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II

SUCCESS AT THE BAR

As I have stated in a preceding number of this Journal, Blackstone had conceived and warmly advocated a scheme for forming a School of English law at Oxford in New Inn Hall, where the Vinerian fellows and scholars would reside together, with himself as principal. Such a scheme would have been clearly in accordance with the wishes of Charles Viner, as disclosed in his will; but convocation would not agree to the proposal. In 1766, when Blackstone saw that his scheme was impossible, he resigned both the principality of the Hall and the Vinerian Professorship and resolved to give up lecturing and devote himself exclusively to his work at the Bar. And as soon as he gave his whole attention to his profession, he succeeded.

On May 1st, 1761, Blackstone was elected a Bencher of the Middle Temple, and five days afterwards he was made a King's Counsel. Two years later, on the establishment of the Queen's Household, he was appointed Solicitor General to her Majesty.

In 1768, when a new Parliament was elected, Blackstone was returned as member for Westbury in Wiltshire. And it was in this Parliament that the scene occurred which I have already described,² when Grenville quoted the Doctor's book in confutation of the statement which he had just made in his speech that a member of Parliament who had once been expelled from the House could not be re-elected. The part which Blackstone took in the discussions over the successive elections of John Wilkes for Middlesex drew upon him attacks from many persons of ability in the House, and severe criticism from the caustic pen of Junius. Hence later in the year 1769, he decided to retire from Parliament, where, he declared, "amidst the range of contending parties, a man of moderation must expect to meet with no quarter from any side." Whether this be true or not, it is a fact that Blackstone's success in the house was far less than had been anticipated.

He still retained the Recordership of Wallingford. Shortly after

¹ This paper is the second part of Mr. Odgers' article on *Sir William Blackstone*. Part I was printed (1918) 27 *YALE LAW JOURNAL*, 599.—Ed.

² *Ibid.* 615.

his marriage he purchased a residence there called Priory Place—a house in which he had occasionally resided, when discharging his duties as Recorder of that borough. He took great interest in the development and prosperity of the town; indeed to him it was largely due that two new turnpike roads were made through Wallingford. He also actively superintended the rebuilding of Wallingford Church with its elegant spire. His active mind was never idle. He was constantly engaged in some scheme of public utility either in London or Wallingford.

I have already stated that much of the success which attended the publication of the four successive volumes of Blackstone's *Commentaries* was due to the purity and elegance of his style and to his power of making the law clear and interesting to his readers, whether they were lawyers or not. But it must not be supposed that his literary ability and power of composition were displayed only in the *Commentaries*. He also had considerable talent as a versifier. This is shown, not only by his prize poem on Milton, to which reference has already been made, and by many later fugitive pieces—but especially by the poem which he wrote on entering the Middle Temple, which I cannot refrain from quoting at full length:—

THE LAWYER'S FAREWELL TO HIS MUSE

“As, by some tyrant's stern command,
A wretch forsakes his native land,
In foreign climes condemn'd to roam,
An endless exile from his home;
Pensive he treads the destined way,
And dreads to go, nor dares to stay;
Till on some neighbouring mountain's brow
He stops, and turns his eye below;
There, melting at the well-known view,
Drops a last tear, and bids adieu:
So I, thus doom'd from thee to part,
Gay queen of fancy and of art,
Reluctant move with doubtful mind,
Oft stop, and often look behind.

“Companion of my tender age,
Serenely gay, and sweetly sage,
How blithesome were we wont to rove
By verdant hill, or shady grove,
Where fervent bees with humming voice
Around the honey'd oak rejoice,
And aged elms, with awful bend,
In long cathedral walks extend!

“Lull'd by the lapse of gliding floods,
Cheer'd by the warbling of the woods,
How blest my days, my thoughts how free,

In sweet society with thee!
 Then all was joyous, all was young,
 And years unheeded roll'd along:
 But now the pleasing dream is o'er,—
 These scenes must charm me now no more:
 Lost to the field, and torn from you,
 Farewell!—a long, a last adieu!

“The wrangling courts, and stubborn law,
 To smoke, and crowds, and cities draw;
 There selfish Faction rules the day,
 And Pride and Avarice throug the way;
 Diseases taint the murky air,
 And midnight conflagrations glare;
 Loose Revelry and Riot bold,
 In frighted streets their orgies hold;
 Or when in silence all is drown'd,
 Fell Murder walks her lonely round;
 No room for peace, no room for you—
 Adieu, celestial Nymph, adieu!

“Shakspeare no more, thy sylvan son,
 Nor all the art of Addison,
 Pope's heaven-strung lyre, nor Waller's ease
 Nor Milton's mighty self must please:
 Instead of these, a formal band
 In furs and coifs around me stand,
 With sounds uncouth, and accents dry,
 That grate the soul of harmony.
 Each pedant sage unlocks his store
 Of mystic, dark, discordant lore;
 And points with tottering hand the ways
 That lead me to the thorny maze.

“There, in a winding, close retreat,
 Is Justice doom'd to fix her seat;
 There, fenced by bulwarks of the *law*,
 She keeps the wondering world in awe;
 And there, from vulgar sight retired,
 Like eastern queens, is much admired.

“Oh! let me pierce the secret shade,
 Where dwells the venerable maid!
 There humbly mark, with reverent awe,
 The guardian of Britannia's law;
 Unfold with joy her sacred page
 (The united boast of many an age,
 Where mix'd though uniform appears
 The wisdom of a thousand years),
 In that pure spring the bottom view,
 Clear, deep, and regularly true,
 And other doctrines thence imbibe,
 Than lurk within the sordid scribe;
 Observe how parts with parts unite

In one harmonious rule of right;
 See countless wheels distinctly tend,
 By various laws, to one great end;
 While mighty Alfred's piercing soul
 Pervades and regulates the whole.

"Then welcome business, welcome strife,
 Welcome the cares, the thorns of life,
 The visage wan, the pore-blind sight,
 The toil by day, the lamp by night,
 The tedious forms, the solemn prate,
 The pert dispute, the dull debate,
 The drowsy bench, the babbling hall,
 For thee, fair *Justice*, welcome all!

"Thus, though my noon of life be past,
 Yet let my setting sun at last
 Find out the still, the rural cell
 Where sage Retirement loves to dwell!
 There let me taste the home-felt bliss
 Of innocence and inward peace;
 Untainted by the guilty bribe,
 Uncursed amid the harpy tribe;
 No orphan's cry to wound my ear,
 My honour and my conscience clear;
 Thus may I calmly meet my end,
 Thus to the grave in peace descend!"

But, in spite of this formal adieu, he could not altogether refrain from further versification. He wrote in 1751, as I have already mentioned, a poem *On the death of Frederick, Prince of Wales*, with which his son, afterwards King George III, expressed himself as much pleased. As Blackstone was then a struggling member of the junior bar, this poem was published under the name of James Clitherow, the man who afterwards became his brother-in-law.

