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CHRISTIAN PHILOSOPHY  
IN THE  
COMMON LAW

BY

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The expansion of a paper on 'The  
Foundations of English Freedom' read  
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## CATHOLIC PHILOSOPHY AND THE COMMON LAW

THE Common Law of England is the only great system of temporal law that came out of the Christian centuries. It came out of the age which gave us the Cathedrals and the Abbeys and the Parish Churches of England, and those ancient centres of Christian philosophy and theology, the Universities of Oxford and of Cambridge.

### INFLUENCING NATIONAL LIFE AND CHARACTER

↑ The classical *History of English Law*, by Pollock and Maitland, ends with these memorable words: 'The law of the age that lies between 1154 and 1272 deserves patient study. For one thing it is a luminous age throwing light on both past and future . . . But we wrong this age if we speak of it only as one that throws light on other ages. It deserves study for its own sake. It was the critical moment in English legal history and therefore in the innermost history of our land and race. It was the moment when old custom was brought into contact with new science. Much in our national life and character depended on the result of that contact. . . Of this there can be no doubt, that it was for the good of the whole world that one race stood apart from its neighbours, turned away its eyes at an early time from the fascinating pages of the *Corpus Juris* and, more Roman than the Romanists, made the grand experiment of a new formulary system. Nor can we part with this age without thinking once more of the permanence of its work. Those few men who were gathered at Westminster round Patteshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children.'

## EXPANSION OVERSEAS

They were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean ; they were penning writs also that would run in the name of the King-Emperor on the shores of the Indian Ocean and the China Sea. The inheritance of the Common Law belongs not only to England and to Ireland, and to the great Dominions of Canada and Australia and New Zealand and to many of the Colonies: it belongs also to all the States (save one) of the American Union, and by infiltration and statutory extension, to the provinces and the States of India.<sup>1</sup>

### ITS INSPIRATION AND CHARACTER

Now it is reasonable to suppose that a system of law which had its origin in England in the 12th and the 13th centuries would be Christian in inspiration and in character. In fact, each of the men who are named on the memorable last page of the great History of Pollock and Maitland was a prelate of the Christian Church. Martin of Patteshull was Archdeacon of Norfolk and Dean of St Paul's; William of Raleigh was Bishop of Norwich and (after a stern struggle with the King) Bishop of Winchester; and Henry of Bracton was Archdeacon of Barnstaple, and at his death in 1268, Chancellor of Exeter Cathedral.

### GOD AND THE CHRISTIAN FAITH

Ever since the period of the Norman Conquest, the emerging principles of the Common Law were being shaped by Christian kings; and by Churchmen who were also Canonists. And at all times the Canon Law 'made a natural bridge to connect legal ideas with ethical and theological discussion.'<sup>2</sup> Even before he demanded the

<sup>1</sup>See Pollock : *Expansion of the Common Law*, pp. 133-4. One may add that there has been a certain infiltration of Common Law principles also in the laws of Scotland and of South Africa and of Quebec which belong originally to other systems of jurisprudence.

<sup>2</sup>Figgis : *From Gerson to Grotius*, p.4.



personal oath and loyalty of all free men, William the Norman proclaimed that 'one God shall be honoured throughout the whole of the kingdom and that the Christian faith shall be kept inviolate.' The God whom William and his kingdom honoured was *He Who Is*, the God of Abraham, of Isaac and of Jacob, the God of the Christian Church. And the faith he ordered to be kept inviolate was the faith of Augustine of Canterbury and of Bede, of Boniface and Alcuin, of Alfred the Great and Edward the Confessor. The duty to honour God and to keep the Christian faith inviolate lay not only on the people, but also on the King. In the Coronation Oath which was used by Dunstan in the tenth century the King is bidden to give one pledge only, which he laid upon the altar: 'In the name of the Holy Trinity: to the Christian people who are under my authority I promise that true peace shall be assured to the Church of God and to all the Christian people in my realm. I promise and enjoin Justice and Mercy in decision of all cases in order that God, who liveth and reigneth, may in His grace and mercy be brought thereby to grant us all His eternal compassion.'

The divine duty of doing Justice that lay upon the conscience of the King is re-affirmed by Henry of Bracton, the Father of the Common Law: *Ad hoc autem creatus est rex et electus, ut justitiam faciat universis, et ut in eo Dominus sedeat et per ipsum sua judicia discernat.*<sup>1</sup> And in his Coronation Oath, the King must swear: first that he will do what in him lies to secure that the Church and all Christian people may have peace in his time; secondly that he will forbid rapine and wrong-doing among all classes of the people; thirdly that in all his

<sup>1</sup>Bracton, *De Legibus*, f. 107. On the same page we read: 'Nihil enim aliud potest rex in terris, cum sit dei minister et vicarius, nisi id solum quod de jure potest. . . rex est dum bene regit, tyrannus dum populum sibi creditum violenta opprimit dominatione.' Compare St Thomas Aquinas, *S. T. I-II*, q. 90, a. 1, ad 3: *alioquin voluntas principis magis esset iniquitas quam lex.* And cp. *ibid* 92, a. 1, *lex tyrannica non est simpliciter lex sed magis est quaedam perversitas legis*; q. 96, a. 4 *magis sunt violentiae quam leges.*

judgments he will ordain equity and mercy as he hopes for mercy from God.<sup>1</sup>

#### COURTS CHRISTIAN AND KING'S COURTS

Within a little time of what Maitland calls the 'concrete conquest of England by a certain champion of Roman orthodoxy,' William made a second decree which reflected an abiding principle of Christian discipline. On the advice of the Archbishops, Bishops, Abbots and chief men of the realm, he issued a Royal Charter which recites that the conditions of episcopal jurisdiction 'have not been of a proper character in England or in accordance with the precepts of the holy Canon law', and which ordains that 'no bishop shall henceforth hold pleas in the Hundred Court, nor shall they bring forward for the judgment of laymen any case which concerns spiritual jurisdiction; but whoever has been summoned for some suit or offence within the province of episcopal jurisdiction shall make answer in accordance with Canon law'.

The separate organisation of spiritual and temporal Courts which is contemplated in the Charter of William reflects the view of the relations between Church and State that had been put forward as early as the fifth century by Pope Gelasius I. In Letters and Tractates Gelasius declared that in Christian society the spiritual and the temporal powers are entrusted to two different orders, each deriving its authority from God, and each supreme in its own sphere and independent, within its own sphere, of the other; nevertheless each of these powers is, in a way, dependent on the other and obliged to have relations with that other; so that while each is supreme in its own sphere, each is also subordinate in the sphere of the other.<sup>2</sup>

<sup>1</sup>Bracton, *Ibid.* f. 107. Carlyle, *Med. Pol. Theory*, III, 34-35. The duty to do Justice that lay upon the conscience of the King is the source and origin of the equitable jurisdiction of the Chancellor, who was the Keeper of the King's Conscience and who, until the fall of Cardinal Wolsey, was almost invariably an ecclesiastic.

<sup>2</sup>Migne: *Pat. Lat.* LIX, 108-109. Carlyle, *Med. Pol. Theory* I, 188-192; II, 144.



## CHRISTIAN SENSE OF PERSONAL FREEDOM AND RESPONSIBILITY

Behind the declaration of Gelasius lies a development of the concept of human personality and of liberty that was unknown to the ancient world. Under the Roman Empire, the cult of the pagan gods was a part of the ordinary duty of the citizen: *sua cuique civitate religio est, nostra nobis*, says Cicero in a lapidary phrase. And when in the course of time the personal worship of the Emperor was introduced, it was rigorously enforced. The teaching of our Lord put an end to ancient doctrines of State absolutism: 'Render to Caesar the things that are Caesar's, and to God the things that are God's'. The Church, which was the bearer of the Christian revelation, had by a necessity of its being to maintain that the moral and spiritual life of man shall be beyond the power and reach of the political officers of the community. There are aspects of human life which are not and cannot be under the control of the laws or the authority of the State. Here is the heart of what we may call the Christian revolution. The political theory of the Middle Ages was profoundly affected or rather controlled by certain conceptions which were distinctively Christian in their form, if not in their origin. The first of these is the principle of the autonomy of the spiritual life which in these ages assumed the form of the independence of the spiritual authority from the control of the temporal<sup>1</sup>.

### THE STRUGGLE OF BECKET

The principle laid down by Gelasius was reflected, as we have seen, in the Charter of William the Norman which

<sup>1</sup>Carlyle, *op. cit.*, Vol. III, 6-9. "Behind the forms of the great conflict (i.e. between Papacy and Empire) we have to recognise the appearance in the consciousness of the civilised world of principles new and immensely significant. For behind it all there lies a development of the conception of individuality or personality which was unknown to the ancient world. . . Men have been compelled to recognise that the individual religious and moral experience transcends the authority of the political and even of the religious society, and that the religious society as embodying this spiritual experience cannot tolerate the control of the State," *ibid.*, pp. 8-9. For St. Thomas Aquinas: *Persona significat id quod est perfectissimum in tota natura* : S.T. I, q. 29, a. 3.

secured a place in England for the Canonical Jurisprudence. In the long run it was, in the opinion of Maitland, by far the most important piece of legislation he enacted. In the course of time Thomas Becket, 'fighting not only the battle of the English Church but of the whole Church and of the Pope', won for the Church in England the right to take its place with the rest of the Church in the full administration of the Canon Law, with the right of appeal to Rome, and freedom of intercourse with the Pope.<sup>1</sup> The freedom that had been won by Becket was ratified and, so to say, consecrated by the first clause of Magna Carta: *Quod ecclesia anglicana libera sit et habeat omnia jura sua integra et libertates suas illaesas.*

The dual organisation of Church and State is recorded by Bracton as a matter of course: 'Among men there are differences in status, since some men are preeminent and preferred (*prelati*) and rule over others; Our Lord the Pope, for instance, in matters spiritual which relate to the priesthood (*sacerdotium*), and under him are archbishops, bishops, and other inferior prelates. Likewise in matters temporal, there are emperors and kings and rulers in things relating to the kingdom (*regnum*), and under them dukes, counts, barons, magnates, and knights.'<sup>2</sup>

#### INFLUENCE OF CANONISTS

At the side of William the Norman when he issued his Charter defining the limits of lay and spiritual jurisdiction stood Lanfranc of Pavia, master of Lombard and of Roman and of Canon Law, who in England carried all before him even when the talk was of *sac* and of *soc*. Lanfranc was at once witness and representative in England of the new renaissance of law—of Roman and of Canon law—which in the eleventh and the twelfth centuries spread outwards from Pavia and Bologna and

<sup>1</sup>Zachariah Brooke: *The English Church and the Papacy*, 1931, 209, 214. For the history and meaning of 'Ecclesia Anglicana' a term, *semble*, of Roman origin, see *ibid*, Chap. 1. On the whole dispute between Henry II and Becket, see *L'Eglise et La Royauté sous Henry II*, by Raymonde Foreville, Paris, 1943.

<sup>2</sup>Bracton, *de Legibus*, f.5 (b).



now filled the intellectual centres and the life of Europe. In no other age since the classical days of the Roman Law had so large a part of the sum total of intellectual endeavour been devoted to jurisprudence. At Bologna, in the middle of the twelfth century the monk Gratian had produced his great book of the Canon Law, the *Concordia Discordantium Canonum*, which came to be known as the *Decretum*. 'The *Decretum*,' says Maitland, 'is a great law book. The spirit which animates the author is not that of a theologian, not that of an ecclesiastical ruler, but that of a lawyer.'

#### THE COURT OF HENRY II

The centre of the historical stage in England was dominated in the twelfth century by the King, Henry II, and by Archbishop Theobald, with his school of Canon law at Canterbury, and Thomas Becket, who had studied the *Decretum* of Gratian at Bologna (and would study the *Decretum* again in exile at Pontigny<sup>1</sup>) and John of Salisbury, author of the *Polycraticus* and the *Metalogicon*, and Baldwin of Ford, who had both been trained in the Papal Curia, and Bartholomew of Exeter, lawyer and theologian from the schools of Paris, and Walter Map, sometime Chancellor of Lincoln and Archdeacon of Oxford, who had also read in Paris under Gerard la Pucelle<sup>2</sup>. The Court

<sup>1</sup>Raymonde Foreville, *ibid*, pp. 22, 265 : "Nous n'hésitons pas à affirmer que la tradition romaine et grégorienne, l'archevêque de Canterbury l'a connue et mise à contribution par l'intermédiaire du *Decret* à l'exclusion de toute autre collection canonique et même de tout contact direct avec les oeuvres des pontifes romains." And see p. 16 : "L'affaire Becket est le noeud de toute la politique ecclésiastique du Plantagenet ; elle ne se comprend qu'à demi si l'on supprime délibérément l'oeuvre de restauration monarchique entreprise depuis l'avènement de Henri II avec le concours de Becket lui-même et les premières passes d'armes qui opposèrent parfois le roi, l'archevêque Théobald et le pape Adrien IV ; d'autre part elle devait avoir une répercussion considérable sur l'évolution politique et judiciaire du royaume d'Angleterre jusqu'à la fin du règne, voire sur l'évolution de la législation et de la jurisprudence canoniques."

<sup>2</sup>Peter of Blois has left a delightful description of the men who were grouped round Archbishop Theobald : "The Court of Theobald is a camp of God, none other than the House of God and the gate of Heaven. . . In the house of my Lord Archbishop are most scholarly men with whom is found all the uprightness of justice, all the caution of prudence, every form of learning. All the knotty problems of the realm are referred to us, and when they are



of Henry II, now in touch with the vivid intellectual life of Europe, was beginning to make some general rules of law for all England. 'We are at a turning-point in the history of English law'.<sup>1</sup> Among the itinerant justices of the King, sitting to do justice in the King's Courts, are Bartholomew of Exeter (who often hears ecclesiastical causes also as Judge Delegate of the Pope), and Walter Map, and Roger Hovenden, the Chronicler. Richard, Bishop of London, in the *Dialogus de Scaccario*, and Hubert Walter, Bishop of Winchester, in the book that is called *Glanvill*, raise law to the level of literature. 'It was through the work of these men that the influence of the legal renaissance of the Continent made itself strongly felt in England. By their work and through that influence the foundations of the Common Law were so well and truly laid that it rules today not only in England but also in the many lands beyond the seas in which Englishmen have settled.'<sup>2</sup>

#### PRELATES AS JUDGES

The greatest, the most lasting triumph of Henry II, says Maitland, is that he made the prelates of the Church his Justices: 'Let us imagine a man whose notion of law and the logic of law is that displayed in the *Leges Henrici I*, coming upon a glossed version of the *Decretum* or on the *Summa*, say of William of Longchamps. His whole conception of what a law-book, what a judgment should be, of how men should state law and argue about law, must undergo a radical change. The effect produced on English law by its contact with Romano-canonical learning seems immeasurable or measurable only by the distance that divides *Glanvill's* Treatise from the *Leges Henrici I*.' (The distance, we are told elsewhere, between logic and caprice; between reason and unreason). 'During the whole of the

discussed in the common hearing, each of us, without strife or objection, sharpens his wits to speak well on them, and produces from a more subtle vein what he thinks the most prudent and sensible advice."

<sup>1</sup>Holdsworth : *History of English Law*, Vol. II, p. 173.

<sup>2</sup>Holdsworth, *ibid*, II, 175-176.

twelfth and the thirteenth centuries English law was administered by the ablest, the best educated men in the realm: by the self-same men who were the Judges Ordinary of the Church's Courts. At one moment Henry II had three Bishops for his Arch-Justiciars. In Richard's reign we can see the King's Court as it sits day by day. It is often enough composed of the Archbishop of Canterbury, two other bishops, two or three Archdeacons, two or three ordained clerks, and two or three laymen. The majority of its members might at any time be called upon to hear ecclesiastical causes and learn the lessons in law that were addressed to them in papal rescripts. Blackstone's picture of a nation divided into two parties "the bishops and clergy" on one side contending for their foreign jurisprudence, "the nobility and laity" on the other side adhering "with equal pertinacity" to the old common law is not true. It is by popish clergymen that our old Common law is converted from a rude mass of customs into an articulate system, and when the popish clergymen, yielding at length to the Pope's commands, no longer sit as the principal Justices of the King's Court, the creative age of our medieval law is over.<sup>1</sup>

#### THE TREATISE OF HENRY OF BRACTON

Even when at length he yields to the Pope's commands, Henry of Bracton (one of whose reasons for writing his Treatise was that ignorant and unlettered men were ascending the Chair of justice before they had learned the law and were perverting it<sup>2</sup>) bequeathed to the world a book *De Legibus et Consuetudinibus Angliae* 'the crown and flower of English medieval jurisprudence' which had 'no competitor in literary style or completeness of treatment till Blackstone composed his *Commentaries* five centuries later.' English law as we see it summed up in Bracton, says Professor Holdsworth, is an achievement of which any

<sup>1</sup>Pollock and Maitland, I, 132-4.

