learned in the law – is another remnant of the old system, in which the constitution of the ancient Aula Regis has been very accurately preserved.

matters, a new Court of Admiralty,[20] they gave at the same time the support of their acquiescence and silence to other innovations, prompted not by public convenience, but by the very spirit of tyranny.

In every reign, at least from the time of Henry VI. down to that of Charles I., torture to extort confessions from those charged with state crimes was practised under warrants from the Privy Council. In the year 1615, by the advice of Lord Bacon, then attorney general, the lustre of whose philosophical reputation is so sadly dimmed by the infamy of his professional career, torture of the most ruthless character was employed upon the person of Peacham, a clergyman between sixty and seventy years of age, to extort confessions which might be used against him in a trial for treason, as to his intentions in composing a manuscript sermon not preached nor shown to any body, but found on searching his study, some passages of which were regarded as treasonable, because they encouraged resistance to illegal taxes. Thirteen years afterwards, when it was proposed to torture Fenton, the assassin of Villiers, Duke of Buckingham, to extort from him a confession of his accomplices, the prisoner suggested that if tortured he might perhaps accuse Archbishop Laud himself. Upon this, some question arose as to the legality of torture; and the judges being called upon for their advice, thus at length driven to speak, delivered a unanimous opinion that the prisoner ought not to be tortured, because no such punishment was known or allowed by the English law; which English law, it now appeared, had for two hundred years been systematically disregarded under the eye and by the advice of judges and sworn lawyers, members of the Privy Council, and without any protest or interference on the part of the courts!

Another instance of similar acquiescence occurred in regard to the Court of Chivalry, which in the reign of Charles I. undertook to assume jurisdiction in the case of words spoken. Thus a citizen was ruinously fined by that court because, in an altercation with an insolent waterman, who wished to impose upon him, he deridingly called the swan on his badge a “goose.” The case was brought within the jurisdiction of the court, by showing that the waterman was an earl’s servant, and that the swan was the earl’s crest, the heavy fine being grounded on the alleged “dishonoring” by the citizen of this nobleman’s crest. A tailor, who had often very submissively asked payment of his bill from a customer of “gentle blood” whose pedigree was duly registered at the herald’s college, on a threat of personal violence for his importunity, was provoked into saying that “he was as good a man as his debtor.” For this offence, which was alleged to be a levelling attack upon the aristocracy, he was summoned before the earl marshal’s court, and mercifully dismissed with a reprimand —*on releasing the debt*!

No aid could be obtained from the common law courts against this scandalous usurpation, by which, without any trial by jury, enormous damages were given.[21] Legal “comity” perhaps prevented any interference. Presently, however, the long Parliament met, and a single resolution of that body stopped forever this usurpation.

But while a scrupulous adherence to technicalities and to legal etiquette prevented the common law courts, on the one hand, from doing justice in private cases, and on the other from guarding the subject against official injuries and usurpations, they showed themselves, as the following biographies will prove, the ready and willing tools on all occasions of every executive usurpation. If the people of Great Britain and America are not at this moment slaves, most certainly, as the following biographies will prove, it is not courts nor lawyers that they have to thank for it.

How essential to liberty is the popular element in the administration of criminal law – how absolutely necessary is the restraint of a jury in criminal cases – was most abundantly proved by the proceedings of the English courts of Star Chamber and High Commission. The Court of Star

[20] Both these courts proceeded according to the forms of the civil law, and without a jury. But occasionally the court of equity directed questions of fact arising before it to be settled by jury trial, and by a statute of Henry VIII. the trial of all maritime felonies before the Admiralty Court was directed to be by jury.

[21] Hyde, (afterwards Lord Clarendon,) himself a lawyer, by whom the usurpations of this court were brought to the notice of Parliament, stated that more damages had been given by the earl marshal in his days, for words of supposed defamation, of which the law took no notice, than by all the courts of Westminster Hall during a whole term.

Chamber, though of very ancient origin, derived its chief importance from statutes of Henry VII. and Henry VIII., by which it was invested with a discretionary authority to fine and imprison in all cases not provided for by existing laws, being thus erected, according to the boasts of Coke and Bacon, into a “court of criminal equity.” The Court of High Commission, whose jurisdiction was mainly limited to clergymen, was created by a statute of Elizabeth as the depository of the ecclesiastical authority as head of the church assumed after the reformation by the English sovereigns. Both these courts consisted of high officers of the crown, including judges and crown lawyers; and though not authorized to touch life or member, they became such instruments of tyranny as to make their abolition one of the first things done after the meeting of the Long Parliament. The only American parallel to these courts is to be found in the authority conferred by the fugitive act of 1850, upon certain commissioners of the Circuit Court of the United States, to seize and deliver over to slavery peaceable residents in their respective states, without a jury, and without appeal.

History is philosophy teaching by example. From what judges have attempted and have done in times past, and in England, we may draw some pretty shrewd conclusions as to what, if unchecked, they may attempt, and may do, in times present, and in America. Nor let any man say that the following pages present a collection of judicial portraits distorted and caricatured to serve an occasion. They have been borrowed, word for word, from the *Lives* of the Chief Justices and of the Chancellors of England, by Lord Campbell, himself a lawyer and a judge, and though a liberal-minded and free-spoken man, by no means without quite a sufficient share of the *esprit du corps* of the profession. Derived from such a source, not only may the facts stated in the following biographies be relied upon, but the expressions of opinion upon points of law are entitled to all the weight of high professional authority.

Nor let it be said that these biographies relate to ancient times, and can have no parallelism, or but little, to the present state of affairs among us here in America. The times which they include are the times of the struggle in Great Britain between the ideas of free government and attempts at the establishment of despotism; and that struggle is precisely the one now going on among us here in America, with this sole difference, that over the water, among our British forefathers, it was the despotism of a monarch that was sought to be established; here in America, the despotism of some two hundred thousand petty tyrants, more or less, in the shape of so many slaveholders, who, not content with lording it over their several plantations, are now attempting, by combination among themselves, and by the aid of a body of northern tools and mercenaries, such as despots always find, to lord it over the Union, and to establish the policy of slaveholding as that of the nation. In Great Britain, the struggle between despotism and free institutions closed with the revolution of 1688, with which these biographies terminate. Since that time the politics of that country have consisted of hardly more than of jostlings between the Ins and the Outs, with no very material variance between them in their social ideas. Among us the great struggle between slaveholding despotism and republican equality has but lately come to a head, and yet remains undetermined. It exhibits, especially in the conduct of the courts and the lawyers, many parallels to the similar struggle formerly carried on in Great Britain. That struggle terminated at last with the deposition and banishment of the Stuart family, and the reëstablishment in full vigor of the ancient liberties of England, as embodied in the Bill of Rights. And so may ours terminate, in the reduction of those who, not content with being brethren seek to be masters, to the republican level of equal and common citizenship, and in the reëstablishment of emancipation, freedom, and the Rights of Man proclaimed in our Declaration of Independence, as the national and eternal policy of these United States!

CHAPTER I.
ROGER LE BRABACON

Roger le Brabacon,[22] from the part he took in settling the disputed claim to the crown of Scotland, is an historical character. His ancestor, celebrated as "the great warrior," had accompanied the Conqueror in the invasion of England, and was chief of one of those bands of mercenary soldiers then well known in Europe under the names (for what reason historians are not agreed) of Routiers, Cottereaux, or *Brabançons*.[23] Being rewarded with large possessions in the counties of Surrey and Leicester, he founded a family which flourished several centuries in England, and is now represented in the male line by an Irish peer, the tenth Earl of Meath. The subject of the present sketch, fifth in descent from "the great warrior," changed the military ardor of his race for a desire to gain distinction as a lawyer. He was regularly trained in all the learning of "Essions" and "Assizes," and he had extensive practice as an advocate under Lord Chief Justice de Hengham. On the sweeping removal of almost all of the judges in the year 1290,[24] he was knighted, and appointed a puisne justice of the King's Bench, with a salary – which one would have thought must have been a very small addition to the profits of his hereditary estates of 33*l.* 6*s.* 8*d.* a year. He proved a most admirable judge;[25] and, in addition to his professional knowledge, being well versed in historical lore, he was frequently referred to by the government when negotiations were going on with foreign states.

Edward I., arbitrator by mutual consent between the aspirants to the crown of Scotland, resolved to set up a claim for himself as liege lord of that kingdom, and Brabacon was employed, by searching ancient records, to find out any plausible grounds on which the claim could be supported. He accordingly travelled diligently both through the Saxon and Norman period, and – by making the most of military advantages obtained by kings of England over kings of Scotland, by misrepresenting the nature of homage which the latter had paid to the former for possessions held by them in England, and by blazoning the acknowledgment of feudal subjection extorted by Henry II. from William the Lion when that prince was in captivity, without mentioning the express renunciation of it by Richard I. – he made out a case which gave high delight to the English court. Edward immediately summoned a Parliament to meet at Norham, on the south bank of the Tweed, marched thither at the head of a considerable military force, and carried Mr. Justice Brabacon along with him as the exponent and defender of his new *suzeraineté*.

---

[22] The name is sometimes spelt Brabaçon, Brabançon, Brabason, and Brabanson.

[23] Hume, who designates them "desperate ruffians," says "troops of them were sometimes enlisted in the service of one prince or baron, sometimes in that of another; they often acted in an independent manner, and under leaders of their own. The greatest monarchs were not ashamed, on occasion, to have recourse to their assistance; and as their habits of war and depredation had given them experience, hardiness, and courage, they generally composed the most formidable part of those armies which decided the political quarrels of princes." – Vol. i. 438. In America we have no mercenary soldiers, but plenty of mercenary politicians, almost as much to be dreaded. —*Ed.*

[24] They were removed because, during the king's absence on the continent, they had been guilty of taking bribes, and other misdemeanors. Of De Wayland, one of their number, and the first chief justice of the Common Pleas, Lord Campbell gives the following account: When arrested, on the king's return from Aquitaine, conscious of his guilt, he contrived to escape from custody, and, disguising himself in the habit of a monk, he was admitted among friars-minors in a convent at Bury St. Edmund's. However, being considered a heinous offender, sharp pursuit was made after him, and he was discovered wearing a cowl and a serge jerkin. According to the law of sanctuary, then prevailing, he was allowed to remain forty days unmolested. At the end of that time the convent was surrounded by a military force, and the entry of provisions into it was prohibited. Still it would have been deemed sacrilegious to take him from his asylum by violence; but the lord chief justice preferred surrendering himself to perishing from want. He was immediately conducted to the Tower of London. Rather than stand a trial, he petitioned for leave to abjure the realm; this favor was granted to him on condition that he should be attainted, and forfeit all his lands and chattels to the crown. Having walked barefoot and bareheaded, with a crucifix in his hand, to the sea side at Dover, he was put on board a ship and departed to foreign parts. He is said to have died in exile, and he left a name often quoted as a reproach to the bench till he was superseded by Jeffreys and Scroggs.

[25] That is, in the ordinary discharge of his duties. His attempt to take away the liberties of the Scotch we shall presently see. —*Ed.*

It is a little curious that one of these competitors for the Scottish throne had lately been an English judge, and a competitor for the very place to which Brabacon, for his services on this occasion, was presently promoted.

From the time of William the Conqueror and Malcolm Canmore, until the desolating wars occasioned by the dispute respecting the right of succession to the Scottish crown, England and Scotland were almost perpetually at peace; and there was a most familiar and friendly intercourse between the two kingdoms, insomuch that nobles often held possession in both, and not unfrequently passed from the service of the one government into that of the other. The Norman knights, having conquered England by the sword, in the course of a few generations got possession of a great part of Scotland by marriage. They were far more refined and accomplished than the Caledonian thanes; and, flocking to the court of the Scottish kings, where they made themselves agreeable by their skill in the tournament, and in singing romances, they softened the hearts and won the hands of all the heiresses. Hence the Scottish nobility are almost all of Norman extraction; and most of the great families in that kingdom are to be traced to the union of a Celtic heiress with a Norman knight. Robert de Brus, or Bruis, (in modern times spelt *Bruce*,) was one of the companions of the Conqueror; and having particularly distinguished himself in the battle of Hastings, his prowess was rewarded with no fewer than ninety-four lordships, of which Skelton, in Yorkshire, was the principal. Robert, the son of the first Robert de Brus, married early, and had a son, Adam, who continued the line of De Brus of Skelton. But becoming a widower while still a young man, to assuage his grief, he paid a visit to Alexander I., then King of Scots, who was keeping his court at Stirling. There the beautiful heiress of the immense lordship of Annandale, one of the most considerable fiefs held of the crown, fell in love with him; and in due time he led her to the altar. A Scottish branch of the family of De Brus was thus founded under the designation of Lords of Annandale. The fourth in succession was "Robert the Noble," and he raised the family to much greater consequence by a royal alliance, for he married Isabel, the second daughter of Prince David, Earl of Huntingdon, grandson of David I., sometimes called St. David.

