

## STUDIES IN ENGLISH PROCEDURE.

### I. THE ATMOSPHERE.

If you go to a foreign country to study the administration of justice you may resort to the books for the principles and rules, but only from personal contact with the men can you ascertain the reasons for their application, the methods used in handling them and the unwritten practice that custom and tradition have established, forming, so to speak, the background of the picture, and filling in spaces which would otherwise seem blank and incomplete. For instance, much of the interlocutory work done in chambers here would seem lax and slipshod if you did not understand that the Masters and Judges rely as much on the co-operation of solicitors and counsel as they do on the Austinian theory of the binding force of law. One day Sir John Macdonell, the Senior Master on the King's Bench side, allowed me to sit with him and hear how he disposed of interlocutory applications. One of these will suffice to illustrate my point. A Turk was suing an English life insurance company, as beneficiary of a life policy which the defendant believed to be a forgery. The Statement and the Defence were both in. But the plaintiff had, for some reason, served a set of interrogatories on the defendant, which the latter had failed to answer. The Master then made a peremptory order on the defendant to answer or suffer judgment, and still the defendant was quiet. Now the plaintiff was before the Master with an application to strike out his opponent's Defence and give final judgment for default of answers. He told his story with righteous indignation. Then the defendant's counsel, a little red-faced K. C., spluttered out a tale of injustice which amounted to this—that his client was represented at the application for leave to serve interrogatories by a junior who was inexperienced, and the junior had neglected to object to more than half of the interrogatories which were oppressive, fishing and embarrassing. All this with an admirable show of injured innocence, as the gentleman should have stated those objections formally in his answers to the rest of the ques-

tions, and served them within the time fixed in the order. The Master shrugged his shoulders and said that as far as the plaintiff's right to judgment was concerned, that was legally perfected, and not a matter of discretion. However, he went on, addressing the plaintiff's counsel, it would be most ungracious of the plaintiff to take advantage of his adversary's predicament, as there was obviously a real defence; there was no compulsion, of course, but it would be the decent thing to allow three days more for answers. The plaintiff looked very pained, but said, "Of course, if the Master thinks I ought to, why, let it go." So the Master made an order for final judgment in three days unless answers were served before. By this solution of the difficulty no injustice was done, the defendant's gratitude was won and the plaintiff's position with the Master was improved for future occasions. The whole proceeding, argument and order, lasted under fifteen minutes, as there were a dozen more like it waiting to be heard. And this is no exceptional case. In every matter, the Master more or less talks things over with the men before him, and tries to make an order which will seem just on the whole merits. Physically, this is made feasible by the fact that the Master sits at a table in a fairly small room, and the solicitors or counsel stand immediately in front of him. But more important is the spirit in which it is done. Cooperation is the best way to describe it.

Another important element in the atmosphere breathed by the English Bar is the care with which the conduct of the barrister in his professional relations is made to conform to the restrictions handed down from past centuries. For instance, it is a breach of etiquette for a barrister, if he moves his chambers from one part of his Inn to another, to send out notices of that fact to his clients, as that would be taken to be a bid for business. On the other hand, the price of every man's work is well known by the solicitors, and the amount of the fee is almost always known in advance. Such inconsistencies cannot be explained otherwise than by the power of tradition. It is, however, a tradition assisted by bricks and mortar. I mean this: habits of men do not persist for centuries unless they are centered about

tangible objects. At the English Bar, those objects are supplied by the dining halls and libraries of the Inns, the churches in the Inns where divine service is held every Sunday, and the very valuable sites occupied by the chambers. It is not clearly settled just who is the legal owner of all this real estate, but it is administered for the benefit of its occupants by the Benchers of each Inn respectively. This duty gives the Benchers a sense of responsibility and inspires in them a respect for the customs appurtenant to the property far greater than any committee would have whose powers extended only to matters of behavior.