<sup>2</sup>Bracton: *De Legibus*, f.1. "The mighty figure of the Father of English Jurisprudence' is said by a competent scholar to have been 'a man of genius as a lawyer and of talent as a latinist': Kantorowicz, *Bractonian Problems*, 1941, pp. 17, 79.



nation may be proud. Within a period of little over a hundred years 'the legislative reforms of a King who was a born administrator had been enforced and logically developed by men who had imbibed through the Canon law much of the *Geist des Römischen Rechts*.'<sup>1</sup>

#### CANONIST INFLUENCE

A class of professional canonists is older than a class of men professedly expert in English temporal law. All the great names of our early law are churchmen and canon lawyers: Lanfranc and Anselm and Theobald and Becket and Hubert Walter and Martin Patteshull and William Raleigh and Henry of Bracton and the rest. Under the influence of these men, the Curia Regis was organised along the lines and according to the pattern of the Papal Curia and the Canon Law. The regular jurisdiction of the King is directly compared by Bracton to that of the Pope: *Sicut dominus papa in spiritualibus super omnibus habet ordinariam jurisdictionem, ita habet rex in regno suo ordinariam in temporalibus*. In the English as in the papal procedure, the first step is to impetrate a writ or breve which is called the original. From the first beginnings of the English law down to the Reformation the issue of original writs was in the hands of the clerks of the Chancery who were always doctors or masters of the Canon Law, 'some of them notaries of the Apostolic See whose authenticity would be admitted the world over.' The law that the Royal Judges administered is called (as is the general law of the Church) the *jus commune* or the Common Law. By *jus commune* the canonists meant the law that is common to the Universal Church as opposed to

<sup>1</sup>Holdsworth : *H. E. L.* II, 217. Bracton took his legal (and his theological) principles from the Old and the New Testaments, and the Councils and the Fathers of the Church, and from the *Decretum* and the *Decretals*, from the *Summa de Causis* and the *Summa de Matrimonio* of Raymond of Pennafort, and the *Summa Decretalium* of Bernard of Pavia, and from the *Ordo Judicarius* and *Summa de Matrimonio* of Tancred and from the *Corpus Juris Civile* and from Azo of Bologna 'the master of all the masters of the law' and from cases decided in England by his own masters, Martin Patteshull and William Raleigh. See *Bracton's Notebook*, ed. F. W. Maitland; and an illuminating article on the sources by Dr Fritz Schulz in *E. H. R.* LX, (May, 1945) pp. 136-176.



constitutions or special customs or privileges of any particular church or province. So in England the Common Law came to mean the body of rational legal principles that were declared and administered by the King's Judges as opposed to the special customs and privileges of any county or borough.<sup>1</sup> As the King's Court organised itself, 'slowly but surely justice done in the King's name by men who are the King's servants becomes the most important kind of justice, reaches out into the remotest corners of the land, grasps the small affairs of small folk as well as the great affairs of earls and barons. Above all local customs rose the custom of the King's Court: *tremendum regiae majestatis imperium.*'

#### THE INNS OF COURT

The withdrawals of churchmen and canonists from the King's Courts brought into view the groups of lay lawyers which had been in course of formation during all these years. 'No English institutions are more distinctively English than the Inns of Court . . . Unchartered, unprivileged, unendowed, without remembered founders, these groups of lawyers formed themselves and in the course of time evolved a scheme of legal education: an academic scheme of the medieval sort, oral and disputatious. For good and ill that was a big achievement; a big achievement in the history of some undiscovered continents.'<sup>2</sup> Elsewhere Maitland says, 'We see at Westminster a cluster of men which deserves more attention than it receives from our unsympathetic because legally uneducated historians. No, the clergy were not the only learned men in England, the only cultivated men, the only men of ideas. Vigorous intellectual effort was to be found outside the monasteries and the universities. These lawyers are worldly men, not men of sterile caste; they marry and found families, some of which become as noble as any in the land; but they are in their way learned, cultivated men, linguists, logicians, tenacious

<sup>1</sup>Pollock and Maitland, I, 176-7.

<sup>2</sup>Maitland: *English Law and the Renaissance.*

disputants, true lovers of the nice case and the moot point. They are gregarious, clubable men, grouping themselves in *hospices* which became schools of law, multiplying manuscripts, arguing, learning and teaching, the great mediators between life and logic, a reasoning, reasonable element in the English nation.

#### A LEGAL UNIVERSITY

During the centuries of the Middle Ages the Inns of Court constituted a true legal university. In a letter to one Faber, à propos Thomas More, Erasmus says: *Natus est Londini, in qua civitate multo omnium celeberrima natum et educatum esse apud Anglos nonnulla nobilitatis pars habetur*<sup>1</sup>. Until the sixteenth century the Inns of Court were, in the fine phrase of Dr Lévy-Uhlmann, the 'University and Church Militant of the Common law.' In the reign of Elizabeth, while the old form of intellectual discipline remained in force, Sir Thomas Smith, Regius Professor of Civil law at Cambridge, exclaimed upon the skill in disputation of the students and apprentices of the Inns of Court. His admiration was particularly excited by the way in which these students and apprentices were apt to handle the matter *etiam cum quid e philosophia theologice depromptum in quaestione ponatur*. Early in the next century in writing "Un description del Common Ley d'Angleterre," Sir Henry Finch explains that the rules of reason are of two sorts; some taken from foreign (i.e. other than legal) learning, both divine and human; the rest proper to law itself. Of the first sort are the principles and sound conclusions from foreign learning. 'Out of the best and very bowels of Divinity, Grammar, Logic, also from Philosophy, natural, political, economic, moral, though in our Reports and Year Books they come not under the same terms, yet the things which you find there

<sup>1</sup>One may recall in passing that English Law was not taught at Oxford or at Cambridge before the middle of the 18th century. In the Middle Ages the older Universities taught no law except Roman Canon and Roman Civil Law.



are the same; for the sparks of all the sciences in the world are raked up in the ashes of the law.<sup>1</sup>

## CHURCHMEN CONTROL

### I. CHANCERY; II. COURTS CHRISTIAN

The rise of the Inns of Court with the orders of Apprentices and of Serjeants (from whom the Bench was now recruited) meant that in future the services of Churchmen and canonists were confined to the Chancery<sup>2</sup> which exercised a certain supervision over the administration of justice in all the King's Courts, and granted equitable relief or equitable remedies in cases where in the judgment of the Chancellor the King's Courts had failed to do justice<sup>3</sup> and to the Courts Christian which in England exercised a wide jurisdiction (parallel to that of the King's Courts) over clerks and layfolk in matters of ecclesiastical economy, and (in the case of layfolk) over matrimonial causes, and wills and intestacies, and in cases of defamation and of usury and breach of faith (*laesio fidei*)<sup>4</sup>. Ecclesiastical jurisdiction

<sup>1</sup>As an illustration, in Y.B., 18-19, Ed. III. (R.S.) 378, two current and contrasting philosophies of jurisprudence are exposed on the Bench when an issue arises as to what the law is: *Hillary, J.* "It is the will of the Justices." *Stonore, C. J.* "No, law is resoun, that which is right." Again, the distinction which is drawn between the private and the public knowledge of the Judge in *Partridge v Strange* (1553), Plowden, p.83 is an echo of the discussion in Aquinas, *S.T.* II-II, q. 67, a. 2. In Y.B. 8 Ed. IV. Mich, pl. 9, the law of Reason of the common lawyers is identified with the law of nature of the canonists. So, in Y.B. 17 Ed. IV. *Brian, C. J.* states a principle of Theology and of Law in a famous sentence: "Comen erudition est que l'entent d'un home ne sera trie car le diable n'ad conusance de l'entente d'home." See Aquinas, *S. T.*, I, q. 57, a. 4; Maritain: *Freedom in the Modern World*, p. 25.

<sup>2</sup>Throughout the Middle Ages, the Chancery (the *Officina Justitiae*) was the centre of the English legal system and the political centre of the Constitution. The Lord Chancellor acted as Secretary of State for Home and Foreign Affairs, and as Minister of Justice. He was Keeper of the Great Seal which was, in Matthew Paris's phrase, the key of the kingdom. In modern times, the centre of the Constitution is the Treasury, which is the office of Finance.

<sup>3</sup>In Digby, *History of Real Property*, 4th ed., at pp. 342-3, 368-9, the lack of skill which the common-lawyer Chancellors of the post-Reformation period exhibited in handling the philosophical ideas that underlie the institution of 'uses' and 'trusts' is contrasted unfavourably with the "enlightened system which had been constructed by the succession of ecclesiastical chancellors."

<sup>4</sup>The canonists and, at a later time, the Civilians also handled Admiralty cases. Hence, the modern association of Probate, Divorce and Admiralty in one Division of the High Court of Justice.



is exercised by Archdeacon, bishop, archbishop, with a right of appeal to Rome. Apart from this appellate jurisdiction, the Pope as 'Universal Ordinary' has an original or instance jurisdiction. It is common practice for a would-be suitor in England to 'impetrate' a writ from Rome and have an action tried in England by the Legate or nominees of the Pope. In some cases such a course may be necessary: 'You wish to sue as co-defendants a man who lives at Lincoln and another who lives at York. What are you going to do? No English prelate has power over both these men. In the judicial system Canterbury is a unit and York is a unit; but England is no unit. Too often we speak of "The Church of England," and forget that there was no ecclesiastically organised body that answered to that name. No tie of an ecclesiastical or spiritual kind bound the Bishop of Chichester to the Bishop of Carlisle, except that which bound them both to French and Spanish bishops.'<sup>1</sup>

#### COURTS CHRISTIAN HEAR CASES OF DEFAMATION

The exercise of jurisdiction by the Courts Christian in cases of defamation, and even in cases of usury, may be at first sight surprising. In the year 1295 Parliament went so far as solemnly to declare that the King's Courts would entertain no action for defamation.<sup>2</sup> The fact is that in those days reputation was conceived to be a kind of spiritual property, *bonum animae*, in the language of St Thomas Aquinas.<sup>3</sup> It is also the thought of Shakespeare, who so often echoes the philosophy of the Middle Ages:

Good name in man and woman, dear my lord,  
Is the immediate jewel of *their souls*.

After the Reformation, the exclusive jurisdiction of the Ecclesiastical Courts (which were now staffed by Roman civilian lawyers in substitution for the canonists of the pre-Reformation time) was successfully challenged, in this matter as in many other matters, by the Courts of Com-

<sup>1</sup>Maitland, *Canon Law in the Church of England*, p. 113-4.

<sup>2</sup>Holdsworth, *H. E. L.*, II, 366.

<sup>3</sup>*S. T.*, II-II, q.73, a.3.

mon Law.<sup>1</sup> By a Statute of 1855 the Ecclesiastical Courts were deprived of their ancient jurisdiction to try cases of defamation.

#### AND CASES OF USURY

From an early time the Church and the Canon law condemned as sinful all usury, that is to say, the taking from a borrower of a payment solely for the use of money lent to the borrower to be applied by him in the normal way as a means of exchange. And the civil laws of all the States of Christendom endorsed and sanctioned the condemnation. The laws attributed to Edward the Confessor already treat usury as a crime: *Si aliquis inde probatus esset, omnes possessiones suas perdet et pro ex lege habetur*. For Glanvill and for Bracton, usury is at once a sin and a crime. In his lifetime, the usurer was dealt with as a sinner by the Courts Christian. If he died unrepentant the King had a claim to his goods. A Statute of 1341 enacted that the King and his heirs shall have cognisance of usurers dead; and that the Ordinaries of Holy Church shall have cognisance of usurers living as to them appertaineth, to subject them to censures of Holy Church for the sin, and to compel restitution of the usury taken against the laws of Holy Church. In 1487, a Statute made void all 'bargayns groundyt in usurye', imposing on those who made such bargains a penalty of a hundred pounds, in addition to any punishment which might be inflicted in the Courts Christian. In due course the English law accepted the distinction that Aquinas drew between a mere payment for the use of money and a payment made to compensate the lender for failure to realise an expected gain due to his not having the money (*lucrum cessans*) or a payment made to compensate the lender for some loss actually occasioned by non-payment of the loan (*damnum emergens*). 'A man may take a benefit for his money two manner of ways, which is *ex damno habito*, when he

<sup>1</sup>In the words of Gibbon, 'the double jurisprudence of Rome (i.e. the Canon and the Civil law) was overwhelmed by the enormous profession of the Common lawyers.'



sustaineth a loss, or *ex lucro cessante*, when his benefit or profit hath been taken away or prevented for want of his money, which he might have bestowed in some wares to furnish his shop at convenient time, and in both these the party is not active but passive.<sup>1</sup>

A Statute of Edward VI, re-affirming the Old Law, declared that usury was utterly prohibited by the word of God, and forbade in the most comprehensive terms the taking of any kind of interest. In the reign of Elizabeth, under the influence of the new doctrine of Calvin and Melancthon, Protestant opinion on usury began to waver. A Statute of 1571 provided that no penalty should attach to usurious transactions if the rate of interest did not exceed ten per cent.<sup>2</sup> Subject to certain statutory modifications and exceptions, the scheme of the Elizabethan Act continued to be the basis on which the law rested until the repeal of the Usury Laws in 1854, under the influence of Bentham, whose *Defence of Usury* came to be 'one of the sacred books of the Economists.'<sup>3</sup>

<sup>1</sup>Malyne, *Lex Mercatoria* (1622) cited Holdsworth, *H. E. L.* VIII, 103. cf. Aquinas, *S. T.* II-II, q. 78, a. 2 ; *De Malo*, q. 13, a. 4. The remark of Stanton, J., in the Eyre of Kent (1313-14) Selden Society, II, 27 : 'penalty and usury are only irrecoverable when they grow out of the sum in which the obligee is primarily bound,' appears to be an early anticipation of the definition of Usury in the *Vix Peruenit* of Benedict XIV.

In the Pipe Roll, 4. Rich. I, (Madox, Exchequer, 166) is a record of a fine paid by a Jew of Bristol 'that it may be found by inquest whether a Jew might take usury of a Jew.'

<sup>2</sup>The abandonment of the old canonist rule was opposed by Dr Wilson, Master of Requests, who expressed the wish that there were 'as strait laws to forbid usurie as there be to forbid felony or murder'; Wilson *On Usury*, f. 73. The book has been edited, with an invaluable introduction, by R. H. Tawney. Of Dr Wilson, Professor Holdsworth says loftily, that being a diplomatist he was somewhat of an amateur in financial and commercial matters. In Dr Holdsworth's opinion, the modification of the law as to usury was 'the condition precedent to the transition from medieval to modern commercial ideas,' *H. E. L.* VIII, pp. 99-110.

<sup>3</sup>The influence of the moral theologians and the canonists on medieval and modern legislation in reference to Usury is fully traced in Ashley's *Economic History*, Part I, cap. III ; Part II, cap. VI. From the introduction to the second edition one infers that Sir William Ashley became in the end a convert to the medieval principle. In a letter, written a few days before his death in April, 1946, in which he reviewed the little work of Fr Lewis Watt, S. J. on *Usury in Catholic Theology*, the late Lord Keynes declared his substantial agreement with the Catholic thesis and his regret that Fr Watt had not retained the old technical terms, *lucrum cessans* and *damnum emergens*, because he thought those terms brought out the essence of the argu-

The medieval prohibition of usury affected all sorts of legal relations, banking and exchange, insurance, loans and mortgages, certain kinds of sales of land or goods, contracts and partnerships, one might almost say the whole range of economic activities. For this reason it came to be 'comme la clef de voûte de l'économie politique du moyen âge.'

