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ENGLISH BOROUGH COURTS.

THE English borough courts may be looked at from many points of view. In any aspect they are interesting, but I shall at present be content in endeavouring to trace something of their relationship to the growth of commercial life, and the gradual development of means of communication and facilities for transport throughout the country. Other points may incidentally be touched upon, but this will be the main purpose.

The story of the borough courts is intertwined with the story of the towns themselves, and something must be said about the beginnings of trade in the towns. Trade has not generally been carried on except in places where there has been either a temporary or a permanent concentration of population. Before the Conquest the beginnings of trade were to be found in the boroughs, but it is necessary (even at the risk of repeating familiar facts) to impress the point that concentration of population in towns as we know it cannot be said to have commenced until after the Stuart period. At the end of that period no provincial centre of population (with the exception of Bristol, Norwich, York and Exeter) contained ten thousand inhabitants, and the majority of the then important towns had only about half that number. Throughout the Middle Ages most of the boroughs were what we should call mere villages. Care must be taken not to draw unwarranted inferences regarding the extent of their trade from the Anglo-Saxon laws confining buying and selling to towns. It is certainly true that even in the earliest times traders would collect in boroughs, because they there enjoyed an especial degree of protection; and in some cases the converse may also be true, namely, that places became boroughs because trade tended to centre on their site; but it must be remembered (and these are points which seem sometimes to be too lightly passed over) that the normal borough was too small a centre of population to have a continuous trade, that trade was done intermittently or at periodical intervals, and in early times mostly during temporary concentrations of population—concourses of buyers and sellers—which as often as not gathered outside, rather than inside, a town, drawing to themselves for the time all the activity of the neighbourhood, and causing a temporary discontinuance of all ordinary proceedings. These commercial concourses were of course

the fairs, and their practical monopoly of such commercial life as existed was one result of prevailing geographical conditions. When the Normans came the land was only partly reclaimed from its wild state, and was traversed by no lines of communication save Roman roads neglected and in disrepair. Periodical meetings to interchange commodities were a natural outcome of lack of facilities for frequent travelling between districts of production and of consumption, and fairs were common throughout Europe from a very early period. We see, then, that the holding of a fair reduced everything in the neighbourhood to a state of suspended animation. Whatever was done was done at the fair, and even the holding of the moot or court in the borough that lay within the circle affected was suspended. Thus in Leicester, which was very early a centre of population (having been one of the Five Boroughs of the Danes) and a place in whose history the commercial element was prominent, we find from a recital in a charter of 1277 that it had been customary for the borough court to be entirely suspended when the great fairs were held. The charter is, however, indicative of change. It provided 'that the courts be held and right done on those who are at home, and that those who are at the fairs be essoined [i. e. excused] by reason of the fairs.'

In these great fairs disputes would arise in course of bargaining that would have to be settled before the wayfaring traders went their several ways, and temporary courts for this purpose have existed in all fairs in England from the earliest times. In cases where the ordinary borough courts were not held during fair time their place would be taken by these tribunals. Only one example has yet been quoted, but there were others. Under a charter of Edward III (confirming and enlarging previous grants extending back to the time of the Conqueror) the Bishop of Winchester, as Lord of St. Giles' Fair, near that city, had the keys of the city given up to him at fair time, and he had 'cognisance of all pleas between the men and tenants of the city, and all other persons within a circuit of seven leagues round the fair, regarding breaches of law, debts, and all contracts whatsoever.' This fair 'closed the shops not only in Winchester, but also at Southampton, which was a capital trading town.' Other instances were at York and Hereford.

These fair courts have always been known in England as Courts of Piepowder (or Pie Poudre), and the expedition with which it was essential they should dispose of business had begun in the time of Edward IV to attract cases where they had not jurisdiction. The preamble to a statute of his reign incidentally sketches the constitution and jurisdiction of the Piepowder Courts, the jurisdiction

comprising strictly only cases arising in the particular fair then being held. We shall find that these courts continue to have a bearing on the subject, but we must now deal more closely with the ordinary town tribunals. As the towns gradually increased in size and facilities for travelling improved, trade tended to settle in the centres of population and the fairs began to decline, but the process was slow.

Every English town that has been of any importance has its own separate history. Common features there have been, but each centre of population was an individual unit that worked out its own destiny in its own way, and individual differences are accordingly to be found in the local courts, though, like the towns, certain courts had particular features in common. We should naturally expect, for example, to find in many places that procedure had been influenced by mercantile usage; but, in looking for these (or indeed any) peculiarities it must be remembered that law became a uniform system extending over the whole kingdom and controlled by a central authority much earlier in England than in most Teutonic countries. The effort to give the law a national character was consummated under Edward I, and, unlike the great trading communities of the continent, whose special laws exercised great influence in the development of national systems, the English chartered boroughs were comparatively 'of small importance; and they stood much in fear of the law of the land. It is doubtful if any royal judge in England would have accepted the maxim—Town's law breaks land's law [1],' although such a rule might be accepted on the continent. This will account for greater uniformity than might otherwise have been expected, but it is by no means to be understood that local differences were entirely blotted out. The common form of proclamation made by the civic authorities at the opening of a fair held by a town always included a declaration that justice would be administered in the court of the fair 'according to the law of the land *and the custom of the town* [2].' Moreover, there is at least one very marked peculiarity exhibited by certain borough courts, namely, the existence in them of the custom of foreign attachment, which must be put down as resulting from their special needs, and as a privilege they secured and retained though it never became part of the common law of the land.