The legal ownership of the property of the Inns is shrouded in as much mystery as the origin of the Inns themselves. The Inner Temple for instance, is not even incorporated, and all its contracts are made in the name of the Treasurer, an annually elected officer. Serjeants' Inn, to which all judges had to belong until the order of Serjeants was abolished forty years ago, was discontinued and sold to a builder, who has since put up an office building there. A great dispute arose over the proceeds, and finally it was decided to distribute the fund among all the members of the Inn then living, each receiving about five thousand pounds. In 1900 a similar dispute again arose over the proceeds from the sale of Clifford's Inn, one of the old Inns of Chancery. There were only sixteen surviving members, and they rejoiced at the precedent of Serjeants' Inn, as the fund amounted to nearly half a million pounds. However, five of the sixteen were not so ambitious as the rest, and refused to allow such a division. After many disagreements, the matter came before a Court of Chancery, and Mr. Justice Cozens-Hardy (now Master of the Rolls) decided that the fund was stamped with a trust in favor of legal education. It was, therefore, paid into Court, and the interest is used for maintaining the lectures given by the Council of Legal Education of the Four Inns. A few years later, similar disposition was made of the proceeds of the sale of New Inn, in the Strand. Whether or not the same would hold true of the property of the present Four Inns, which have assimilated all the rest, will probably not be decided for many years to come. All are flourishing and even growing larger, with the exception of

Gray's Inn, which seems to be about at a standstill and is the smallest of the four.

The popular respect in England for the majesty of the law is, I believe, built not only upon the dignity which hedges the Bar about, but upon the high quality and ability of the judges. The English Constitution is not a written document, so it is impossible to give a statement of the method of choosing the judges which will be accurate in every detail. But it is correct to say that practically all judicial appointments are made by the Lord Chancellor. In a few cases, like that of the appointment of the Lord Chief Justice, and of the Lords of Appeal, the appointment is, nominally, made by the Prime Minister. But in practice, even those names are as a rule proposed to that dignitary by the Lord Chancellor. A great responsibility therefore rests on the Lord Chancellor, and the quality of the Bench varies according to that of the occupant of his seat. A strong man will insist on sheer merit as the basis for appointment, irrespective of Party lines; a man not so firm will allow his colleagues in the Cabinet to express the wishes or even the command of his Party. In such a case it is difficult for the Lord Chancellor to refuse to be guided by them, as his position is as much political and administrative as it is legal. He is a member of the Cabinet—which in England is the real ruler of the country, initiating legislation and moulding the policies of all government departments. He is the presiding officer of the House of Lords. He is the political head of the Church of England. He goes out of office with his party, unlike all other judges, who hold office for life. He is not, therefore, strictly speaking, the personal embodiment of the law; he is rather a link between the judiciary and the executive, his functions partaking of both and his tenure of office depending upon his party's continuance in power. However, it is remarkable that in few instances have barristers been elevated to judicial rank who have not merited the honor.

The appointments are for life; there is at present no age limit or compulsory retirement from service. The salaries are generous, the Lord Chancellor enjoying a grant of ten thousand pounds per annum, the Lord Chief Justice eight thousand pounds, the

Lords of Appeal six thousand pounds, and the *puisne* Judges of the three divisions of the High Court five thousand pounds.

English lawyers have, as a class, little knowledge of American legal and judicial conditions, but they always express the greatest surprise upon being told that in most of the American States the judiciary is elective and that a judge is elected only for a short term of years. To them the ideas of judicial rank and of complete independence of future financial problems are synonymous.

In most American States there is a system of local courts of first instance, with jurisdiction defined by geographical boundaries, from which appeals can be carried up to intermediate and final courts of purely appellate jurisdiction. In England the County Courts present a similar distribution of judicial business. But they have a jurisdiction limited in amount, and all important litigation is carried on in the High Court itself. The High Court, taking cognizance concurrently of common law, equity and probate disputes, is at the same time a court of first instance and a court of appellate jurisdiction. It sits not only in London, but also in about sixty provincial towns where assizes are held. To describe it in terms of American usage, we should say it was a supreme court sitting from time to time in all the counties as well as in the capital, and trying disputes at *nisi prius* as well as hearing arguments on appeal. Still above it, however, is the tribunal called the House of Lords, which could better be described as the Court of Lords, as only properly designated members of the House sit upon appeals.