#### MARRIAGE AND THE FAMILY

Of no less importance was the jurisdiction that the canonists and the Courts Christian exercised over the institution of marriage and the family. Before the Reformation England had no temporal law of marriage. Marriage was a sacrament. All causes concerning marriage and divorce (*a mensa et thoro*) and legitimacy were within the jurisdiction of the Courts Christian. At the opening of his fourth book, on *Sponsalia*, the English canonist Lyndwood<sup>1</sup> writes: 'Here we might discuss what is marriage, whence it derives its name, how it is contracted, where it was instituted, what are the causes of its institution, what good flows from it, and what impediments there are to it.' And he adds: 'Of all these matters Innocentius has treated, and yet more fully Johannes Andreae'; in other words, to ascertain what is the English law of marriage, one is referred to the works of these two canon-

ment 'that the correct measure of interest is the loss, actual or potential, to the lender, and not the gain to the borrower. In other words, it is usury to extract from the borrower some amount additional to the true sacrifice of the lender which the weakness of the borrower's bargaining position or his extremity of need happens to make a feasible proposition.'

<sup>1</sup>William Lyndwood, the leading English canonist of the 15th century was Keeper of the Privy Seal, 1432-1443. To the question, under what law are heretics burnt in England? Lyndwood answers in substance that certain constitutions of the Emperor Frederick II have been sanctioned by a Decretal contained in the Sext of Boniface VIII. The Statute of 1401 authorised the burning of those heretics only who 'according to the canonical sanctions' ought to be relinquished to the secular arm. The 'canonical sanctions' are found under the title *De Hereticis* in the books of papal law. One may note that the test in England for one suspected of Lollardy took the form of a declaration that every Christian was bound to obey the constitutions and ordinances contained in the Decretum, the Decretals, the Sext, the Clementines, in such wise as obedience was demanded by the Roman Church. Maitland, *Roman Canon Law*, 176-7; Pollock and Maitland, vol. II, 546-7.



ists, one of whom was '*laicus et uxoratus*' and the other of whom was Pope.

It is noteworthy that some of the leading principles of the Christian law of marriage were defined by the Popes in cases where the parties were English. In a famous Decretal Alexander III writes to the Bishop of Norwich: 'We understand from your letter that a certain man and woman at the command of their lord mutually received each other, no priest being present, and no such ceremony being performed as the English Church is wont to employ, and then that before any physical union another man solemnly married the same woman and knew her. We answer that if the first man and woman received each other by mutual consent directed to time present saying one to another "I receive you as mine" (*meam*) and "I receive you as mine" (*meum*), then, albeit there was no such ceremony as aforesaid, and albeit there was no carnal knowledge, the woman ought to be restored to the first man, for after such consent she could not and ought not to marry another. If however, there was no such consent, as aforesaid, and no union preceded by a consent *de futuro*, then the woman must be left to the second man who subsequently received her and knew her and she must be absolved from the suit of the first man.' On the one hand stands the bare consent *per verbum de presenti*, unhallowed and unconsummated; on the other a solemn and consummated union. The formless interchange of words prevails over the combined force of ecclesiastical ceremony and sex relation.<sup>1</sup>

Though marriage by mere words (*per verba de presenti*) was a valid marriage, it was not on an equal footing for all

<sup>1</sup>Pollock and Maitland : II, 371, 373-4. See the caustic comment of Maitland on the solemn declaration by the House of Lords in 1843 that 'by the ecclesiastical and Common law of England the presence of an ordained clergyman was from the remotest period essential to the formation of a valid marriage.' In fact, at the beginning of the thirteenth century Archbishop Hubert Walker, with a saving clause for the honour and the privilege of the Roman Church, published a constitution that no marriage was to be celebrated until banns have been thrice published and that no persons were to be married save publicly in the face of the Church and in the presence of the *parochus*. At the Lateran Council in 1215 Innocent III extended the rule as to banns of marriage over the whole realm of Christendom.

purposes with a marriage which had been consummated (*matrimonium ratum et consummatum*). In a discussion as to the limits of the power of the Pope, Stephen Langton has a passage relative to the matter: 'We say that it is not known nor is it possible to define how far the Pope can go. For who would have dared to say before the time of Alexander III that a woman who had not consummated her marriage could transfer herself to the monastic life? Who would not have denied that the Lord Pope in the light of the saying in the Gospel "whomsoever God hath joined together let no man put asunder" could give dispensation for a matter of this kind? But afterwards, when the Decretal was issued, any man who had previously denied it, would say that the Lord Pope could dispense.'<sup>1</sup>

If, in a proceeding before one of the King's Courts, the existence or non-existence of a marriage between two persons became relevant to the inquiry, the matter was referred to the Ordinary for his certificate. Again, neither adultery nor bigamy nor incest was an offence against the temporal law. These matters also were handled and punished by the Courts Christian.<sup>2</sup> The rule that children born out of wedlock are legitimated by the subsequent marriage of their parents was definitely settled by a

<sup>1</sup>Powicke: *Stephen Langton*, p. 140. The argument here is incidental to a discussion of [the power of the Pope to dispense] from the payment of tithes.

<sup>2</sup>Accordingly, with the decline of the ecclesiastical courts it became necessary to make bigamy and incest statutory offences punishable in the King's Courts. In the year 1942 it was declared in the Court of Appeal, that the justification of ecclesiastical courts over layfolk, is now 'obsolete and gone beyond recall.' See 1942, 2 K.B. at pp. 258-9. Adultery is therefore no longer punishable by ecclesiastical sanctions nor is it a crime by statute or at common law. The late Lord Merrivale, sometime President of the Probate and Divorce Division, appears to have thought that there ought to be (apart from the remedy by way of divorce) a criminal sanction for adultery: *Marriage and Divorce*, pp. 58-9.

In contradistinction to the rule of the Roman Civil Law and of the law of those countries that, following the Roman tradition, recognised brothels as a necessary institution, keeping a bawdy house is a criminal offence at Common Law. The reasoning behind the Common law rule may be found in *S.T. III, Supp.*, q.65, a.3, and leads to the conclusion: *Accedere ad mulierem non junctam sibi matrimonio, quae concubina vocatur, est contra legem naturae*. See Rand, *Cicero in the Court Room of Aquinas*, Marquette Univ. Press, 38.



decision of Alexander III addressed to the Bishop of Exeter which is included in the collection of Decretals published in 1234 by Pope Gregory IX. In so far as it related to the inheritance of land, the rule was rejected by the barons and the royal judges at the Council of Merton in 1236.<sup>1</sup> The King's Courts maintained their *Nolumus* in cases of inheritance of land by submitting to a jury *as an issue of fact* the question whether A was born before or after the marriage of his parents, rather than by referring to the Court Christian *as an issue of law* the question whether A was the legitimate child of the same parents. The legitimacy of the offspring of putative marriage is dealt with by Bracton in a passage which he borrowed from the canonist Tancred: 'If a woman in good faith marries a man who is already married believing him to be unmarried and has children by him such children will be adjudged legitimate.'<sup>2</sup>

Throughout the Middle Ages marriage was a sacrament, hallowed by the Church, and protected by the Courts Christian. In the classical philosophy which was still current the family (which is the source of life and being of men and of States) was recognised as a unit intermediate between the individual and the community. 'It is evident that a household is a mean between the individual and the City or Kingdom, since just as the individual is part of the household, so is the household part of the City or Kingdom.'<sup>3</sup> And the diverse ends of the individual and the family and the State were served by different sciences or kinds of prudence: 'The individual good, the good of the family, and the good of the City and Kingdom are different ends. Wherefore there must needs be different species of prudence corresponding to these

<sup>1</sup>We may note that 'it was no baron but a lawyer, an ecclesiastic, a judge, Bracton's master, William Raleigh, who had to meet the clerical forces (at Merton) and to stand up for English practice against the laws and canons and consensus of Christendom.' William Raleigh was at the time a canon of St Paul's and was going to be a bishop and something of a martyr, his name being joined with the names of Anselm and Becket: Grosseteste, *Epist*, pp. 76, 95.

<sup>2</sup>Bracton: *De Legibus*, f. 63b.

<sup>3</sup>Aquinas: *S. T. II-II*, q. 50, a. 3.

different ends, so that one is *prudence* simply so called, which is directed to one's own good, another *economics or domestic prudence* which is directed to the common good of the home, and a third, *politics or political prudence*, which is directed to the common good of the State or Kingdom.<sup>1</sup>

The classical and Christian respect that was thus paid to the institution of marriage and the family was a marked feature of medieval life in England and gave rise to the saying which is older than its expression in Semayne's case that 'an Englishman's home is his castle.' More than once even in modern times the highest courts have recognised the father's undoubted right 'as master of his own house, as king and ruler in his own family, to enforce his command by his own authority within his own domain.' 'The Common Law,' said Lord Atkin, one of the greatest of the English Judges of our time, in 1919, 'does not regulate the form of agreements between spouses (living in amity). Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for little in these cold courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop and the principles of the Common Law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Court, Sheriff's officer and reporter. In respect of these promises, each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted.'<sup>2</sup>

<sup>1</sup>Ibid q. 47, a. 11, *in corp.* The economists of the 19th century on the other hand conceived society in the image of two men cast upon an otherwise uninhabited island. And individualists and socialists continue to think of politics in terms of a supposed conflict between the individual and the State. The family unit is eliminated. The child becomes by Statute and almost of necessity the child of the State. The illegitimate child, *filii nullius* is for John Stuart Mill a norm: 'I hold that to no child, merely as such, anything more is due, than what is admitted to be due to an illegitimate child.' *Political Economy*, Book II, chap. 2, s. 3.

<sup>2</sup>*Balfour v Balfour*, 1919, 2 K.B., 571, 579. In Semayne's case (1604) 5 Co. 91, it is laid down: 'The house of Everyman is to him as his castle and fortress as well for his defence against injury as for his repose . . . *domus sua cuique est tutissimum refugium.*'



## NATURAL LAW: IN THE KING'S COURTS

From the law which was administered by the Chancery and in the Courts Christian, we pass to the law which was administered in the Courts of our Lord the King. The articulation of the principles of the English law by a succession of prelates and of canonists and of lay lawyers who were trained in Christian philosophy and in the discipline of the Christian faith meant that the law of England came to recognise the ideas and principles of the Natural Law, to which the Church has always been loyal.<sup>1</sup> The *Decretum* of Gratian, following the example of Isidore and the Fathers, and the texts of the Roman Civil law, had affirmed the existence and operation everywhere of the principles of natural law. The great English publicists had repeated the doctrine. John of Salisbury in his *Polycraticus* affirmed the existence and operation of a system of natural law and declared that human law must not be at variance with it, that if human law contradicted the natural law, it is invalid and should not be enforced. Of like mind was Stephen Langton, who had professed theology for twenty years at the University of Paris, before he was appointed Archbishop of Canterbury. Stephen Langton affirmed that the natural law is binding on princes and bishops alike, that there is no escape from it, that it is beyond the reach of the Pope himself, who could not dispense from it, seeing that the fabric of any form

<sup>1</sup>See e.g. Pius XII, *Summi Pontificatus*, 1939, translated by Monsignor Ronald Knox, p.12: 'Today the false views held in earlier times have been amalgamated with new inventions and misconceptions of the human mind. And this perverse process has been pushed so far that nothing is left but confusion and disorder. *One leading mistake* we may single out, as the fountain-head, deeply hidden, from which the evils of the modern state derive their origin. Both in private life and in the state itself, and moreover in the mutual relations of race with race, of country with country, the one universal standard of morality is set aside; by which we mean *the natural law*, now buried away under a mass of destructive criticism and neglect. . . . This natural law reposes, as upon its foundation, on the notion of God, the almighty creator and father of us all, the supreme and perfect law-giver, the wise and just rewarder of human conduct. When the willing acceptance of that eternal Will is withdrawn, such wilfulness undermines every principle of just action. The voice of nature, which instructs the uninstructed and even those to whom civilization has never penetrated, over the difference between right and wrong, becomes fainter and fainter till it dies away.'

of society is bound up with it. Of Stephen Langton whom we may almost name the author of *Magna Carta*, 'a real English prelate troublesome alike to King and Pope,' Professor Powicke says that 'in the light of our constitutional history he seems to take a place beside the great Common lawyers or Somers or Burke.'<sup>1</sup>

Henry of Bracton in turn affirms the rule of Natural Law and says that liberty *quae est de jure naturali, per jus gentium auferri non potuit, licet per jus gentium fuerit obfuscata. Jura enim naturalia sunt immutabilia.*<sup>2</sup> The principle is re-affirmed in the 15th century by Sir John Fortescue, Chief Justice of the King's Bench, (a declared disciple of St Thomas Aquinas) for whom the Natural Law is so to say the source and spring of the Common Law. And the same principle will be re-affirmed in the 16th century by Christopher St German, a disciple of John Gerson, in *The Doctor and Student*, and in the 17th and the 18th centuries, by Coke and Holt.

Of Natural Law, *matrem et dominam omnium legum humanarum*, Fortescue says in the *De Laudibus*: 'the laws of England in those points which they sanction by reason of the law of nature, are neither better nor worse in their judgments than are all laws of other nations in like cases. For, as Aristotle said in the 5th Book of the Ethics, Natural Law is that which has the same force among all men.'<sup>3</sup> Besides the *De Laudibus* and the *De Monarchia* (to which we shall return) Fortescue wrote what Professor E. F. Jacob rightly calls 'a very important treatise' on the *De Natura Legis Naturae*. The work was written at a time during the wars of the Roses when Fortescue was a fugitive in Scotland, living in the Convent of the Dom-

<sup>1</sup>Powicke, *Stephen Langton*, p. 21. At p. 47, Professor Powicke points out that the same Stephen Langton was the author of 'one of the greatest of all hymns,' the *Veni, Sancte Spiritus*.

<sup>2</sup>Bracton, *De Legibus*, f. 4. Here Bracton differs sharply from what will be the opinion of his younger contemporary St Thomas Aquinas; see *infra* pp. 30-31 and of St Thomas More in the *Utopia*, in f.3, in discussing the various meanings of the term *Jus Naturale* Bracton cites Ulpian with a difference: *Jus Naturale est quod natura, id est ipse Deus, docuit omnia animalia*.

<sup>3</sup>*De Laudibus*, cap. 16. Translated by Dr S. B. Chrimes, p. 39.



inican Fathers at Edinburgh.<sup>1</sup> Here and elsewhere Fortescue expressly teaches that the Law of Nature 'which is the keystone of his jurisprudence' is the ground of all law. He adds in the *De Laudibus* that the rules of Natural Law, if reduced to writing and promulgated by authority of the prince, and commanded to be kept, are converted into a constitution of something in the nature of a Statute; and oblige the Prince's subjects under greater penalty than before, by reason of the strictness of the command. In the absence of such an express command, it is clear that for him the rules of natural law operate *proprio vigore* and carry a natural sanction: *praecepta moralia ex ipso dictamine naturalis rationis efficaciam habent, etiamsi nunquam in lege statuuntur.*<sup>2</sup>

In the *Doctor and Student* of Christopher St German (1460-1540), whose book was to influence English Law and Equity for a period of two centuries and more, we are told that law is founded, first on the Eternal Law which is the Wisdom of God moving all things to a good end, and secondly on the Law of Nature of reasonable creatures, or 'the law of reason as it is commonly called by those that are learned in the law of England.' This law, he says, is written in the heart of Everyman, teaching him what is to be done and what is to be fled. It is never changeable by no diversity of place or time. Against this law, prescription, statute or custom may not prevail, any alleged prescriptions, statutes, or customs, brought in against it being things void and against justice.<sup>3</sup> In his enumera-

<sup>1</sup>It is noteworthy that the literary activities of Sir John Fortescue, our first great text writer after Bracton, began and largely coincided with his period of residence in the Convent of the brethren of St Thomas Aquinas. The works of Fortescue deserve to be edited jointly by a constitutional lawyer and theologian.

<sup>2</sup>S. T. I-II, q. 100, a. 11. The existence and operation of a natural sanction to the rules of Natural Law is largely overlooked nowadays though it may again come into view. Thus, the Soviet experiment in free abortion in public clinics and hospitals in Russia had to be abandoned after some fifteen or sixteen years owing to 'the grave injury to the female' that was found to follow. Like murder and adultery, abortion is an offence against the natural law.