And till the end of his life Blackstone maintained his interest in literary matters. He amused himself by annotating Shakespeare's plays, and communicated his notes to Mr. Steevens who inserted them in his last edition of the *Plays*. He also wrote *An Investigation of the Quarrel between Pope and Addison*, which was published with Blackstone's permission by Dr. Kippis in the *Biographia Britannica*, and praised by Disraeli.

ELEVATION TO THE BENCH

After the publication of the *Commentaries*, Blackstone's reputation as a great and able lawyer was thoroughly established and his practice at the bar steadily increased. Hence in January, 1770, he was offered the post of Solicitor-General, which had become vacant on the resignation of Mr. Dunning. But he felt that his constitution was not equal

to the strain which would be put upon it, if he undertook the duties of so important a position in addition to his private practice, and the offer was declined. But in the very next month after his refusal of the post of Solicitor-General, he was offered and accepted a still greater honour and one which he thoroughly deserved. Mr. Justice Clive resigned his seat on the bench of the Court of Common Pleas and was granted a pension of £1200 a year. The vacant seat was offered to Blackstone and accepted by him on February 9th, 1770.

Some unusual circumstances however followed upon the appointment of Blackstone to the vacancy in the Common Pleas. He had a great regard for Mr. Justice Yates, a judge of the King's Bench, who was only one year older than Blackstone; they were close personal friends. In the month of February, 1770, Yates, for some reason, desired to leave the Court of King's Bench and requested Blackstone to agree to an exchange. Blackstone was glad to oblige a man for whom he felt a high esteem. He therefore at once agreed to occupy a seat in the Court of King's Bench, and thus enabled his friend to be transferred to the Common Pleas. But Mr. Justice Yates did not long enjoy his new seat. He was always a man of a weak constitution and on June 7th, 1770, he died of a neglected cold on his chest. Blackstone was then appointed to his original destination in the Common Pleas.

This story of the appointment of Blackstone as a Judge, first of one and then of another of the Courts at Westminster, should be borne in mind by every member of the Middle Temple; as it prevents any charge of inconsistency being brought against the records of our Honourable Society! To the panel on the Eastern side of the great South Window in our Ancient Hall is affixed a brass tablet, which bears the following inscription:

"The Honorable
Sr William Blackstone, Knight,
one of the Justices of
His Majesty's Court of King's Bench
Aō. Dñi. 1770."

But in the Benchers' corridor is preserved Sir William Blackstone's patent as a Judge of the Court of Common Pleas which recently was given to us by Sir Rufus Isaacs, now Lord Reading and Lord Chief Justice of England. At first sight one is puzzled by the discrepancy between the names of the Courts, but all bewilderment vanishes, as soon as one notices that this patent is dated June 25th, 1770, that being the day on which he was transferred from the King's Bench to the Court of Common Pleas.

MR. JUSTICE YATES

It seems a clear and simple story, this—that Mr. Justice Yates should wish to change his Court, and that Blackstone should do what he could to help his friend in the matter. Yet it gave occasion for a bitter controversy, in the course of which serious imputations were made against Lord Mansfield, who was then Lord Chief Justice of the King's Bench. It is necessary therefore to deal with the matter at some little length.

In the first place, there is no doubt about the facts. The records clearly show that on February 9th, 1770, Blackstone kissed his Majesty's hand on his appointment as Judge of the Court of Common Pleas. Three days later, he was called to the degree of Serjeant-at-law in the Hall of Serjeants' Inn, Chancery Lane. Previous, however, to the passing of his patent, Mr. Justice Yates expressed an earnest wish to retire from the King's Bench into the Court of Common Pleas. To this wish Blackstone readily acceded. Accordingly, on February 16th, Mr. Justice Yates was granted a new patent which made him a Justice of the Court of Common Pleas. On the same day, Blackstone kissed his Majesty's hand, on being appointed a Judge of the Court of King's Bench, and then also received the honour of Knighthood; and on the evening of the same day was sworn into his office, before the Lords Commissioners Smythe and Aston, at the former's house in Bloomsbury Square. But Mr. Justice Yates died on June 7th, 1770, between Easter and Trinity terms. Thereupon Sir William asked to be transferred to his original destination in the Common Pleas, and accordingly on Friday, 22nd June, kissed his Majesty's hand on being appointed a judge of the Common Pleas in succession to Mr. Justice Yates. On the evening of Monday, 25th June, Sir William executed a resignation of his office of Judge on the King's Bench and his patent was sealed, and he was sworn in before the Lords Commissioners, Smythe, Bathurst and Aston, at the former's house in Bloomsbury Square.³

But these records afford no answer to the question, why did Sir Joseph Yates desire, so shortly before his death, to quit the Court of King's Bench, of which he had been a distinguished member for six years, and retire into the Court of Common Pleas, which was regarded as of lesser rank?

All this happened in the spring of the year 1770; and at the time, so far as I am aware, no one seemed to think that there was anything sinister or remarkable in the circumstance. The salary of a puisne judge was the same in both courts—£2000 a year. Why should not the learned judges sit where they pleased, if the authorities consented?

³ See the *Biographical History of Sir William Blackstone*, by a Gentleman of Lincoln's Inn (D. Douglas), published in 1782.

(i) But eleven months later, the following diatribe appeared in a letter⁴ written by Junius and addressed to the Right Honourable Lord Mansfield, in which he describes that learned judge as being "like a woman . . . timid, vindictive, and irresolute," and accuses him of a "bias and inclination to depart from the decisions of your predecessors, which you certainly ought to receive as evidence of the common law. Instead of those certain positive rules by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. Decisions given upon such principles do not alarm the public so much as they ought, because the consequence and tendency of each particular instance is not observed or regarded. In the meantime the practice gains ground; the Court of King's Bench becomes a Court of equity, and the judge, instead of consulting strictly the law of the land, refers only to the wisdom of the Court, and to the purity of his own conscience. The name of Mr. Justice Yates will naturally revive in your mind some of those emotions of fear and detestation with which you always beheld him. That great lawyer, that honest man, saw your whole conduct in the light that I do. After years of ineffectual resistance to the pernicious principles introduced by your Lordship, and uniformly supported by your *humble friends* upon the bench, he determined to quit a court whose proceedings and decisions he could neither assent to with honour nor oppose with success." But I do not accept an uncorroborated statement of Junius—"that bold, powerful, and impudent writer"⁵—as any evidence of the truth of what he states. And where is there any confirmation of his story? In the fanciful picture which he draws of a "timid, vindictive, irresolute" Lord Mansfield, standing terror-struck before the rugged honesty of Yates, I see no trace of William Murray, the skilful advocate, the able politician, the clever debater, the sturdy opponent of the elder Pitt, the man on whose support the Government of the Duke of Newcastle depended for its existence. Moreover, the savage animosity which Junius felt against Lord Mansfield, is shown by his ridiculous attempt to revive in 1770 the story that Murray in his youth had "frequently drunk the Pretender's health upon his knees"⁶—a charge which had, seventeen years previously, been refuted after an inquiry into its truth before the Privy Council and the House of Lords.

