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Impress of Personality upon the Common Law during its Formative Period

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"In the infancy of societies the Chiefs of State form the institutions, afterwards the institutions form the Chiefs of State"

Montesquieu.

"The prejudices which judges share with their fellow men have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

O.W. Holmes Jr.

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The Common Law, as it comes to us, has its origin either in customs voluntarily observed, or in laws or rules imposed directly or indirectly

by the supreme political authority. In either case it is qualified or modified, and often to a large extent, by the personality of the particular judges who have solidified or crystalized the customs into law, or by the idiosyncracies of the representatives of supreme political authority who have imposed the law.

Without challenging a discussion of the relative claims of "force" and "order" in the origin of municipal law, I will concede to the one school that "order" is an essential element in the law of nature, but we cannot fail to observe, that in the

translation of that law for many use
it has been impressed at its
very infancy as municipal
law, with many of the characteristic
marks of "force"; and some of these
are the impressions on the law
of the individual characters of the
men, who from time to time
have been called upon either to
make the law or to "declare
what the law is." This is
most apparent in the law of
very early times, when the
king or ruler was at once
the legislature and the executive.
But later, down through mediaeval
and far into modern judicial
history, each succeeding judge,
as he moulded into unwritten

law the customs of his day, left the finished product stamped with the peculiarities of his own mind, his own mode of thinking and his own individual idea of Justice.

In a similar degree, law receives an impression from the national characteristics, as well as from the character and personalities of particular lawgivers.

An obstacle to the progress of the science of law has been found in the implication of law with the individual character of each particular state or exhibited in its national customs.

Lord Campbell says "It is curious to observe that notwithstanding

the sweeping changes of laws and institutions introduced at the conquest, the characteristic differences between Englishmen and Frenchmen in the management of local affairs still exists after the lapse of so many centuries: and that while with us parish vestries, town councils and County sessions, are the organs of the petty confederated republics into which England is parcelled out. In France, whether the Government be nominally republican or monarchial no one can alter the direction of a road, build a bridge, or open a mine without the authority of the Ministre Ponts et Chaussees.

"In Ireland there being much more Celtic than Anglo-Saxon blood no selfreliance is felt and a disposition prevails to throw everything upon the Government"

The Gael does not possess that reliance upon his own individual ability that marks the Anglo-Saxon, and consequently their laws, through all changes of government perserved in throwing all, even petty responsibilities upon the general government. While we see the sturdy selfreliant character of the Anglo-Saxon or Saxon-Norman people — that character so eminently fitted for individual freedom — unconsciously impressing itself upon the funda-

mental principles of the common law, and giving to it, more than any other system of laws, that bent which throws at large responsibility upon the individual, and local communities, and correspondingly relieves the general government.

It will now be our task to trace, very briefly, the influence certain men of power or intellectual force have had in the formation or interpretation of the common law, and how far they have impressed upon it their own mental idiosyncracies.

Notwithstanding the fine spun theories of certain learned lawyers of the present day who provide

the common law with a Latin origin, we observe that when the morning twilight of civilization began to dispel the darkness of barbarism in the time of Alfred the Great, it gave us glimpses of a rough and semi-barbaric civil government then existing. A system so essentially different from the civil law, that it would seem to require a long stretch of the imagination to give them a common origin.[a]

Then let us say that with Alfred, the common law had its birth. At that time it was indeed a feeble infant, nursed in the cradle of internecine strife and barbaric invasion.

a. Reeves Hist Com Law pp. 162-3
Finlaysons n. 1b p. 161.

Feeble and weak it was long in imminent danger of being entirely distroyed in the anarchy and civil war that followed the death of Alfred — when England was ~~harassed~~ ~~harassed~~ harassed by robber hordes from without and torn by civil strife within.

The troublous times in which he reigned prevented Alfred from giving to the law that care and sustenance that no doubt he desired and that his wisdom and patriotism dictated. Consequently in the common law of to day we see very little that directly reminds us of the Great Alfred.

