3-1931

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THE LAW OF ENGLAND DURING THE PERIOD OF THE COMMONWEALTH

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The period to be considered in this paper is from 1649, the date of the execution of Charles I, to 1660, the date of the restoration of his son, Charles II. This entire period was essentially the same from both the legal and practical standpoint, although some authorities are disposed to divide it into two parts, the Commonwealth and the Protectorate. While it is true that Oliver Cromwell did not become officially Protector until almost 1654, yet this division seems unnecessary. In fact the army, acting through Cromwell, had large influence long before 1649; and, on the other hand, after Cromwell was officially the chief executive of England, he was still anxious—probably over-anxious—to retain the form and the substance of a Parliamentary government. The accession of Cromwell as Protector, therefore marks no distinct division in the legal or political history of England.

But while this is true, it cannot be denied that there was a considerable change in the government during this period. There is no definite date to mark it, but the position of the government at the beginning and the end of the period is in fairly sharp contrast. The Commonwealth started as a republic without an executive head, and it ended as practically a limited monarchy, so that the Restoration changed the form of government in little more than name.

The Conditions of the Time

That the Puritans were not able to set up a lasting form of government is perhaps not particularly surprising, but it re-
minds us that they had an enormous problem in setting up any kind of government at all. Cromwell and his followers had established themselves in undisputed command of the ship of state, but that ship had little motive power and if it continued to move at all, did so merely because of its existing impetus. Still less did it have any steering apparatus. To abandon this somewhat anachronistic metaphor, there was a rather pressing problem of setting up a government, and keeping it going after it was started. This problem was, and continued to be, so serious that it could hardly have been added as an item to the numerous sins, of which the Puritans were no doubt guilty, if they had failed to accomplish anything in the development of the law.

But there were other conditions that discouraged constructive work in legal matters. Outwardly, things were in the utmost disorder during the whole of the period. There were almost constant wars with Holland, Spain, etc.1 These wars were carried on with brilliant success from a military, and especially from a naval, point of view, but they absorbed so much of the time and attention of the government as again to excuse it if it had been disposed to let legal matters continue their accustomed course.

Besides these foreign wars, there were internal difficulties not less troublesome. The constant difficulties with Scotland and Ireland were no doubt partly the fault of the policies of the Cromwellian regime, though this regime was hardly worse than its predecessors in this respect, and was rather distinctly better than its immediate successors. But however this may be, these difficulties might well have discouraged legal reform. Even worse were the constant threats, and not infrequent actualities, of disorder in England itself from the Royalist supporters.

One other very difficult problem may be mentioned as a rather natural impediment to much attention being given to legal reform. This was the financial problem. The present generation hardly needs to be reminded that war and taxes go together and that both are well described in the simple phrase attributed to General Sherman. They were very prominent in the Commonwealth period, and there is little doubt that both government and people would have agreed with General Sherman. It must be remembered that there had been plenty of war before

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1649 to make the financial conditions bad enough in that year, even if the taxes imposed by Parliament could have been promptly and completely collected, which was emphatically not the case, and even if the expenditure of the public funds had been efficient and careful, which is even farther from the actual situation. The Cromwellian government handled the financial problem with great skill, but not even supermen could have done much more than hold their own in a period of foreign wars and internal disorder. And in addition to all this, the difficulties of collecting taxes were far greater than at present. We have no more love for the Publican than had the people of England in the middle of the 17th century, but we now regard him as an ever-present and largely unescapable evil. But the Englishman of the Commonwealth period had by no means the same idea. He was accustomed to think that the King should live "off his own," with the exception of certain import duties, with which the average man had no direct contact. The taxes which Parliament had levied during the Civil War were avowedly only emergency, and when it was necessary to continue them during the Commonwealth period, the popularity of the government suffered a permanent eclipse.

From all this, it is apparent that it would be difficult to pick a period in English history, with the possible exception of the period of the Wars of the Roses, when the prospect of legal progress would seem less inviting. Yet in fact this was a period of enormous progress. This was not confined to the setting up and pulling down of governments, though this had its remote and perhaps its immediate influence in accustoming people to thinking of law as readily changed in accordance with their wishes. Indeed, the birth of modern political thought can be quite reasonably identified in the all-inclusive legislative activity of this period. There was a very large amount of actual legislation intended to make permanent changes in the law, and there were even more, and more radical, proposals. It is not as important as might be thought to distinguish actual and merely projected legislation of the Commonwealth, since the actual legislation was put an end to at the Restoration, and so had no more permanent effect than the proposed legislation. But this effect has

2 1450-1485.
not been slight; it furnished a path for English—and American—legal reform, which both countries followed with little deviation for more than two centuries after the Restoration, and without even yet attaining all of the goals which the Cromwellian statesmen pointed out.

But the legislative activity of the Commonwealth was not without its very immediate effects. Not the least of these was its influence on that cynical political thinker, Thomas Hobbes. Hobbes cordially disliked the Commonwealth, largely because he attributed the disordered conditions of the time to Puritan and anti-Royalist activities; but he was influenced by the legislative activity of the Commonwealth to think of legislation as the normal type of law. He thus became an important fore-runner of the Utilitarian School, which has had great influence in Anglo-American juristic thought.