(ii) A somewhat different account of the matter is given us many years later by Lord Campbell, in his life of Lord Mansfield, published in 1849. In this version of the story, Lord Mansfield appears no longer as a "timid, irresolute" man, trembling before his subordinate, but rather as a truculent and overbearing chief, scourging one of his

⁴ Letter XLI, dated November 14, 1770.

⁵ 8 Foss, *Judges of England* (1864) 345.

⁶ See 1 *Junius' Letters* (1850) 307, n.

puisne judges with scathing sarcasms. And this, it is suggested, arose entirely out of the famous case of *Perrin v. Blake*,⁷ the judgments in which were delivered in the Court of King's Bench on February 8th, 1770. I must tell my readers the story of this interesting law-suit in some detail.

In this case the testator, John Williams, who was seised in fee of land, commenced his will by declaring:—"It is my intent and meaning, that none of my children should sell or dispose of my estate for longer time than his life"; and then, after devising the land to his son John, and various other persons for their respective lives, concluded with a remainder "to the heirs of the body of my said son John." Obviously, if the rule in *Shelley's Case* governed the construction of this will, John took an estate in tail, which he could at his pleasure convert into an estate in fee simple, and then dispose of the land. This was the view taken by Mr. Justice Yates, who was a great common-law lawyer, many of whose decisions are reported by Burrow. He took his stand upon the accepted rules of the common law and the reported decisions of earlier judges, one of which, *Coulson v. Coulson*,⁸ was precisely in point. Lord Mansfield on the other hand, who was always inclined to place common sense before authority, declared that the rule in *Shelley's Case* must not be followed in the construction of this will; because the testator had clearly declared his intention to the contrary. He therefore held that John took only a life estate in the land.

Lord Campbell in his *Lives of the Chief Justices of England*⁹ prefers to state the matter thus:—"But, unfortunately, Lord Mansfield being intoxicated by the incense offered up to him, or misled by an excessive desire of preferring what he considered principle to authority, took a different view of the construction of the will, and resolved that John should only be considered as having taken an estate for life. Two of the puisnies (Willes and Aston) were induced to agree with him, but the stout-hearted Yates stubbornly stood out for the rule in *Shelley's Case* and the authority of *Coulson v. Coulson*." Lord Campbell then gives a long quotation from Lord Mansfield's judgment and adds in a note, "Judge Yates was so much hurt by the sarcasms thus levelled against him, that he resigned his seat in the Court of King's Bench, and transferred himself to the Court of Common Pleas."¹⁰ But where is there any evidence of these sarcasms which are said to have driven Yates from the Court in which he had sat comfortably for six years? I have searched carefully through the three reports dealing with the case, and I can find nothing in them at all resembling sarcasm (welcome though it would have been!). In the quotation which Lord Campbell

⁷ 4 Burr. 2579; 1 Wm. Bl. 672; 1 Doug. 343.

⁸ (1740, K. B.) 2 Stra. 1125.

⁹ (1849) II, 432.

¹⁰ *Ibid.* 433, n.

makes from the judgment of Lord Mansfield, I can only find one sentence in which any allusion is made to the fact that the members of the Court were not unanimous. It runs as follows:—"I agree that this is within the rule of *Shelley's Case*, and I do not doubt that there are and have been always lawyers of a different bent of genius and different course of education, who have chosen to adhere to the strict letter of the law, and they will say that *Shelley's Case* is an uncontrollable authority, and they will make a difference between trusts and legal estates, to the harassing of a suitor."¹¹ But could even the most thin-skinned judge regard this sentence as a sarcasm—still less as a sarcasm which would compel him to change his court? Certainly, a sensible man like Yates would not be driven from the honourable place which he occupied in the King's Bench by this one sentence in the judgment of the Chief Justice. And yet it is at the end of this extract that Lord Campbell adds the note, already quoted, that "Judge Yates was so much hurt by the sarcasms *thus levelled* against him, that he resigned his seat in the Court of King's Bench." So it was not anything said privately in discussion between the judges, but this one sentence in the judgment delivered by Lord Mansfield in open Court which is supposed by Lord Campbell to have driven Yates from the King's Bench.

(iii) In the third place stands Foss, the pleasing author of the well-known *Lives of the Judges*, the nine volumes of which appeared at intervals between 1848 and 1865. I am informed by a very learned Judge, now retired from the Bench, that the materials for this book were submitted to Lord Campbell for his perusal before it was published. If so, it is not surprising perhaps that we find Foss following, though somewhat timidly, in Lord Campbell's track. When speaking of Mr. Justice Yates he tells us that "He ventured sometimes to differ from his noble chief, who chafed so much under any opposition of opinion, that Sir Joseph, to avoid his lordship's covert sarcasms, determined to take the first opportunity to leave his Court."¹²

Note that in this passage Foss asserts that Yates *sometimes* differed from his noble chief. But Sir James Burrow, in his report of *Perrin v. Blake*,¹³ records a remarkable fact—"that, excepting this case and another in this volume, there never has been, from the 6th of November 1756, to the time of the present publication a final difference of opinion in the Court in any case or upon any point whatsoever. It is remarkable too, that excepting these two cases, no judgment given during the same period has been reversed, either in the Exchequer Chamber or in Parliament; and even these reversals were with great diversity of opinion among the judges."

¹¹ *Ibid.* 433.

¹² 8 Foss, *op. cit.* 411.

¹³ 4 Burr. at p. 2582.

Now Sir James Burrow was Master of the Crown Office and thus had easy access to the records of the Court of King's Bench. It is clear from what he says that Yates could not possibly have differed more than twice from Lord Mansfield. I believe that he differed only once and that that was in the case of *Perrin v. Blake*. And see how courteously and modestly his judgment in that case commences. "I shall ever feel an unaffected uneasiness when it falls to my lot to be so unfortunate as to differ with my brothers, and I shall always conclude that in such case I am in the wrong, but here I will adopt the very delicate apology of my brother *Willes*, 'that judges should always adhere to the opinion they themselves form, without conceding to the influence of any other.' If in the present case I am in an error, I must say that I have spared no pains to discover the source of my error; but I have formed my opinion after the most diligent enquiry and severest investigation."¹⁴ Could any gentleman—and Lord Mansfield was a gentleman—take offence at a difference of opinion so courteously expressed? And remember that Foss himself praises Lord Mansfield, not only for "the fairness and impartiality of his decisions," but also for "the patient courtesy of his manners."¹⁵

Moreover, the judgment of the Court of King's Bench was reversed on the 29th January, 1772, in the Exchequer Chamber by six out of eight judges, De Grey, C. J., and Smythe, B., being the only two who upheld the opinion of Lord Mansfield.¹⁶ And of the six judges who overruled the decision of the King's Bench, Blackstone's judgment has always been regarded as the most clear and convincing. Yet this difference of opinion never made Lord Mansfield break out into violent sarcasms against Blackstone, and never in any way affected the friendship that had so long existed between these two great lawyers.