<sup>3</sup>*Doctor and Student*: Introduction, cap. I and II. With this statement Dr Pickthorn affirms that 'every judge of the later 15th century would have agreed.' In his essay on Reason and Conscience in the 16th century jurisprudence, (*Collected Works*, Vol. II, 193) Professor Vinogradoff points out

tion of the laws in force in England in the early years of the 17th century, Sir Edward Coke names the *lex coronae* and the *lex et consuetudo parliamenti* and the *lex naturae et communis lex angliae*. The law of nature and the Common Law are thus enumerated in one breath as it were and represent so to say a single combination.<sup>1</sup>

In fact the principle of an over-riding law of nature was for many centuries accepted and followed not only by the Common lawyers and the King's Judges, but also by Parliament which was and is even nowadays sometimes said to be in its ultimate essence a Court of Justice; the High Court of Parliament. In 1468 for example, the Chancellor told the House of Lords that Justice 'was ground, well and root of all prosperity, peace and public rule of every realm, whereupon all the law of the world had been ground and set, which resteth in three; that is to say, the law of God, the law of nature, and positive law.' And early in the 17th century, the Speaker of the House of Commons, 'still orthodox even if not beyond dispute,' declared that the laws whereby the ark of this government hath ever been steered are of three kinds, first the Common Law, grounded or drawn from the law of God, the law of reason, and the law of nature, not mutable; the second, the positive law, founded, changed and altered by and through the occasion and policies of time; the third, customs and usages, practised and allowed with time's

that St German's exposition of Natural law corresponds closely in the main to Scholastic patterns laid down by St Thomas and expounded by John Gerson. Gerson, he notes, was a Nominalist, and follower of Occam, but 'his eclectic teaching supplied St German with the elements of Thomist doctrine.' In fact, e.g., a large part of Chapter III of the *Doctor and Student* on the Law of God, is taken bodily from the corpus of *S. T.*, I-II, q. 91, a. 4.

<sup>1</sup>The doctrine of Fortescue and of St German and of Coke thus recognises in the law of Nature and the law of Reason a set of unchanging principles and of rational conclusions from those principles in the manner of St. Thomas Aquinas: *S. T.* I-II, q. 94, a.4. *Lex naturae quantum ad prima principia communia est eadem apud omnes et secundum rectitudinem et secundum notitiam. Sed quantum ad quaedam propria, quae sunt quasi conclusiones principiorum communium, est eadem apud omnes ut in pluribus et secundum rectitudinem et secundum notitiam; sed ut in paucioribus potest deficere et quantum ad rectitudinem. . . et quantum ad notitiam . . . Sicut apud Germanos olim latrocinium non reputabatur iniquum cum tamen sit expresse contra legem naturae, ut refert Julius Caesar in libro de Bello Gallico.*



approbation without known beginnings. One may accordingly say that at any rate until late in the 17th century, the principle of an overriding law of nature was a commonplace of legislation and of jurisprudence and familiar to the political and the public mind of England. In fact, the principle was strongly re-affirmed by Chief Justice Holt at the beginning of the 18th century and again though less strongly by Blackstone in his *Commentaries on the Law of England*.

During all the creative centuries of the Common Law the end of the law was a moral end. *Finis hujus rei est ut in regno conservetur pax et justitia*. For all the great lawyers from Bracton to Lord Mansfield, jurisprudence is a part of Ethics. *Ethicae vero supponitur quasi morali scientiae quia tractat de moribus*.<sup>1</sup> In a sentence that will echo through the centuries Bracton will state the great constitutional principle that 'the King is under God and the law.'<sup>2</sup> *Ipse autem rex non debet esse sub homine sed sub Deo et sub lege quia lex facit regem . . . Attribuat igitur rex legi quod lex attribuit ei videlicet dominationem et potestatem. Non est enim rex ubi dominatur voluntas et non lex*.<sup>3</sup> The theme will be taken up by an anonymous scribe in one of the Year Books: 'the law is the highest inheritance of the King by which he and all his subjects are to be ruled; and if there were no law, there would be no King and no inheritance.'

<sup>1</sup>Bracton; f. I, b; Lord Mansfield, Fifoot, p. 29.

<sup>2</sup>The principle was invoked by Sir Edward Coke in a famous quarrel with King James I; and by the President of the unconstitutional tribunal which passed sentence on King Charles I (IV State Trials, 1018); in the sermon which was preached at the restoration of Charles II; and in the opening speech of Justice Robert Jackson at the trial of the War Criminals at Nuremberg. (*Trial of Major War Criminals*, p. 36).

<sup>3</sup>The text continues: *Et quod sub lege esse debeat, cum sit dei vicarius, evidenter apparet ad similitudinem Ihesu Christi, cuius vices gerit in terris. Quia verax dei misericordia, cum ad recuperandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, qua ad destruendum opus diaboli non virtute uteretur potentiae sed justitiae ratione. Et sic esse voluit sub lege, ut eos qui sub lege erant redimeret. Noluit enim uti viribus, sed iudicio. Sic etiam beata dei genetrix, virgo Maria, mater domini, quae singulari privilegio supra legem fuit pro ostendendo tamen humilitatis exemplo legalibus subditi non refugit institutis. Sic ergo rex, ne potestas sua maneat infrenata.*

ENGLISH CONSTITUTIONAL LAW  
BORROWS FROM AQUINAS

In the fifteenth century the principle stated by Bracton finds new force and definition in the *De Monarchia* of Sir John Fortescue which is the first book that was written in English on the English Constitution. The first chapter of the *De Monarchia* has to do with 'the deference bi twene *dominium regale* and *dominium politicum et regale*.' The opening sentences read: 'There bith two kyndes off kyndomes, of the wich that on is a lordship callid in laten *dominium regale*, and that other is callid *dominium politicum et regale*. And thai diuersen in that the first kyng may rule his peple bi suche lawes as he makyth hym self. And therefore he mey sett upon thaim tayles and other imposicions such as he wol hym self, without thair assent. The secounde kyng may not rule his peple by other lawes than such as thai assenten unto. And therefore he mey sett upon thaim non imposicions with owt thair owne assent. This diuersite is wel taught bi Seynt Thomas in his boke wich he wrote ad regem Cipri de regimine principum.'<sup>1</sup> In this way Sir John Fortescue sought in the writings of St Thomas Aquinas a philosophical basis for the constitutional regime in England and for the rule that the King as a constitutional monarch needed the consent of Parliament to the imposing of taxes and the making of laws. The practical working out of the theory of representation and the doctrine of consent is detailed in the current edition of May's *Parliamentary Practice*: 'The

<sup>1</sup>Much learning has been spent in the endeavour to identify the citation, *c. f.* Chrimes: *English Constitutional Ideas*, 314, 324, 339. In fact the distinction between *dominium regale* and *dominium regale et politicum* is a familiar doctrine with St Thomas. See Demongeot, *Le Meilleur Régime Politique selon Saint Thomas*, p. 41, seqq., where a number of citations are given from his *Commentary on the Politics of Aristotle*, and elsewhere. See also, *S. T.*, I, q. 81, a. 3: *Anima quidem corpori dominatur despotico principatu, intellectus autem appetitui politico et regali*. And see I-II, q. 17, a. 7; q. 56, a. 4; q. 58, a. 2. For the profound influence exercised by Aquinas and Egidius Romanus on the thoughts of Sir John Fortescue, see Hezelteine, *Preface to De Laudibus* ed. Chrimes, p. xlviii.

In passing we may note that the men who issued the writs of summons to Parliament *ad deliberandum et consentiendum et faciendum* were manifestly familiar with the philosophy and the psychology of the Schoolmen.



theory of representation and the doctrine of consent are traced to an ecclesiastical origin by attributing to the Lateran Council of 1215 the motive source, to the practice of the English Church Councils from 1226 onwards the precedents, and to ecclesiastical leaders the principle applied first in connection with taxes on 'Spiritualities' that taxation demands both representation and consent. It is now shown that the feudal doctrine of consent to taxation lacked the element of representation. The Church affirming the principle *quod omnes tangit ab omnibus approbetur* linked the two practices together and so laid the foundation of the power of the Commons. Even more important was the contribution of the leaders of the Church in England, both in principle and in practice, to the union of the different estates of the realm into one single *communitas regni*.<sup>1</sup>

#### THE FELLOWSHIP OF A FREE COMMUNITY

In accordance with the principles of Christian philosophy and theology, England will be a free community. It will be an association of families of free men and women living in the fellowship of a free community. Already in the *De Legibus* Bracton had declared in a text that he borrowed from Florentinus, that by virtue of his nature man is free: *Est autem libertas naturalis facultas ejus, quod cuique facere libet, nisi quod iure aut vi prohibetur*. And he proceeds: *sed secundum hoc videtur quod servi sint liberi* and adds: *In hac parte ius civile vel gentium detrahit iuri naturali*. In the next sentence he declares that servitude is a rule of the *ius gentium* by which a man is subjected to the dominium of another man against natural right and justice (*contra naturam*). In this forthright declaration in favour of freedom Bracton goes beyond his younger contemporary St Thomas Aquinas whose doctrine seems to be that slavery does not belong to the first principles of natural law, but that it appears in the *ius gentium* as an institution which natural reason established among men; as an institution appropriate not to man as

<sup>1</sup>May's *Parliamentary Practice*, 1946 ed., p. 7.

such, but to this or that man, to whose advantage it may be to be ruled by another.<sup>1</sup>

In the course of the centuries the doctrine which animated the Common Law, that by virtue of his nature man is free, wrought in England a social revolution. Throughout the Anglo-Saxon period the mass of the English people were slaves or serfs or villeins or otherwise of unfree condition. All the Germanic peoples recognised slavery. At the coming of William the Conqueror an extensive slave trade was being carried on at Bristol and was only temporarily stopped by the preaching of Bishop Wulfstan. At the end of the Anglo-Saxon period the class of praedial serfs comprised most of the humble cultivators of the soil. The gebur, the ploughman, the cottar and their progeny were often serfs attached to the soil and sold with the soil. They were the most valuable part of the stock of the farm and their pedigrees were carefully kept.<sup>2</sup> The slave class, which was composed of men and women who were slaves by birth, of those who in evil days 'had bowed their heads for bread', was tending to become merged in the miscellaneous class of persons who actually cultivated the soil. Such a state of things was inconsistent with the witness of Augustine that 'God did not make man to lord it over his fellows, but only to be master of irrational creatures; and that the desire to rule over our equals is an intolerable lust of soul,' and with the declaration of Gregory (who mistook the Saxon slaves in the market place—the *Angli*—for *Angeli*) 'that the main purpose of the Incarnation was to break the chain of slavery by which men are bound and to

<sup>1</sup>S. T. II-II, q. 57, a. 3 : *Dicendum quod hunc hominem esse servum, absolute considerando, magis quam alium, non habet rationem naturalem ; sed solum secundum aliquam utilitatem consequentem, in quantum utile est huic quod regatur a sapientiori et illi quod ab hoc juvetur.* And see his Commentary on Aristotle, I Pol. Lec. III, IV. Lottin, *Droit Naturel chez Saint Thomas*, 2nd ed. p. 90.

<sup>2</sup>Holdsworth, *History of English Law*, Vol. II, p. 42. The social movement of pre-Norman times is described by Professor Stenton : 'The central course of Old English social development may be described as the process by which a peasantry, at first composed of essentially free men, acknowledging no lord below the King, gradually lost economic and personal independence.' *Anglo-Saxon England*, p. 463.



restore them to their natural freedom.' It was natural then that the equality of human nature should be affirmed by the Canonists as a first principle and that it should pass in due course into the texture of the Common Law.<sup>1</sup> In the Book that is called *Glanvill* we meet at once the great conception of the Common Law, the free and lawful man (*liber et legalis homo*), existing not merely as an idea but so to say as an institution. 'All through this period,' says Professor Holdsworth, 'the medieval Common Law was creating the idea of the normal person—the free and lawful man of the English law.'<sup>2</sup> 'Among laymen,' says Maitland, speaking of the 13th century, 'the time has indeed already come when men of one sort, free and lawful men (*liberi et legales homines*), can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional. The lay Englishman, free, but not noble, who is of full age, and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person.'<sup>3</sup>

The growth of the Common Law was thus unfavourable to the existence of a class of slaves or serfs or villeins or other men of unfree condition. In the course of time all the unfree and dependent classes were merged in one mass under the general title of *villani*, and in the end, in obedience to its own principles and in the interests of the social welfare, the Common Law came to hold the villein to be a free and lawful man. The law of villein status was never repealed. It fell into disuse because the persons to whom it applied had ceased to exist in the early Tudor

<sup>1</sup>Carlyle, II, 118. In one of his Decretal Letters, the English Pope, Adrian IV, (d. 1159) laid it down that 'as in Jesus Christ there is neither free nor slave and the Sacraments are open to all, so also the marriage of slaves must not be prohibited, and even if the contract is made without the consent or against the will of the master (so as to be invalid according to the Civil Law), the marriage is not to be dissolved or declared void in the Ecclesiastical Court : *Decretals*, IV, 9, 1 : cited Carlyle, *ibid*, II, 132.

<sup>2</sup>*H. E. L.*, Vol. III, 457. *Glanvill*, Book 13, c. 16, ed. Woodbine, p. 166.

<sup>3</sup>Pollock and Maitland, I, 390. *Legalis homo* implied freedom from legal disability of every kind, excommunication, outlawry, minority, infamy caused by perjury, and so forth.

time.<sup>1</sup> The principle that Lord Mansfield put into words in *Somerset's case*, was implicit in our law from the beginning: 'By the Common Law of England no man may hold property in another . . . Let the black go free.'

#### THE DIGNITY OF MAN

The sense of Christian dignity and the principles of Christian philosophy thus converted England into a society of free men and women living in the fellowship of a free community. From the beginning the ordinary man of the law was conceived not only to be a free man but also to be a good man. *De omni homine*, says Bracton, *presumitur quod sit bonus homo donec probetur in contrarium*. The Judges of the Common Law, who were trained in Christian principles and in the discipline of Christian living,<sup>2</sup> had a deep respect for the ordinary man of the law, which could scarcely be shared by those who started with the theory that the nature of man is radically corrupt, and that the proper life of man is 'poor, nasty, dull, brutish and short.'<sup>3</sup> In the portraits that Shakespeare draws of minor characters such as the Fool in *Lear*, or the gardeners and the groom in *Richard II*, and old Adam in *As You Like It*, we seem to catch a reflection of the ordinary man as he appeared in the society of the 16th century. Take the sketch that Shakespeare gives of Corin the shepherd in his answer to Touchstone: 'Sir, I am a true labourer, I earn that I eat, get that I wear, owe no man hate, envy no man's happiness, glad of other men's good,

<sup>1</sup>In *Doctor and Student*, which was first published in 1523, the theologian in the dialogue gravely doubts the righteousness of villeinage: 'me thinketh it first good to see whether it may stand with conscience that one may claim another to be his villein, and that he may take from him his lands and goods, and put his body in prison if he will, it seemeth hee loveth not his neighbour as himself that doth so to him.'

<sup>2</sup>The lawyers of the Tudor time, Professor Holdsworth tells us, 'knew their Vulgate well.' Of Sir John Fortescue, Miss Levett has said: 'His dialogue on Faith and Understanding bear witness to the vivid religion of a busy man of affairs, a religion which rings as true as the cloistered virtue of à Kempis.' Of the home of Thomas More, Erasmus wrote: 'It is a school or University of Christian teaching wherein are studied all the branches of a liberal education.'

<sup>3</sup>If the nature of man be radically corrupt, he must obviously be coerced by some external power to lead him to decent courses and ways of living. There is an inner logic in *Leviathan*.



content with my harm ; and the greatest of my pride is to see my ewes graze and my lambs suck'.<sup>1</sup> Elsewhere, as in Hamlet, Shakespeare reflects the purest medieval tradition in the famous passage :

What a piece of work is man : how noble in reason ;  
how infinite in faculty ; in form and moving how  
express and admirable ; in action how like an angel ;  
in apprehension, how like a god ! The beauty of the  
world, the paragon of animals.

He makes Horatio speak of the 'sovereignty of reason,' while Hamlet describes most fully the traditional view :

What is a man,  
If his chief good and market of his time  
Be but to sleep and feed ? A beast, no more.  
Sure he that made us with such large discourse  
Looking before and after, gave us not  
That capability and god-like reason  
To fust in us unused.