Even more immediate was the influence on the law of England after the Restoration. The goodness of the laws of Charles II, as contrasted with the badness of his administration, has often been pointed out. For the former, he is very largely indebted to those whom he affected to regard as the murderers of his father. While all the Commonwealth laws were repealed at the Restoration, some were reenacted, and it is those reenactments which furnished most of the legal virtues of the Restoration.

The Rump Parliament

When the kingship in England was temporarily ended, in 1649, the governing body was, or at least appeared to be, the remains of the Long Parliament, or rather its House of Commons, since the House of Lords was immediately put an end to by the Act of March 19, 1649—a statute which had little permanent effect, even during this period. But there was not so very much left even of the Commons, since the House had been "purged" of its Royalist and other malcontent elements by Colonel Pride in December 1648. It assumed to be the supreme power of the realm, though it actually divided authority with

4 Jeremy Bentham (1748-1832) was the leader of this school which in turn led to the English Analytical School of which John Austin (1790-1859) was the founder and chief figure.
the army. Perhaps it would have been as well if the army had done at once what it was driven to do later—that is turned this hold-over body, then and still popularly known as the "Rump Parliament," into the street. But apparently the army made a *bona fide* attempt to permit the Rump Parliament to try its hand. Cromwell was supreme in the army, and, as already said, he was almost morbidly anxious to avoid anything savoring of a military despotism. It is true that Taswell-Langmaid insists that the Rump was a mere instrument in carrying out the will of the army,⁶ but it is hardly conceivable that the army would have tolerated such a thoroughly inefficient instrument for that purpose, for over three years.

Though the Rump was small as Parliaments go, it was obviously too large a body to administer the country. Even for legislative purposes, it divided itself into committees, and it assumed to delegate the executive power to a Council of 41 members. Just as clearly, the Council itself was too large for an efficient executive body, and it too subdivided into committees. But the Council was kept pretty well under the control of Parliament. It cannot be denied, either, that Cromwell was compelled—it seems clear that this was against his own wishes—to gradually take over the executive power during the continuance of the Rump. The actual conditions required a stronger and more consistent governmental administration than the Rump was able to furnish.

That the Rump Parliament should be very popular with the people is perhaps more than could reasonably be expected, especially as conditions, not wholly of its own making, forced it to unpopular courses, such as the continued levying of what it had previously stated to be merely emergency taxes. But its general attitude added to that lack of popularity. It had a seriously inflated sense of personal dignity. For example, it explicitly declined to agree not to interfere with private law-suits. Furthermore, the body was terribly pedantic, and continued to insist on the legality of its palpably illegal position.

But even this clumsy and often silly set of busy-bodies cannot be denied certain creditable accomplishments. Perhaps they are entitled to little credit for passing the necessary general acts for setting up the form of a government, since otherwise they

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could not have lasted as many months as they did years. But they did accomplish an excellent piece of work in reorganizing the courts. Every reasonable effort was made to remove the conscientious scruples of the existing judges toward remaining in office. In fact half of the twelve common law judges did remain in office, and in general the courts were well served during the period. Rolle was made Chief Justice of the "Upper Bench," as the Kings Bench was now called. He continued to serve until his death in 1655. Sir Matthew Hale was later put on the Court of Common Pleas, and it is hardly necessary to add that this too strengthened the Commonwealth courts.

Another important judicial reform for which the Rump Parliament is to be credited, is the enactment of a law providing for fixed salaries for judges. Thus the Commonwealth did away with one of the most vicious practices in judicial administration—the compensation of judges by fees. During this period the judges were paid handsome salaries, but the fact that they received no fees not only did away with great danger of judicial corruption, but also made it easier to put an end to the unseemly conflicts between the courts with respect to their jurisdictions.

One other most beneficial change in the legal system was made by the Rump Parliament, when it enacted that all law books and records (except in the Court of Admiralty) should be in English, and should be written in a common hand. Thus this most pedantic of Parliaments did away for the time being with one of the most disgusting pedantries of the legal profession, which the Restoration carried on for almost another century.

The Rump Parliament made one fundamental reform in commercial law by providing for a system of standard weights and measures. This was only a small step, but a very necessary one, in protecting the general public against fraud and extortion. Many previous and some later Parliaments had shown plenty of activity in preventing laborers from seeking to advance themselves, and there had been some legislative activity in curbing mercantile progress. But this latter was obviously becoming

7 Plucknett, op. cit., p. 54.
8 Before this period and for a considerable time after it all English court proceedings and such reports of the cases as were published were all in so-called "Law French" or perhaps more correctly "Norman French." This was a kind of hybrid of the French and English language possessing practically all the vices of both and the virtues of neither. Its long con-
bad policy, and in fact, according to Inderwick,9 the situation at the beginning of this period was essentially that laws against laborers were enforced while those against the upper classes were not. The Puritans were not sufficiently advanced to do away with the medieval laws against laborers, but they must have credit for seeing that the way to regulate the mercantile classes was not primarily to restrict their activities, but rather to compel them to be fair and honest with their customers. The act respecting weights and measures was a long step toward the modern policy of commercial regulations.