Robert, son of "Robert the Noble" and the Scottish princess, was born at the Castle of Lochmaben, about the year 1224. The Skelton branch of the family still flourished, although it became extinct in the next generation. At this time a close intercourse was kept up between "Robert the Noble" and his Yorkshire cousins; and he sent his heir to be educated in the south under their auspices. It is supposed that the youth studied at Oxford; but this does not rest on any certain authority. In 1245, his father died, and he succeeded to the lordship of Annandale. One would have expected that he would now have settled on his feudal principality, exercising the rights of *furca et fossa*, or "pit and gallows," which he possessed without any limit over his vassals; but by his English education he had become quite an Englishman, and, paying only very rare visits to Annandale, he sought preferment at the court of Henry III. What surprises us still more is, that he took to the gown, not the sword; and instead of being a great warrior, like his forefathers and his descendants, his ambition seems to have been to acquire the reputation of a great lawyer. There can be little doubt that he practised as an advocate in Westminster Hall from 1245 till 1250. In the latter year we certainly know that he took his seat on the bench as a puisne judge, or justiciar; and, from thence till 1263, extant records prove that payments were made for assizes to be taken before him – that he acted with other justiciars in the levying of fines – and that he went circuits as senior judge of assize. In the 46th year of Henry III. he had a grant of 40*l.* a year salary, which one would have supposed could not have been a great object to the Lord of Annandale. In the barons' wars, he was always true to the king; and although he had no taste for the military art, he accompanied his royal master into the field, and was taken prisoner with him at the battle of Lewes.

The royal authority being reëstablished by the victory at Evesham, he resumed his functions as a puisne judge; and for two years more there are entries proving that he continued to act in that capacity. At last, on the 8th of March, 1268, 52 Henry III., he was appointed "capitalis justiciarius

ad placita coram rege tenenda," (chief justiciary for holding pleas before the king); but unless his fees or presents were very high, he must have found the reward of his labors in his judicial dignity, for his salary was very small. Hugh Bigod and Hugh le Despencer had received 1000 marks a year, "ad se sustentandum in officio capitalis justitiarii Angliæ," (for sustaining themselves in the office of chief justice of England,) but Chief Justice de Brus was reduced to 100 marks a year; that is, 66*l.* 13*s.* 4*d.* Yet such delight did he take in playing the judge, that he quietly submitted both to loss of power and loss of profit.

He remained chief justice till the conclusion of this reign, a period of four years and a half, during which he alternately went circuits and presided in Westminster Hall. None of his decisions have come down to us, and we are very imperfectly informed respecting the nature of the cases which came before him. The boundaries of jurisdiction between the Parliament, the Aula Regis, and the rising tribunal afterwards called the Court of King's Bench, seem to have been then very much undefined.

On the demise of the crown, Robert de Brus was desirous of being reappointed. He was so much mortified by being passed over, that he resolved to renounce England forever; and he would not even wait to pay his duty to Edward I., now returning from the holy wars.

The ex-chief justice posted off for his native country, and established himself in his castle of Lochmaben, where he amused himself by sitting in person in his court baron, and where all that he laid down was, no doubt, heard with reverence, however lightly his law might have been dealt with in Westminster Hall. Occasionally he paid visits to the court of his kinsman, Alexander III., but he does not appear to have taken any part in Scottish politics till the untimely death of that monarch, which, from a state of peace and prosperity, plunged the country into confusion and misery.

There was now only the life of an infant female, residing in a distant land, between him and his plausible claim to the Scottish crown. He was nominated one of the negotiators for settling the marriage between her and the son of Edward I., which, if it had taken place, would have entirely changed the history of the island of Great Britain. From his intimate knowledge both of Scotland and England, it is probable that the "Articles" were chiefly of his framing, and it must be allowed that they are just and equitable. For his own interest, as well as for the independence of his native country, he took care to stipulate that, "failing Margaret and her issue, the kingdom of Scotland should return to the nearest heirs, to whom of right it ought to return, wholly, freely, absolutely, and without any subjection."

The Maid of Norway having died on her voyage home, the ex-chief justice immediately appeared at Perth with a formidable retinue, and was in hopes of being immediately crowned king at Scone; – and he had nearly accomplished his object, for John Baliol, his most formidable competitor in point of right, always feeble and remiss in action, was absent in England. But, from the vain wish to prevent future disputes by a solemn decision of the controversy after all parties should have been heard, the Scotch nobility in an evil hour agreed to refer it, according to the fashion of the age, to the arbitration of a neighboring sovereign, and fixed upon Edward I. of England, their wily neighbor. The Scottish nobles being induced to cross the River Tweed, and to assemble in the presence of Edward, under pretence that he was to act only as arbitrator, Sir Roger de Brabacon by his order addressed them in French, (the language then spoken by the upper classes both in Scotland and England,) disclosing the alarming pretensions about to be set up.

A public notary and witnesses were in attendance, and in their presence the assumed vassals were formally called upon to do homage to Edward as their *suzerain*, of which a record was to be made for a lasting memorial. The Scots saw too late the imprudence of which they had been guilty in choosing such a crafty and powerful arbitrator. For the present they refused the required recognition, saying that "they must have time for deliberation, and to consult the absent members of their different orders." Brabacon, after advising with the king, consented that they should have time until the following day, and no longer. They insisted on further delay, and showed such a determined spirit of resistance, that their request was granted and the first day of June following was fixed for the

ceremony of the recognition. Brabacon allowed them to depart; and a copy of his paper, containing the proofs of the alleged *superiority* and *direct dominion* of the English kings over Scotland, was put into their hands. He then returned to the south, where his presence was required to assist in the administration of justice, leaving the Chancellor Burnel to complete the transaction. Although the body of the Scottish nobles, as well as the body of the Scottish people, would resolutely have withstood the demand, the competitors for the throne, in the hopes of gaining Edward's favor, successively acknowledged him as their liege lord, and their example was followed by almost the whole of those who then constituted the Scottish Parliament.[26]

Bruce afterwards pleaded his own cause with great dexterity, and many supposed that he would succeed. Upon the doctrine of *representation*, which is familiar to us, Baliol seems clearly to have the better claim, as he was descended from the eldest daughter of the Earl of Huntingdon: but Bruce was one degree nearer the common stock; and this doctrine, which was not then firmly established, had never been applied to the descent of the crown.

When Edward I. determined in favor of Baliol, influenced probably less by the arguments in his favor than by the consideration that from the weakness of his character he was likely to be a more submissive vassal, Robert de Brus complained bitterly that he was wronged, and resolutely refused to acknowledge the title of his rival. He retired in disgust to his castle of Lochmaben, where he died in November, 1295. While resident in England, he had married Isabel, daughter of Gilbert de Clare, Earl of Gloucester, by whom he had several sons. Robert, the son of Robert the eldest, became Robert I. of Scotland, and one of the greatest of heroes.

When judgment had been given in favor of Baliol, Brabacon was still employed to assist in the plan which had been formed to bring Scotland into entire subjection. There being a meeting at Newcastle of the nobles of the two nations, when the feudatory king did homage to his liege lord, complaint was made by Roger Bartholomew, a burgess of Berwick, that certain English judges had been deputed to exercise jurisdiction on the north bank of the Tweed. Edward referred the matter to Brabacon and other commissioners, commanding them to do justice according to the laws and customs of his kingdom. A petition was then presented to them on behalf of the King of Scotland, setting forth Edward's promise to observe the laws and customs of that kingdom, and that pleas of things done there should not be drawn to examination elsewhere. Brabacon is reported thus to have answered: —

"This petition is unnecessary, and not to the purpose; for it is manifest, and ought to be admitted by all the prelates and barons, and commonalty of Scotland, that the king, our master, has performed all his promises to them. As to the conduct of his judges, lately deputed by him as SUPERIOR and DIRECT LORD of that kingdom, they only represent his person; he will take care that they do not transgress his authority, and on appeal to him he will see that right is done. If the king had made any temporary promises when the Scottish throne was vacant, in derogation of his just *suzerainеté*, by such promises he would not have been restrained or bound."[27]

Encouraged by this language, Macduff, the Earl of Fife, entered an appeal in the English House of Lords against the King of Scotland; and, on the advice of Brabacon and the other judges, it was resolved that the respondent must stand at the bar as a vassal, and that, for his contumacy, three of his principal castles should be seized into the king's hands.

Although historians who mention these events designate Brabacon as "grand justiciary," it is quite certain that, as yet, he was merely a puisne judge; but there was a strong desire to *reward* him

[26] Just like our northern candidates for the presidency, and the dough-face politicians who contrive to get chosen to Congress by northern constituencies, whose rights they then barter away and betray. —*Ed.*

[27] This is the very ground upon which it is attempted, now, to justify the repeal of the Missouri prohibition of slavery, while Brabacon's defence of English judges in Scotland is a counterpart to the justification by our federal judges of the authority given to slave-catching commissioners. —*Ed.*

for his services, and, at last, an opportune vacancy arising, he was created chief justice of the King's Bench.

Of his performances in this capacity we know nothing, except by the general commendation of chroniclers; for the Year Books, giving a regular account of judicial decisions, do not begin till the following reign.

On the accession of Edward II., Brabacon was reappointed chief justice of the King's Bench, and he continued very creditably to fill the office for eight years longer. He was fated to deplore the fruitless result of all his efforts to reduce Scotland to the English yoke Robert Bruce being now the independent sovereign of that kingdom, after humbling the pride of English chivalry in the battle of Bannockburn.[28]

At last, the infirmities of age unfitting Brabacon for the discharge of judicial duties, he resigned his gown; but, to do him honor, he was sworn a member of the Privy Council, and he continued to be treated with the highest respect till his death, which happened about two years afterwards.

[28] May the pending attempts of the Southern States, countenanced and supported by the federal judges, to establish a "superiority" and "direct dominion" over the north, be met and repelled with similar spirit and success! —*Ed.*

CHAPTER II.
ROBERT TRESILIAN

We next come to a chief justice who actually suffered the last penalty of the law – and deservedly – in the regular administration of retributive justice – Sir Robert Tresilian – hanged at Tyburn.

I can find nothing respecting his origin or education, except a doubtful statement that he was of a Cornish family, and that he was elected a fellow of Exeter College, Oxford, in 1354. The earliest authentic notice of him is at the commencement of the reign of Richard II., when he was made a serjeant at law, and appointed a puisne judge of the Court of King's Bench. The probability is, that he had raised himself from obscurity by a mixture of good and evil arts. He showed learning and diligence in the discharge of his judicial duties; but, instead of confining himself to them, he mixed deeply in politics, and showed a determination, by intrigue, to reach power and distinction. He devoted himself to De Vere, the favorite of the young king, who, to the great annoyance of the princes of the blood, and the body of the nobility, was created Duke of Ireland, was vested for life with the sovereignty of that island, and had the distribution of all patronage at home. By the influence of this minion, Tresilian, soon after the melancholy end of Sir John Cavendish,[29] was appointed chief justice of the King's Bench; and he was sent into Essex to try the rebels. The king accompanied him. It is said that, as they were journeying, "the Essex men, in a body of about 500, addressed themselves barefoot to the king for mercy, and had it granted upon condition that they should deliver up to justice the chief instruments of stirring up the rebellion; which being accordingly done, they were immediately tried and hanged, ten or twelve on a beam, at Chelmsford, because they were too many to be executed after the usual manner, which was by beheading."