I believe that this injurious myth arose entirely out of contiguity of dates. The judgment of the Court of King's Bench in *Perrin v. Blake* was delivered on February 8th, 1770, and Mr. Justice Yates was transferred to the Court of Common Pleas only eight days afterwards, namely on February 16th. Hence people jump to the conclusion that the first event must have been the cause of the second.

(iv) May I venture to make a suggestion which affords, I think, a more reasonable solution of the difficulty, if there is any, than any of those already mentioned. The commerce of England increased by leaps and bounds during the time that Lord Mansfield was Chief Justice, and his reputation as a commercial judge rose higher and higher every year. Hence the work in the Court of King's Bench constantly

¹⁴ 1 *Collectanea Juridica*, 309.

¹⁵ *Loc. cit.* 342.

¹⁶ An Appeal was then brought to the House of Lords, but the dispute was eventually compromised between the parties without coming to a decision there. So the result of the case was that John Williams, Junior, took an estate tail.

increased. Foss tells us that Yates, even at the commencement of his career, suffered from "considerable feebleness of constitution."¹⁷ A seat as junior puisne Judge on the Bench of the Court of Common Pleas would be a far easier berth for him than that which he held as senior puisne in the Court of King's Bench. Was not that the true reason for his desire to make the exchange? And, as we know, he died within four months of his removal.

BLACKSTONE ON THE BENCH

And so he was a judge—"and a good judge too." Not perhaps a great judge—certainly not a brilliant judge—but an able and upright, a learned and careful, a conscientious and impartial judge. He was gifted with an excellent memory; whatever he had read and once digested, he never forgot. He always had the courage of his convictions; yet he did not enforce his view upon the jury when the matter was one for their decision. He endeavoured to obey the maxim of Lord Bacon, that a judge "should be a light to jurors, to open their eyes, but not a guide, to lead them by the nose."¹⁸ Foss speaks of Blackstone in terms of high praise:—"Whoever reads the reports of the period during which he sat upon the bench, must acknowledge that he was equally distinguished as a judge, as he had been as a commentator. Some of the judgments that he pronounced are remarkable for the learning they display, and for the clearness with which he supports his argument; and in the few instances in which he differed from his colleagues, his opinion was in general found to be right."¹⁹

Let us glance rapidly at two of the decisions in which he took an important part.

I have referred in the preceding pages to the valuable judgment which Blackstone delivered in the Exchequer Chamber, when the case of *Perrin v. Blake* came before that Court on a writ of error. This judgment was not published in Blackstone's lifetime, nor was it prepared for publication by him, nor was it among the papers which he directed his executors to publish. It will be found set out at full length in 1 Hargrave, *Law Tracts* (1787) 487 ff. It has always been regarded as most forcible and convincing and as a clear exposition of sound law. Sir James Burrow describes it as a "very able and elaborate argument."²⁰ Lord Campbell tells us in his *Lives of the Chief Justices of England*²¹ that "Mr. Justice Blackstone's argument on this occasion was so inimitably exquisite, that his reputation as a lawyer

¹⁷ *Loc. cit.* 413.

¹⁸ See Lord Bacon's speech in the Common Pleas to Sir Richard Hutton, when he was called to be one of the Judges of that court on March 3, 1617.

¹⁹ *Loc. cit.* 249.

²⁰ 4 Burr. at p. 2581.

²¹ II, 433, n.

depends upon it still more than upon his Commentaries." Lord Thurlow, it is true, found in it "some few incorrect expressions in the sequel of his argument, which yet are not corrected."²² Yet it is commended and treated as of high authority in the very learned, yet delightfully humorous judgment of Lord Macnaghten in *Van Grutten v. Foxwell*.²³

Next I must say a few words about the famous case of *Scott v. Shepherd*.²⁴ The market-house at Milborne Port is a covered building supported by arches and enclosed only at one end. A large concourse of people was assembled in it on the evening of the fair-day, October 28th, 1770. The defendant threw a lighted squib into the market-house which fell upon the stall of one Yates who sold gingerbread, etc. Yates' assistant, Willis, instantly—in order, it was said, to prevent injury to himself and to the wares of Yates—took up the squib from off the stall and threw it across the market-house, where it fell upon another stall belonging to Ryal, who sold the same sort of wares. He instantly—to save his own goods, it is said,—took up the squib and threw it to another part of the market-house, where it unfortunately struck the plaintiff in the face and put out one of his eyes. The action came on for trial at Bridgwater Assizes in the summer of 1772, when the jury found a verdict for the plaintiff for £100 damages. In the following Easter term, it was contended before the Court of King's Bench that the defendant was not liable, because it was Ryal and not he who caused the lighted squib to come in contact with the plaintiff's face. Nares, J., Gould, J., and De Grey, C. J., held however that the action was maintainable because it was the defendant who "gave the mischievous faculty to the squib" and first started it on its wild career across the market-house at Milborne Port. Blackstone on the other hand held that the action did not lie.

When as a young man I first read the report of this case in Smith's *Leading Cases*, I at once came to the conclusion that Blackstone was right and that the other judges were wrong. Not that I then knew anything about the fine distinction between an action of trespass and an action on the case; I decided the matter on the facts. I knew quite well what a lighted squib was; I had thrown such things about myself; and the idea that there would be "terror impressed upon" any man in Somersetshire—my own county—by a lighted squib, as Gould, J., asserted, seemed to me preposterous. I felt sure that Willis and Ryal were merely entering into the fun of the fair and were not thinking in the least of their "own safety and self-preservation," nor of the preservation of their wares nor of doing anything "tending to affright the bystanders." The decision of the majority of the judges

²² 3 Hargrave, *Jurisconsult Exercitationes* (1813) 363.

²³ (H. L.) [1897] A. C. 667-681.

²⁴ (1773, C. P.) 2 Wm. Bl. 892, 2 Sm. Lg. Cas. 480.

turns expressly on the assumption that Willis and Ryal were not to be considered free agents, that what they did was "by necessity," was "the inevitable consequence of the defendant's unlawful act." Had they been considered as free agents voluntarily intervening, the other judges would have agreed with Blackstone, J. But it is possible that there were findings of the jury which prevented their doing so.

We will now proceed to consider the character of Blackstone as a judge in criminal cases. He was a man of unbounded philanthropy, and he pleaded the cause of humanity with tenderness and courage. He could not accept the theory that the only method of lessening crime was by increasing the severity of punishment. He knew that punishment should be reformatory as well as deterrent. He had realised that when the law is too severe, it excites popular sympathy in favour of the criminal. He deplored the fact that in his day no less than a hundred and sixty offences had been "declared by act of Parliament to be felonies without benefit of clergy; or in other words to be worthy of instant death."²⁵ So dreadful a list," he contended, "instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one-half of the convicts, and recommend them to the royal mercy. Among so many chances of escape, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices, and if, unexpectedly, the hand of justice overtake him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity has taught him to condemn."²⁶ Blackstone, in short, agreed with Montesquieu and Beccaria that crimes are more effectually prevented by the certainty, than by the severity, of the punishment.