This Parliament had a committee on law, headed by Hale, which did excellent work, and even went so far as to propose a code; but little came of this, despite the active support of the army, and its work was rather over-shadowed by the corresponding committee of the succeeding Parliament, which will be later considered. Before leaving the consideration of the Rump Parliament, it should be noticed that it passed several acts for toleration,10 and that it showed a very commendable, as well as unprecedented, lack of bloodthirstiness toward its political foes. This admirable characteristic was fully shared by Cromwell, and the advent of the Commonwealth was virtually free from the butcheries which had usually occurred on similar occasions. Fortunately the good example of Cromwell and the Rump Parliament was followed by the Restoration government.

With all its pedantry, the Rump Parliament could not but recognize that it was a holdover body and should dissolve so that a new Parliament could be elected. In theory it recognized this from the first, but it showed a great skill in prolonging itself. It spent over two years in passing a bill for its own dissolution, and when it finally did accomplish this, the bill was a palpable fraud. It provided that existing members should return without reelection and that they should form a committee to pass on the validity of elections. It is perfectly evident that the Rump was so far from really intending to retire that it passed a permanent self-perpetuating bill.

That the army should have lost its patience with the Rump is hardly surprising. It can hardly be denied that the military

10 See below, p. 379.
leaders, perhaps largely because of the influence of Cromwell, had shown great forbearance with Parliament in all its sanctimonious and dignified muddling in a period of great emergency. This self-perpetuating bill was, however, the last straw which broke the back of even Cromwell's patience. Accordingly, in April 1653, at the head of a contingent of the army, Cromwell invaded the sacred precincts of the Rump Parliament, and forcibly dissolved it. The reason which they gave in their public statement was that the Rump showed an intention to perpetuate itself permanently. Holdsworth suggests that the real reason was that the Rump was seeking to deprive Cromwell of the command of the army. This may have had its influence, though it may be surmised that the army would have exercised an effective veto on any such attempt. At any rate, Cromwell's explanation satisfied the country, where the expulsion of the Rump was extremely popular; though perhaps this was largely due to the fact that it was already far in the bad graces of the people.

The Barebones Parliament

The coup d'état of April 1653 left Cromwell in supreme control. This situation was, no doubt, to his liking so far as carrying on the details of governmental business was concerned, but, as has been said, he was extremely anxious to have a popularly-elected legislative body in frequent session. But he was compelled to recognize that the existing circumstances made a general election impossible, so, apparently more as a temporary expedient than anything else, he called a "Council" to meet July 4, 1653. The persons summoned were selected by Cromwell, and the form of the summons shows clearly that he did not intend that it should function as a Parliament; nevertheless its first act was to resolve that it was a Parliament. This was probably not a very happy decision, since it too vividly reminded the nation of the late unlamented Rump Parliament.

One of the members of this so-called Parliament was blessed—if that is the appropriate word—with the cognomen of "Praise God Barebones." This gave the Royalist scoffers an excellent opportunity to dub it "Barebones Parliament," which has continued to be the usual name for it until the present, though the name of "Little Parliament" is also applied to it.

But Barbones Parliament, despite the undignified name by which it is known to posterity, and despite the fact that it was not really a Parliament at all (or perchance because of this last fact) proved to be rather better than usual. Its actual enactments are not numerous, but include an act settling the jurisdiction of the Court of Admiralty in a manner which has continued substantially until the present, as well as a somewhat inadequate, but because of the ending of ecclesiastical jurisdiction, rather necessary, act regarding marriages. But quite suddenly and unexpectedly, it voted on November 13th to dissolve. It is not entirely clear why Barbones Parliament so completely reversed the procedure of the Rump Parliament by retiring when most people were willing to have it stay, but it seems that this action must have been the result of disagreements within the body, which could not be reconciled.

If this were all, Barbones Parliament would certainly not be regarded as very important. But it has enormous significance, not for what it did, but for what it proposed. Its law committee set itself busily to work to draw up a scheme for law reform, and in the few months that the body was in session completed a detailed plan, which has yet to be carried out in full, but anticipates almost all procedural reforms (and many other legal reforms) that have since appeared. The plan is therefore worthy of a brief summary.¹²

With respect to real estate law, the most important proposal was to abolish fines and recoveries, substituting a simple deed. It followed that an ordinary deed by a tenant in tail would bar the entail, and thus a proposal by an essayist back in 1648 that entails should be abolished would be carried out. It was also proposed to abolish arbitrary fines on copyholds, and more important still, to abolish survivorship between joint tenants, in the absence of a contrary provision in the instrument creating the tenancy. These provisions, except the one with respect to fines which has become obsolete, have been adopted. Finally it was proposed to establish a universal Register of Titles, which should contain a record of all incumbrances and other things affecting land titles. This reform has been still longer in coming. In fact, Robinson, writing about 1859, expressed the view that the Eng-

¹² The plan is considered at length by Jenks in his treatise—*A Short History of English Law* (3d ed., London, 1924).
lish people did not want it.\textsuperscript{13} If so, they have changed their minds since the War, for in 1925 this reform was largely carried out. It has, of course, long been working effectively in America. It seems a great misfortune that this change has been delayed so long in England.