Tresilian now gained the good graces of Michael de la Pole, the lord chancellor, and was one of the principal advisers of the measures of the government, being ever ready for any dirty work that might be assigned to him. In the year 1385, it was hoped that he might have got rid, by an illegal sentence, of John of Gaunt, who had become very obnoxious to the king's favorites. But the plot got wind, and the Duke, flying to Pontefract Castle, fortified himself there till his retainers came to his rescue.

In the following year, when there was a change of ministry, Tresilian was in great danger of being included in the impeachment which proved the ruin of the chancellor; but he escaped by an intrigue with the victorious party, and he was suspected of having secretly suggested the commission signed by Richard, and confirmed by Parliament, under which the whole power of the state was transferred to a commission of fourteen barons. He remained very quiet for a twelvemonth, till he thought that he perceived the new ministers falling into unpopularity, and he then advised that a bold effort should be made to crush them. Meeting with encouragement, he secretly left London, and, being joined by the Duke of Ireland, went to the king, who was at Nottingham, in a progress through the midland counties. He then undertook, through the instrumentality of his brother judges, to break the commission, and to restore the king and the favorite to the authority of which it had deprived them. His plan was immediately adopted, and the judges, who had just returned from the summer assizes, were all summoned in the king's name to Nottingham.

On their arrival, they found not only a string of questions, but answers, prepared by Tresilian. These he himself had signed, and he required them to sign. Belknappe, the chief justice of the Common Pleas, and the others, demurred, seeing the peril to which they might be exposed; but, by

[29] He had been murdered by a body of insurgent peasants headed by Jack Straw, one of the leaders in Wat Tyler's insurrection. —*Ed.*

promises and threats, they were induced to acquiesce. The following record was accordingly drawn up, that copies of it might be distributed all over England: —

"Be it remembered, that on the 25th of Aug., in the 11th year of the reign of K. Rich. II., at the castle of Nottingham, before our said lord the king, Rob. Tresilian, chief justice of England, and Robt. Belknappe, chief justice of the common bench of our said lord the king, John Holt, Roger Fulthorp, and Wm. de Burg, knights, justices, &c., and John de Lokton, the king's serjeant-at-law, in the presence of the lords and other witnesses under-written, were personally required by said lord the king, on the faith and allegiance wherein to him the said king they are bound, to answer faithfully unto certain questions hereunder specified, and to them then and there truly recited, and upon the same to declare the law according to their discretion, viz.: —

"1. It was demanded of them, 'Whether that new statute, ordinance, and commission, made and published in the last parl. held at Westm., be not derogatory to the loyalty and prerogative of our said lord the king?' To which they unanimously answered that the same are derogatory thereunto, especially because they were against his will.

"2. 'How those are to be punished who procured that statute and commission?' —*A.* That they were to be punished with death, except the king would pardon them.

"3. 'How those are to be punished who moved the king to consent to the making of the said statute?' —*A.* That they ought to lose their lives unless his Maj. would pardon them.

"4. 'What punishment they deserved who compelled, straightened, or necessitated the king to consent to the making of the said statute and commission?' —*A.* That they ought to suffer as traitors.

"5. 'How those are to be punished who hindered the king from exercising those things which appertain to his royalty and prerogative?' —*A.* That they are to be punished as traitors.

"6. 'Whether after in parl. assembled, the affairs of the kingdom, and the cause of calling that parl. are by the king's command declared, and certain articles limited by the king upon which the lords and commons in that parl. ought to proceed; if yet the said lords and commons will proceed altogether upon other articles and affairs, and not at all upon those limited and proposed to them by the king, until the king shall have first answered them upon the articles and matters so by them started and expressed, although the king's command be to the contrary; whether in such case the king ought not to have the governance of the parl. and effectually overrule them, so as that they ought to proceed first on the matters proposed by the king: or whether, on the contrary, the lords and commons ought first to have the king's answer upon their proposals before they proceeded further?' —*A.* That the king in that behalf has the governance, and may appoint what shall be first handled, and so gradually what next in all matters to be treated of in parl., even to the end of the parl.; and if any act contrary to the king's pleasure made known therein, they are to be punished as traitors.

"7. 'Whether the king, whenever he pleases, can dissolve the parl., and command the lords and commons to depart from thence, or not?' —*A.* That he can; and if any one shall then proceed in parl. against the king's will, he is to be punished as a traitor.

"8. 'Since the king can, whenever he pleases, remove any of his judges and officers, and justify or punish them for their offences; whether the lords and commons can, without the will of the king, impeach in parl. any of the said judges or officers for any of their offences?' —*A.* That they cannot; and if any one should do so he is to be punished as a traitor.[30]

"9. 'How he is to be punished who moved in parl. that the statute should be sent for whereby Edw. II. (the king's great grandfather) was proceeded against and deposed in parl.; by means of sending for and imposing which statute, the said late statute, ordinance, and commission, were devised and brought forth in parl.?' —*A.* That as well he that so moved, as he who by pretence of that motion carried the said statute to the parl., are traitors and criminals, to be punished with death.

[30] Some of our federal judges would no doubt like very much to see this rule established among us. —*Ed.*

"10. 'Whether the judgment given in the last parl. held at Westm. against Mich. de la Pole, Earl of Suffolk, was erroneous and revocable, or not?' —*A.* That if that judgment were now to be given, they would not give it; because it seems to them that the said judgment is revocable, as being erroneous in every part of it.

"In testimony of all which, the judges and serjeants aforesaid, to these presents have put their seals in the presence of the rev. lords, Alex. abp. of York, Rob. abp. of Dublin, John bp. of Durham, Tho. bp. of Chichester, and John bp. of Bangor, Rob. duke of Ireland, Mich. earl of Suffolk, John Rypon, clerk, and John Blake, esq.; given the place, day, month, and year aforesaid."

Tresilian exultingly thought that he had not only got rid of the obnoxious commission, but that he had annihilated the power of Parliament by the destruction of parliamentary privilege, and by making the proceedings of the two houses entirely dependent on the caprice of the sovereign.

He then attended Richard to London, where the opinion of the judges against the legality of the commission was proclaimed to the citizens at the Guildhall; and all who should act under it were declared traitors. A resolution was formed to arrest the most obnoxious of the opposite faction, and to send them to take their trials before the judges who had already committed themselves on the question of law; and, under the guidance of Tresilian, a bill of indictment was actually prepared against them for a conspiracy to destroy the royal prerogative. Thomas Ush, the under sheriff, promised to pack a jury to convict them; Sir Nicholas Brambre, who had been thrice lord mayor, undertook to secure the fidelity of the citizens; and all the city companies swore that they would live and die with the king, and fight against his enemies to their last breath. Arundel, Bishop of Ely, was still chancellor; but Tresilian considered that the great seal was now within his own grasp, and, after the recent examples of chief justices becoming chancellors, he anticipated no obstacle to his elevation.

At such a slow pace did news travel in those days, that, on the night of the 10th of November, Richard and his chief justice went to bed thinking that their enemies were annihilated, and next morning they were awoke by the intelligence that a large force, under the Duke of Gloucester and the Earls of Arundel and Nottingham, was encamped at Highgate. The confederate lords, hearing of the proceedings at Nottingham, had immediately rushed to arms, and followed Richard towards London, with an army of 40,000 men. The walls of London were sufficient to repel a sudden assault; and a royal proclamation forbade the sale of provisions to the rebels, in the hope that famine might disperse them. But, marching round by Hackney, they approached Aldgate, and they appeared so formidable, that a treaty was entered into, according to which they were to be supplied with all necessaries, on payment of a just price, and deputies from them were to have safe conduct through the city on their way to the king at Westminster. Richard himself agreed that on the following Sunday he would receive the deputies, sitting on his throne in Westminster Hall.

At the appointed hour he was ready to receive them, but they did not arrive, and he asked "how it fortuned that they kept not their promise." Being answered, "Because there is an ambush of a thousand armed men or more in a place called the Mews, contrary to covenant; and therefore they neither come, nor hold you faithful to your word," – he said, with an oath, that "he knew of no such thing," and he ordered the sheriffs of London to go thither and kill all they could lay hands on. The truth was, that Sir Nicholas Brambre, in concert with Tresilian, had planted an ambush near Charing Cross, to assassinate the lords as they passed; but, in obedience to the king's order, the men were sent back to the city of London. The lords at last reached Westminster, with a gallant troop of gentlemen; and as soon as they had entered the great hall, and saw the king in his royal robes sitting on the throne, with the crown on his head and the sceptre in his hand, they made obeisance three times as they advanced, and when they reached the steps of the throne they knelt down before him with all seeming humility. He, feigning to be pleased to see them, rose and took each of them by the hand, and said "he would hear their plaint, as he was desirous to render justice to all his subjects." Thereupon they said, "Most dread sovereign, we appeal of high treason Robert Tresilian, that false justice; Nicholas Brambre, that disloyal knight; the Archbishop of York; the Duke of Ireland; and the Earl of Suffolk;"

– and, to prove their accusation to be true, they threw down their gauntlets, protesting by their oaths that they were ready to prosecute it to battle. “Nay,” said the king, “not so; but in the next Parliament (which we do appoint beforehand to begin the morrow after the Purification of our Lady,) both they and you, appearing, shall receive according to law what law doth require, and right shall be done.”

It being apparent that the confederate lords had a complete ascendency, the accused parties fled. The Duke of Ireland and Sir Nicholas Brambre made an ineffectual attempt to rally a military force; but Chief Justice Tresilian disguised himself, and remained in concealment till he was discovered, after being attainted, in the manner to be hereafter described.

The election for the new Parliament ran strongly in favor of the confederate lords; and, on the day appointed for its meeting, an order was issued under their sanction for taking into custody all the judges who had signed the opinion at Nottingham. They were all arrested while they were sitting on the bench, except Chief Justice Tresilian; but he was nowhere to be found.

When the members of both houses had assembled at Westminster Hall, and the king had taken his place on the throne, the five lords, who were called Appellants, “entered in costly robes, leading one another hand in hand, an innumerable company following them, and, approaching the king, they all with submissive gestures reverenced him. Then rising, they declared their appellation by the mouth of their speaker, who said, ‘Behold the Duke of Gloucester comes to purge himself of treasons which are laid to his charge by the conspirators.’ To whom the lord chancellor, by the king’s command, answered, ‘My lord duke, the king conceiveth so honorably of you, that he cannot be induced to believe that you, who are of kindred to him, should attempt any treason against him.’ The duke, with his four companions on their knees, humbly gave thanks to the king for his gracious opinion of their fidelity. And now, as a prelude to what was going to be acted, each of the prelates, lords and commons then assembled, had the following oath administered to them upon the rood or cross of Canterbury, in full Parliament: ‘You shall swear that you will keep, and cause to be kept, the good peace, quiet, and tranquillity of the kingdom; and if any will do to the contrary thereof, you shall oppose and disturb him to the utmost of your power; and if any will do any thing against the bodies of the five lords, you shall stand with them to the end of this present Parliament, and maintain and support them with all your power, to live and die with them against all men, no person or thing excepted, saving always your legiance to the king and the prerogatives of his crown, according to the laws and good customs of the realm.’”

Written articles to the number of thirty-nine were then exhibited by the appellants against the appellees. The other four are alleged to have committed the various acts of treason charged upon them “by the assent and counsel of Robert Tresilian, that false justice;” and in most of the articles he bears the brunt of the accusation. Sir Nicholas Brambre alone was in custody; and the others not appearing when solemnly called, their default was recorded, and the lords took time to consider whether the impeachment was duly instituted, and whether the facts stated in the articles amounted to high treason. Ten days thereafter, judgment was given “that the impeachment was duly instituted, and that the facts stated in several of the articles amounted to high treason.” Thereupon, the prelates having withdrawn, that they might not mix in an affair of blood, sentence was pronounced, “that Sir Robert Tresilian, the Duke of Ireland, the Archbishop of York, and Earl of Suffolk, should be drawn and hanged as traitors and enemies to the king and kingdom, and that their heirs should be disinherited forever, and that their lands and tenements, goods and chattels, should be forfeited to the king.”

Tresilian might have avoided the execution of his sentence, had it not been for the strangest infatuation related of any human being possessing the use of reason. Instead of flying to a distance, like the duke, the archbishop, and the earl, none of whom suffered, although his features were necessarily well known, he had come to the neighborhood of Westminster Hall on the first day of the session of Parliament; and, even after his own attainder had been published, trusting to his disguise, his curiosity induced him to remain to watch the fate of his associate, Sir Nicholas Brambre.