For the literature and for the law of the sixteenth century the dignity of man is founded in the belief that he is a being made in the image of God, and having dominion over all the lesser orders of created things.<sup>2</sup> Now if there be One superior to the King or to the State to whom (as the conscience of the King and our own conscience testifies) Everyman owes a duty or duties, it

<sup>1</sup>Compare the answer that Thomas More made in the Tower to Thomas Cromwell : 'I am the King's true faithful subject and daily bedesman and pray for His Highness and all the realm. I do nobody no harm, I say no harm, I think no harm, but wish everybody good. And if this be not enough to keep a man alive in good faith I long not to live.'

<sup>2</sup>In the *Utopia*, the King 'gave to Everyman free liberty and choice to believe what he would, saving only that he earnestly and straitly charged them that no one should conceive so vile and base an opinion of the dignity of man's nature, as to think that souls die and perish with the body ; or that the world runneth at all adventures governed by no divine providence.' One who does not believe in the existence of God and the immortality of the soul they count 'not in the number of men, but as one that hath debased the high nature of his soul to the vileness of brute beast bodies ; much less in the number of their citizens . . . wherefore he that is thus minded is deprived of all honours, excluded from all offices and removed from all administration of the Common Weal. And thus he is of all sorts despised as being necessarily of a base and vile nature.' So, too, Plato fixed the death penalty for those who denied the truth of his system and doubted the existence of God : *Laws* 10, 907d, 909d. *Paideia*, Jaeger, III, 349.

follows (our rank in the order of creation being the same), that Everyman is on a level with each of his fellow men and that Everyman has rights against his fellows and against the State. A duty towards a superior Power necessarily confers rights against an inferior power. Men hold their lives on a lease from God, not from the State. The Judges of the Common Law, recognising and enforcing the principles of Natural Law and of Christian philosophy (and without the assistance of any Act of Parliament) defined the offences of suicide and murder and manslaughter and rape.<sup>1</sup>

#### THE BOND OF NATURAL FRIENDSHIP

In the thought of the Common Law, Everyman is thus taken to be a free, and therefore a responsible man and a good man (for all his frailty), and a friend at heart to his fellow men. *Inest autem homini naturalis inclinatio ad omnium hominum dilectionem; ac si omnis homo omni homini esset familiaris et amicus.* The doctrine of Aquinas will be echoed by Sir Thomas More in the *Utopia*: "The fellowship of nature is a strong league: and men be better and more surely knit together by friendship and benevolence than by covenants of leagues, by hearty affection

<sup>1</sup>In the case of *Hales v Petit*, (4 and 5 Eliz.) Plowden, 253, suicide was declared in the Common Bench to be an offence against nature, against God, and against the King:—

i. against nature, because it is contrary to the rules of self-preservation, which is the principle of nature, for every living thing does by instinct of nature defend itself from destruction, and then to destroy oneself is contrary to nature, and a thing most horrible.

ii. against God, in that it is a breach of his commandment, thou shalt not kill; and to kill oneself by which act he kills in presumption his own soul is a greater offence than to kill another.

iii. against the King, in that hereby he has lost a subject and . . . he being the head has lost one of his mystical members.

The frame of the judgment clearly reflects the threefold argument against suicide in the *Summa Theologica*, (II-II, q. 64, a. 5). The case has an added interest since it is said to have supplied the basis of the reasoning on suicide in the Gravedigger's Scene in *Hamlet*. The reference to the 'mystical members' recalls the fact that in preparing the betrayal of the Pilgrims in 1536, Henry VIII had written: 'I as your Head pray for you my members that God may light you with His Grace to knowledge.' Pickthorn, *Tudor Government*, II, pp. 341-2.



of mind than by words.<sup>1</sup> Erasmus, the friend of More, is naturally of one mind with him. 'Nature, or rather God, hath shaped this creature (that is, Man), not to war, but to friendship, not to destruction, but to health, not to wrong, but to kindness and benevolence.'<sup>2</sup> The existence of this natural friendship between man and man is thus a bond not only of social but also of international order.

The friendship of male and female supplies the basis of the bond of matrimony. The fellowship of man and woman in marriage belongs to a different and a deeper plane of living than the ordinary relation of citizen and citizen. And the deepest friendship is of necessity the most enduring. To the ordinary man of the law, who had a sense of his own dignity and of the duty that he owed to God, and the obligations that he owed to his wife and to his children, the indissoluble character of Christian marriage (which was a means of sacramental grace) did not appear an intolerable burden. The office of parent creates of its own right the most dignified status in society. *Prius est esse quam esse tale*. The spouses who give life and being to the community are the chief agents of social welfare and of the common good.

#### FREEDOM AND RESPONSIBILITY

With freedom goes responsibility. *Liber est causa sui*. A free man is answerable for his own acts and omissions. At Common Law Everyman is answerable for his own acts. No man is answerable for the act of another unless he has commanded it or consented to it: *quia quis pro alieno facto non est puniendus*. Before the end of the twelfth century 'anything that we could call slavery was

<sup>1</sup>According to Stapleton, author of the *Tres Thomae*, (1858) More was an accomplished Thomist, who had paid special attention to the study of dogmatic theology. (Eng. Translation, 1928, p.38). In the *Dialogue of Comfort* (ed. Hallet, p.80) which was written in the Tower, he makes a specific reference to the Article in the *Summa* II-II, q.168, a.2: *Utrum in ludis possit esse aliqua virtus?* Had he the *Summa* with him in the Tower?

<sup>2</sup>Franciscus de Vitoria, one of the Spanish founders of International Law belongs to the same fellowship; *Videtur quod amicitia inter homines sit de jure naturali*.

extinct. The mere relationship between lord and vassal did not make the one responsible for the acts of the other.<sup>1</sup> Our Common Law when it took shape in Edward I's day, did not . . . make masters pay for acts they had neither commanded nor ratified. 'It would be against all reason to impute blame or default to a man where he has none in him, for the carelessness of his servants cannot be said to be his act: *Ceo serra encounter tout reason de mitter culpe ou default en un home, lou il n'ad nul en luy, car negligence de ses servants ne poit estre dyt son fesauns.*'<sup>2</sup> So too Fairfax in Y.B. 6 Ed.VI, 'felony is of malice prepense and when an Act is done against a man's will there is no felonious intent.'

The Common Law conception of the legal responsibility of Everyman for his own acts springs from the conviction of the moral and intellectual autonomy of Everyman. By virtue of this autonomy each man is an original source of spontaneous and rational action. The doctrine *que chaque homme a une intelligence toute personnelle* is for Aquinas, who is in this matter a pioneer and a representative of Christian thought in the Middle Ages, *le fondement philosophique de tout ce qu'il y a de philosophie dans sa psychologie et sa morale.*<sup>3</sup> 'Fondé sur la substantialité de l'intellect et l'immortalité qu'elle entraîne, l'être individuel du chrétien acquiert la dignité d'un être permanent, indestructible, distinct de tout autre dans sa permanence même et source originale d'une activité rationnelle dont l'exercice décidera de la destinée future de cet être responsable. Il ne faut pas se dissimuler que nous sommes ici

<sup>1</sup>Pollock and Maitland, Vol. II, 529, 533. 'Our present doctrine about the liability of a master for a tort committed by a servant "acting within the scope of his employment," can hardly be traced in any definite shape beyond the revolution of 1688': *ibid.*, 528.

<sup>2</sup>Holdsworth, *H. E. L.*, Vol. III, 373, 383; Vol. VIII, 473. The liability of the employer for injuries caused by the acts and faults of his servants is analogous to the duties imposed on owners of things which are or may be dangerous: Pollock, *Essays in Jurisprudence*, 128. The doctrine came from the Roman lawyers in the Admiralty Court, Holdsworth, VIII, 475. Holmes, *Common Law* pp. 16, 20.

<sup>3</sup>Gorce, *Essor de la Pensée au Moyen Age*, 273, 299. 'Toute une moitié, toute la partie centrale de *Contra Gentiles* est une doctrine synthétique de la forme intellectuelle de chaque homme, principe de son autonomie morale, une immense théorie, toute neuve, de l'intellectualisme métaphysique moral.' *ibid.*, 263.



*à la source de toute la vie de l'esprit dans son double exercice théorique et pratique, puisque c'est en tant que rationnel, donc en tant que personne, que l'individu peut discerner le vrai du faux, c'est à dire avoir une science, et discerner le bien du mal, c'est à dire avoir une morale.*"<sup>1</sup>

#### EMERGENCE OF THE YEOMAN

Animated by the principles of Christian philosophy and theology, the Common Law in the centuries of its creative power and achievement slowly built a social system on the basis of the dignity of human personality and the intellectual and moral autonomy of Everyman. Of that system as it developed in an agrarian economy the social type was the Copyholder or more truly the Yeoman. It was by the Copyholder, according to William Harrison, that 'the greatest part of the realm doth stand and is maintained.' The copyhold had grown out of the old villein tenure but 'now copyholders stand upon a sure ground, now they weigh not their Lord's displeasure, they shake not at every sudden blast of wind, they eat, drink, and sleep securely, only having a special care of the main Chance, viz: to perform carefully what Duties and Services so ever their Tenure doth exact and Custom doth require : then let the Lord frown, the Copyholder cares not knowing himself safe and not within any danger.'<sup>2</sup> The yeoman was either a copyholder or a freeholder. Many of the ancestors of the yeomen of Elizabethan and Stuart days were following the plough as bondsmen. Now, the yeoman was 'a gentleman in ore whom the next age may see refined.'

The emergence of the yeoman is now acknowledged to have been due to 'the natural trend of social and economic developments,' even though it may have been accelerated by the Black Death and the Peasants' Revolt. Already in

<sup>1</sup>Etienne Gilson, *L'Esprit de la Philosophie Medievale*, (Gifford Lectures) 1932, Vol. I, 210, 195-215.) Hawkins, *Sketch of Medieval Philosophy*, 1946, p. 79. *S. T. I.*, q. 79, aa. 4, 5 ; q. 84, a. 5 ; *De Unitate Intellectus contra Averroistas*.

<sup>2</sup>Sir Edward Coke : *The Compleat Copyholder*, p. 31.

Chaucer the summoner in the Friar's Tale announces the worth of yeomanry :

I am a yeman, knowen is ful wyde  
My trouthe wol I holde as in this cas  
For though thou were the devel Sathanas  
My trouthe wol I holde to thee my brother.

It was, we are told, the increase in free personal status of those who had lately risen from an estate of villeinage, and the advantage they took of that freedom to move about and improve their condition that brought many tenants to the position of yeomen. The fact that the lands of yeomen were their own or under their direct control bred in them a sense of pride and a personal interest and responsibility not discernible nor to be expected in the poorer husbandmen or tenant farmers who worked at somebody else's bidding. In the 16th century Sir Thomas Smyth called the yeomen the 'liver veins of the Commonwealth yielding both good juice and nourishment to all other parts thereof', And Nathaniel Newbury spoke of them as 'the pith and substance of the country.' They were indeed on several counts 'the backbone of the English nation.'<sup>1</sup>

In *Cases and Causes*, we are told, 'the law of England hath conceived a better opinion of the Yeomanry that occupy Lands than of Tradesmen, artificers, or labourers.' None the less the tradesmen, artificers, and labourers, had their own proper dignity and worth. The ideal of the Common Law was a moral ideal : honest manufacture, a just price, a fair wage, a reasonable profit. 'So long as economic dealings were based on a system of personal relationships they all had an implied moral character. To

<sup>1</sup>The Registers of the University of Oxford from 1567 to 1622 reveal this classification :

Sons of Noblemen (Earls, Lords and Barons) ..	84
Sons of Knights .. .. .	590
Sons of Esquires .. .. .	902
Sons of Gentlemen .. .. .	3,615
Sons of Plebeians (including Yeomen) ..	6,635
Sons of the Clergy .. .. .	985
Those whose status is not given .. .. .	758

The facts in this section are taken from *The English Yeoman* by Mildred Campbell (1942). See pp. 15, 17, 35, 50, 61-8, 118, 120, 271, 360.



supply a bad article was morally wrong, to demand excessive payment for goods or for labour was extortion, and the right or wrong of every transaction was easily understood.<sup>1</sup> These principles of Christian ethics which animated the Common Law stood in sharp contrast with the principles of pagan ethics that marked the Roman Civil Law. 'What Christian morality as represented in its highest features aimed at was not merely the prevention of obvious injustice or deceit but the fulfilment of the law of Christ: "whatsoever ye would that men should do unto you, do ye also unto them." In nothing was the contrast between this precept and the conduct sanctioned by the Roman Civil Law more evident than in purchase and sale. The principle recognised by the Roman Law had been that price was entirely a matter to be determined by free contract. Early in the 3rd century Paulus laid it down that in buying and selling, a man has a natural right to purchase for a small price that which is really more valuable and to sell at a high price that which is less valuable, and for either to over-reach the other. Echoing Pomponius in this, he taught that in purchase and sale it is naturally allowed to the contracting parties to try and over-reach one another.'<sup>2</sup> Again, in a case where a contract in restraint of trade was before the Court, *Hull*, Justice, said: 'A ma intent, vous purrez aver demurre sur luy que l'obligation est voide eo quod le condition est encountre common ley, et per Dieu, si le pl' fuit ici il irra a prison tanque il ust fait fine au Roy.'<sup>3</sup> The Statutes that were passed to deal with abuses were, as Mr. Leadam has pointed out, in accordance with the current doctrines of moral theology.<sup>4</sup> A

<sup>1</sup>Cunningham, *Industry and Commerce*, I, 465, 466.

<sup>2</sup>Ashley, *Econ. History*, 11th to 14th century, second ed. 1892, p. 132

<sup>3</sup>Y. B. 2 Henry V, Pasch. PL. 26.

<sup>4</sup>*Select Cases in the Star Chamber*, S.S. Vol. II, xxxix. One may recall that throughout this period the Master of the Rolls, the Clerk of the Parliament and all the Canonist Masters in Chancery, were part of the machinery of Parliament and attended as a matter of course without any writ of summons. Again, on occasion, moral theologians were summoned to advise Parliament on points of legislation. Thus Wycliffe appears to have been summoned in 1378 as one of the Doctors of Theology who were to advise Parliament. See *History of Parliament*, ed. Wedgwood 1932, Vol. I, p. xxxii. Vol. II, lix-lx.

Statute of 23 Ed. III embodies the doctrine of the just price : 'All sellers of all manner of victual shall be bound to sell the same victual for a reasonable price having respect to the price that the said victual be sold at in the places adjoining, so that the same sellers have moderate gains and not excessive, reasonably to be required according to the distance of the place from whence the said victuals be carried.' An Act of 27 Ed. III, directed that in Staple Towns 'houses shall be let at reasonable prices, imposed by the Mayor.' In this way, by the articulation of Christian principles of morals and philosophy into a technical system of jurisprudence, a series of Judges and Masters of the Common Law brought into existence 'a far more developed, more rational and mightier body of law than the Roman.'

#### THE CONSTITUTION OF ENGLAND ORIENTATED TOWARDS GOD

Throughout the creative centuries of the Common Law, the orientation of the mind and life of England was towards God : Godward. All the life and institutions of the realm were inspired and guided by a moral ideal.<sup>1</sup> The Church was everywhere the centre of community life. The separate organisation of Church and State was designed to secure that the moral and spiritual life of Everyman should be free from control by the political officers of the community, and so to avoid the danger of totalitarianism.<sup>2</sup> The King, that is to say, the executive power, was by virtue of his Coronation Oath, and of the Custom of his own Court, 'under God and the law.' In his exposition

<sup>1</sup>In Lambard, (ed.1619) *Eirenarcha*, the old order appears : The points of charge (of the Justices in Quarter Sessions) 'do either concern God, the Prince or subject' ; 'All these laws' do either command or prohibit things agreeing or repugnant to some of the four cardinal virtues, Prudence, Justice, Fortitude, or Temperance. All these ordinances do either draw us to the good or withdraw us from the evil of the mind, the body, or fortune. Holdsworth, *H. E. L.*, Vol. IV, p. 543.