But even where the punishment of death was not inflicted, the condition of the convict of that day was scarcely the happier on that account. He was sentenced to imprisonment for life or for a long period of years. During the whole time that Blackstone was a judge, the regular English prisons were of two kinds. There were the common county gaols, used indiscriminately

- (a) for accused persons detained before or during trial;
- (b) for criminals sentenced to death or transportation, in the interval between judgment and execution;
- (c) in some cases for criminals sentenced to imprisonment as a distinct punishment; and
- (d) for insolvent debtors.

²⁵ The number was increased to over two hundred before the year 1800. See *A Century of Law Reform* (1901) 5, 45, 46.

²⁶ 4 *Commentaries*, ch. 1, p. 18.

There were also Houses of Correction, popularly called "Bridewells," in which were housed those whose punishment was to consist in the confinement itself. There was some difference between the two, but of both it may be said generally, that they hardly pretended to answer any purpose whatever except, on the one hand that of simple detention, and on the other hand, that of making the inmates at all events sufficiently uncomfortable, not to wish to enter them again.

The buildings were for the most part unhealthily situated and ill-constructed; and in them all prisoners alike, without distinction of age, sex or character and without regard to the nature of the offence which each had committed, were herded together in the daytime and might or might not have separate cells at night. They had, as a rule, no honest means of employing themselves; in the Bridewells hard labour was often part of the sentence, but either from the lack of means of supervision or from the supposed danger of entrusting the prisoners with tools, it was seldom that any work was actually done. Much less was there any provision for religious or other instruction. On the other hand, gaming and fighting were allowed to go on without interruption and the gaolers made a profit by selling spirits to the prisoners. In short, the moral conditions were such that every inmate left the gaol more hardened and cunning in vice and more ignorant of everything useful than when he entered it; while the physical conditions were such that a large proportion of the prisoners never came out at all or came out only to die.

This was due not only to the construction of the buildings but also to the close packing of the inmates, the absence of cleanliness and of all sanitary precautions, and above all, to the fact that the prisoners were reduced to the very verge of starvation, unless they were able to buy food or obtain it from private charity. These conditions engendered a disease, popularly called gaol-fever, which was unknown in any other civilised country. For fear of infection, the gaolers themselves never entered the cells if they could possibly avoid doing so, and in some instances judges sickened and died in consequence of visiting the prisons in the course of their duty. Moreover, terrible havoc was made among the sailors in our ships of war through some released prisoners carrying the fever with them when they were impressed for the navy. Hence it was often less prejudicial to the State, if not also better for the convict himself, that he should be hanged at once instead of being sent to prison. This may perhaps account for the enormous increase in the number of offences made punishable with death, and for the successive experiments in the way of transportation from the time of Cromwell downwards, all of which were ill-conceived and disastrous.

At last attention was called to this terrible state of things by the philanthropist, John Howard, who at the risk of his health and life had visited nearly every prison in England and on the Continent. He published a full report of his experiences in the year 1776, which

aroused the conscience of the public. Blackstone was the first of the King's judges to encourage and support the efforts of Howard; and in this effort he was strenuously supported by his former pupil, Jeremy Bentham. They both felt strongly that in a Christian country such a shameful state of things should no longer be permitted to exist; for it ruined both the morals and the health of those who were under the care of the State. A bill was introduced into Parliament to provide "detached houses of hard labour for convicts." In these houses (as the judge explained to a grand jury) the convicts were to be separately confined during the intervals of their labour, and instructed in religion and morality; they would be given no opportunity of indulging in gambling or drunkenness, and compelled to work for the benefit of the public.

But though the bill, owing mainly to the humane efforts of Blackstone and Lord Auckland, passed into law in 1779,²⁷ no "penitentiary house" was ever built in accordance with its provisions. The act was never carried into effect; there was an abortive negotiation for land which was never purchased; and there the matter ended for a while. But in the next generation, the beneficial effects to be derived from improving the conditions of all prisons and from the employment of the prisoners in their different classes were fully recognised. The present condition of our gaols is largely due to the efforts of Howard and Blackstone in the matter.

There was another good thing which Blackstone did while he was on the Bench. He strongly represented that the salary of a puisne judge ought to be increased, owing to the diminution in the value of money and the consequent increase in the price of food and other necessaries of life. He succeeded in obtaining a treasury order that the salary of every puisne judge of the three superior Courts at Westminster should be raised from £2000 to £2400 a year. This was a good thing not only for the judges but also for the Bar; for a bad habit had grown up of allowing judges to hold Recorderships and other minor appointments after they had been raised to the Bench, as some compensation for the smallness of their judicial salaries. These appointments had formerly been held, as they are now, by eminent members of the Bar. Thus Mr. Michael Foster, a great authority on the criminal law, was appointed Recorder of Bristol in 1735, after he had been 22 years at the Bar. He was made a judge of the Court of King's Bench and knighted in 1745; but he retained the Recordership of Bristol until a few months before his death in November 1763. Again, Mr. Justice Yates, who was made a judge of the same Court in January 1764, was early in the following year appointed Chancellor of the County Palatine of Durham. The duties attendant on these

²⁷ St. 19 George III c. 74.

minor offices could not fail to distract the judges from their proper work at Westminster, especially when we remember that a journey from London to Bristol or Durham was no slight matter in those days.

ILLNESS AND DEATH

But Blackstone's work as a judge was now often interrupted by illness. He had always been too much bent on study to pay attention to his health; from his youth upwards he was strongly averse to taking exercise, and hence became corpulent and gouty. At last a nervous disorder attacked him, which led to giddiness. About Christmas 1779, he was seized with dropsy and "water on the chest" which led to an alarming shortness of breath. He recovered sufficiently to come up to town in January, 1780, and tried to resume his judicial duties. But he was speedily seized with pains in his head which brought on drowsiness and stupor; all the efforts of his medical advisors proved unavailing and he died on the 14th February, 1780, in the 57th year of his age. He was buried by his own direction in a vault which he had built for his family in his parish church of St. Peter's, Wallingford.

His wife, with whom he had passed nearly nineteen years of happy married life, survived him. By her he had had nine children; the eldest and youngest of whom died in infancy. The seven who survived him were named Henry, James, William, Charles, Sarah, Mary, and Philippa. King George, hearing that the family were left badly off, was good enough to make some provision for them; as we have already stated, when Prince of Wales he had read some of Blackstone's lectures in manuscript.²⁸ The latter's son Henry, who was little more than sixteen years old at the time of his father's death, eventually succeeded to Priory Place, his father's residence at Wallingford. This estate was still in the possession of one of the judge's descendants as late as the year 1864. Henry also became Vinerian Professor at Oxford, and indeed succeeded to nearly all the rest of his father's academical honours.