This chivalrous citizen, who had been knighted for the bravery he had displayed in assisting Sir William Walwort to kill Wat Tyler and to put down the rebellion, having been apprehended and lodged in the Tower of London, was now produced by the constable of the Tower, to take his trial. He asked for further time to advise with his counsel, but was ordered forthwith to answer to every point in the articles of treason contained. Thereupon he exclaimed, "Whoever hath branded me with this ignominious mark, with him I am ready to fight in the lists to maintain my innocency whenever the king shall appoint!" "This," says a chronicler, "he spake with such a fury, that his eyes sparkled with rage, and he breathed as if an Etna lay hid in his breast; choosing rather to die gloriously in the field, than disgracefully on a gibbet."

The appellants said "they would readily accept of the combat," and flinging down their gages before the king, added, "We will prove these articles to be true to thy head, most damnable traitor!" But the lords resolved "that battle did not lie in this case; and that they would examine the articles with the proofs to support them, and consider what judgment to give, to the advantage and profit of the king and kingdom, and as they would answer before God."

They adjourned for two days, and met again, when a number of London citizens appeared to give evidence against Brambre. For the benefit of the reader, the chronicler I have before quoted shall continue the story: —

"Before they could proceed with his trial, they were interrupted by unfortunate Tresilian, who, being got upon the top of an apothecary's house adjoining to the palace, and descended into the gutter to look about him and observe who went into the palace, was discovered by certain of the peers, who presently sent some of the guard to apprehend him; who entering into the house where he was, and having spent long time in vain in looking for him, at length one of the guard stepped to the master of the house, and taking him by the shoulder, with his dagger drawn, said thus: 'Show us where thou hast hid Tresilian, or else resolve thy days as accomplished.' The master, trembling, and ready to yield up the ghost for fear, answered, 'Yonder is the place where he lies;' and showed him a round table covered with branches of bays, under which Tresilian lay close covered. When they had found him they drew him out by the heels, wondering to see him wear his hair and beard overgrown, with old clouted shoes and patched hose, more like a miserable poor beggar than a judge. When this came to the ears of the peers, the five appellants suddenly rose up, and, going to the gate of the hall, they met the guard leading Tresilian, bound, crying, as they came, 'We have him, we have him.' Tresilian, being come into the hall, was asked 'what he could say for himself why execution should not be done according to the judgment passed upon him for his treasons so often committed;' but he became as one struck dumb; he had nothing to say, and his heart was hardened to the very last, so that he would not confess himself guilty of any thing. Whereupon he was without delay led to the Tower, that he might suffer the sentence passed against him. His wife and his children did with many tears accompany him to the Tower; but his wife was so overcome with grief, that she fell down in a swoon as if she had been dead. Immediately Tresilian is put upon an hurdle, and drawn through the streets of the city, with a wonderful concourse of people following him. At every furlong's end he was suffered to stop, that he might rest himself, and to see if he would confess or acknowledge any thing; but what he said to the friar, his confessor, is not known. When he came to the place of execution he would not climb the ladder, until such time as being soundly beaten with bats and staves he was forced to go up; and when he was up, he said, 'So long as I do wear any thing upon me, I shall not die;' wherefore the executioner stript him, and found certain images painted like to the signs of the heavens, and the head of a devil painted, and the names of many of the devils wrote in parchment; these being taken away he was hanged up naked, and after he had hanged some time, that the spectators should be sure he was dead, they cut his throat, and because the night approached they let him hang till the next morning, and then his wife, having obtained a licence of the king, took down his body, and carried it to the Gray-Friars, where it was buried."

Considering the violence of the times, Tresilian's conviction and execution cannot be regarded as raising a strong presumption against him; but there seems little doubt that he flattered the vices of the unhappy Richard; and historians agree that, in prosecuting his personal aggrandizement, he was utterly regardless of law and liberty. He died unpitied, and, notwithstanding the "historical doubts" by which we are beset, no one has yet appeared to vindicate his memory.

CHAPTER III.
THOMAS BILLING

The crown of England, transferred on the deposition of Richard II.[31] in 1399 to the Lancaster family in the person of Henry IV., was worn successively by him and by his son and grandson, Henry V. and Henry VI. After the lapse, however, of sixty-two years, the imbecility of Henry VI. enabled the Legitimist or Yorkist party to triumph by placing Edward IV. on the throne.

At this time Sir John Fortescue, an able man and distinguished by his treatise *De Laudibus Legion Angliæ*, (Praises of the Laws of England,) was chief justice of the King's Bench; but being an ardent Lancastrian, and having written pamphlets to prove that Richard II. was rightly deposed, that Henry IV. had been called to the throne by the estates of the kingdom and the almost unanimous voice of the people, and that now, in the third generation, the title of the House of Lancaster could not be questioned, he was by no means the man to suit the new dynasty. He was removed to make way for Sir John Markham, who had been for nineteen years a puisne judge of the same court, and who, though he had not ventured to publish any thing on the subject, yet in private conversation and in "moots" at the Temple, such as that in which the white and red roses were chosen as the emblems of the opposite opinions, did not hesitate to argue for indefeasible hereditary right, which no length of possession could supersede, and to contend that the true heir of the crown of England was Richard, Duke of York, descended from the second son of Edward III. His sentiments were well known to the Yorkist leaders, and they availed themselves of the legal reasoning and the historical illustrations with which he furnished them; but he never sallied forth into the field, even when, after the death of Richard, the gallant youth his eldest son displayed the high qualities which so wonderfully excited the energy of his partisans. However, when Henry VI. was confined as a prisoner in the Tower, and Fortescue and all the Lancastrian leaders had fled, Markham was very naturally and laudably selected for the important office of chief justice of the King's Bench. Although he was such a strong Legitimist, he was known not only to be an excellent lawyer, but a man of honorable and independent principles. The appointment, therefore, gave high satisfaction, and was considered a good omen of the new *régime*.

He held the office above seven years, with unabated credit. Not only was his hand free from bribes, but so was his mind from every improper bias. It was allowed that when sitting on the bench, no one could have discovered whether he was Yorkist or Lancastrian; the adherents of the reigning dynasty complaining (I dare say very unjustly) that, to obtain a character for impartiality, he showed a leaning on the Lancastrian side.[32]

At last, though he cherished his notions of hereditary right with unabating constancy, he forfeited his office because he would not prostitute it to the purpose of the king and the ministers in wreaking their vengeance on the head of a political opponent. Sir Thomas Cooke, who inclined to the Lancastrians, though he had conducted himself with great caution, was accused of treason and committed to the Tower. To try him a special commission was issued, over which Lord Chief

---

[31] The persistence of Richard II. in the same arbitrary principles of which the advocacy cost Tresilian his life, caused his deposition a few years afterwards, as to which, Lord Campbell observes, —"While we honor Lord Somers and the patriots who took the most active part in the revolution of 1688, by which a king was cashiered, hereditary right was disregarded, and a new dynasty was placed on the throne, we are apt to consider the kings of the house of Lancaster as usurpers, and those who sided with them as rebels. Yet there is great difficulty in justifying the deposition of James II., and condemning the deposition of Richard II. The latter sovereign, during a reign of above twenty years, had proved himself utterly unfit to govern the nation, and, after repeated attempts to control him, and promises on his part to submit to constitutional advice, he was still under the influence of worthless favorites, and was guilty of continued acts of tyranny and oppression; so that the nation, which, with singular patience, had often forgiven his misconduct from respect to the memory of his father and his grandfather, was now almost unanimously resolved to submit no longer to his rule."

[32] Fuller, in praising Fortescue and Markham, says, "These I may call two chief justices of the chief justices, for their signal integrity; for though the one of them favored the house of Lancaster, and the other of York, in the titles to the crown, both of them favored the house of Justice in matters betwixt party and party."

Justice Markham presided, and the government was eager for a conviction. But all that could be proved against the prisoner was, that he entered into a treaty to lend, on good security, a sum of 1000 marks for the use of Margaret, the queen of the dethroned Henry VI. The security was not satisfactory, and the money was not advanced. The chief justice ruled that this did not amount to treason, but was at most misprision of treason. Of this last offence the prisoner being found guilty, he was subjected to fine and imprisonment; but he saved his life and his lands. King Edward IV. was in a fury, and swearing that Markham, notwithstanding his high pretensions to loyalty, was himself little better than a traitor, ordered that he should never sit on the bench any more; and appointed in his place a successor, who, being a *puisne*, had wished to trip up the heels of his chief, and had circulated a statement, to reach the king's ear, that Sir Thomas Cooke's offence was a clear, overt act of high treason. Markham bore his fall with much dignity and propriety – in no respect changing his principles or favoring the movement which for a season restored Henry VI. to the throne after he had been ten years a prisoner in the Tower.

Upon the dismissal of Sir John Markham, Edward IV., who no longer showed the generous spirit which had illustrated his signal bravery while he was fighting for the crown, and now abandoned himself by turns to voluptuousness and cruelty, tried to discover the fittest instrument that could be found for gratifying his resentments by a perversion of the forms of law, and with felicity fixed upon Sir Thomas Billing, who, by all sorts of meannesses, frauds, and atrocities, aided by natural shrewdness, or rather low cunning, had contrived to raise himself from deep obscurity to a puisne judge of the King's Bench; and in that situation had shown himself ready to obey every mandate, and to pander to every caprice of those who could give him still higher elevation. This is one of the earliest of the long list of politico-legal adventurers who have attained to eminence by a moderate share of learning and talent, and an utter want of principle and regard for consistency.[33]

His family and the place of his education are unknown. He was supposed to have been the clerk of an attorney; thus making himself well acquainted with the rules of practice and the less reputable parts of the law. However, he contrived (which must have been a difficult matter in those days, when almost all who were admitted at the inns of court were young men of good birth and breeding) to keep his terms and to be called to the bar. He had considerable business, although not of the most creditable description, and in due time he took the degree of the coif, that is, became a serjeant.

His ambition grew with his success, and nothing would satisfy him but official preferment. Now began the grand controversy respecting the succession to the crown; and the claim to it through the house of Mortimer, which had long been a mere matter of speculation, was brought into formidable activity in the person of Richard, Duke of York. Billing, thinking that a possession of above half a century must render the Lancastrian cause triumphant, notwithstanding the imbecility of the reigning sovereign, was outrageously loyal. He derided all objections to a title which the nation had so often solemnly recognized; enlarging on the prudence of Henry IV., the gallantry of Henry V., and the piety of the holy Henry VI., under whose mild sway the country now flourished, happily rid of all its continental dependencies. He even imitated the example of Sir John Fortescue, and published a treatise upon the subject, which he concluded with an exhortation "that all who dared, by act, writing, or speech, to call in question the power of Parliament to accept the resignation of Richard II., or to depose him for the crimes he had committed, and to call to the throne the member of the royal family most worthy to fill it, according to the fashion of our Saxon ancestors, should be proceeded against as traitors." This so pleased Waynflete, the chancellor, and the other Lancastrian leaders, that Billing was thereupon made king's serjeant, and knighted.

When the right to the crown was argued, like a peerage case, at the bar of the House of Lords, Billing appeared as counsel for Henry VI., leading the attorney and solicitor general; but it was

[33] A list by no means limited to England, but very much lengthened out in America. —*Ed.*

remarked that his fire had slackened much, and he was very complimentary to the Duke of York, who, since the battle of Northampton, had been virtually master of the kingdom.

We know nothing more of the proceedings of this unprincipled adventurer until after the fall of Duke Richard, when the second battle of St. Alban's had placed his eldest son on the throne. Instantly Sir Thomas Billing sent in his adhesion; and such zeal did he express in favor of the new dynasty that his patent of king's serjeant was renewed, and he became principal law adviser to Edward IV. When Parliament assembled, receiving a writ of summons to the House of Lords, he assisted in framing the acts by which Sir J. Fortescue and the principal Lancastrians, his patrons, were attainted, and the last three reigns were pronounced tyrannical usurpations. He likewise took an active part in the measures by which the persevering efforts of Queen Margaret to regain her ascendency were disconcerted, and Henry VI. was lodged a close prisoner in the Tower of London.