With respect to equity, the proposals were less sound, as might have been expected from a Puritan commonwealth, but this matter can be more satisfactorily treated in connection with Cromwell's Chancery Ordinance. And the proposals show considerable hostility to the legal profession, including attempts to limit their fees and other similar proposals, the adoption of which the profession has succeeded—whether to the public benefit or not is debatable—in preventing.

With respect to the courts and to civil procedure, the most important proposal was one for the establishment of small claims courts throughout the country. This valuable reform was accomplished piece-meal through more than two centuries succeeding. In addition it was proposed to substitute a straightforward action for the recovery of land for the action of ejectment—a reform accomplished in substance in the 19th century. The institution of an action for wrongful death, thus anticipating Lord Campbell's Act, was not here referred to, but was later urged by Shepherd, who had great influence over Cromwell.

But it was perhaps in criminal law and procedure that the most vital changes were proposed. One of these was the abolition of \textit{peine forte et dure}, a fiendish practice which unfortunately continued more than a century longer. The purpose of \textit{peine forte et dure} was to compel the accused to plead, and the proposal of the Barebones Parliament was that a plea of guilty should be entered for a prisoner who refused to plead for himself. The modern practice is, of course, to have a plea of not guilty entered under these circumstances.

Another important proposal for the protection of those accused of crime, was to permit them to have counsel in all cases. This is so much a matter of course with us that we can hardly realize what a revolutionary proposal this was. Also it was proposed to radically restrict the doctrine of corruption of blood by felony—a doctrine which had no reasonable basis after the abolition of feudalism but continued for long centuries to inflict cruel injustice upon the families of criminals. However, the

\textsuperscript{13} Robinson, \textit{op. cit.}, p. 487.
Puritans were not in general very merciful, and so it is hardly surprising that there were comparatively few proposals for the reform of the very barbarous criminal code of the time. But a very slight reduction in the number of capital crimes was suggested, and Cromwell himself later urged a considerable reduction in the number of such crimes. Cromwell also sought the abolition of benefit of clergy, which no doubt made the criminal law more merciful, but shielded actual criminals from the punishment which they deserved.

Still more radical was the proposal of the Barebones committee that criminals be compelled to work for the benefit of the victims of their crimes. This change has never been actually put into effect, and it is today advocated chiefly by social workers outside the legal profession. It is distinctly painful for a member of the legal profession to be obliged to confess that the only reason which appears for the lack of enthusiasm which our profession has shown toward this proposal is that it is one of the most completely and obviously just and sensible proposals that has ever been made in this connection. That we have not accepted the Cromwellian program in this respect is not to their discredit, but rather to our disgrace.

The Barebones committee did suggest one step toward more merciful punishments, but one which Blackstone would undoubtedly have opposed because it took away one of the ways in which the law showed its favoritism toward the female sex, of which he so often reminded his readers. At this period, as now, a man who murdered his wife would be hanged. But wives who murdered their husbands were exempt from this punishment, and the proposal was to take away this exemption. The apparent ungallantry of the suggestion is diminished by the fact that husband-killers were just as effectively and even more unpleasantly put to death, by being burned at the stake. Selden opposed this change on the theory that burning was good enough for "these baggages," which is perhaps true, but seems a bit harsh, particularly as the pleasure was denied to the male sex.

One other matter was considered by the committee. That was the question still in doubt in many jurisdictions whether a person injured by the felonious act of another can sue the guilty party before criminal proceedings are brought. The committee recommended that this right be denied. Whether or not this is

14 See Blackstone's Commentaries, especially Chapter XV.
the better rule, it is obvious that it is better to settle it one way or the other than not to settle it at all, as is the practice of posterity. Jenks remarks as to this, with obvious exasperation, "And we have waited in vain, two centuries and a half for its enactment!"15

It has been the fashion to regard the Barebones Parliament as a pack of theorists, who spent their time in philosophic speculation, and whose high-flown plans for legal reform were wisely allowed to die a natural death, because of their lack of practicality. But, as Jenks points out, the fact that more than two-thirds of their recommendations have been since adopted tends to show that they were not only philosophically desirable but entirely practical. The real reason for their failure to become enacted was partly the fact that the disorders of the time made it difficult to give attention to such matters, and partly the fact that they were accompanied by a rather rigid tariff of legal fees, intended to reduce the cost of court proceedings. This provision not only abated the enthusiasm, but aroused the active hostility, of the powerful legal profession.

The Instrument of Government16

The self-dissolution of Barebones Parliament was followed very promptly by the promulgation of the so-called "Instrument of Government." This was a rather detailed provision for the government of the country, amounting to a written constitution. The Royalists sneeringly referred to it as "The Saints' New Magna Charta." It was probably the work of the army, and was promulgated by Cromwell, December 16, 1653.

The Instrument named Cromwell as Lord Protector, and he, with his Council, was to act as the executive agency. Parliament was to meet at least once in three years, and it is important to notice that the system of rotten boroughs was done away with. This was a very advanced step, since it was long before the Industrial Revolution, and so the rottenness of the boroughs did not so greatly injure the rest of the country as it did after 1750 and until this reform was finally accomplished in 1832. A property qualification for voting for Parliament of £200 was im-

15 See Jenks, op. cit.
posed; this was rather high, but at least had the largely unprecedented virtue of being uniform. The powers of Parliament were safeguarded by giving it a considerable hand in the appointment of the Council, and by providing that the Protector should have only a suspensive veto of Parliamentary acts.