The young offspring of Alfreds wise reign was saved for a time when Edward the confessor became king of all England. He revived the dying body of Alfred's code, but imparted to it so much of his own mildness and weakness of character, that it was again nearly strangled in the whirlwind of usurpation that followed his death.

Harold was king for so short a time, and his brief reign so filled with civil war and invasion that he had no time to impress upon the laws of his country any mark of his own manly and independent character.

William undoubtedly looked

upon the Saxon and not the Civil law as the foundation of the judicial system of his newly acquired Kingdom, — was crowned King of England with the ancient Saxon forms — taking the coronation oath of the Saxon Kings — and swearing to govern according to the laws of Edward the Confessor and the ancient laws of the kingdom.x

William the Conqueror wisely injected a portion of the Civil law — as an elixer into the veins of the weakly and uncertain offspring of Alfred and Edward, and thus cured much of its weakness, but at the same time he

clothed it in the barbaric habiliments of the feudal law. The fashion of those clothes remains, but it is so modified and softened by a more enlightened civilization and the lapse of eight centuries that but little of the original vestments remain.

William in fact, if not in name, uniting in himself all the departments of government — the legislative, executive and judicial — the laws of his day ~~reflecting~~ reflect, perhaps more than those of any other period, the personality of the despot

who made them.

William's character was selfish-grasping, ambitious and cruel. Hallam describes him as "a cold and farsighted statesman, of great talents, with little passion or insolence, but utterly indifferent to human suffering"

He soon moulded the laws of England into conformity with his own peculiar character. Personally aristocratic and despotic, his laws recognized no rights residing in the masses; cruel and inhuman, - his laws were merciless and severe. His despotic

selfishness, was long remembered in the severe penalties prescribed for offences that touched the royal pleasure, as compared with offences that affected only the individual subject. "The killing of a deer or boar or even a hare was punished with the loss of the delinquents eyes; and that too at a time when the killing of a man could be atoned for by paying a moderate compensation."[a]

Probably the strong tendency to despotism in the laws of William the Conqueror in some measure led to the firm establishment two hundred years later of the

[a] Hume's History of England

true foundation of English liberty. John was merely following in the footsteps of his illustrious ancestor when his encroachments on political and personal liberty were met by Stevn Langdon and the barons.

In the sharp contest between king and people that culminated in Magna Charta, (1215) the great written constitution of England, it is not very difficult to trace, amid the paths made by so many men of eminent talents and political virtues, the path marked by the footsteps of Archbishop Langdon. Under the

influence of his counsel the barons fought for the united interest and welfare of the three orders the clergy, the nobility, and the great commonality of the freemen of the realm. And for the first time in history, the barons fought for rights and privileges for the serf, as well as for the restoration of rights lost by the barons themselves.[a]

Langdons wisdom by including all classes under the protection of Magna Charta, laid the permanent foundation for the constitutional portion of the common law, and indeed, the supreme law as

[a] Guizot.

published in the great charter naturally moulds the subsequent juridical history of England.

Leaving for the present a more particular discussion of the impression made by Langdon upon the common law, and passing Glanville we will stop and briefly consider the influence of Henry de Bracton in directing the course of the common law.

Lord Campbell says that "Bracton was one of the greatest jurists that ever lived in any age. Who, drawing his sentiments from the rich fountains of Roman Jurisprudence, expressed them in the Latin

tongue with a purity, seldom reached by the imitators of the Augustan age, and who was rivaled by no juridical writer until Blackstone arose, five centuries afterwards."

History tells us nothing of the private life or character of this great jurist, and even leaves us in some doubt as to whether or not he held the high office of Chief Justiciar. Lord Campbell continues, "we have the pedigree, at least up to the conquest, and a minute account of those who were employed in desolating the world, but we have no information whatever of the

origin, and very little of the career of a man, who explained to his semi barbaric countrymen the benefits to be derived from an equitable system of laws, defining and protecting the rights of all classes"

From the meagre history of him that remains, we may suppose, with a tolerable degree of certainty, that he practiced in the common law courts of Westminster, and for some time held the office of Justiciar or Judge of the Aula Regis, and was probably appointed Chief Justiciar in 1265 and held that office until his death near the close of the year 1267.