Sir John Markham, the honorable and consistent Yorkist, now at the head of the administration of the criminal law, was by no means so vigorous in convicting Lancastrians, or persons suspected of Lancastrianism, as Edward and his military adherents wished; and when state prosecutions failed, there were strong murmurs against him. In these Mr. Serjeant Billing joined, suggesting how much better it would be for the public tranquillity if the law were properly enforced. It would have appeared very ungracious, as well as arbitrary, to displace the chief justice, who had been such a friend to the house of York, and was so generally respected. That there might be one judge to be relied upon, who might be put into commissions of oyer and terminer, Billing was made a puisne justice of the Court of King's Bench. He was not satisfied with this elevation, which little improved his position in the profession; but he hoped speedily to be on the woolsack, and he was resolved that mere scruples of conscience should not hold him back.

Being thus intrusted with the sword of justice, he soon fleshed it in the unfortunate Walter Walker, indicted before him on the statute 25 Edward III., for compassing and imagining the death of the king. The prisoner kept an inn called the Crown, in Cheapside, in the city of London, and was obnoxious to the government because a club of young men met there who were suspected to be Lancastrians, and to be plotting the restoration of the imprisoned king. But there was no witness to speak to any such treasonable consult; and the only evidence to support the charge was, that the prisoner had once, in a merry mood, said to his son, then a boy, "Tom, if thou behavest thyself well, I will make thee heir to the Crown."

Counsel were not allowed to plead in such cases then, or for more than three centuries after; but the poor publican himself urged that he never had formed any evil intention upon the king's life, – that he had ever peaceably submitted to the ruling powers, – and that though he could not deny the words imputed to him, they were only spoken to amuse his little boy, meaning that he should succeed him as master of the Crown Tavern, in Cheapside, and, like him, employ himself in selling sack.

Mr. Justice Billing, however, ruled —

"That upon the just construction of the statute of treasons, which was only declaratory of the common law, there was no necessity, in supporting such a charge, to prove a design to take away the natural life of the king; that any thing showing a disposition to touch his royal state and dignity was sufficient; and that the words proved were inconsistent with that reverence for the hereditary descent of the crown which was due from every subject under the oath of allegiance; therefore, if the jury believed the witness, about which there could be no doubt, as the prisoner did not venture to deny the treasonable language which he had used, they were bound to find him guilty."

A verdict of guilty was accordingly returned, and the poor publican was hanged, drawn, and quartered.[34]

Mr. Justice Billing is said to have made the criminal law thus bend to the wishes of the king and the ministers in other cases, the particulars of which have not been transmitted to us; and he

[34] Some of our American advocates of constructive treasons have laid down the law much in the same spirit. —*Ed.*

became a special favorite at court, all his former extravagances about cashiering kings and electing others in their stead being forgotten, in consideration of the zeal he displayed since his conversion to the doctrine of "divine right."

Therefore, when the chief justice had allowed Sir Thomas Cooke to escape the penalties of treason, after his forfeitures had been looked to with eagerness on account of the great wealth he had accumulated, there was a general cry in the palace at Westminster that he ought not to be permitted longer to mislead juries, and that Mr. Justice Billing, of such approved loyalty and firmness, should be appointed to succeed him, rather than the attorney or solicitor general, who, getting on the bench, might, like him, follow popular courses.

Accordingly, a *supersedeas* to Sir John Markham was made out immediately after the trial of *Rex* v. *Cooke*, and the same day a writ passed the great seal, whereby "the king's trusty and well-beloved Sir Thomas Billing, Knight, was assigned as chief justice to hold pleas before the king himself."

The very next term came on the trial of Sir Thomas Burdett. This descendant of one of the companions of William the Conqueror, and ancestor of the late Sir Francis Burdett, lived at Arrow, in Warwickshire, where he had large possessions. He had been a Yorkist, but somehow was out of favor at court; and the king, making a progress in those parts, had rather wantonly entered his park, and hunted and killed a white buck, of which he was peculiarly fond. When the fiery knight, who had been from home, heard of this affair, which he construed into a premeditated insult, he exclaimed, "I wish that the buck, horns and all, were in the belly of the man who advised the king to kill it;" or, as some reported, "were in the king's own belly." The opportunity was thought favorable for being revenged on an obnoxious person. Accordingly he was arrested, brought to London, and tried at the King's Bench bar on a charge of treason, for having compassed and imagined the death and destruction of "our lord the king."

The prisoner proved, by most respectable witnesses, that the wish he had rashly expressed was applied only to the man who advised the king to kill the deer, and contended that words did not amount to treason, and that – although, on provocation, he had uttered an irreverent expression, which he deeply regretted – instead of having any design upon the king's life, he was ready to fight for his right to the crown, as he had done before; and that he would willingly die in his defence.

"Lord Chief Justice Billing left it to the jury to consider what the words were; for if the prisoner had only expressed a wish that the buck and his horns were in the belly of the man who advised the king to kill the buck, it would not be a case of treason, and the jury would be bound to acquit; but the story as told by the witnesses for the crown was much more probable, for sovereigns were not usually advised on such affairs, and it had been shown that on this occasion the king had acted entirely of his own head, without any advisers, as the prisoner, when he uttered the treasonable words, must have well known: then, if the words really were as alleged by the witnesses for the crown, they clearly did show a treasonable purpose. Words merely expressing an opinion, however erroneous the opinion, might not amount to treason; but when the words refer to a purpose, and incite to an act, they might come within the statute. Here the king's death had certainly been in the contemplation of the prisoner; in wishing a violence to be done which must inevitably have caused his death, he imagined and compassed it. This was, in truth, advising, counselling, and commanding others to take away the sacred life of his majesty. If the wicked deed had been done, would not the prisoner, in case the object of his vengeance had been a subject, have been an accessory before the fact?[35] But in treason accessories before the fact were principals, and the prisoner was not at liberty to plead that what

[35] It was, we may suppose, from this charge that Mr. Justice Curtis, of the Supreme Court of the United States, got the law retailed in his charge to the grand jury of the Massachusetts District, in consequence of which indictments were found against Wendell Phillips and Theodore Parker for obstructing the execution of the fugitive slave act – on the ground that certain speeches of theirs in Faneuil Hall against that statute "referred to a purpose" and "incited to an act" of resistance to it, thereby making their expression of opinion criminal. —*Ed.*

he had planned had not been accomplished. Therefore, if the jury believed that he had uttered the treasonable wish directed against his majesty's own sacred person, they were bound to convict him."

The jury immediately returned a verdict of guilty; and the frightful sentence in high treason, being pronounced, was carried into execution with all its horrors. This barbarity made a deep impression on the public mind, and, to aggravate the misconduct of the judge, a rumor was propagated that the late virtuous chief justice had been displaced because he had refused to concur in it.

Lord Chief Justice Billing, having justified his promotion by the renegade zeal he displayed for his new friends, and enmity to his old associates, was suddenly thrown into the greatest perplexity, and he must have regretted that he had ever left the Lancastrians. One of the most extraordinary revolutions in history, – when a long continuance of public tranquillity was looked for, – without a battle, drove Edward IV. into exile, and replaced Henry VI. on the throne, after he had languished ten years as a captive in the Tower of London.

There is no authentic account of Billing's deportment in this crisis, and we can only conjecture the cunning means he would resort to, and the pretences he would set up, to keep his place and to escape punishment. Certain it is, that within a few days from the time when Henry went in procession from his prison in the Tower to his palace at Westminster, with the crown on his head, while almost all other functionaries of the late government had fled, or were shut up in jail, a writ passed the great seal, bearing date the 49th year of his reign, by which he assigned "his trusty and well-beloved Sir John Billing, Knight, as his chief justice to hold pleas in his court before him." There can be as little doubt that he was present at the Parliament which was summoned immediately after in Henry's name, when the crown was entailed on Henry and his issue, Edward was declared a usurper, his most active adherents were attainted, and all the statutes which had passed during his reign were repealed. It is not improbable that there had been a secret understanding between Billing and the Earl of Warwick, (the king maker,) who himself so often changed sides, and who was now in possession of the whole authority of the government.

While Edward was a fugitive in foreign parts, the doctrine of divine right was, no doubt, at a discount in England, and Billing may have again bolted his arguments about the power of the people to choose their rulers; although, according to the superstition of the age, he more probably countenanced the belief that Henry was a saint, and that he was restored by the direct interposition of Heaven.

But one would think he must have been at his wits' end when, in the spring of the following year, Edward IV. landed at Ravenspurg, gained the battle of Barnet, and, after the murder of Henry VI. and the Prince of Wales, was again on the throne, without a rival. Billing does seem to have found great difficulty in making his peace. Though he was dismissed from his office, it was allowed to remain vacant about a twelvemonth, during which time he is supposed to have been in hiding. But he had vowed that, whatever changes might take place on the throne, he himself should die chief justice of the King's Bench; and he contrived to be as good as his word.

By his own representations, or the intercession of friends, or the hope of the good services he might yet render in getting rid of troublesome opponents, the king was induced to declare his belief that he who had sat on the trials of Walker and Burdet had unwillingly submitted to force during the late usurpation; and on the 17th of June, 1472, a writ passed the great seal, by which his majesty assigned "his right trusty and well-beloved Sir John Billing, Knight, as Chief Justice to hold pleas before his Majesty himself."

For nearly nine years after, he continued in the possession of his office, without being driven again to change his principles or his party. One good deed he did, which should be recorded of him – in advising Edward IV. to grant a pardon to an old Lancastrian, Sir John Fortescue. But for the purpose of reducing this illustrious judge to the reproach of inconsistency, which he knew made his own name a by-word, he imposed a condition that the author of *De Laudibus* should publish a new treatise, to refute that which he had before composed, proving the right of the house of Lancaster to the throne; and forced him to present the petition in which he assures the king "that he hath so

clearly disproved all the arguments that have been made against his right and title, that now there remaineth no color or matter of argument to the hurt or infamy of the same right or title by reason of any such writing, but the same right and title stand now the more clear and open by that any such writings have been made against them."

There are many decisions of Chief Justice Billing on dry points of law to be found in the Year Books, but there is only one other trial of historical importance mentioned in which he took any part; and it is much to be feared that on this occasion he inflamed, instead of soothing, the violent passions of his master, with whom he had become a special favorite.

Edward IV., after repeated quarrels and reconciliations with his brother, the Duke of Clarence, at last brought him to trial, at the bar of the House of Lords, on a charge of high treason. The judges were summoned to attend, and Lord Chief Justice Billing was their mouthpiece. We have only a very defective account of this trial, and it would appear that nothing was proved against the first prince of the blood, except that he had complained of the unlawful conviction of Burdet, who had been in his service; that he had accused the king of dealing in magic, and had cast some doubts on his legitimacy; that he had induced his servants to swear that they would be true to him, without any reservation of their allegiance to their sovereign; and that he had surreptitiously obtained and preserved an attested copy of an act of Parliament, passed during the late usurpation, declaring him next heir to the crown after the male issue of Henry VI. The Duke of Buckingham presided as high steward, and in that capacity ought to have laid down the law to the peers; but, to lessen his responsibility, he put the question to the judges, "whether the matters proved against the Duke of Clarence amounted, in point of law, to high treason." Chief Justice Billing answered in the affirmative. Therefore a unanimous verdict of guilty was given, and sentence of death was pronounced in the usual form. I dare say Billing would not have hesitated in declaring his opinion that the beheading might be commuted to drowning in a butt of malmsey wine; but this story of Clarence's exit, once so current, is now generally discredited, and the belief is, that he was privately executed in the Tower, according to his sentence.

Lord Chief Justice Billing enjoyed the felicitous fate accorded to very few persons of any distinction in those times – that he never was imprisoned, that he never was in exile, and that he died a natural death. In the spring of the year 1482, he was struck with apoplexy, and he expired in a few days – fulfilling his vow – for he remained to the last chief justice of the King's Bench, after a tenure of office for seventeen years, in the midst of civil wars and revolutions.

He amassed immense wealth, but dying childless, it went to distant relations, for whom he could have felt no tenderness. Notwithstanding his worldly prosperity, few would envy him. He might have been feared and flattered, but he could not have been beloved or respected, by his contemporaries; and his name, contrasted with those of Fortescue and Markham, was long used as an impersonation of the most hollow, deceitful, and selfish qualities which can disgrace mankind.