The most important sections of the Instrument are the 6th and the 30th. The 6th section provided:

"That the laws shall not be altered, suspended, abrogated, or repealed, nor any new law made, nor any tax, charge, or imposition laid upon the people, but by common consent in Parliament, save only as is expressed in the thirtieth article."

The 30th section provided:

"That the raising of money for defraying the charge of the present extraordinary forces, both at land and sea, in respect of the present wars, shall be by consent of Parliament, and not otherwise: save only that the Lord Protector, with the consent of the major part of the Council, for preventing the disorders and dangers which might otherwise fall out both by land and sea, shall have power, until the meeting of the first Parliament, to raise money for the purposes aforesaid; and also to make laws and ordinances for the peace and welfare of these nations where it shall be necessary, which shall be binding and in force, until order shall be taken in Parliament concerning the same."

The result would thus be that Parliament would be nearly absolutely supreme when it was in session, except that it could not pass laws contravening the Instrument of Government, but that the Protector would have large legislative power when it was not in session. Even so, this represented a considerable diminution from the powers of the Rump Parliament, and so was bitterly resented by the Republicans.

The Instrument was thus intended as a fundamental law, perpetually providing for that separation of powers which Montesquieu was later to think was fundamental in English governmental organization, and which, for good or evil, was to become enshrined in our federal, and most of our state, constitutions. It likewise provided for the end of the monarchy, and here its effect was even less lasting. But not only the idea of separation of powers, but the even more fundamental idea of a written constitution binding all departments of government, while without permanent effect in England, has been enthusiastically received and practiced in America. The Institute also

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17 The Spirit of the Laws.
contains some provisions protecting the rights of citizens, particularly with respect to taxation and religion, and thus provided a germ for our bills of rights.

But even the most enthusiastic American constitution worshipper would criticise the Instrument of Government in that it had no provision for its own amendment. Whether or not this was intentional, it would certainly make it wholly unworkable anywhere. And the whole scheme of a written constitution does not seem to fit English ideas. Trevely says:

"A written constitution, as distinct from the sum of ordinary law and custom is alien to the English political genius. One of the worst signs of the straits to which Cromwell was driven by his inability to find a basis of national agreement, was the fact that he promulgated written constitutions dividing up by an absolute line—never to be altered—the powers of Protector and Parliament respectively. These expedients were contrary to the real method of English progress. The London fog which decently conceals from view the exact relations of executive and legislative at Westminster, has enabled the constitution to adapt itself unobserved to the requirements of each passing age."18

Not in England, then, but in America, must we look for the permanent influence of the Instrument of Government.

The Intervening Ordinances by Cromwell

Parliament was not to meet for more than eight months after the promulgation of the Instrument of Government, so that Cromwell, who promptly qualified as Lord Protector, was given an opportunity to exercise his power to make ordinances. This time and power he exercised to the full, and generally to good purpose, especially with respect to financial and administrative matters, which are not, however, of permanent importance. He even promulgated an ordinance for the Union of Scotland and Ireland to England, though this too took a long time to be permanently accomplished. But the most important of these ordinances was the so-called Chancery Ordinance.

At the beginning of the Commonwealth period, the Great Seal had been entrusted to a commission of three members. It is clear that this was originally intended as a mere temporary expedient, and that it was hoped that all equity jurisdiction would be abolished. The great unpopularity of Chancery was perhaps only a reflection of what always happens in a revolu-

18 Trevely, op. cit., p. 511.
tionary era (it was so at the time of the American Revolution), but there were several more definite reasons. In the first place the influence of the common lawyers was very strong at this period. Then, Chancery was identified in the popular mind with the Prerogative Courts. That this was really a misconception did not affect the strength of this feeling. And finally, there was the feeling, not wholly without basis, that the Chancellor had assumed to exercise too great personal discretion and that too little regard had been paid to rules and to predictability of decisions. Selden was still living and very influential, and his comparison of the decrees of different Chancellors with the varying length of their feet has never been forgotten.

In the meantime, the commission had done some very good work in straightening out conflicts of jurisdiction between other courts, but had not been quite so efficient in handling their own work. By this time, though, it had become evident that it was useless to hope for the entire abolishment of Chancery jurisdiction, as indeed had been actually tried for about a month; then, as always, it was found impossible to administer justice wholly by rule, and without discretion. But the Puritan desire to accomplish this as nearly as possible still remained, and the Chancery Ordinance reflects it.

In the first place, this ordinance was so framed as to give the persons administering it no discretion in that particular. The practice was regulated so as to make it more expeditious and less expensive. This was desirable, had it been done with moderation; but such absurd provisions as that a case could be heard only one day made it wholly unworkable. Other provisions that cannot be commended are those absolutely forbidding Chancery to relieve against penal bonds or to issue interlocutory injunctions.