It is certain that he had great practical experience in judicial proceedings, as well as a profound knowledge of jurisprudence in all its departments. Holding for a long time, the office of presiding justice, it is probable that he came more closely into contact with the lawyers and legal affairs of this kingdom than Glanville who held the office of chief Justiciar, but whose time was largely ~~occupied~~ occupied with military operations and affairs of state. I find no record of any important state case having been tried before Bracton, and so probably his time and attention were entirely

given to the cultivation or application of the common law. —

No report of proceedings in the Common law courts having come down to us from this day the only gauge we have to determine the influence he exercised in directing the course of the law, we have in his great work De Legibus et Consuetudinibus Angliæ.

For its great merit, this work was entitled to, and probably did receive a respectful consideration equal to that accorded to his opinions and decisions as a Judge of the Aula Regis, and equal to, or greater than the consideration we now accord

to Blackstones commentaries and other great text books.

Consequently, it must have long been quoted by lawyers in the common law courts, as a full and correct exposition of the common law at the time it was written.[a] The only defect imputed to the work, seems to be its frequent introduction of the civil law, but this will be found to be by way of illustration and not as authority.[b]

It detracts nothing from his worth and influence in shaping the common law, that he drew the attention of English lawyers from the exclusive contemplation of their own fo-

[a] IV Bl. Com. 433
[b] Lord Campbell

civilian code - even, more distinguished for precision than for enlarged principles. His influence in infusing broad principles of justice and humanity - into the common law cannot be over estimated - and to him may be ascribed the transformation of the common law from a barbarous code into a social science.

The influence of his work was felt[a] almost immediately after its publication, and to it, coupled with the strong and vigorous administration of Edward I, "our Justinian", is attributable the rapid progress towards a science, made by

[a] IV Blackstone 424

the law during the reign of that monarch.

Bracton's work was finished in 1267, the year of his death — and Edward I. commenced his reign in 1272. Five years was a very short time for the work of Bracton to be studied and sufficiently understood to exert any considerable influence in shaping the jurisprudence of a country, — especially would this be so in an age as dark as that in which Bracton lived.

But to show the progress made in the law so soon after his work was finished and published, I have but to quote Blackstone [a] who, speaking of

[a] Com. IV — 425

Edward 1., says "In his time the law did receive so sudden a perfection that Sir Matthew Hale does not scruple to affirm that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom than in all the ages since that time put together" But is it not altogether probable that the powerful sovreign is receiving the credit for what was really performed by an obscure lawyer in the previous reign - partly because Bracton's work could not bear fruit during the revolutionary close of Henry the Thirds reign, and before

order was restored by Edward— and partly, because the lustre of of any work performed by a subject, was absorbed by the sovereign.

In seeking to peace, the credit for the progress made in the science of law during Edwards reign, where I think it belongs, I do not desire to detract anything from the juridical fame of Edward who was in fact the "Justinian of England, and who studied the principles of law as conscientiously as any lawyer of his day; for do we not read that he "took delight in perusing Glanvill, Bracton and Fleta, which in those simple and happy times,

composed a complete law library."

But more than all, his strong sense of justice in dealing with the internal affairs of his kingdom, coupled with a vigorous and energetic character, induced him to give the jurisprudence of his kingdom that especial protection and fostering care, without which it would have been impossible for the legal philosophy of Bracton to accomplish its good purpose.

During Edward's reign the most important result of the influence of Bracton's work was the laying of the foundation for the court of Chancery, as it existed until the passage of the "Supreme Court Judicature Act."[a]

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[a] Bispham's Eq Jr. 10= Haynes Outlines of Eq 40.
Story's Eq Jr. § 44 IV Blackstone
"Edward I. established the Courts of Equity as it existed for so many centuries" Campbell's Lives Ch. Js 1-2, Snell gives the credit for this institution entirely

The Chancellor was entrusted with the power of doing justice to the subject where no remedy was provided by the common law.