CHAPTER IV.
JOHN FITZJAMES

Of obscure birth, and not brilliant talents, Sir John Fitzjames made his fortune by his great good humor, and by being at college with Cardinal Wolsey. It is said that Fitzjames, who was a Somersetshire man, kept up an intimacy with Wolsey when the latter had become a village parson in that county; and that he was actually in the brawl at the fair when his reverence, having got drunk, was set in the stocks by Sir Amyas Paulet.

While Wolsey tried his luck in the church, with little hope of promotion, Fitzjames was keeping his terms in the inns of court; but he chiefly distinguished himself on gaudy days, by dancing before the judges, playing the part of "Abbot of Misrule," and swearing strange oaths – especially by *St. Gillian*, his tutelary saint. His agreeable manners made him popular with the "readers" and "benchers;" and through their favor, although very deficient in "moots" and "bolts," he was called to the outer bar. Clients, however, he had none, and he was in deep despair, when his former chum – having insinuated himself into the good graces of the stern and wary old man, Henry VII., and those of the gay and licentious youth, Henry VIII. – was rapidly advancing to greatness. Wolsey, while almoner, and holding subordinate offices about the court, took notice of Fitzjames, advised him to stick to the profession, and was able to throw some business in his way in the court of Wards and Liveries —

"Lofty and sour to them that lov'd him not:
But to those men that sought him, sweet as summer."

Fitzjames was devotedly of this second class, and was even suspected to assist his patron in pursuits which drew upon him Queen Catharine's censure: —

"Of his own body he was ill, and gave
The clergy ill example."

For these or other services, the cardinal, not long after he wrested the great seal from Archbishop Wareham, and had all legal patronage conferred upon him, boldly made Fitzjames attorney general, notwithstanding loud complaints from competitors of his inexperience and incapacity.

The only state trial which he had to conduct was that of the unfortunate Stafford, Duke of Buckingham, who, having quarrelled with Wolsey, and called him a "butcher's cur," was prosecuted for high treason before the lord high chancellor and Court of Peers, on very frivolous grounds. Fitzjames had little difficulty in procuring a conviction; and although the manner in which he pressed the case seems shocking to us, he probably was not considered to have exceeded the line of his duty: and Shakspeare makes Buckingham, returning from Westminster Hall to the Tower, exclaim —

"I had my trial,
And, must needs say, a noble one; which makes me
A little happier than my wretched father."

The result was, at all events, highly satisfactory to Wolsey, who, in the beginning of the following year, created Fitzjames a puisne judge of the Court of King's Bench, with a promise of being raised to be chief justice as soon as there should be a vacancy. Sir John Fineux, turned of eighty, was expected to drop every term, but held on four years longer. As soon as he expired, Fitzjames was appointed his successor. Wolsey still zealously supported him, although thereby incurring considerable obloquy. It was generally thought that the new chief was not only wanting in gravity of moral character, but that he had not sufficient professional knowledge for such a situation.

His highest quality was discretion, which generally enabled him to conceal his ignorance, and to disarm opposition. Fortunately for him, the question which then agitated the country respecting the validity of the king's marriage with Catharine of Arragon, was considered to depend entirely on the canon law, and he was not called upon to give any opinion upon it. He thus quietly discharged the duties of his office till Wolsey's fall. But he then experienced much perplexity. Was he to desert his patron, or to sacrifice his place? He had an exaggerated notion of the king's vengeful feelings. The cardinal having been not only deprived of the great seal, but banished to Esher, and robbed of almost the whole of his property under process of *præmunire*, while an impeachment for treason was still threatened against him, the chief justice concluded that his utter destruction was resolved upon, and that no one could show him any sympathy without sharing his fate. Therefore, instead of going privately to visit him, as some old friends did, he joined in the cry against him, and assisted his enemies to the utmost. Wolsey readily surrendered all his private property, but wished, for the benefit of his successors, to save the palace at Whitehall, which belonged to the see of York, being the gift of a former archbishop. A reference was then made to the judges, "whether it was not forfeited to the crown;" when the chief justice suggested the fraudulent expedient of a fictitious recovery in the Court of Common Pleas, whereby it should be adjudged to the king under a superior title. He had not the courage to show himself in the presence of the man to whom he owed every thing; and Shelley, a puisne judge, was deputed to make the proposal to him in the king's name. "Master Shelley," said the cardinal, "ye shall make report to his highness that I am his obedient subject, and faithful chaplain and bondsman, whose royal commandment and request I will in no wise disobey, but most gladly fulfil and accomplish his princely will and pleasure in all things, and in especial in this matter, inasmuch as the fathers of the law all say that I may lawfully do it. Therefore I charge your conscience, and discharge mine. Howbeit, I pray you show his majesty from me that I most humbly desire his highness to call to his most gracious remembrance that there is both heaven and hell."

This answer was, no doubt, reported by Shelley to his brethren assembled in the Exchequer Chamber, although, probably, not to the king; but it excited no remorse in the breast of Chief Justice Fitzjames, who perfected the machinery by which the town residence of the Archbishops of York henceforth was annexed to the crown, and declared his readiness to concur in any proceedings by which the proud ecclesiastic, who had ventured to sneer at the reverend sages of the law, might be brought to condign punishment.

Accordingly, when Parliament met, and a select committee of the House of Lords was appointed to draw up articles of impeachment against Wolsey, Chief Justice Fitzjames, although only summoned, like the other judges, as an assessor, was actually made a member of the committee, joined in their deliberations, and signed their report.

The authority of the chief justice gave such weight to the articles that they were agreed to by the lords, *nemine contradicente*; but his ingratitude and tergiversation caused much scandal out of doors, and he had the mortification to find that he might have acted an honorable and friendly part without any risk to himself, as the king, retaining a hankering kindness for his old favorite, not only praised the fidelity of Cavendish and the cardinal's other dependants who stuck by him in adversity, but took Cromwell into favor, and advanced him to the highest dignities, pleased with his gallant defence of his old master: thus the articles of impeachment (on which, probably, Fitzjames had founded hopes of the great seal for himself) were ignominiously rejected in the House of Commons.

The recreant chief justice must have been much alarmed by the report that Wolsey, whom he had abandoned, if not betrayed, was likely to be restored to power, and he must have been considerably relieved by the certain intelligence of the sad scene at Leicester Abbey in the following autumn, which secured him forever against the fear of being upbraided or punished in this world according to his deserts. However, he had now lost all dignity of character, and henceforth he was used as a vile instrument to apply the criminal law for the pleasure of the tyrant on the throne, whose relish for blood soon began to display itself, and became more eager the more it was gratified.

Henry retaining all the doctrines of the Roman Catholic religion which we Protestants consider most objectionable, but making himself pope in England in place of the Bishop of Rome, laws were enacted subjecting to the penalties of treason all who denied his *supremacy*;[36] and many of these offenders were tried and condemned by Lord Chief Justice Fitzjames, although he was suspected of being in his heart adverse to all innovation in religion.

I must confine myself to the two most illustrious victims sacrificed by him – Fisher, Bishop of Rochester, and Sir Thomas More. Henry, not contented with having them attainted of *misprision of treason*, for which they were suffering the sentence of forfeiture of all their property and imprisonment during life, was determined to bring them both to the block, and for this purpose issued a special commission to try them on the capital charge of having denied his supremacy. The lord chancellor was first commissioner; but it was intended that the responsibility and the odium should chiefly rest on the Lord Chief Justice Fitzjames, who was joined in the commission along with several other common law judges of inferior rank.

The case against the Bishop of Rochester rested on the evidence of Rich, the solicitor general, who swore he had heard the prisoner say, "I believe in my conscience, and by my learning I assuredly know, that the king neither is, nor by right can be, supreme head of the church of England;" but admitted that this was in a confidential conversation, which he had introduced by declaring that "he came from the king to ask what the bishop's opinion was upon this question, and by assuring him that it never should be mentioned to any one except the king, and that the king had promised he never should be drawn into question for it afterwards." The prisoner contending that he was not guilty of the capital crime charged for words so spoken, the matter was referred to the judges.

"Lord Chief Justice Fitzjames, in their names, declared 'that this message or promise from the king to the prisoner neither did nor could, by rigor of law, discharge him; but in so declaring of his mind and conscience against the *supremacy*– yea, though it were at the king's own request or commandment – he committed treason by the statute, and nothing can discharge him from death but the king's pardon.'"

Bishop of Rochester.– "Yet I pray you, my lords, consider that by all equity, justice, worldly honesty, and courteous dealing, I cannot, as the case standeth, be directly charged therewith as with treason, though I had spoken the words indeed, the same not being spoken maliciously, but in the way of advice or counsel, when it was required of me by the king himself; and that favor the very words of the statute do give me, being made only against such as shall '*maliciously* gainsay the king's supremacy,' and none other; wherefore, although by rigor of law you may take occasion thus to condemn me, yet I hope you cannot find law, except you add rigor to that law, to cast me down, which herein I have not deserved."

Fitzjames, C. J.– "All my brethren are agreed that '*maliciously*' is a term of art and an inference of law, not a qualification of fact. In truth, it is a superfluous and void word; for if a man speak against the king's supremacy by any manner of means, that speaking is to be understood and taken in law as *malicious*."

Bishop of Rochester.– "If the law be so, then it is a hard exposition, and (as I take it) contrary to the meaning of them that made the law, as well as of ordinary persons who read it. But then, my lords, what says your wisdom to this question, 'Whether a single testimony may be admitted to prove me guilty of treason; and may it not be answered by my negative?' Often have I heard it said, that to overcome the presumption from the oath of allegiance to the king's majesty, and to guard against the dire consequences of the penalties for treason falling on the head of an innocent man, none shall be convicted thereof save on the evidence of two witnesses at the least."

[36] The recent claim set up in America for legislative supremacy over conscience – a claim contended for by so many of our leading lawyers and divines – is not less blasphemous and outrageous than this claim of Henry VIII., and belongs to the same category. —*Ed.*

Fitzjames, C. J.– "This being the king's case, it rests much in the conscience and discretion of the jury; and as they upon the evidence shall find it, you are either to be acquitted or else to be condemned."

The report says that "the bishop answered with many more words, both wisely and profoundly uttered, and that with a mervailous, couragious, and rare constancy, insomuch as many of his hearers – yea, some of the judges – lamented so grievously, that their inward sorrow was expressed by the outward teares in their eyes, to perceive such a famous and reverend man in danger to be condemned to a cruell death upon so weake evidence, given by such an accuser, contrary to all faith, and the promise of the king himself."

A packed jury, being left to their conscience and discretion, found a verdict of guilty; and Henry was able to make good his saying, when he was told that the pope intended to send Bishop Fisher a cardinal's hat – "'Fore God, then, he shall wear it on his shoulders, for I will have his head off."

The conduct of the chief justice at the trial of Sir Thomas More was not less atrocious. After the case for the crown had been closed, the prisoner, in an able address to the jury, clearly proved that there was no evidence whatever to support the charge, and that he was entitled to an acquittal; when Rich, the solicitor general, was permitted to present himself in the witness box, and to swear falsely, that "having observed, in a private conversation with the prisoner in the Tower, 'No Parliament could make a law that God should not be God,'[37] Sir Thomas replied, 'No more can the Parliament make the king supreme head of the church.'"

A verdict of guilty was pronounced against the prisoner, notwithstanding his solemn denial of ever having spoken these words. He then moved, in arrest of judgment, that the indictment was insufficient, as it did not properly follow the words of the statute which made it high treason to deny the king's supremacy, even supposing that Parliament had power to pass such a statute. The lord chancellor, whose duty it was, as head of the commission, to pass the sentence – "not willing," says the report, "to take the whole load of his condemnation on himself, asked in open court the advice of Sir John Fitzjames, the lord chief justice of England, whether the indictment was valid or no."

Fitzjames, C. J.– "My lords all, by St. Gillian, (for that was always his oath,) I must needs confess that if the act of Parliament be not unlawful, then the indictment is not, in my conscience, invalid."