<sup>2</sup>Throughout the Middle Ages, St Thomas Becket was one of the most popular saints, and his shrine at Canterbury the most popular shrine in Europe. To him, in the heart of the Temple, a chapel was dedicated, and in use by the Common lawyers until the reign of Henry VIII, who had it removed or adapted to secular uses, as Henry 'is known to have regarded with peculiar disfavour the memory of this rebellious churchman.'



of the *Magna Carta* Sir Edward Coke calls attention more than once to the preamble in which the King confesses that the Charter was made and granted for the honour of God, for the exaltation of Holy Church, and for the amendment of the Kingdom, and the good of the King's soul. Here as elsewhere the law for great men became the law for all men. It was the practice of the most powerful of the English Kings to exhort his servants in all their doings and affairs touching the King first to pay respect and regard to God and afterwards to the King, their Master.<sup>1</sup> The Legislature also and the Judicature of a Christian State, severally acknowledged that English Jurisprudence had as its foundation the Law of God and the Eternal Law, and the principles of Natural Law and Justice which are so to say the reflection or the participation in rational creatures of the Eternal Law.

The institution of marriage, too, on which the State was founded was a Sacrament of the Church, sacred in character and indissoluble in essence. Every English man and every English maid was presumed by the law to have the dignity and the moral power (assisted by divine grace) to exchange and to keep promises of marriage 'for better, for worse . . . till death us do part.' And the spouses were deemed to be fit and worthy together to manage the affairs of the household and out of their own resources to maintain and educate the children of the marriage<sup>2</sup> ;

<sup>1</sup>King Henry VIII 'on an occasion shortly after his entry into the office of Lord Chancellor, moved eftsoons Sir Thomas More to weigh and consider "his great matter" ; who, falling down upon his knees, humbly besought his Highness to stand his gracious sovereign . . . saying that there was nothing in the world had been so grievous unto his heart as to remember that he was not able . . . for that matter anything to find whereby he could with his conscience safely serve his Grace's contention ; as he always bare in mind the most godly words that his Highness spake unto him at his first coming into his noble service, the most virtuous lesson that ever Prince taught his servant, willing him first to look unto God, and after God unto him, as in good faith he said he did, or else might his Grace well account him his most unworthy servant.' Harpsfield, *Life of More*, pp. 23, 57.

<sup>2</sup>Apart from modern Statutes, the right and duty of the parents to control and direct the education of their children, is fully recognised in English law and Equity : see III, Co. Rep. 39, B. Until lately, the right and duty was indelible, *Humphreys v Polak*, 1901, 2 K.B., 385. In *re Agar Ellis*, 1883, 24 Ch. Div., the Court of Appeal stated 'the Court must not be tempted

## and to own and administer property in land or goods.<sup>1</sup>

to interfere with the natural order and course of family life . . . except in those very special cases in which the State is called upon for reasons of urgency to set aside the parental authority and to intervene for itself. To neglect the natural jurisdiction of the father over the child would be really to set aside the whole course and order of nature and . . . disturb the very foundation of family life.' The Court must seek the benefit of the infant 'having regard to the Natural Law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.' *In re Carroll*, 1931, 1, K.B. 317, in the Court of Appeal, reference was made to the article in the *Summa Theologica* which asks whether the children of Jews ought to be baptized against the will of their parents. The answer of Aquinas is that until a child reaches a certain maturity of mind, it rests *sub quodam spirituali utero parentum*, and so it would be contrary to natural justice if it were removed from its parents' custody or if anything were done to it against its parents' will. *S. T.* II-II, q. 10, a. 12 ; III, q. 68, a. 10. The phrase *sub quodam spirituali utero parentum* is a noteworthy anticipation of modern psychological science. During the latest war, the American Army authorities are said to have hearkened to the advice of the psychiatrists and to have postponed the enlistment and accelerated the demobilisation of fathers of families for the reason that 'the surest guarantee of a happy adult life is a childhood spent in the visible love and protection of both parents.'

<sup>1</sup>The right to the possession of external goods springs from the rational character of man. In *Sum. Theol.*, II-II, q. 66, a. 1, Aquinas asks: *Utrum naturalis sit homini possessio exteriorum rerum?* And answers: *Sic habet homo naturale dominium exteriorum rerum: quia, per rationem et voluntatem potest uti rebus exterioribus ad suam utilitatem, quasi propter se factis; semper enim imperfectiora sunt propter perfectiora. Hoc autem naturale dominium super ceteras creaturas, quod competit homini secundum rationem, in qua imago Dei consistit, manifestatur in ipsa hominis creatione, Genes. I, (v. 26) ubi dicitur: Faciamus hominem ad similitudinem et imaginem nostram: et praesit piscibus maris, etc.* In the next article he asks: *Utrum licet alicui rem aliquam quasi propriam possidere?* And answers: that it is lawful and necessary for human life for three reasons: *Primo quidem, quia magis sollicitus est unusquisque ad procurandum aliquid quod sibi soli competit quam aliquid quod est commune omnium vel multorum: quia unusquisque laborem fugiens, relinquit alteri id quod pertinet ad commune; sicut accidit in multitudine ministrorum. Alio modo, quia ordinatius res humanae tractantur si singulis immineat propria cura alicujus rei procurandae: esset autem confusio si quilibet indistincte quaelibet procuraret. Tertio, quia per hoc magis pacificus status hominum conservatur, dum unusquisque re sua contentus est. Unde videmus quod inter eos qui communiter et ex indiviso aliquid possident, frequentius jurgia oriuntur.* Speaking in the *Utopia*, in his own name, Sir Thomas More assigns in substance the same reasons for the institution of private property: 'Me thinketh that men shall never there live wealtheely, where all thinges be commen. For howe can there be abundance of goodes or of any thing, where every man withdraweth his hande from labour? Whome the reward of his own gaines driveth not to worke, but the hope that he hath in other mens travayles maketh him slowthfull. Then when they be pricked with povertye, and yet no man can by any lawe or right defend that for his owne, which he hath gotten with the labour of his owne handes, shall not there of necessity be continual sedition and bloodshed? Specially the authority and reverence of magistrates being taken away, which, what place it may have, with such men among whom there is no difference I cannot devise.' The argument of Aquinas and Sir Thomas More is repeated in substance by Pope Leo XIII in the famous Encyclical, *Rerum Novarum*, of 1891.



## THE INCARNATION OF ENGLISH LAW AND EQUITY

Guided by an inspiration or by a sure instinct, the students and apprentices of the Inns of Courts had over a period of centuries spontaneously kept in the Year Books a matchless record of the dealings of the King's Courts with the free men and women of England, and of their relations one with another as they appeared in evidence before the Court.

At the turning point of English history the Inns of Court recognised as their outstanding representative one who had been in turn Speaker of the House of Commons and Lord Chancellor and who was, so to say, the incarnation of English law and Equity; and of the Christian theology and philosophy that animated the Common Law.

Against this man in an evil time a charge of treason was laid. In the first of the four counts of his Indictment, it was alleged that Sir Thomas More had maliciously kept a complete silence and refused to give a direct answer to an interrogatory proposed to him in the Tower by Thomas Cromwell, the King's Secretary of State, asking whether he recognised the King as the Supreme Head on earth of the Church in England.<sup>1</sup>

The King had claimed (and an Act of Parliament had sanctioned his claim) to be Head of the Church in England to be "King and Pope, and something more than the Pope;" and, as Head of the Church, to be entitled to define the doctrine of the Christian faith and the prin-

<sup>1</sup>The gist of the Indictment (which is set out in Harpsfield's *Life*, pp. 270-1) runs: *Quidam tamen Thomas More, nuper de Chelcheth, in Comitatu Mydd. Miles, deum pre oculis non habens, sed instigatione diabolica seductus, septimo die Maii Anno regni dicti domini Regis vicesimo septimo . . . apud dictam turrin London . . . coram Thoma Cromwell Armigero, primario Secretario Domini Regis . . . et coram diuersis aliis personis . . . per mandatum ipsius domini Regis examinatus et interrogatus, an ipse eundem dominum Regem supremum caput in terra ecclesiae anglicane accipiebat, acceptabat, et reputabat, et eum sic accipere, acceptare, et reputare, vellet . . . idem Thomas ad tunc et ibidem maliciose penitus silebat responsumque directum ad illud interrogatorium facere recusabat. Et hec verba Anglicana sequencia dictis domini Regis veris subditis adtunc et ibidem edicebat, videlicet, "I will not meddyl with any such matters, for I am fully determyned to serue God, and to thynk uppon his passion and my passage out of this worlde."*

ciples of Christian morals.<sup>1</sup> The King had also claimed in a matter of Christian marriage to exercise the jurisdiction of the Pope and even to be judge in his own cause.<sup>2</sup> The King was now claiming the divine prerogative of judging the silences of the mind and conscience of his subjects.

Against this charge of Silence, Sir Thomas More protested: 'Touching I say this challenge and accusation, I answer that for this my taciturnity and silence neither your law nor any law in the world is able justly and rightly to punish me, unless you may besides lay to my charge, either some word or some fact in deed. For ye must understand that, in things touching conscience every true and good subject is more bound to have respect to his conscience and to his soul than any other thing in all the world besides.'<sup>3</sup>

At the crisis of his life, which was also a crisis in the life of England, Thomas More appealed to a text which is to be found in the Treatise on Law of the greatest of the Christian theologians; in the answer to an article which asks: *Utrum fuerit necessarium aliquam esse legem divinam?*<sup>4</sup>

<sup>1</sup>By Statute 31, Henry VIII, cap. 8, Statutes 1817, vol. III, p. 726, men might be punished with death for offence against 'any proclamation to be made by the King's Highness, his heirs or successors, for and concerning any kind of heresies against Christian religion.' The religion of Everyman now depended upon the King who was entitled to pronounce *ex cathedra* what Englishmen must believe on pain of death.

<sup>2</sup>In the course of his trial, Sir Thomas More spoke to his judges: 'Howbeit it is not for this Supremacy so much that ye seek my blood as for that I would not condescend to the marriage.' He was defending not only freedom of conscience, and the freedom of the Church, but also the integrity of Christian marriage.

<sup>3</sup>In his opening speech at the trial of the Major War Criminals at Nuremberg, Sir Hartley Shawcross, Attorney General, said: 'The warrant of no man excuseth the doing of an illegal act. Political loyalty, military obedience are excellent things, but they neither require nor do they justify the commission of patently wicked acts. There comes a point where a man must refuse to answer to his leader if he is also to answer to his conscience.' *Official Report*, p. 87.

<sup>4</sup>S. T., I-II, q. 91, a. 4. *De his potest nemo legem ferre de quibus potest judicare. Judicium autem hominis esse non potest de interioribus motibus, qui latent, sed solum de exterioribus actibus, qui apparent. Et tamen ad perfectionem virtutis requiritur quod in utrisque actibus homo rectus existat. Et ideo lex humana non potuit cohibere et ordinare sufficienter interiores actus, sed necessarium fuit quod ad hoc superveniret lex divina.* It is the third of four arguments for the necessity of a divine law. The synthesis of the argument is found in the lovely line of the Psalm: *Lex Domini immaculata, convertens animas, testimonium domini fidele, sapientiam praestans parvulis.*



The protest and the argument were overruled. Following on the verdict of guilty, Thomas More, who was now in law a traitor, interrupted the Chancellor (now hastening to pass sentence) and claimed to speak in arrest of judgment. 'Inasmuch as this Indictment is grounded upon an Act of Parliament directly repugnant to the laws of God and His Holy Church, the Supreme government of which or any part thereof, may no temporal Prince presume by any law to take upon him, as rightfully belonging to the See of Rome . . . only to St Peter and his successors, Bishops of the same See, by special prerogative granted ; it is therefore in law among Christian men, insufficient to charge any Christian man.' And by analogy he further showed 'that it was both contrary to the Laws and Statutes of this our land, yet unrepealed as they might evidently perceive in *Magna Carta: quod ecclesia anglicana libera sit, et habeat omnia jura sua integra, et libertates suas illaesas*.<sup>1</sup> And also contrary to the sacred oath which the King's Highness. . . always with great solemnity received at his coronation ; alleging moreover that no more might this realm of England refuse obedience to the See of Rome, than might the child refuse obedience to his own natural father. For St Gregory, Pope of Rome, of whom, by St. Augustine his messenger, we first received the Christian faith might of Englishmen truly say : " You are my children, because I have given to you everlasting salvation, a far higher and better inheritance than any carnal father can leave to his children, and by regeneration made you my spiritual children in Christ."

The execution of Sir Thomas More took place on the day on which he had declared his wish to die, 6th July, 1535, which was the eve of St Thomas of Canterbury, and the Octave of St Peter. The King had expressed the desire that at his execution he should not use many words. He was content to use few words, yet those few words had a message of deep meaning for the King and for all

<sup>1</sup>The Church which is named in *Magna Carta* is the Church in England in communion with Rome. Z. N. Brooke *ubi sup.* pp. 8-20. Holdsworth, *H. E. L.* Vol. I, pp. 589-591. The Charter is still unrepealed.

mankind : 'I die in and for the faith of the Holy Catholic Church, the King's good servant, but God's first.'<sup>1</sup>

#### RISING OF THE YEOMEN OF THE NORTH

Within a little time, impelled to action by the execution of More and Fisher and by the changes in religion that the King had made, the yeomen and the artisans of Lincoln and Yorkshire and Lancashire and the North, rose in defence of the old faith. They constituted themselves a Pilgrimage of Grace, and carried a Cross as 'their banner principal' and wore a badge of 'The Five Wounds of Christ.' In their proclamation they announced that : 'thys pylgrimage we have taken hyt for the preservacyon of Cryste's church, of thys realme of England, the kynge our soverayne lord, the nobyltye, and comyns of the same.' And they administered an Oath : 'Ye shall swear to be true to Almighty God, to Christ's Catholic Church, to our Sovereign Lord the King, and unto the Commons of this realm ; so help you God.' For their leader they took one Robert Aske, a lawyer of Gray's Inn. The Common lawyers of the Inns of Court were now defending the English law against the Roman Civil law that had newly been established by the King, newly claiming to be Emperor, and their champions 'were numerously present among the pilgrims in whose ranks they carried on the struggle with weapons in their hands.'<sup>2</sup>

The yeomen and the artisans 'and all the herdmen of this our Pilgrimage of Grace' were defeated by the treachery of the King, and their leaders were executed, 'With More perished all that was wisest in England ; with him Fisher and the Carthusians all that was holiest. With the leaders of the Pilgrims perished the Medieval Chivalry of England.'<sup>3</sup>

<sup>1</sup>The last words of Sir Thomas More manifestly contained a message to King Henry that he who was about to die as a traitor 'always bare in mind the most godly words that his Highness spake unto him at his first coming into his noble service, willing him first to look unto God and after God unto him.' *Supra* p. 42 note (1).

<sup>2</sup>The references to the Pilgrimage of Grace are taken from Dodds' *Pilgrimage of Grace*, (Cambridge, 1915, vol. I, pp. 109, 129, 176, 179, 367, 384 ; vol. II, pp. 114, 183.)

<sup>3</sup>R. W. Chambers, *Thomas More*, pp. 381, 382.



THE KING BECOMES EMPEROR, RULING  
CHURCH AND STATE

'In 1535 the year in which More was done to death, the Year Books come to an end ; in other words the great stream of Law Reports that has been flowing for near two centuries and a half, ever since the days of Edward I, becomes discontinuous and then runs dry. The exact significance of this ominous event has never yet been duly explored, but ominous it surely is. Some words that once fell from Edward Burke occur to us: "to put an end to the Reports is to put an end to the law of England"'.<sup>1</sup> The strange though significant language of Maitland will unfold its mystery in the long course of time.