It is difficult to trace the influence Edward — independent of Bracton — has upon the formation of the common law, but it is certain that he effectually stopped the encroachments of the Pope and his clergy by prescribing fixed limits to the ecclesiastic jurisdiction. He settled the form and effect of fines levied in the court of common pleas, although fines were really of Saxon origin.

By the Statutes of Winchester he improved upon Alfred's laws

for preserving the public peace.

He instituted the recovery of debt by writ of elegit, which permitted execution to be levied upon upon real estate; also the law permitting lands to be charged in a statute merchant, to pay debts contracted in trade.

The statutes of mortmain was originated under his influence - and its operation was salutary notwithstanding its partial avoidance by the invention of uses, even though its invocation in some very recent cases - as in the Girard - Cornell University controversy has not been altogether satisfactory.

This catalogue might be extended almost indefinitely - but Blackstone

sums up the whole subject in his terse and comprehensive style by saying "That the very scheme and model of the administration of common justice between party and party, was entirely settled by this King, and has continued nearly the same in all succeeding ages to this day — abating some alterations, which the humour or necessity of subsequent times hath occasioned. x x x I cannot give a better proof of the excellency of his constitutions, than, that from his time to that of Henry the Eighth, there happened very few and those, not very considerable alterations in the legal forms of proceedings"[a]

[a] 4 Commentaries 427

The changes in the law that were induced by the direct influence of the sovereign during the reign of Henry the eighth - and the next subsequent reigns - except those affecting religion - were few and unimportant and we will pass them over until in the reign of Elizabeth we "come to him who was pronounced by his contemporaries, and is still considered the greatest oracle of our municipal jurisprudence, who afforded a bright example of judicial independence and to whom we are indebted for one of the main pillars of our constitution"[a]

Sir Edward Coke was peculiarly qualified to stem the tide of

[a] Lord Campbell Lives Ch. Js. 1 - 245.

monarchial absolutism, that threatened to overwhelm the constitutional barriers protecting the freedom of England.

When the foolish irresolute and short-sighted James assumed control of the wave of monarchial supremacy started by Henry the eighth, and augmented, but kept within healthy bounds by the wise and vigorous policy of Elizabeth, he used it as an instrument of oppression; diverting it from the channels into which it had been directed by Elizabeth, he employed it only to convert a constitutional government into an unlimited monarchy.

When the fierce onslaught was

made upon constitutional liberty by the first Stuarts; backed by all the patronage of the Government, the popular cause must have suffered a complete overthrow, had no head been found around which to rally, no rock upon which to receive and break the first shock of the onset — and give the people warning and time to gather and marshal their ~~their~~ forces.

Coke was the rock, and received unshaken and almost alone, the first wave of oppression that swept out from the Stuarts.

Again and again that wave rushing with redoubled violence,

was broken and rolled back from that rock, around which, was gathered the peoples cause.

"When all the other judges basely succumbed to the mandate of a sovereign, who wished to introduce despotism under the forms of juridical proceedure, he did his duty at the sacrifice of his office, in spite of the blandishments the craft and the violence of the court of Charles I." [a]

Considering his splendid achievements, and the debt of gratitude we owe him, a view of his private character is unpleasant. He was narrow- cold- selfish and avaricious. His attainments and education were confined exclusively to the law,

[a] Campbells. lifs of Coke 345.

and his ambition was sordid.
"He was more remarkable for memory than imagination, and he had as much delight in cramming the rules of prosody in doggrel verse, as in perusing the finest passages of Virgil."[b]

His one sterling virtue was his rigid and incorruptible honesty; his one accomplishment was his complete mastery of the common law. "He seems never to have carried his thoughts beyond existing institutions, or modes of thinking, and to have labored to comprehend and remember what he was taught"[a]

With no taste for elegant literature — no healthy imagination,

[a] Camp. L's Ch. Js. 1 - 248
[b] Id. 1 - 245

and wholly ignorant of the principles of philosophy,[a] it at first seems difficult to see what influence Lord Coke had in forming the common law.