There were, however, some beneficial provisions, which played their part in later Chancery reforms. Such are the provisions discouraging appeals, and instituting a summons containing a statement of the nature of the suit to take the place of the old, blind subpoena. There was also a provision prohibiting

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10 In his Table Talk. It is true that this collection of informal works of Selden was not compiled and published until after his death; but it is reasonably clear that his views on this subject and some others as to which he felt strongly must have been frequently expressed and generally known.
the enforcement of oral trusts of land—a partial anticipation of the Statute of Frauds.

On the whole, one must agree with Robinson that this Ordinance "aimed with more earnestness than skill at rapidity, simplicity, and cheapness." It really accomplished nothing beyond giving some good and more bad leads as to the proper way to accomplish Chancery reform. The Commonwealth did start one real reform by putting common lawyers on the Chancery bench, but perhaps even this was premature.

Other less important, but thoroughly sound, ordinances made by Cromwell at this time were one prohibiting dueling, and one providing for the beginning of a national highway system. Both started distinctly beneficial movements.

The First Protectorate Parliament

The first Parliament under the Instrument of Government met September 3, 1654. In general it showed a lack of ordinary intelligence seldom equalled by any legislative body even in modern times. The Parliament spent much time in debating the Instrument of Government which no doubt could have been improved, but which constituted their only warrant for existence as a legislature. They even went so far as to draw a new constitutional bill, though they apparently did not dare to push this—perhaps realizing that this would be their own death-warrant as a legislative body. But in addition to all this, they assumed to review all acts of the Barebones Parliament and all of Cromwell's ordinances—a matter perhaps within their authority but certainly one which they should have deferred in favor of more pressing and less controversial matters.

With this frittering away of their time, the Parliament quite naturally accomplished very little, even with respect to the ordinary business of government. One fair sample of their work is the fact that they put the army on free quarter, substantially though not formally. One rather curious episode was their passing a bill opening the Court of Common Pleas to barristers. Perhaps this was a desirable reform, though it too may have been premature; at any rate, the Serjeants maintained their monopoly by force, and Cromwell did not interfere. This Parliament also suspended the operation of the Chancery Ordinance. No doubt this action did not increase their popularity.

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20 Robinson, op. cit., p. 471.
with Cromwell, but their instinct in this matter was sound, and their action was followed by the next Parliament.

Cromwell several times warned this Parliament to cease their childish performances, but without effect. By January, 1655, his patience was exhausted, and on the 22nd of that month he dissolved it, with a show of indignation which probably quite inadequately represented his actual feelings. This first Protectorate Parliament may thus be properly characterized in modern parlance as "a total loss."

The Second Protectorate Parliament

The Instrument of Government required only triennial Parliaments, so that Cromwell was under no necessity of calling one until 1658. One would have supposed that his experience with the last Parliament would have caused him to dispense with another as long as possible. But his over-anxiety to have a legislative body in session, and in particular to avoid the appearance of a military despotism, induced him to call a Parliament for September 17, 1656. This last consideration with respect to military power was especially significant at this time, since Cromwell had felt compelled to put the country under what amounted to military rule as the result of a serious Royalist uprising at Salisbury, in March 1655. But Hallam's comment that "It is remarkable that Cromwell could neither govern with Parliaments nor without them" seems entirely justified.

It is fairly clear that the Government tampered with the elections for the new Parliament, in the hope of obtaining a more tractable body than before. Even so, about 100 Republican and Royalist members were arbitrarily excluded when the Parliament met. Thus this Parliament started as a purged and almost a rump assemblage. Still, it did much better than its predecessor, particularly with regard to administrative matters. One of its distinct achievements was the establishment of a post-office system to be operated directly by the Government rather than farmed out to private contractors, as was the previous custom. It again suspended the operation of the Chancery Ordinance, and thus really put an end to it.

But the chief work of this Parliament was the drawing up of

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a new written constitution. This action was approved by Cromwell, who no doubt recognized that the Instrument of Government needed some revision. Besides, it would be desirable to have a constitution drawn up by a popularly elected body rather than the existing one which had been drafted by the army, though certainly it was not for that reason particularly favorable to the military element of the nation. When the new constitution was completed and accepted, this Parliament was prorogued under rather favorable auspices, to meet again on January 20, 1658.

The Humble Petition and Advice

The new constitution was entitled the "Humble Petition and Advice," because put in the form of a petition to Cromwell. One rather significant episode in its drafting must be recounted. It was originally proposed to make Cromwell King. He was probably favorably disposed toward this proposition, for the entirely proper reason that his position would thereby be made regular. But the opposition of the army compelled him to decline, and the document as finally accepted continued him as Lord Protector. It is generally felt that this was a fatal mistake. English institutions and traditional feeling demand a King, at least in name, and it is only by accepting this title that Cromwell could have secured any chance for the permanency of his regime. As thus amended, the Petition was accepted on May 28, 1657; certain additional articles were accepted on June 26th.

The Humble Petition and Advice was, like the Instrument of Government, a written constitution without provision for amendment. It too provided for the separation of powers and had a limited bill of rights. And it too explicitly said that no law contrary to its provisions should be of any effect. But it had two rather fundamental differences from its predecessor.