Certain violent changes in the law and the Constitution were immediately manifest. In order to prepare his attack upon the Church the King had claimed to be an Emperor. In the preamble to the Statute of Appeals Henry had sketched with his own hand the relations between the State and the new Anglican Church : 'Whereas : by divers old histories and chronicles it is manifestly declared that *this realm of England is an Empire . . . governed by one Supreme Head and King . . . unto whom a body politic, divided in terms and by names of *spiritualtie* and *temporalitie* be bounden and owe to bear next to God a natural and humble obedience ; he being also institute . . . with plenary whole and entire authority and jurisdiction to render and yield justice and final determination to all manner of folk in all causes within his realm . . . without restraint or provocation to any foreign princes or potentates of the world. The body spiritual thereof having power when any cause of the law divine happened to come in question or of spiritual learning it was declared. . . by that part of the said body politic called *the spiritualtie* (now being usually called the English Church) which . . . is sufficient and meet of itself, without the intermeddling of any exterior person . . . to declare and determine all such doubts and to administer all such offices and duties as to their*

<sup>1</sup>Maitland, *English Law and the Renaissance*.

rooms spiritual doth appertain . . and the laws temporal for trial of property, of lands and goods, for the conservation of the people of this realm in unity and peace . . was and yet is administered. . . by sundry judges and administrators of the other part of the said body politic called *the temporaltie* ; and . . the King his most noble progenitors and commons of this said realm at divers and sundry parliaments made . . sundry laws . . for the sure conservation of the prerogatives liberties and pre-eminences of the said *imperial crown* of this realm and of the *jurisdictions Spiritual and Temporal* of the same, to keep it from the annoyance as well of the See of Rome as from the authority of other foreign potentates . . . be it enacted.'

The comment of the historian of the English law is clear and outspoken : 'The preamble to this Statute of Appeals is remarkable, partly because it manufactures history on an unprecedented scale, but chiefly because it has operated from that day to this as a powerful incentive to the manufacture by others upon some similar lines. The Tudor settlement of the relations of Church and State was a characteristically skilful instance of the Tudor genius for creating a modern institution with a medieval form. But in order to create the illusion that the new Anglican Church was indeed the same institution as the medieval Church, it was necessary to prove the historical continuity of these two very different institutions ; and obviously this could only be done by an historical argument. When this argument had been put forward in a statutory form it became a good statutory root of title for the continuity and catholicity of this essentially modern institution. But a merely statutory root of title gave an obvious handle to its opponents and could hardly be expected to satisfy its supporters. It is not therefore surprising that lawyers, theologians, and ecclesiastical historians soon began from their different points of view, to amplify and illustrate this historical argument, in order to prove that it rested upon a solid basis of historic truth. Two great professions thus have had and still have a direct professional interest



in maintaining this thesis. The lawyers are tied to it by their Statutes and cases ; the ecclesiastics by the tradition and authoritative declarations of their Church . . it was not till a historian arose who, besides being the greatest historian of the century, was both a consummate lawyer and a dissenter from the Anglican as well as from other churches, that the historical worthlessness of Henry's theory was finally demonstrated.'<sup>1</sup>

#### THE CATASTROPHE OF THE SPIRITUAL COURTS

The 'new Anglican Church' of which Professor Holdsworth speaks has its principle of being and of unity and its source of authority in the State. It is likewise with the new ecclesiastical Courts of our Lord the King. Let Maitland tell the story :

'In the first place, we have come upon what must be called a sudden catastrophe in the history of the spiritual courts. Henceforth they are expected to enforce and without complaint they do enforce, statutes of the temporal legislature, Acts of the English Parliament. Henceforth not only is their sphere of action limited by the secular power . . but their decisions are dictated to them by Acts of Parliament.

'In the second place, these Acts of Parliament which the ecclesiastical Courts must now administer are imposing upon them not merely new law but a theory about the old law. Henceforth a statutory orthodoxy will compel all judges to say that it is only "by their own consent" that people of this realm ever paid any regard to Decretals or other laws proceeding from any foreign prince or prelate.

'Some of the ecclesiastical judges will be laymen who would have been incapable of sitting on the judgment seat to declare the law of the Church, were it not for a statute which has swept away "divers constitutions of the bishops of Rome and their adherents the bishops of England," and at the same time has proclaimed that the King has, and always had, full power and authority to exercise

<sup>1</sup>Holdsworth, *H. E. L.* 3rd ed., Vol. I, pp. 589-591. The italics in the foregoing passage are mine. The historian referred to is F. W. Maitland.

ecclesiastical jurisdiction.

‘But the great breach of continuity has yet to be noted. The academic study of the Canon Law was prohibited. No step that Henry took was more momentous. He cut the very life thread of the old learning. The ecclesiastical judges in time to come might administer such of the ancient rules as were not contrariant nor repugnant to the laws (newly interpreted) of God and the Statutes of our Lord the King ; but they would not have been like their predecessors in time past steeped and soaked for many a year in the papal law books and their ultra-papal glosses. And, as if this were not enough, Henry encouraged and endowed the study of the Civil Law, and the unhallowed civilian usurped the place of the Canonist on the Bench. The significance of the change is sometimes overlooked. The rulers of the Church had long known that the jurisprudence of Justinian’s books, if it was a useful hand-maid, would be a terrible mistress. What else could it be ? The first lesson that we learn if we open the Code is the very lesson that Henry was teaching : that an Emperor can legislate *De Episcopis et Clericis, de Sacrosanctis Ecclesiis*, nay, *De Sancta Trinitate et Fide Catholica*. What does the first chapter of the first title of the first book teach us ? That the Emperor fixed the faith of his subjects by reference to the standard orthodoxy of the bishops of Rome and Alexandria. What an Emperor did, the King who had “the dignity and royal estate of an Imperial Crown,” could do. The theory of Church and State which the civilian found in his books was the Imperial Papalism, the Caesaro-Papismus of Byzantium ; and now what had been the one known antidote to this theory, was to be placed out of reach : the schools of Canon Law were closed.

‘If Henry were minded to be “the Pope, the whole Pope, and something more than the Pope,” he might trust the civilians to place the triple and every other crown upon his head. In the eyes of the Common lawyers, whose traditions were medieval, the Church might still have appeared as a power co-ordinate with the State : but the



civilian would, if he were true to his Code and his Novels, find his ideas realised when and only when the Church had become a department of State.<sup>1</sup>

In this way, under the absolute control of the King, and after one King had lost his head, under the absolute control of Parliament<sup>2</sup> the new Anglican Church came into existence without any power in its own right to define the doctrines of the Christian faith or the principles of Christian morals. Never having the ability in its own right to make new Canons, it lost, first to the civilian lawyers of Doctors Commons, and at a later time to the Common lawyers, its control over matters that formerly came within the jurisdiction of the Catholic Church and of the Courts Christian.

The cessation of the academic study of the Canon law and the disappearance of the Canonists of the authentic tradition from the King's Curia and from the Chancery and from the spiritual Courts, was naturally followed by a change—sometimes a slow change—in the moral and intellectual principles which guided the action of the Executive, and the legislation of Parliament and the administration of justice by the Courts of Chancery and

<sup>1</sup>Maitland, *Roman Canon Law in the Church of England*, pp. 90-94.

<sup>2</sup>The Tudor and the early Stuart monarchs claimed and exercised absolute dominion over the Church. In 1571, Wray, the Speaker, said that 'over ecclesiastical causes Her Majesty's power is absolute.' In 1580, the Lord Chancellor specially admonished the Speaker that the House of Commons 'should not deal or intermeddle with any matters touching Church government.' In 1593, Elizabeth bade the Lord Keeper tell the Speaker that the members 'might have a free voice, which is the very trew liberty of the House. Not as some suppose to speak there of all causes as him listeth, and to frame a form of Religion or a state of government as to their idle brains shall seem meetest, she sayth no King fitt for his state will suffer such absurdities.' Charles I was 'even less likely to tolerate parliamentary interference with the Church than with his own prerogative. In 1628, he declared 'We are the Supreme Governor of the Church of England.' In 1646, he wrote: 'It is not the change of Church government which is chiefly aimed at—though that were too much—but it is by that pretext to take away the dependency of the Church from the Crown; which, let me tell you, I hold to be of equal consequence to that of the military, for people are governed by pulpits more than the sword in times of peace.' After the Restoration the King could no more stop the discussion of questions affecting the Church than he could stop the discussion of questions affecting his prerogative. Holdsworth, *H. E. L.*, IV. 89, 90, 207; VI, 131, 136. And 'the State' to which the Church was now subordinate had necessarily taken upon itself the character of a divine institution: Holdsworth, IV, 200.

(under the supervision of the Chancellor) by the Courts of Common Law.

#### FORCE AND RIGHT

Thomas Cromwell, the Vicar-General of Henry VIII, had as his vade mecum, the *Prince* of Machiavelli ; and caused a judicious translation to be made of the *Defensor Pacis* of Marsilio of Padua (also in his time a Vicar General) which, under the title of the *Defence of Peace*, he circulated widely among the religious houses and elsewhere. Of the *Prince*, Reginald Pole wrote that 'it had already poisoned England and would poison all Christendom.' The political philosophy of Marsilio of Padua, which argued the complete independence and omnicompetence of the secular State, found ready acceptance with Cranmer. In the debate among the English divines in 1540, Cranmer is the most radical and the most Marsilian : 'All Christian princes have committed unto them immediately of God the whole cure of all their subjects, as well concerning the administration of God's word for the cure of souls as concerning the ministration of things political and of civil government.' Richard Hooker in turn will maintain the principle : 'It is undoubtedly a thing even natural that all free and independent societies should make their own laws : which thing being generally fit and expedient in the making of all laws, we see no cause why to think otherwise in laws concerning the service of God ; which in all well-ordered States and Common-wealths is the first thing that law hath care to provide for.'<sup>1</sup>

The growth, in the sixteenth century, of the conception of sovereignty tended to alter old ideas as to equitable and legal principles. 'Men's conception of the relations of law and equity were naturally affected by the substitution of a background of material force, on which the sovereign state was based, for the religious and moral background which underlay the political theories of the Middle Ages.'<sup>2</sup>

<sup>1</sup>Hooker, *Ecclesiastical Polity*, Bk. VIII, cap. 6, Pt. 6, (slightly abridged). The teaching of Hooker will have resonances in the thought of Sanderson and Hales and Stillingfleet, and Locke and Keble and Gladstone. See D'Entrèves, *Medieval Contributions to Political Thought*, Marsilio of Padua.  
<sup>2</sup>Holdsworth, *H. E. L.*, Vol. IV, 279.



Already in the reign of Elizabeth, Plowden makes it clear that the lawyers of his day had ceased to regard Equity as a set of moral principles which should habitually influence the judges in the decision of concrete cases.

The example of the Reformation Parliament (1529-1536) led Sir Thomas Smith in the same century to declare that 'the most high and absolute power in the realm of England consisteth in Parliament.' It was obviously difficult to assign any limits to the power of a body which had effected such sweeping changes. 'The legislation which had deposed the Pope and made the Church an integral part of the State had made it clear that the morality of the provisions of the law or the reasons which induced the legislature to pass it could not be regarded by the Courts.'<sup>1</sup> In the reign of Henry VIII, says Professor Holdsworth, 'it was realised that Acts of Parliament, whether public or private were legislative in character ; and the Judges are obliged to admit that these acts however morally unjust must be obeyed.'<sup>2</sup>

For Thomas Hobbes, exploiting the new conception of sovereignty, law is no longer *sanctio justa, jubens honesta et prohibens contraria*. It is on the contrary the command of a sovereign, which, though it may be iniquitous, cannot be unjust.<sup>3</sup> The moral aim of the medieval legislator had given way to the desire to secure the material power of the State. For the old conception according to which the State existed to execute justice and to maintain truth there was now substituted a new conception : that the being of the State was embodied in its sovereign and that the State existed to carry out the will of the sovereign.

<sup>1</sup>*Ibid*, p. 186.

<sup>2</sup>*Ibid*, p. 185. 'There was no need therefore for the Courts of Common Law to be anything but useful servants of the Crown.' *Ibid*, p. 188. Cp : Lee v Bude, 1871, 6 CP 582 per Willes J. : 'It was once said . . . that if an Act of Parliament were to create a man judge in his own cause, the Court might disregard it. That dictum stands as a warning rather than an authority to be followed. We sit here as servants of the Queen and the legislature.' The 'dictum' was uttered by Holt, C. J. in the *City of London v Wood*, 1692, 12 Mod. and declared that as the Judge is 'agent' and the party is 'patient' in the cause, it is manifest contradiction to maintain that the same man may be judge and party. Cf. the Attorney General in the *Stevenage* case ; *The Times*, 12 Feb, 1947.

<sup>3</sup>Hobbes *Works*, Vol. VI, 25, 26.

Under the influence of this new conception, the idea that the rules of divine and natural law bound the whole State, Prince and people, rulers and subjects alike, withered away, and in the course of time was openly rejected.<sup>1</sup> In the 18th century Blackstone would write that Parliament 'hath sovereign and uncontrolled authority' in making, conforming, repealing and expounding laws ; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the Constitution of these kingdoms . . . it can in short do everything that is not naturally impossible, and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.<sup>2</sup> In the current edition of May's *Parliamentary Practice* it is said that 'the constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government : but Parliament is not controlled in its discretion and when it errs its errors can only be corrected by itself. To adopt the words of Sir Edward Coke, the power of Parliament is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.'<sup>3</sup>

<sup>1</sup>See Winfield, *Chief Sources of English Legal History*, p. 315 : The law of nature . . . 'of interest to students of historical jurisprudence on a topic which has long since had its brains knocked out' ; cf. Kecourek 30 Ill. L.R. 548 'The world's greatest legal illusion.'

<sup>2</sup>In a speech which is reported in the issue of *The Times*, dated 13/5/46, Sir Hartley Shawcross said : 'Parliament is sovereign ; it can make any laws. It could ordain that all blue-eyed babies should be destroyed at birth : but it has been recognised that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, those laws will be supported and can be enforced.' Jurisprudence is no longer a part of ethics : it is a nice calculation of force.

<sup>3</sup>Though legislation is no longer bound by the rules of justice, the Judges still pursue justice : 'I say that the guiding principle of a Judge in deciding cases is to do justice ; that is justice according to law, but still justice. I have not found any satisfactory definition of justice . . . what is just in any particular case is what appears to be just to the just man, in the same way as what is reasonable is what appears to be reasonable to the reasonable man.' Per Lord Wright, cited Paton on Jurisprudence, p. 75. 'Eminent judges have at times used the phrase "the principles of natural justice." The phrase is of course used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense. In ancient days a person wronged executed his own justice . . . the truth is that justice is a very elaborate con-



## THE ELIMINATION OF THE LAW OF GOD

Omnipotence of necessity has no equal. Accordingly, in matters of modern legislation there is no God. The law of God is no longer the foundation of the law of England. In the year 1861, in a judgment concerning marriage which was given by the Supreme Tribunal in the House of Lords, it was declared : 'We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of being contrary to God's law. It is our law which makes the marriage void and not the law of God.' It is the courtesy—and the condescension—of Omnipotence to omnipotence.

With God goes Christ. In the year 1917, at the height of the first World War, an issue was raised in the Supreme Tribunal of the House of Lords : is the maintenance of the Christian religion part of the policy of the English law? A bequest of money had been left by will to a society whose purposes were confessedly anti-Christian. Was the bequest valid ? The High Court and the Court of Appeal had declared in favour of its validity ; the matter was now being argued in the Lords. The dull pages of the Law Reports leap to life under the argument : 'A society for the subversion of Christianity is illegal and is incapable of enforcing a bequest . . . Christianity is and always has been regarded by the Courts of this country as the basis on which the whole of the law of England rests, and any movement for the subversion of Christianity has always been held to be illegal. If so, when and how has the law been altered ? . . . In 1675 Lord Hale expressly stated that Christianity is part and parcel of the Common Law of England. . . .' The argument fails ; the appeal is dismissed by a majority of four to one, Lord Finlay, the Chancellor dissenting. In the leading judgement of the majority Lord Sumner declares : 'My Lords, I take the memorandum to be that of a society deliberately and entirely anti-Christian. If the respondents are an anti-Christian society is the

ception, the growth of many centuries of civilisation ; and even now the conception differs widely in countries usually described as civilised.' *Per Maugham Justice*, 1929, 1 Chancery, 624.

maxim that Christianity is part of the law of England true, and if so, in what sense? . . . My Lords in all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England" is really not law: it is rhetoric.<sup>1</sup>

#### DISINTEGRATION OF CHRISTIAN MARRIAGE

In the course of judgment which he gave in this case Lord Sumner took occasion to say that 'the English family is built on Christian ideas and if the national religion is not Christian there is none.' In fact, the institution of marriage which had been guarded for many centuries by the Canonists passed at the time of the Reformation into the care of the civilian lawyers of Doctors Commons and in their hands it retained for three whole centuries the essence of the Christian tradition. As lately as the middle of the 19th century, by the law of England 'an English marriage was indissoluble in any Court. It was something that could not be broken; indissoluble in essence.' And Lord Campbell, one of the greatest lawyers and judges of his time, said that 'not a single English Counsel would have set his name to the opinion that judicial indissolubility was not a legal quality of every English marriage.' In the year 1857, there was passed the Matrimonial Causes Act, which gave national sanction to a contractual and sub-Christian view of marriage and introduced a regular system of divorce. In a famous case in the House of Lords in the year 1924, Lord Sumner stated his opinion: 'I am afraid that the sanctity of marriage intercourse passed into the limbo of "lost causes and impossible loyalties" in 1857. You cannot give the spouses the legal right to have their married life investigated in open Court with a view to its formal and legal termination without being prepared, when necessary, to violate the sanctity of that life.' Confirming this opinion a distinguished Professor of Roman

<sup>1</sup>*Bowman v Secular Society*, 1917, Appeal Cases, 452, 464. In giving judgment, Lord Dunedin admits that it is impossible to decide the case as it is in fact decided without going counter to what has been said by judges of great authority in past generations. Lord Buckmaster, also of the majority, observes: 'The Common Law whatever its scope, did not specially safeguard what we know as the Church of England, but the Christian faith.'