A fine statue by Bacon of Blackstone with his right hand on the *Commentaries* was erected in All Souls' College after his death. It now stands in a commanding position in the Codrington Hall which is part of the magnificent library of that College. Its erection was mainly due to the high esteem and regard in which Blackstone was held by Dr. Buckler, Fellow of that College and Custos Archivorum in the University of Oxford. He was one of Blackstone's oldest and most intimate friends and survived him for a period of only ten months. By his will he bequeathed a sum of money to the College towards the erection of such a statue.

²⁸ (1918) 27 YALE LAW JOURNAL, 609.

An excellent portrait of Sir William Blackstone in his robes as a judge was painted by Gainsborough. This is now in the National Gallery. A good copy of it is in the Benchers' Reading-room at the Middle Temple; it was painted for the Society by Eddis in 1835. Another copy may be dimly seen in the Hall of All Souls' College, Oxford. A third copy is owned by Miss Rennell of South Kensington, London, S. W., and a fourth by William J. Campbell, Esq., of Philadelphia, U. S. A.

An engraving of this picture by John Hall was prefixed to the title-page in the 8th edition of the *Commentaries*. Eight editions of the *Commentaries* had appeared in Blackstone's lifetime and the ninth was in course of preparation at the time of his death.

Here then we say farewell to William Blackstone. He was a man of the highest moral character—a good husband, an excellent father and a faithful friend. He was a man of sincere religious principles and always actuated by noble motives. In private life, he was amiable and cheerful and much beloved by his family, and by the friends whose society he enjoyed, as they did his.

But he was physically lethargic and averse to taking proper exercise, and this made him corpulent and languid. Towards the close of his life, his physical infirmities rendered him irritable, a fault which he acknowledged and deplored. Yet he was always benevolent and sympathetic and never malicious or unjust. When sitting as a judge "his heavy features and his contracted brow so contradicted his real disposition that he was considered by the public to be somewhat morose and austere. One of his great excellencies was his rigid punctuality, the neglect of which in others would at once produce that irritation of temper, to which from his bodily infirmities he was sometimes liable."²⁹

He was very near-sighted, and this gave him a wrinkled brow. Yet he was a pattern of neatness and kept his house and all his books and papers in perfect order. He had also a tidy mind and a wonderful memory. He was a great reader; there was hardly any branch of the literature of his day with which he was unacquainted.

Blackstone, from his earliest youth, had no doubt a natural reserve and diffidence, which he could never shake off, and which many mistook for discourtesy or pride. Bentham, as we have seen, was one of these. And this notion that Blackstone was a proud man was enhanced after he became a judge by the undoubted fact that he was a stickler for forms. He would never lessen the dignity of his office by any outward levity of behaviour; and in this surely he was right.

In the House of Commons he was always opposed to party violence. His perseverance in pursuing whatever he thought right was unremitting. He was an able, upright and impartial judge; perfectly

²⁹ Foss, *loc. cit.* 251.

acquainted with the laws of his country. He was a man of high public spirit—neither a Tory nor a bigot. He believed in civil and religious liberty, as interpreted by Locke, and as understood in England in Blackstone's time. He was in truth a typical old Whig; and his veneration for the English Constitution bordered on idolatry.

BLACKSTONE'S REPORTS

By a clause in his will, Sir William directed that his MS. Reports³⁰ of Cases determined in Westminster Hall, taken by himself, and contained in several large note books, should be published after his decease. The cases reported in these note books extend from Michaelmas Term, 1746, to Michaelmas Term, 1779. The first volume contains 35 cases decided between Michaelmas 1746 and Michaelmas 1750. But no cases are included which were decided in the following six years, as Blackstone resided chiefly at Oxford during that period; while in the years 1757, 1758 and 1759, no cases are reported in either Easter or Trinity Terms, as Blackstone then came to Town for Michaelmas and Hilary Terms only.

The first edition of these Reports was published in 1781 and edited by James Clitherow, Blackstone's executor and brother-in-law; it was printed in Dublin. The reports of cases in the first volume, which were taken by Blackstone while at the bar, are often rough and incomplete—sometimes even ungrammatical. To this however there is one marked exception. The report of the Chancery case of *Burgess v. Wheate* runs from p. 123 to p. 186 of the first volume. This was because Lord Mansfield kindly allowed Mr. Clitherow to have access to the official copy of the judgments, in order to correct any errors or supply any omissions in the report which had been supplied to Blackstone by his friend Fazakerly. The reports of cases in the second volume, which were taken by the late Judge when he was on the Bench, are much fuller and more finished. There, many of his own judgments are given very copiously and at great length; so we may conclude that they are reported exactly as they were delivered by him, possibly from a written paper.

An interesting case in which Blackstone was Counsel is only to be found in these reports.³¹ It is not only interesting in itself but also as showing that Blackstone had studied Montesquieu's *De l'Esprit des*

³⁰ These Reports must be carefully distinguished from those known as "Henry Blackstone's Reports." The two volumes of "Blackstone's Reports" contain the decisions chiefly of the Court of King's Bench, from 1746 to 1780. The two volumes of "Henry Blackstone's Reports" contain the decisions of the Court of Common Pleas from 1788 to 1796. This Henry Blackstone was the nephew of the Judge, not his son; he was also a member of the Middle Temple.

³¹ *The King v. Guerchy* (1765, K. B.) 1 Wm. Bl. 545.

Lois before he published the first volume of his *Commentaries*.³² The Count de Guerchy, the French Ambassador, had been indicted in London for soliciting one de Vergy to assassinate M. D'Eon. Application was made to the Attorney and Solicitor General to enter a *noli prosequi*, and they removed it by *certiorari* into the King's Bench. Serjeant Glynn, and Dunning appeared for the prosecutors. Blackstone, who was alone for the defendant, argued with great force that such an indictment violated the well-recognised privilege of an Ambassador and succeeded in obtaining a *noli prosequi*. This took place in Easter Term 1765; and Blackstone quotes in his argument the following passage from Montesquieu: "Le droit des gens a voulu que les princes s'envoyassent des ambassadeurs: et la raison, tirée de la nature de la chose, n'a pas permis que ces ambassadeurs dépendissent du souverain chez qui ils sont envoyés, ni de ses tribunaux. Ils sont la parole du prince qui les envoie, et cette parole doit être libre."