Lord Chancellor.– "*Quid adhuc desideramus, testimonium? Reus est mortis.* (What more do we need? He is worthy of death.) Sir Thomas More, you being, by the opinion of that reverend judge, the chief justice of England, and of all his brethren, duly convicted of high treason, this court doth adjudge that you be carried back to the Tower of London, and that you be thence drawn on a hurdle to Tyburn, where you are to be hanged till you are half dead, and then being cut down alive and embowelled, and your bowels burnt before your face, you are to be beheaded and quartered, your four quarters being set up over the four gates of the city, and your head upon London Bridge."

No one can deny that Lord Chief Justice Fitzjames was an accessory to this atrocious murder.

The next occasion of his attracting the notice of the public was when he presided at the trials of Smeaton and the other supposed gallants of Anne Boleyn. Luckily for him, no particulars of these trials have come down to us, and we remain ignorant of the arts by which a conviction was obtained, and even a *confession*– although there is every reason to believe that the parties were innocent. According to the rules of evidence which then prevailed, the convictions and confessions of the gallants were to be given in evidence to establish the guilt of the unhappy queen, for whose death Henry was now as impatient as he had once been to make her his wife.

When the lord high steward and the peers assembled for her trial, Fitzjames and the other judges attended, merely as assessors, to advise on any point of law which might arise. I do not find that they were consulted till the verdict of guilty had been recorded, and sentence was to be pronounced.

[37] This would hardly be allowed by some of our American juridical deniers and deriders of the "higher law." It is hard to distinguish a law (such as the fugitive slave act) which sets the moral sentiment at defiance, from a law that God shall not be God. —*Ed.*

Burning was the death which the law appointed for a woman attainted of treason; yet as Anne had been Queen of England, some peers suggested that it might be left to the king to determine whether she should die such a cruel and ignominious death, or be *beheaded*, a punishment supposed to be attended with less pain and less disgrace. But then a difficulty arose whether, although the king might remit all the atrocities of the sentence on a man for treason, except beheading, which is part of it, he could order a person to be beheaded who was sentenced to be burnt. A solution was proposed, that she should be sentenced by the lord high steward to be "burnt or beheaded at the king's pleasure;" and the opinion of the judges was asked, "whether such a sentence could be lawfully pronounced."

Fitzjames, C. J.– "My lords, neither myself nor any of my learned brothers have ever known or found in the records, or read in the books, or known or heard of, a sentence of death in the alternative or disjunctive, and incline to think that it would be bad for uncertainty. The law delights in certainty. Where a choice is given, by what means is the choice to be exercised? And if the sheriff receives no special directions, what is he to do? Is sentence to be stayed till special directions are given by the king? and if no special directions are given, is the prisoner, being attainted, to escape all punishment? Prudent antiquity advises you *stare super antiquas vias*; and that which is without precedent is without safety."

After due deliberation, it was held that an absolute sentence of beheading would be lawful, and it was pronounced accordingly; the court being greatly comforted by recollecting that no writ of error lay, and that their judgment could not be reversed.

Fitzjames died in the year 1539, before this judgment served as a precedent for that upon the unfortunate Queen Catharine Howard; and he was much missed when the bloody statute of the Six Articles brought so many, both of the old and of the reformed faith, on capital charges, before the Court of King's Bench.

CHAPTER V.
THOMAS FLEMING

The greatest part of my readers never before read or heard of the name of Thomas Fleming; yet, starting in the profession of the law with Francis Bacon, he was not only preferred to him by attorneys, but by prime ministers, and he had the highest professional honors showered upon him, while the immortal philosopher, orator, and fine writer continued to languish at the bar without any advancement, notwithstanding all his merits and all his intrigues. But Fleming had superior good fortune, and enjoyed temporary consequences, because he was a mere lawyer – because he harbored no idea or aspirations beyond the routine of Westminster Hall – because he did not mortify the vanity of the witty, or alarm the jealousy of the ambitious.

He was the younger son of a gentleman of small estate in the Isle of Wight. I do not find any account of his early education, and very little interest can now be felt respecting it; although we catch so eagerly at any trait of the boyhood of his rival, whom he despised. Soon after he was called to the bar, by unwearied drudgery he got into considerable practice; and it was remarked that he always tried how much labor he could bestow upon every case intrusted to him, while his more lively competitors tried with how little labor they could creditably perform their duty.

In the end of the year 1594, he was called to the degree of serjeant, along with eight others, and was thought to be the most deeply versed in the law of real actions of the whole batch. It happened that, soon after, there was a vacancy in the office of solicitor general, on the promotion of Sir Edward Coke to be attorney general. Bacon moved heaven and earth that he himself might succeed to it. He wrote to his uncle, Lord Treasurer Burleigh, saying, “I hope you will think I am no unlikely piece of wood to shape you a true servant of.” He wrote to the Queen Elizabeth, saying, “I affect myself to a place of my profession, such as I do see divers younger in proceeding to myself, and men of no great note, do without blame aspire unto; but if your majesty like others better, I shall, with the Lacedemonian, be glad that there is such choice of abler men than myself.” He accompanied this letter with a valuable jewel, to show off her beauty. He did what he thought would be still more serviceable, and, indeed, conclusive; he prevailed upon the young Earl of Essex, then in the highest favor with the aged queen, earnestly to press his suit. But the appointment was left with the lord treasurer, and he decided immediately against his nephew, who was reported to be no lawyer, from giving up his time to profane learning – who had lately made an indiscreet, although very eloquent, speech in the House of Commons – and who, if promoted, might be a dangerous rival to his cousin, Robert Cecil, then entering public life, and destined by his sire to be prime minister. The cunning old fox then inquired who would be a competent person to do the queen’s business in her courts, and would give no uneasiness elsewhere; and he was told by several black-letter judges whom he consulted that “Serjeant Fleming was the man for him.” After the office had been kept vacant by these intrigues above a year, Serjeant Fleming was actually appointed. Bacon’s anguish was exasperated by comparing himself with the new solicitor; and in writing to Essex, after enumerating his own pretensions, he says, “When I add hereunto the obscureness and many exceptions to my competitor, I cannot but conclude with myself that no man ever had a more exquisite disgrace.” He resolved at first to shut himself up for the rest of his days in a cloister at Cambridge. A soothing message from the queen induced him to remain at the bar; but he had the mortification to see the man whom he utterly despised much higher in the law than himself, during the remainder of this and a considerable part of the succeeding reign.

Fleming, immediately upon his promotion, gave up his serjeantship, and practised in the Court of Queen’s Bench. He was found very useful in doing the official business, and gave entire satisfaction to his employers.

At the calling of a new Parliament, in the autumn of 1601, he was returned to the House of Commons for a Cornish borough; and, according to the usual practice at that time, he ought, as solicitor general, to have been elected speaker; but his manner was too "lawyer-like and ungenteel" for the chair, and Serjeant Croke, who was more presentable, was substituted for him.

He opened his mouth in the house only once, and then he broke down. This was in the great debate on the grievance of monopolies. He undertook to defend the system of granting to individuals the exclusive right of dealing in particular commodities; but when he had described the manner in which patents passed through the different offices before the great seal is put to them, he lost his recollection and resumed his seat.

Bacon, now member for Middlesex, to show what a valuable solicitor general the government had lost, made a very gallant speech, in which he maintained that "the queen, as she is our sovereign, hath both an enlarging and restraining power: for, by her prerogative, she may, 1st, set at liberty things restrained by statute law or otherwise; and 2dly, by her prerogative she may restrain things which be at liberty." He concluded by expressing the utmost horror of introducing any bill to meddle with the powers of the crown upon the subject, and protesting that "the only lawful course was to leave it to her majesty of her own free will to correct any hardships, if any had arisen in the exercise of her just rights, as the arbitress of trade and commerce in the realm."

This pleased her exceedingly, and even softened her ministers, insomuch that a promise was given to promote Fleming as soon as possible, and to appoint Bacon in his place. In those days there never existed the remotest notion of dismissing an attorney or solicitor general, any more than a judge; for, though they all alike held *during pleasure*, till the accession of the house of Stuart the tenure of all of them was practically secure. An attempt was made to induce Fleming to accept the appointment of queen's serjeant, which would have given him precedence over the attorney general; but this failed, for he would thereby have been considered as put upon the shelf, instead of being on the highway to promotion.

Elizabeth died, leaving Bacon with no higher rank than that of queen's counsel; and on the accession of James I., Fleming was reappointed solicitor general.

The event justified his firmness in resisting the attempt to shelve him, for in the following year, on the death of Sir William Peryam, he was appointed chief baron of the Exchequer. While he held this office, he sat along with Lord Chief Justice Popham on the trial of Guy Fawkes and the gunpowder conspirators; but he followed the useful advice for subordinate judges on such an occasion – "to look wise, and to say nothing."

His most memorable judgment as chief baron was in what is called "The Great Case of Impositions." This was, in truth, fully as important as Hampden's case of ship money, but did not acquire such celebrity in history, because it was long acquiesced in, to the destruction of public liberty, whereas the other immediately produced the civil war. After an act of Parliament had passed at the commencement of James's reign, by which an import duty of 2*s.* 6*d.* per cwt. was imposed upon currants, he by his own authority laid on an additional duty of 7*s.* 6*d.*, making 10*s.* per cwt. Bates, a Levant merchant, who had imported a cargo of currants from Venice, very readily paid the parliamentary duty of 2*s.* 3*d.* upon it, but refused to pay more; thereupon the attorney general filed an information in the Court of Exchequer, to compel him to pay the additional duty of 7*s.* 6*d.*; so the question arose, whether he was by law compellable to do so. After arguments at the bar which lasted many days, —

Fleming, C. B., said: "The defendant's plea in this case is without precedent or example, for he alleges that the imposition which the king has laid is '*indebitè, injustè, et contra leges Angliæ imposita*, and, therefore, he refused to pay it.' The king, as is commonly said in our books, *cannot do wrong*; and if the king seize any land without cause, I ought to sue to him in humble manner (*humillime supplicavit*, &c.), and not in terms of opposition. The matter of the plea first regards the prerogative, and to derogate from that is a part most undutiful in any subject. Next it concerns the transport

of commodities into and out of the realm, the due regulation of which is left to the king for the public good. The imposition is properly upon currants, and not upon the defendant, for upon him no imposition shall be but by Parliament.(!) The things are currants, a foreign commodity. The king may restrain the person of a subject in leaving or coming into the realm, and *a fortiori*, may impose conditions on the importation or exportation of his goods. To the king is committed the government of the realm; and Bracton says, 'that for his discharge of his office God hath given him the power to govern.' This power is double – ordinary and absolute. The ordinary is for the profit of particular subjects – the determination of civil justice; that is nominated by civilians *jus privatum*, and it cannot be changed without Parliament. The absolute power of the king is applied for the general benefit of the people; it is most properly named *policy*, and it varieth with the time, according to the wisdom of the king, for the common good. If this imposition is matter of state, it is to be ruled by the rules of policy, and the king hath done well, instead of 'unduly, unjustly, and contrary to the laws of England.' All commerce and dealings with foreigners, like war and peace and public treaties, are regulated and determined by the absolute power of the king. No importation or exportation can be but at the king's ports. They are his gates, which he may open or close when and on what conditions he pleases. He guards them with bulwarks and fortresses, and he protects ships coming hither from pirates at sea; and if his subjects are wronged by foreign princes, he sees that they are righted. Ought he not, then, by the custom he imposes, to enable himself to perform these duties? The impost to the merchant is nothing, for those who wish for his commodities must buy them subject to the charge; and, in most cases, it shall be paid by the foreign grower, and not by the English consumer. As to the argument that the currants are *victual*, they are rather a delicacy, and are no more necessary than wine, on which the king lays what customs seemeth him good. For the amount of the imposition it is not unreasonable, seeing that it is only four times as much as it was before. The wisdom and providence of the king must not be disputed by the subject; by intendment they cannot be severed from his person. And to argue *a posse ad actum*, because by his power he may do ill, is no argument to be used in this place. If it be objected that no reason is assigned for the rise, I answer it is not reasonable that the king should express the cause and consideration of his actions; these are *arcana regis*, and it is for the benefit of every subject that the king's treasure should be increased."

He then at enormous length went over all the authorities and acts of Parliament, contending that they all prove the king's power to lay what taxes he pleases on goods imported, and he concluded by giving judgment for the crown.