Law, speaking of the pagan Romans says that 'their highly developed sense of dignity and decency prevented them from discussing the intimacies of marriage and family life in the Courts. A modern divorce suit would have seemed to them shameless.' From time to time since 1857 the grounds of divorce and the facilities for obtaining divorce have been extended, and there has been a progressive downgrading, not to say de-grading, of the idea and the institution of marriage. The movement of things was not inaccurately described by Lord Russell of Killowen in the House of Lords in 1938, when he declared that 'what was once a holy estate enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will.' At the last, the Parliament and the Executive of England were content to abandon the institution of marriage to the solicitude—and the statesmanship—of our leading comic writer.<sup>1</sup>

#### DISAPPEARANCE OF YEOMEN AND FREE ARTIFICERS

The decline in the sanctity of marriage goes with the decline in the dignity and worth of the spouses who make the marriage. The final test of any State lies in the quality and kind of man and woman that the laws and institutions of that State are designed to shape and to serve. The social type which the Common Law of Eng-

<sup>1</sup>With the introduction of the idea of marriage as a terminable relation between the spouses and the growing popularity of divorce and the corresponding decline in morals, the child no longer had an anchorage in his home. Moreover, the current political philosophies of individualism and socialism, eliminated the idea of the family, and reduced politics to a conflict between the individual and the State ; and tended to assign the child away from its impermanent home to the permanent institution of the State. In 1891, the State assumed the obligation to pay for the education of children. The Children's Act of 1908 proceeded on the principle that the child is no longer the child of the parents and is now the child of the State. In a book entitled *Our Towns*, which is referred to in the White Paper on Educational Reconstruction of 1943, the hope is expressed that 'John Smith's child may become in truth, John Bull's child, a cherished part of its country's capital.' In July, 1943, Dr Edith Summerskill, referring in the House 'to woman's revolt in the home' declared : 'she has refused to produce the most valuable commodity in the world, the embryo worker.' The words were spoken in the Debate on Depopulation, a matter involving moral issues, which is now being investigated by a Royal Commission.

land, nourished by Christian philosophy and theology, and assisted by a Parliament which was guided by the law of God, and the Law of Nature, was designed to produce was the Yeoman and the small owner: free, responsible, independent, God-fearing.<sup>1</sup> With the elimination of Christian philosophy and theology in favour of the new materialism, and with the emergence of an omnipotent parliament which was no longer guided or bound by the rules of justice or the law of God, the yeoman type ceased to appear and in a short time ceased to be. And with him there disappeared also the independent artisan and artificer.<sup>2</sup> The process was complete in the 18th century. When Mill wrote his *Treatise on Political Economy* he was already only a memory: 'The Yeomanry who were vaunted as the glory of England while they existed, and have been so much mourned o'er since they disappeared, were either small proprietors or small farmers, and if they were mostly the last, the character they bore for sturdy independence is the more noticeable.' The first use of the Omnipotence of Parliament was to attack and undo the small farmers and the small proprietors. The really critical period was 'somewhere after 1688.' The Yeomen became 'the slaves of the Industrial Revolution'. Already in 1770, Oliver Goldsmith wrote the story of *The Deserted Village*.

<sup>1</sup>It is noteworthy that Sir Thomas More defended the Yeomen and the Husbandmen against the beginnings of enclosures which happened already in his time. 'Therefore that one covetous and insatiable cormorant may compass about and enclose many thousand acres of ground together with one pale or hedge the husbandmen be thrust out of their own, or by violent oppression they be put beside it, or by covin and fraud they be so weary that they be compelled to sell all; by one means therefore or another, either by hook or by crook, they must needs depart away, poor silly wretched souls, men, women, husbands, wives, fatherless children, widows, woful mothers with their young babes, and their whole household, small in substance and much in number, as husbandry requireth many hands. . . and when they have wandered about till that (the little they have got by sale of their goods) be spent, what can they then else do, but steal, and then, justly, pardy, be hanged or go about begging.' Cited, *The Disappearance of the Small Landowner*, Ford Lectures, 1909, by Arthur Johnson. The facts and citations above are from this book.

<sup>2</sup>See Arthur Johnson *ubi sup*; Mill, *Political Economy*, 1869, 155. Howard Roberts. *Town and Country Planning*. 1946, p.1. Holdsworth, *H. E. L.*, Vol, VI, 341, 346, 355.



## DISINTEGRATION OF MAN

The movement of the latter time has been to substitute for the old Common Law conception of the 'free and lawful man' a new conception—taken from a German model—of the 'insured person.' The insured person is by definition a dependent creature, of impaired responsibility, and scarcely free. It is a sign of his condition that in an increasing number of instances, proceedings may be brought in his name, without his consent and even against his will, by a subordinate official of one government department or another.<sup>1</sup> And now under the National Insurance Act Everyman has been marked with the same sign. The long travail of Omnipotence is at an end: its offspring is the dependent citizen.<sup>2</sup>

## A MEMORY AND A HOPE

The direction of our movement, which some people like to call Progress, has thus led through the disintegration of the Church and the elimination of the law of God and the law of nature, and of the principles of Christian philosophy and theology, to the disintegration of marriage and the disintegration of man. All these institutions the greatest of the Common lawyers defended as he stood his trial in Westminster Hall. According to Professor R. W. Chambers: 'it was left for men who were certainly not engaged in the pursuit of wealth—Thomas More, Fisher, the Carthusians, to stand as champions of liberty of conscience in the darkest day of English freedom.' At his trial for treason in refusing to accept the King as Head of the Church in England, after verdict and before sentence, Sir Thomas More spoke to his judges: 'seeing that I see ye are determined to condemn me (God knoweth how) I will now in discharge of my conscience speak my mind plainly and freely touching my indictment and your

<sup>1</sup>See Allen, *Law and Orders*, p. 162.

<sup>2</sup>It is an odd reflection that in the opinion of competent observers, 'Parliament is no longer in any real sense the sovereign power in the State.' 'I am speaking now after forty years of experience,' said David Lloyd George, 'Parliament has really no control over the Executive, it is a pure fiction.' : Allen, *Law and Orders*, p. 129.

statute withal,' And having protested that the Act of Supremacy was directly repugnant to the laws of God and His Holy Church and *ultra vires* a parliament of Christian men, and contrary to the provisions of Magna Carta, he added at the end: 'Howbeit, it is not for this Supremacy so much that ye seek my blood, as for that I would not condescend to the marriage'. On the scaffold he bore witness: 'I die in and for the faith of the Holy Catholic Church, the King's good servant but God's first.'

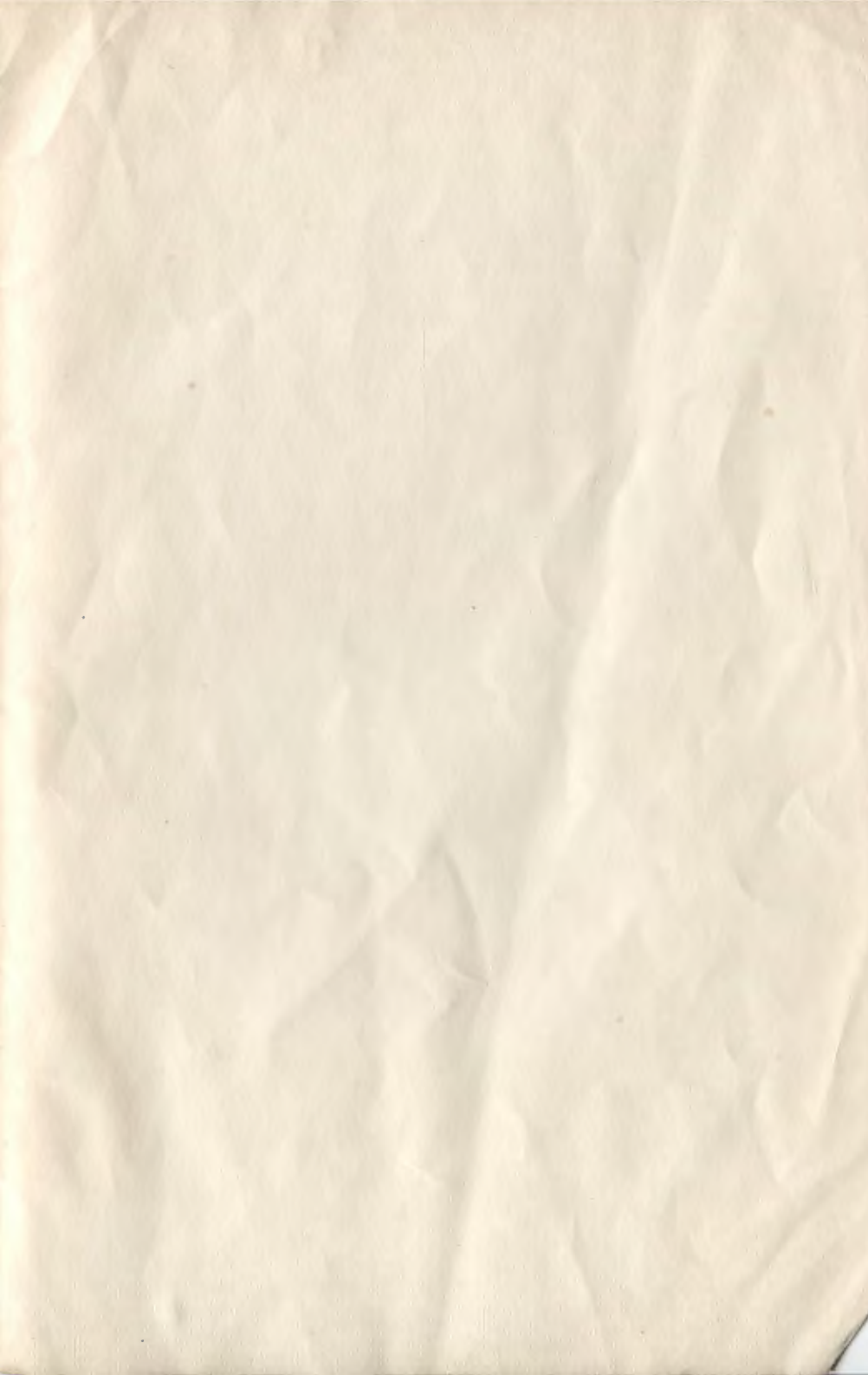
The freedom of the Christian conscience, the institution of Christian marriage, the integrity of the Christian Church, belief in Christ and in God, a whole synthesis of the institutions and articles of the Christian faith was at stake at the trial in Westminster Hall at which Sir Thomas More defended to the last the Primacy of the Pope. On this issue he had spoken to his friend Antonio Bonvisi words of truth and also of prophecy: 'That holdeth up all'.

After the passage of four hundred years the name of St Thomas More is for the men of all the countries of the Common Law and of all the lands the centre of a great memory and a great hope. On the first page of his classical biography one of the great masters of English literature states the issue: What is the meaning of More's life and death to those who are not of the faith for which he suffered? 'This book attempts to answer the question and to depict More not only as a martyr which he was, but also as a great European statesman; More's far-sighted outlook was neglected amid the selfish despotisms of his age; yet his words, his acts, and his sufferings, were consistently throughout life, based upon principles which have survived him. More was killed, but these principles must, in the end, triumph. If they do not, the civilisation of Europe is doomed.'<sup>1</sup>

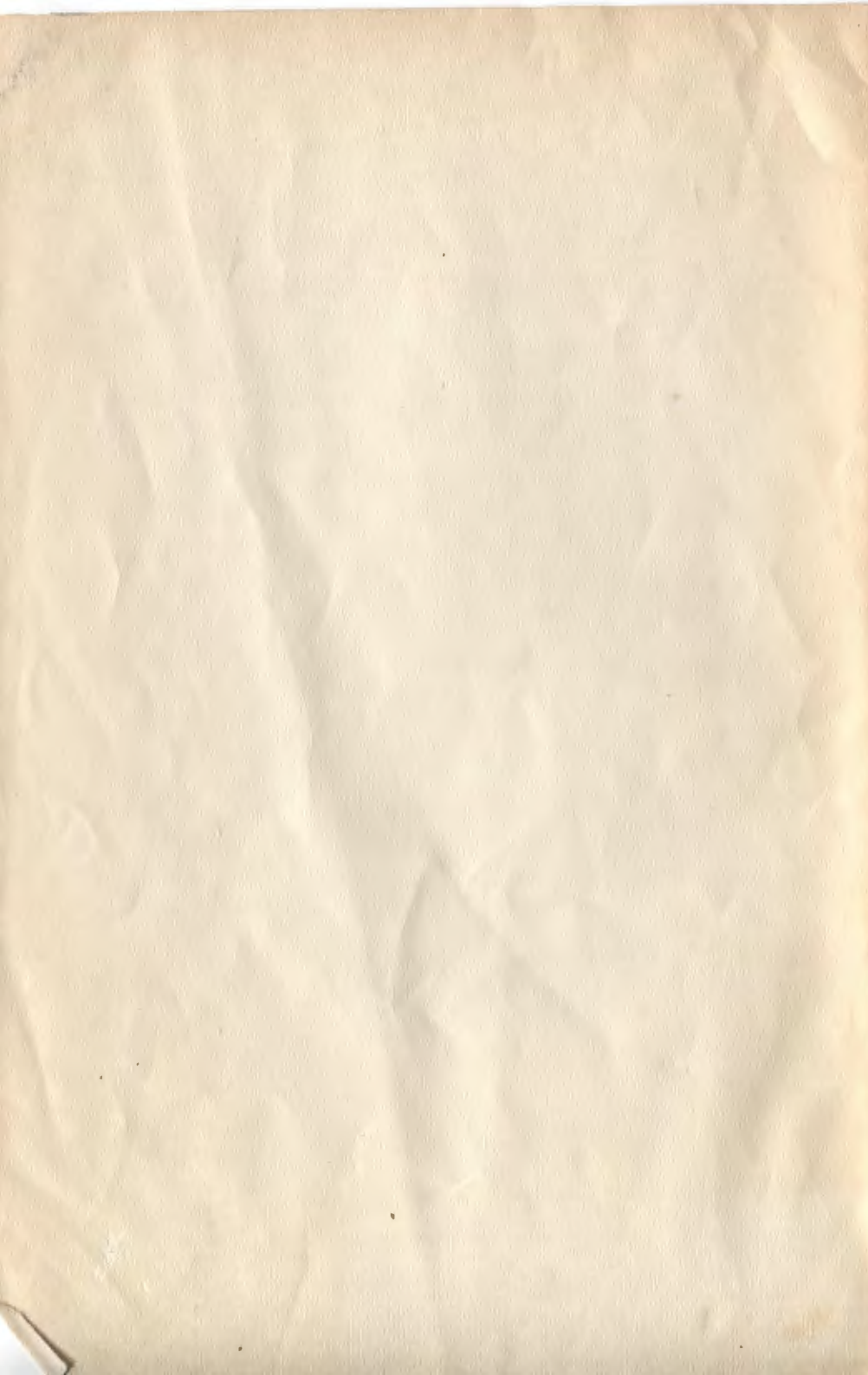
<sup>1</sup>R. W. Chambers, *Thomas More*, Prologue, p. 15.



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