I have already dealt with the famous cases of *Perrin v. Blake* and *Scott v. Shepherd*. Another which excited considerable interest at the time is reported on pp. 754-758 of Vol. II of these Reports. Mr. Brass Crosby, the Lord Mayor of London, was a member of the House of Commons, and was committed to the Tower under a warrant of Mr. Speaker, dated March 27th, 1771, for an alleged contempt of the House of Commons. On April 18th he applied to the Court of Common Pleas for a Writ of *Habeas Corpus* at Common law (not under the Act), which was granted to him. But, on return being made to the Writ on April 22nd, he was remanded to the Tower. The Court, which consisted of De Grey, C. J., Gould, Blackstone, and Nares, JJ., were unanimously of opinion that they could not discharge the prisoner. "He appeared to be a *member* of the House of Commons, *adjudged* by that House to be guilty of a breach of privilege, and *committed* in *execution* by the authority of that House (now sitting) for the said offence. The House of Commons is a Superior Court of Judicature with respect to its own privileges, and especially over its own members. This Court never discharges persons committed for a contempt by any supreme Court, such as the two Houses of Parliament, and the Courts of Westminster Hall. The law has entrusted to these the power of judging of their own contempts in the last resort. If there lay any appeal from them, it would detract from their dignity, and they would cease to be supreme Courts."

And this decision has always been followed by our Courts in similar cases.

³² *The Spirit of Laws* is again quoted by Blackstone in Book I, ch. II, 161 of the *Commentaries*, and its influence is clearly apparent throughout that chapter. But it is not correct to say, as some French writers have done, that Blackstone "*procède de Montesquieu*."

SUBSEQUENT HISTORY OF THE COMMENTARIES

The chorus of approbation which the *Commentaries* received on their first appearance continued for eleven years without the interruption of any discordant voice. Then in 1776 there appeared a work, entitled *A Fragment on Government*, which was written by Blackstone's former pupil, Jeremy Bentham, now at the mature age of 28 years. The preface to the first edition of this work contains a vehement denunciation of Blackstone and all his works. After impressing upon the readers how necessary it is that we should all comprehend the principles of our law and endeavour to improve them wherever they need reformation, Bentham continues in the following strain:—"If to this endeavour we should fancy any author, especially any author of great name, to *be*, and as far as could in such case be expected, to *avow himself*, a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works; of a great part, at least, of the esteem and influence which these works might, under whatever title, have acquired.

"Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least I saw, in the Author of the celebrated *Commentaries on the Laws of England*: an author whose works have had, beyond comparison, a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable), than any other writer who on that subject has ever yet appeared.

"It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole."³³ But in spite of this bold denunciation, Blackstone's *Commentaries* continued to be read by every law-student and also by very many persons who had no intention of entering the legal profession. For instance, the great historian, Edward Gibbon, himself tells us that he read the *Commentaries* three times through from cover to cover.

Nearly sixty years later, John Austin, in his *Province of Jurisprudence Determined*,³⁴ went even further than Bentham in his denunciation of Blackstone, to whom he alludes as the imitator of Hale, and then continues:—"The method observed by Blackstone in his far too celebrated *Commentaries*, is a slavish and blundering copy of the very imperfect method which Hale delineates roughly in his short and

³³ 1 Bentham's *Works* (Bowring's ed.) 227.

³⁴ (3d ed., 1869) I, 71.

unfinished Analysis. From the outset to the end of his Commentaries, he blindly adopts the mistakes of his rude and compendious model, missing invariably, with a nice and surprising infelicity, the pregnant but obscure suggestions which it proffered to his attention, and which would have guided a discerning and inventive writer to an arrangement comparatively just. Neither in the general conception, nor in the detail of his book, is there a single particle of original and discriminating thought. He had read somewhat (though far less than is commonly believed) but he had swallowed the matter of his reading, without choice and without rumination. He owed the popularity of his book to a paltry but effectual artifice, and to a poor, superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the over-weening conceit of their national or peculiar institutions, which then was devoutly entertained by the body of the English people, though now it is happily vanishing before the advancement of reason. And to this paltry but effectual artifice he added the allurements of a style which is fitted to tickle the ear, though it never or rarely satisfies a severe and masculine taste."⁸⁵

These censures are decidedly severe! And the reader will observe that they apply to the *Commentaries* as a whole. But the fiercest attacks made by both Austin and Bentham are levied against the second section of the *Introduction* to that work, in which Blackstone deals with the theory and sources of law and discusses the nature of laws in general.⁸⁶ He had but repeated in flowing language the views of earlier English writers on this subject, with little or no enquiry into the accuracy of their theories. It was enough for him that these theories were almost universally accepted by the legal profession in the days of George II. But this was just another reason why Bentham should fiercely denounce them, and he certainly does convict Blackstone of laxity of thought in some of his statements. He was sometimes too willing to accept without question statements made by Lord Coke and other recognised authorities. Subsequent workers in the field of legal history have occasionally found him at fault. Thus, Sir Henry Sumner Maine mentions an instance in which Blackstone now proves to be wrong, but adds with characteristic fairness: "the explanation was really the best which could be given in Blackstone's day."⁸⁷ We must not blame Blackstone for not knowing things which no one had discovered in his lifetime.

Blackstone naturally begins by defining the word "law." His definition is as follows: "That rule of action which is prescribed by some superior and which the inferior is bound to obey." This is quite as

⁸⁵ As to Austin's attacks on Blackstone's style see (1918) 27 YALE LAW JOURNAL, 615.

⁸⁶ I *Commentaries* (2d ed., 1756) 38 ff.

⁸⁷ *Early Hist. of Institutions*, 223. And see also *ibid.* 273.

good as most, and better than many definitions of a law. Austin indeed derives his definition from it. Blackstone then proceeds to discuss at some length the meaning of the "toil-worn" phrase—the "law of nature." And, of course, strong objection has been taken to his views on this matter; for it is one over which our jurists always fiercely fight.

Now it must be admitted that "the law of nature" is a very elastic term. It is sometimes used as identical with the law of God or conscience or "natural justice," while at other times it seems to denote little more than savage customs or animal instincts.³⁸ Blackstone thought fit to call the unwritten law of God "the law of nature," the title by which certain of the later Roman jurists designated their *jus gentium*—though that, as Sir Henry Sumner Maine has proved to us, was at first merely "the sum of the common ingredients in the customs of the old Italian tribes," and was therefore of *human* origin.

If, however, by the phrase, "the law of nature," it is intended to describe any law of human origin, then I confess that I regard the law of nature much as Betsey Prig regarded Mrs. Harris. I have even ventured to assert in one of my books³⁹ that "there is not now, and never was, any such thing as a 'law of nature' in any sense in which a practising lawyer of to-day understands the word 'law.'" There are only two kinds of law—the law of God and the law of the State. Both are partly written and partly unwritten, the written portion being in each case the later in date. But there is no distinction in substance between the written and the unwritten law of God; for the written law was unwritten, until God revealed it to some man who wrote it down, and its reduction into writing in no way increased its efficacy and force. But there are distinctions of practical importance between the written and the unwritten law of a State.

There are, of course, immutable rules of right and wrong which God has stamped on the heart of man. These theologians and moral philosophers variously describe as the "dictates of conscience," or "the moral sense," or the "intuitions of right and wrong." To all these terms I myself prefer the beautiful phrase used by Thomas à Kempis⁴⁰ "The Truth that teacheth within." And in my opinion the "law of nature" is a far-fetched and incongruous name for the voice of conscience. Why should the dictates of our consciences be termed "the law of nature" when they are really the whisperings of God in our hearts, which are even higher, purer and nobler than the promptings of weak human nature?