Historians take no notice of this decision, although it might have influenced the destinies of the country much more than many of the battles and sieges with which they fill their pages. Had our foreign commerce then approached its present magnitude, Parliaments would never more have met in England, – duties on tea, sugar, timber, tobacco, and corn, imposed by royal proclamation, being sufficient to fill the exchequer, – and the experiment of ship money would never have been necessary. The chief baron most certainly misquotes, misrepresents, and mystifies exceedingly; but, however fallacious his reasoning, the judgment ought not to be passed over in silence by those who pretend to narrate our annals, for it was pronounced by a court of competent jurisdiction, and it was acted upon for years as settling the law and constitution of the country.[38]

King James declared that Chief Baron Fleming was a judge to his heart's content. He had been somewhat afraid when he came to England that he might hear such unpalatable doctrines as had excited his indignation in Buchanan's treatise, "*De Jure Regni apud Scotis*," and he expressed great joy in the solemn recognition that he was an absolute sovereign. Our indignation should be diverted from him and his unfortunate son, to the base sycophants, legal and ecclesiastical, who misled them.

[38] One striking instance, among a thousand, both old and new, how little the so much vaunted decisions of courts virtually amount to. Decisions that are to stand, can only stand upon their own inherent rectitude and reasonableness, and not upon the authority of those who make them. —*Ed.*

On the death of Popham, no one was thought so fit to succeed him as Fleming, of whom it was always said that, "*though slow, he was sure*;" and he became chief justice of England the very same day on which Francis Bacon mounted the first step of the political ladder, receiving the comparatively humble appointment of solicitor general.

Lord Chief Justice Fleming remained at the head of the common law rather more than six years. During that time the only case of general interest which arose in Westminster Hall was that of the Postnati. As might be expected, to please the king, he joined cordially in what I consider the illegal decision, that persons born in Scotland after the accession of James to the throne of England, were entitled to all the privileges of natural born subjects in England, although it was allowed that Scotland was an entirely separate and independent kingdom. Luckily, the question is never likely again to arise since the severance of the crown of Hanover from that of Great Britain; but if it should, I do not think that Calvin's case could by any means be considered a conclusive authority, being founded upon such reasoning as that "if our king conquer a Christian country, its laws remain till duly altered; whereas if he conquer an infidel country, the laws are *ipso facto* extinct, and he may massacre all the inhabitants."

Lord Chief Justice Fleming took the lead in the prosecution of the Countess of Shrewsbury before the Privy Council, on the charge of having refused to be examined respecting the part she had acted in bringing about a clandestine marriage, in the Tower of London, between the Lady Arabella Stuart, the king's cousin, and Sir William Somerset, afterwards Duke of Somerset. He laid it down for law, that "it was a high misdemeanor to marry, or to connive at the marriage of any relation of the king without his consent, and that the countess's refusal to be examined was 'a contempt of the king, his crown and dignity, which, if it were to go unpunished, might lead to many dangerous enterprises against the state.' He therefore gave it as his opinion that she should be fined £10,000 and confined during the king's pleasure."

While this poor creature presided in the King's Bench, he was no doubt told by his officers and dependants that he was the greatest chief justice that had appeared there since the days of Gascoigne and Fortescue; but he was considered a very small man by all the rest of the world, and he was completely eclipsed by Sir Edward Coke, who at the same time was chief justice of the Common Pleas, and who, to a much more vigorous intellect and deeper learning, added respect for constitutional liberty and resolution at every hazard to maintain judicial independence. From the growing resistance in the nation to the absolute maxims of government professed by the king and sanctioned by almost all his judges, there was a general desire that the only one who stood up for law against prerogative should be placed in a position which might give greater weight to his efforts on the popular side; but of this there seemed no prospect, for the subservient Fleming was still a young man, and likely to continue many years the tool of the government.

In the midst of these gloomy anticipations, on the 15th day of October, 1613, the joyful news was spread of his sudden death. I do not know, and I have taken no pains to ascertain, where he was buried, or whether he left any descendants. In private life he is said to have been virtuous and amiable, and the discredit of his incompetency in high office ought to be imputed to those who placed him there, instead of allowing him to prose on as a drowsy serjeant at the bar of the Common Pleas, the position for which nature had intended him.

CHAPTER VI.
NICHOLAS HYDE

After the abrupt dissolution of the second Parliament of Charles I. 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, then holding that office, to which he had been appointed hardly two years before, 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 imprison any of his subjects without a warrant specifying the offence with which they are charged. This being reported to the cabinet, Sir Randolph Crewe was immediately dismissed from his office; and, in a few weeks after, Sir Nicholas Hyde was made chief justice in his stead. He was the uncle of the great Lord Clarendon. They were sprung from the ancient family of "*Hyde of that ilk*" in the county palatine of Chester; their branch of it having migrated, in the sixteenth 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 of 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 stanch stickler for prerogative; but this was supposed to arise rather from the sincere opinion he had formed of what the English constitution was, or ought to be, than from a desire to recommend himself for promotion. He is thus good naturedly 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 in the place of one so well-beloved, and so suddenly removed."

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 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, therefore, 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,[39] 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 offence 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.'"

From such a fair beginning,[40] 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;"[41] 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 it insufficient. He said he had found a resolution of all 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."[42]

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

---

[39] Noy at this time was of the popular party. He afterwards went over to the court, and was made attorney general. —*Ed.*

[40] Similar pretences of respect for law and popular rights often serve as preface here in America to judgments as atrocious as that of Chief Justice Hyde. —*Ed.*

[41] This is the universal excuse for all sins, whether of omission or commission, on the part of courts who pay but little regard to Bishop Burnet's sensible observation that a precedent against reason "signifies no more but that the like injustice has been done before." —*Ed.*

[42] Though the lawyers, both in England and America, have long since abandoned the pretence, so impudently maintained by Hyde, of a right in the executive authorities to imprison for contempt, into the ground and nature of which the courts had no right to inquire, they still claim for themselves and for one another – at least in Pennsylvania – a like right, and insist with the same unction upon the absolute necessity of trusting "the courts" in these matters, and of relying upon their "mercy." See, in the Appendix, No. 3, the opinion of the Supreme Court of Pennsylvania, as delivered by Judge Black, of which the insolent conclusion was evidently borrowed from the above opinion of Chief Justice Hyde. —*Ed.*

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,[43] 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, of the Common Pleas, to Whitehall, 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,[44] he allowed it to be 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 any thing 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 extrajudicial opinion,[45] Lord Chief Justice Hyde and the other judges were assembled at Serjeants' 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 privilege and the independence of the House of Commons: "That a Parliament man committing an offence 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

[43] This celebrated lawyer, who had succeeded Fleming as chief justice of the King's Bench, had been, as well as Crewe, turned out of office after holding the place for three years, because he would not allow the government to interfere with his administration of justice. He was now the leader of the popular party in the House of Commons. —*Ed.*

[44] We have had recent striking instances in America of the same thing in some of the "misconstructions" placed by judges on the laws in restraint of drunkenness and liquor selling. —*Ed.*

[45] Like those given by several federal judges in support of the fugitive slave act. —*Ed.*

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 offence 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 offences, 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 offence 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 ofttimes punishable in an inferior court – as if a judge shall commit a capital offence 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 offence 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 £2000, and the others in smaller sums.

This 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. 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.

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.

CHAPTER VII.
JOHN BRAMPSTON

On the vacancy in the office of chief justice of the King's Bench, created by the death of Sir Thomas Richardson, A. D. 1635, the king and his ministers were exceedingly anxious to select a lawyer fitted to be his successor. Resolved 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. Serjeant 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*, (for counsel given and to be given.) Having been some years an "apprentice," he took the degree of serjeant 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 offences 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 offence, is illegal.

He refused a seat in the House of Commons, as it suited him better to plead for those who were in the 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 serjeant, 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[46] 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 Brampston was deemed the fittest person to place at the head of the common law judges. On the 18th of April, 1635, 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 his thanks

[46] Noy had begun, like Brampston, a flaming patriot, but, like him and so many other lawyers, had been bought over to the side of power by the hope of promotion, and being made attorney general, had advised the issue of the writs for ship money. —*Ed.*

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 oaths 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."[47]

In quiet times, Lord Chief Justice Brampston 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.[48]

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 defence 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 Serjeant's Inn Hall, Lord Chief Justice Brampston 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 Brampston, 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 20*s.*

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 Brampston said, "Such a judgment should be allowed to stand until it were reversed in Parliament, and none ought to be suffered to dispute against it."[49]

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 must either have been a little deranged in his intellect, or animated by an extraordinary eagerness for ecclesiastical promotion. Having heard that Mr. 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!*

---

[47] Cro. Car. 403. 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.

[48] This is exactly the sort of judges from whom we in America have so much to fear. —*Ed.*

[49] We have seen in America similar attempts to stop counsel from exposing the unsoundness of judicial opinions given in support of the fugitive slave act. —*Ed.*

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 denying of ship money, it is time for every loyal subject to strike in." *Brampston, 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 the defence 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 offence 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."[50]

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 any thing to say in your own defence, 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." *Brampston, 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 £5000, 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.

Lord Chief Justice Brampston's services were likewise required in the Star Chamber. He there zealously assisted 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, Brampston 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."

This 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

[50] This is the very doctrine lately revived, in a little different shape, by some of our American divines – that whatsoever the legislative power in its conscience thinks it may require, we ought to yield. —*Ed.*

he was found guilty; and when the deliberation arose about the punishment, thus spoke Lord Chief Justice Brampston: —

"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 libellous 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 £5000 to the king, he do pay a fine of £3000 to the archbishop, seeing the offence 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 offence, I cannot tell how to spare him; for the consideration that should mitigate the punishment adds to the enormity of the offence."

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 imprisonment. 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.

Now came the time when Lord Chief Justice Brampston 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. Brampston 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 Brampston 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 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,[51] was arrested while sitting on his tribunal in Westminster Hall, and committed a close prisoner to Newgate.

Chief Justice Brampston 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 Brampston, 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

[51] Some of our American federal judges are in the habit of declaiming much in the same style against abolitionists – who, indeed, may be considered as occupying a position in our present affairs in many respects parallel to that of the English Puritans in the times of Charles I. —*Ed.*

by color thereof, was illegal. Therefore, without further dispute thereof, the court gives judgment for the plaintiff."[52]

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."

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 Brampston 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 travelling in the disturbed state of the country, a mere pretence – by a *supersedeas* under the great seal dismissed him from his office, and immediately appointed Sir Robert Heath to be chief justice of England in his stead.

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.

Having withdrawn entirely from public life, he 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.

[52] Having once refused to hear counsel against ship money, he now undertook to square the account by refusing to hear counsel for it. —*Ed.*

CHAPTER VIII.
ROBERT HEATH

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 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 would otherwise 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 vices* 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 defence 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 immemorially 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 practitioner. 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 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 offence. I have already mentioned the speeches of their counsel.[53] "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."

"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,"[54] 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.

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. 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.

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 happened in Parliament, and that they had a right to punish whatsoever was done there by Parliament men in an unparliamentary manner.

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 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

[53] See life of Hyde, ante, p. 97.

[54] This supposed inability of the king to do wrong has in America among a certain class been transferred to the federal government, which represents the royal authority of the English. —*Ed.*

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 *information*, it was pleaded that a court of common law had no jurisdiction to take cognizance of speeches made in the House of Commons; 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 attempt had hitherto been made to sanction; and that, although part of the supposed offences 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 matters of privilege; but contended that such cases had happened during the session of Parliament, and that it did not follow that an offence committed in the house might not be questioned after a dissolution.

The judges unanimously held that, although the alleged offences had been committed in Parliament, the defendants were bound to answer in the Court of King's Bench, in which all offences 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.

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 pretence of some novelty, he granted patents, vested 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 £1500 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*

Конец ознакомительного фрагмента.

Текст предоставлен ООО «ЛитРес».

Прочитайте эту книгу целиком, купив полную легальную версию на ЛитРес.

Безопасно оплатить книгу можно банковской картой Visa, MasterCard, Maestro, со счета мобильного телефона, с платежного терминала, в салоне МТС или Связной, через PayPal, WebMoney, Яндекс.Деньги, QIWI Кошелек, бонусными картами или другим удобным Вам способом.