Coke's achievement was in chrystalizing into a system, compact and unchangable, the constitutional law of England.

Even in his valuable work as a legislator, he originated nothing new, but only insisted upon the preservation of the law as it was.

At the very outset of his professional career, he placed himself at the head of his profession by his able conduct for the plaintiff in the

[a] Camp. Lives Ch. J's 1 245.

celebrated "Shellys Case." Here then, we find an authoritative and definite statement of a principle of law that had been recognized as far back as the year books, but the application of which had fallen into a very uncertain condition. The "rule" as announciated in "Shellys Case" has since been a conspicuous feature in the law of real property, and as Kent says has given more specimens of profound logic, skillful criticism, and refined distinction, than any other rule of the common law. Though it is still recognized as law in England, it has been abrogated

wholly, or in part in most of our states; and in studying it we merely pay "a humble tribute to the memory of departed learning"[a] and I mention the case only as an illustration of the method and profound legal acumen of Mr Coke.

One of the means relied on by the Stuarts, to effect their schemes of absolutism, was the Court of High Commission; a court which had been established at the accession of Elizabeth, for causes purely ecclesiastical in their nature; but as it was not bound by any fixed rules, it was sought after her death, under the powerful patronage of

[a] 4 Kent. Com 2.30 f.

the King to give this court jurisdiction of ~~all~~ any cause, lay or spiritual - without appeal.

Sir Edward Coke, at this time Chief Justice of the Court of Common Pleas, decided in the face of the royal displeasure, that the court of High Commission had no such power; and for a short time its usurpations were stayed. Cokes influence in this matter is apparent, for so soon as Coke was removed from the bench, the Court of High Commission renewed and extended its usurpations, until it was entirely swept away by one of the first acts of the long-parliament.

The dispute arising in regard to this count, led to the celebrated conference between Francis I. and Lord Coke and the other Judges of the law court[a] and it was from Coke's conduct on this occasion that the leaders of the parliamentary party took their cue, in the subsequent contest between king and state.

Coke's greatest achievements for the constitutional portions of the common law, were performed in a legislative capacity in the House of Commons. The opening of the parliament of 1628 was the grand crisis of the English Constitution. "Had our distinguished patriots then quailed, parliaments

[a] 12 Coke, 63

councils thereafter have been merely the subject of antiquarian research, or perhaps occasionally summoned to register the edicts of the crown.

But the house of commons, having begun the session with taking the sacrament and holding a solemn feast, on the very first day Sir Edward Coke sounded the charge.

The first grievance specifically brought before the house was the decision of the courts respecting commitments by the king and council, without naming any cause, and "being committed by the king therefore he must not be bailed."

To remedy this evil, Coke drafted and carried resolutions

that were subsequently made the foundation of the Habeas Corpus Act.

Almost his last public act, and the crowning achievment of his life - was the framing and carrying of the "Petetion of Right", enumerating the abuses of prerogative from which the country was lately suffering, and after declaring them contrary to existing laws - resolved itself into an act of parliament and in the most express and stringent terms protected the people in all times to come from similar oppressions.

The Petetion of Right was passed without change, and its

attempted violation soon after led to the bloody civil war that ended when the head of Charles the first rolled upon the scaffold. No subsequent violation lost to England the American colonies.

At the death of Sir Edward Coke the formation of the common law was complete. Greater jurists have arisen since then but their work has been to interpret; the superstructure of the common law was complete, and they had only to carve and shape it to suit the exigencies of particular circumstances or situations. The great changes that have been made in the law since the great

Codes day, have been statutory.
Only the experience that dictated the wisdom of such changes, was drawn from the common law.
The formative period was complete and the structure stood forth bold, rugged, and unpolished, to be softened and brightened by those who chose to
"Master the lawless science of our law,
That codeless myriads of precedent,
That wilderness of single instances
Through which, a few, by wit or fortune led,
May beat a pathway out to wealth or fame" [a]

[a] Tennyson