Blackstone, however, has thought fit to restrict the phrase "the law of God" to the written law of God which he calls the "revealed or

³⁸ *Jus naturale est, quod natura omnia animalia docuit.* Inst. I, 2; D. I. I. I. 3.

³⁹ Odgers, *The Common Law*, 3.

⁴⁰ *De Imitatione Christi*, I.

divine law," while he confers the title of "the law of nature" on the unwritten law of God as distinct from, and of greater antiquity than that law of God which is revealed in Holy Writ. I do not regard this as a good name for any portion of the law of God; for our human nature constantly tempts us to act in contravention of the law of God. But Blackstone is entitled, like his predecessors in the field, to bestow the name on any body of law he chooses, so long as by his definition he makes his meaning clear. Many others, both before and since, have used the term in the same sense as Blackstone. Cicero, for instance, declares in his *De Republica*,⁴¹ that God is the author of natural law.

Blackstone indeed might have found warrant in the Bible for his calling the unwritten law of God the "law of nature." For St. Paul tells us in his *Epistle to the Romans*⁴² that "When the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the meanwhile accusing or else excusing one another." Does not St. Paul here mean that the Gentiles who had never seen or heard of the law of Moses had a "law written in their hearts" by "nature" and to which their conscience bears witness?

But the main cause of Bentham's and Austin's indignation against Blackstone was not his definition of the law of nature but his "apologetic optimism," his entire content with the law and constitution of England as it then stood. They regarded his extravagant praise of the institutions which existed in England in his day as serious obstacles to any attempt at the reformation of abuses which they found intolerable. They denounced him as an opponent of every suggested reform and as a determined and persevering enemy to the welfare of mankind. Blackstone appeared to them wholly to ignore the fact that a very small proportion of the men of England had any share in the government of their country. His father was a citizen of London, and he himself had a vote as Recorder of Wallingford and also as a resident occupier in that borough. His mother's male relatives were "forty shilling freeholders" in Wiltshire. So they all had votes for the election of members to Parliament. Hence it seemed to him, no doubt, that the popular control of legislation was vested in quite the proper persons. And in other matters Blackstone certainly was an optimist, though I think Lord Justice James goes too far when he describes him as "the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws."⁴³ But Blackstone's high appreciation of English

⁴¹ *Lib. III, 23.*

⁴² *II, 14, 15.*

⁴³ See *In re Goodman's Trust* (1881) 17 Ch. D. 296.

law and English institutions was only natural. He was a Whig to the bottom of his heart; his admiration for the British constitution, as settled in the days of William III and Queen Anne, knew no bounds. Yet Montesquieu expresses similar views with almost equal force;⁴⁴ why may not an Englishman do the same? As a matter of fact, England was at this date, according to the theory of its government, the freest country in Europe—though whether this theory was always strictly carried out in practice under Walpole, Pelham and Pitt may be questioned.

Moreover, it is not the fact that Blackstone had no fault to find with the Constitution of his country; there were some things which he rightly criticised and even condemned, especially in connection with our statute law. He admitted that "the British Constitution, though the noblest inheritance of mankind, yet has its faults." But his opponents felt that these were but a very small proportion of the matters which, in their opinion, urgently needed reform.

At the same time, it must be admitted that Blackstone was a bit of a toady. No English historian can read without a smile the glowing description which he gives us of the landed aristocracy and of the nobility of England in the year 1758.⁴⁵ And every one residing in Oxford at that date must have been a little surprised to see the undergraduates who attended Blackstone's lectures described as a "long and illustrious train of noble and ingenious youth, who are not more distinguished among us by their birth and possessions than by the regularity of their conduct and their thirst after useful knowledge."⁴⁶ Note too his explanation of the legal maxim "The King can do no wrong." This of course merely means that there is no tribunal in our country that can try him for any offence. Yet Blackstone bases it upon an imaginary perfection of the King's will, which renders him incapable of *mens rea*. "The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing: in him is no folly or weakness." And this was written when George the Second was King of England!⁴⁷

But in spite of the attacks made upon Blackstone's optimistic views, by the advanced Radical school of jurists, headed by Bentham and Austin, the *Commentaries* were still regarded with the greatest esteem, not only by the legal profession but also by the general public. They were translated into French in 1774-6, and portions were subsequently translated into Italian and German. Foss, writing in 1864, speaks of the great work thus:—

⁴⁴ See *De l'Esprit des Lois*, bk. XI, ch. VI, "*De la Constitution d'Angleterre*."

⁴⁵ See his opening discourse, xxviii-xxx.

⁴⁶ *Ibid.*

⁴⁷ I *Commentaries*, 245.

"The name of Blackstone is inseparably connected with the law of England. What Lyttelton and his crabbed expositor were to our legal ancestors, Blackstone is to modern students." . . . Whereas the study of law "was confined in former times to those who pursued it as an avocation, few men of rank or fortune now consider their education complete without gaining an insight into the constitution of the country through Blackstone's easy and perspicuous pages; and Abridgments are even introduced into schools for the instruction of the young."⁴⁸

Blackstone's *Commentaries* still remained without a rival as a popular introduction to the laws of England; but owing to the numerous changes made in the law itself both by statute law and judicial decision that work soon ceased to be an accurate account of our law and so might lead the student astray. Many editions therefore appeared, leaving the text of the author unaltered, but with copious notes by careful and learned editors (such as Edward Christian, John Taylor Coleridge and others), stating the alterations that had taken place. But at last it was found impossible to keep the book up to date by this method; the constant clashing of the notes with the text became intolerable. So in 1841 Mr. Serjeant Stephen—a lawyer of great ability and learning who was already well-known as the author of an excellent *Treatise on the Principles of Pleading in Civil Actions*—re-wrote Blackstone's *Commentaries* with a tender hand, and so produced the four volumes which we all know as *Stephen's Commentaries*—a work which has now reached its 16th edition, and which is still the standard work prescribed for the Solicitor's Intermediate Examination. Hence now the *Commentaries* are rarely read exactly as they were written by their author. Nevertheless, so long as our law is studied in any corner of our great Empire, some variant of them will be in every student's hands.

The *Commentaries* had a wide circulation, not only in England and all our colonies, but also on the continent of Europe. It is still to this book that most continental writers refer on points of English law. In the United States of America, too, Blackstone speedily secured a host of admirers; there, his work achieved a triumphant success. The first American edition appeared in 1771-2; it was published in Philadelphia. His *Commentaries* inspired with enthusiasm the most eminent among American lawyers—such as Professor Thayer, Chancellor Kent, Judge Story, and Marshall. And to these men is largely due the foundation of the famous American law-schools and the soundness and extent of legal education which is now to be found everywhere in the United States of America.

⁴⁸ *Loc. cit.* 243.