The first of these was the provision for an "other House" of from forty to seventy members. The original Petition left the method of choosing this other House somewhat uncertain, but the additional articles of June 26th provided that it should be chosen by the Protector. This provision was undoubtedly a reflection of the feeling that the experiment of a single-chamber legislative body had not worked satisfactorily. Of course it went back substantially to the abolished House of Lords, though by

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another name. This was probably a step in the right direction, though a foreign observer is inclined to feel that Parliament is now single-chambered in all but form.

Another important change was the deprivation of the power, which the Protector had under the Instrument of Government, to make binding ordinances during the time that Parliament was not in session. That Cromwell accepted this vital reduction of his own powers without protest is certainly adequate proof that he was not one who sought primarily personal prestige and power.

In some other respects the Petition represented a trend toward monarchy, though not under that name. For instance, the Protector was given the power to appoint his successor. Also the voting qualifications were made more stringent than even in the Instrument of Government.

The Parliament Under the Humble Petition and Advice

The Parliament which met in January, 1658, was a continuation of the one which had framed the Humble Petition and Advice. But one important difference was immediately manifest. The new House had 63 members, whom Cromwell had chosen from among his strongest supporters, so that his position in the lower House was weakened. The result was that the older House performed in a manner which was reminiscent of the first Protectorate Parliament. Despite the critical international situation, of which Cromwell forcibly reminded it several times, the lower House proposed to spend weeks in debating the inconsequential matter of the proper way to address the other House. Cromwell’s patience with this sort of childishness (to which legislators of all ages and climes seem unfortunately prone) seems to have been largely exhausted by his previous experiences, and he tolerated this Parliament less than a month, dissolving it in February.

The only bill passed by this 1658 Parliament which is of interest to us at this point is one for reviving the study of law in the Inns of Court. In fact this had been a definite policy of the Commonwealth almost from the beginning, and the period marks a definite revival of legal education. Indeed the Government was greatly interested in all education, and made vigorous though not very successful attempts at progress along this line.

After the dissolution of the 1658 Parliament, the interna-
tional situation engrossed the attention of the government until the sudden death of Cromwell on September 3, 1658. That practically concludes the era from our standpoint since nothing was accomplished thereafter. A new Parliament was summoned in 1659, which was elected under the old rotten borough system. This did nothing, and was soon dissolved. Then followed a year of practical anarchy, and then the Restoration.

Religion and Toleration

One further aspect of the Commonwealth laws has been neglected up to this time. What was the attitude of the government and the dominant classes toward social conditions, and especially toward religious matters?

The rulers of the Commonwealth were strong Puritans, and they reflected their beliefs in their enactments. That this was a period of blue-laws is as clear as it is naturally to be expected. Some of these laws are to be applauded, particularly those which put an end, for the time being, to certain brutal sports, and to dueling. But many others, like the one for the closing of theaters, and the one making adultery a capital crime, were as absurd as they were clearly vicious in tendency. Here next to nothing permanent was accomplished, and on the whole it is probably fortunate that this is so.

But on another side the Commonwealth not only shows to better advantage but also accomplished work of lasting importance. This was on the side of religious toleration. While an established church was instituted in all but name, yet other faiths were in greater or less degree tolerated. This was almost as new an idea in governmental policy as it is sound. No doubt others before this time (though very few) had thought of the possibility of tolerating those who did not agree with them in religious matters, yet this was the first time that the idea had permeated to the dominant class of society and so became the avowed policy of the government.

All the Parliaments of the Commonwealth era, whatever their other failings, showed a strong desire for fairly widespread toleration. This desire was not only shared but exceeded by the army (which had passed a strong resolution to this effect in 1648), and no one went farther in this direction than Cromwell himself. Thus what laws there were which provided for
the persecution of members of unpopular religious sects were not enforced by Cromwell.

A considerable series of statutes looking toward toleration was begun by a statute of the Rump Parliament, passed in 1650, which repealed most of the existing statutory penalties for failing to attend the established church. The Councils were not very enthusiastic for toleration, and the Royalists vigorously opposed it; but Cromwell insisted on it. In 1657, the Parliament under the Humble Petition and Advice, though accomplishing little else, as we have seen, passed an Act providing for toleration of all who acknowledged the Trinity and the Scriptures, except Catholics and those guilty of licentious practices. Ministers who differed from the accepted Puritan doctrines were to be capable of holding civil office, though not entitled to governmental maintenance.

This statute was the high water mark of legal provisions for toleration during the period, but a very considerable degree of toleration was provided for in the two fundamental government documents, the Instrument of Government and the Humble Petition and Advice. The latter instrument, indeed, goes practically as far as the 1657 statute, which was passed in conformity with it, except that even Protestant religious which were under an episcopal form of government were excluded from its benefits.

In fact, however, there was during the whole period not the slightest persecution of any Protestant sect, unless the Quakers are to be so regarded. The Quakers were often rather harshly dealt with by the local magistrates, but they were in part to blame themselves, because of their disorderly behavior, which frequently went to lengths at that time regarded as blasphemous. Nevertheless, Cromwell did what he could to moderate the severity of the punishments inflicted upon even the most obdurate of these people, and several times made blanket orders for their release from prison. It is certain that the most vigorous persecution which they ever underwent during Cromwell's life was kind treatment compared with their constant persecution for a long period after the Restoration.