Prominent on the American legal landscape looms the recording system, under which deeds, agreements and judgments are published to the world and bind, for certain purposes, not only the immediate parties, but all others whose rights are affected by notice. That system is not part of the English machinery, and its absence is one of the most important differences between the methods of the two countries. In America the practice of putting on record all documents conveying an interest in realty has led to the universal rule that a judgment entered against a man becomes, for the security of the judgment cred-

itor, *ipso facto* a lien upon all the judgment debtor's real property. Out of this state of law have sprung the familiar "judgment note", the "bond and mortgage" and many other business devices unknown to English mercantile transactions. There could be no more striking example of how substantive rights grow out of procedural changes. In England a judgment is not a lien upon the debtor's realty unless a writ for its enforcement is registered in the land registry office.

As a result of the habit of recording deeds, all American States require the papers served by adversaries in legal proceedings upon each other, to be filed in the office of the court, where they become part of the public records, accessible to all the public, or at any rate to all members of the Bar. No such provision exists in the English rules. It is true that the actual pleadings are filed in the Central Office, but they are principally for the convenience of the judge who will try the case, and are not accessible except to persons having a direct interest in the case.

Even such persons have to pay a small fee for the privilege of inspecting the papers filed. Furthermore, none of the interlocutory applications are included in this bundle. In the ordinary case, it consists solely of Writ, Statement, Defence, Notice of Trial, and Judgment. All other papers in the cause are simply served by the parties upon each other, and do not appear of record. An affidavit of service by the side anxious to proceed therefore always precedes steps taken for default by the other. This absence of official records of the steps taken in litigation makes it difficult for a foreign student to find out how actions are conducted from summons to satisfaction. He must look here and there and everywhere for information, and piece it together as best he can.

In the matter of costs there is another marked difference between English and American ideas. In most American States, the costs allowed a successful litigant cover only the actual expenses of getting his case on the record and having the issues tried. In England the idea is to go beyond that and actually reimburse the successful party in respect to everything he has had to pay in connection with the legal settlement of the dispute. He

has had to pay a solicitor, one or more barristers, and perhaps taken time off to attend at the trial as a witness. If he be awarded his costs, he will be reimbursed. There is a fixed scale of charges for every kind of act done and paper drawn by either solicitor or counsel, and for all the many details of preparing for trial, getting witnesses, trying the issues, and obtaining satisfaction of a judgment. This is applied by the Master when he is asked by the successful party to tax the costs. There are, in fact, two scales, a higher and a lower. The higher is called the "solicitor and client scale," and is based on what it would be fair for a solicitor to charge his client for the work done; the lower one is called the "party and party scale," and is based on what it is fair for a successful party to win from a defeated one for the same kind of work. This is the scale on which costs are usually recovered in actions on the common law side of the court, so that a litigant may not be and usually is not in fact, completely reimbursed. However, he gets more than he would in an American court in the same kind of action.

Pleading and practice are regulated entirely by Rules of Court, and not at all by statute. This is the last point in which the work of the English Bar differs from that of the American. There is a Rule Committee, on which sit judges, barristers and solicitors. Under the provisions of the Judicature Act, it has authority to make alterations or innovations in the Rules, which will have the same force as law—with this distinction, that the Judges and Masters who administer the Rules cannot be bound to allow technical advantages to work real injustice. The Rule Committee is an active body, making frequent changes in the Rules, and it is not only more accessible than a legislature, but more reasonable, more learned in the law, and more ready to act when the need is shown.

Taking for granted that American readers are familiar with the broad division of the English Bar into solicitors and barristers—the first getting the case from the client, and the second presenting it to the court—I have tried to set down a few of the less obvious things which have come to be taken so much for granted in England that they are not even set down in the books.

They are, more or less, the background to which I refer, or, to throw that metaphor over, the atmosphere of the English lawsuit.

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*(The first instalment of Part Two of this article, "The Rule-Making Authority," will appear in the January number.)*