With respect to Roman Catholics, it is clear that Cromwell himself was in favor of a large measure of toleration. But here he could make no progress, since public sentiment was generally against him and governmental sentiment wholly so. But in
fact the most severe laws against Catholics were not enforced during the period. The same is true, though perhaps to a lesser extent, as respects the Jews. Cromwell wanted to modify the severe laws against them, but sentiment against them was so strong that little was accomplished before his death.

It might seem that the Puritan desires and accomplishments in the line of religious toleration were not very striking, and indeed, judged by the ideas of our time, that is so. But that is not a fair way to judge them. The Puritans were the first rulers who ever admitted and urged the justice and practicability of religious toleration. They did not carry it very far, but they carried it farther than it had ever been carried before, and farther than it was for many years thereafter. If the idea of religious toleration is a commonplace to us, that is because the Commonwealth government had the insight and courage to break away even to a slight extent from the equally widespread commonplace of their time that toleration of any but the true religion—which meant, of course, the then established church—was as wicked as it was impolitic.

Conclusion

The Commonwealth period represents a distinct hiatus in the regular process of English constitutional development, and there always has been—perhaps always will be—a great disagreement as to whether the period contributed anything of value or not. Some regard the Commonwealth as a brilliant success, which, while itself short-lived, yet made valuable and permanent contributions to the legal and political development of England, and through it of America. A conspicuous example of those taking this position is Inderwick, who says:

“Our English Justinian, King Edward I, spent thirty-five years over the reform of our laws, while Cromwell during his short tenure of office purified the administration of justice by the appointment of learned, just, and independent judges, and reformed the law itself by the introduction of numerous amendments, which the judgment of posterity has indorsed with approval and acceptance.”

Inderwick’s position is that the only reason for Cromwell’s failure was his untimely death.

Others take directly the opposite view. They regard the whole period as one of retrogression or at least one where no

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23 Inderwick, op. cit., p. 317.
legal and political progress was made. The Commonwealth, they think, was a complete failure, and it is not only charitable but entirely sound to ignore it as a factor in English development, except as a very unfortunate check upon that development. Of this opinion is Holdsworth, who is disposed to admit that the law needed reforming, but thinks that the Puritans had neither the opportunity nor the competence to do it. He apparently does not think that the Commonwealth did have any effect on English legal development, since he says that any influence that they would have had would have been fatal to continuous and orderly development of English law. This sounds a little like Blackstone, and the similarity is heightened by his expression that such interruption was avoided at the price of a “few anomalies.”

It seems that the legal difficulties which the Puritans sought to cure were more than few, and that “anomalies” is a rather weak way to characterize such things as peine forte et dure and the burning of women at the stake.

It would, however, be presumptuous to attempt fully to appraise the conflicting views of these and other eminent authorities. But perhaps it is not improper to suggest that the truth, as so often happens, lies somewhere between these very extreme views.

It would seem that the legal reforms proposed by the Commonwealth were, so far as not purely Puritanical in scope, in general well conceived. The only conspicuous exception to this rule is the Chancery Ordinance, which would probably have done more harm than good. But here the second sober thought of the government officials themselves prevented its ever being actually put into effect.

But unfortunately a great part of the attention of the lawmakers was confined to matters of public law. Here their work not only did not last, but, as already shown, could not last. The idea of a written constitution limiting all subsequent legislative action and permanently separating the governmental functions, is one which is wholly alien to English modes of thought. Even this idea has had enormous consequences in America, but in so far as England is concerned, this was a wholly false step, and led nowhere. Furthermore, the undoubted reforms in private and criminal law made or proposed by the Commonwealth were

24 Holdsworth, op. cit., v. 6, pp. 428-30.
so connected with the unworkable government arrangements, that they all fell, or seemed to fall, with it.

On the other hand, any attempt to entirely ignore the Commonwealth is also deemed to failure. The Restoration tried hard enough to accomplish this, and their failure conclusively demonstrates its impossibility. In the first place, the legal reforms which the Commonwealth instituted, have made their way to a surprising extent. As already said, Charles II owed most of the undoubted reforms which he made in the law to Commonwealth example. And successive English and American governments have been taking ideas from the Commonwealth. The only unfortunate part of it is that this progress has been so slow. We can still obtain sound suggestions for law improvement from the statutes and Parliamentary committee reports of the Cromwellian era.

Even with respect to governmental matters, this period was not wholly unfruitful. Its affirmative ideas were unworkable, but its negative accomplishments have been permanent. These negative ideas are (1) there is no longer to be an absolute monarchy, and (2) no branch of the government is to be superior to Parliament. The Puritans did not succeed in their endeavor to put these principles into writing, but they did in fact make them binding governmental principles, as James II, and others, found to their cost.

The Commonwealth as such failed; that can hardly be doubted. But its influence is still felt for good on both sides of the Atlantic. The constitutional development which it gave to England was unworkable in form, but has by no means disappeared in substance. And even the form has influenced America. But the most important debt which both countries owe to the people of the Cromwellian era is the large number of new and generally sound ideas, which these dour but, for their time, rather liberally-minded Puritans produced. Their ideas have given a path toward legal reform on which all succeeding generations have largely traveled, and the possibilities of which are even yet far from exhausted.