The jurisdiction of the old borough courts was of course very limited territorially, but it was obviously desirable in the interests of the burgesses that limits of jurisdiction should interfere as little

[1] Law and Politics in the Middle Ages. By Edward Jenks. 1898.
[2] See Memoirs of Bartholomew Fair. By Henry Morley. 1859. And see form used at Newcastle, quoted below.

as possible with the taking of proceedings against non-resident merchants with whom dealings were carried on. This would appear to be the necessity that gave rise to the custom of foreign attachment, a procedure to which parallels are to be found in Roman law and in continental systems. Foreign attachment was 'an attachment of foreigners' goods, found within a liberty or city, for the satisfaction of some citizen to whom the foreigner is indebted; or of money in the hands of another person due to him against whom an action of debt is brought [1].' 'Foreign' means, in this connexion, simply outside the borough. Thus at Leominster there was the borough and 'the foreign,' the latter being within the jurisdiction of the manor, but not within the liberty of the bailiff of the borough; and at Walsall the local court was called 'The Court of Record for the Borough and Foreign of Walsall,' the two areas being co-extensive with the parish of Walsall. The word 'foreign' also formed part of the title of the courts at Colchester, Lincoln, and Great Grimsby, but it must not be assumed from this that foreign attachment necessarily existed in them. Indeed the only courts wherein the custom has prevailed to any extent have been those of London, Bristol and Exeter. In consequence of decisions in recent years limiting the extent to which the procedure can be made use of, suitors have not so frequently availed themselves of it, but it has in its time played an important part. Early examples of its use were quoted in the House of Lords cases of *Cox* v. *Mayor of London* (1867) and *Mayor of London* v. *Joint Stock Bank* (1881), but none referred to was so ancient as an example to be found in the Exeter records, which from the earliest times are remarkably perfect. A number of years ago they were arranged and calendared in consequence of reference to them having been found necessary in litigation in which the corporation was engaged [2], and the record of the proceedings in a case of foreign attachment in 1289–90 was then extracted from the Mayor's Court rolls. It appears that a merchant was attached in that court at the suit of the city officers for non-payment of town dues upon the importation of goods into the port. The proceedings are very quaint. 'David de la Hull [evidently a stranger] was attached on suspicion for withholding the custom of divers merchandise, and all his goods found were ordered to be attached until he should make satisfaction. He was attached by his horse, upon which he gave security, and, after the proceedings had lasted some time, he entered the liberty at the favour of the mayor and gave 40*s*., and for his trespass against the liberty

[1] Jacob's Law Dictionary. 1756.
[2] The records have not been published, and I am indebted to the kindness of Mr. Geo. R. Shorto, the Town Clerk, for most of the particulars given in this article concerning the Exeter courts.

40*s*.' It must of course be borne in mind that 40*s*. in the old days was worth very much more in goods or labour than 40*s*. of our modern money.

Another curious case where foreign attachment was employed, this time at Bristol, is worth mentioning. The territorial limits of jurisdiction there include a certain portion of the Bristol Channel, and a ship was once attached under this procedure when twenty miles from the town itself. The captain, however, in contempt of the court, sailed away and carried the officer of the court to Jamaica. On his return the contempt was compromised.

We proceed to look at one or two individual examples of towns and their courts. Some places are more typical than others, and in choosing a community where the influence of the commercial element has been exemplified we could probably take no better instance than Bristol, which has been remarkable for the number of local jurisdictions exercised within it, and is an example of a town that has owed all its eminence to trade, having been 'for centuries the greatest purely trading town in the country.' Trade flowed to it largely on account of its geographical position, but, as we have seen, in the earliest times the fairs absorbed most of the trade, and it would be consistent with this that a place owing its standing almost wholly to commerce should be unimportant at first. Bristol itself had never been a Roman station, and, at the time of Domesday Book, it was only part of the royal manor of Barton. It had not then the distinguishing characteristics of the typical 'borough[1],' and we do not look for the usual borough court. The court for the hundred in which it was situated had to serve. The early charters speak of its 'hundred court,' but at the end of the reign of King John the town had a mayor, and in the time of Edward III two local courts had become well established. A charter granted in the forty-seventh year of his reign (1373) made the town a county of itself, and specified the extent of jurisdiction of the Mayor's Court, which was to continue as had been accustomed, but was not to have cognizance of 'the pleas which were accustomed to be holden in our court in the said town of Bristol called the Court of the Tolzey before the steward and other our officers in that place.' These are the two courts, and this is the first mention by its distinctive name—the Tolzey Court—of the tribunal which afterwards absorbed most of its companions. It is supposed that it was originally held before the bailiffs of the hundred, and that the reference to 'steward' in the charter designated the officers at first known in the town as provosts, but

[1] For these characteristics see Domesday Book and Beyond. By F. W. Maitland. 1897.

called from 1267 to 1310, stewards. This view seems more likely to be correct than another to the effect that the original court became united with that of the steward of the royal household. Bristol received royal visits, but no king ever resided there, and when, subsequently, Richard II granted that the steward, marshal and clerk of the market of the king's household should no longer sit or exercise their offices within the town, the court did not cease to exist, indicating that the royal steward was not connected with it. One clear inference from the name of the tribunal seems permissible. Tolls, we know, played a very important part in early trading, being often exacted in kind, and the Tolzey, or place where they were collected, was a gathering place of merchants. This was therefore a commercial court. Several leases of the town had been obtained, but Edward IV granted the town to the mayor and commonalty for ever (1461), and the Tolzey court then became annexed to the corporate jurisdiction. Both before and after this a contest for jurisdiction was carried on between the Mayor's and the Tolzey court. There was also a court of the Staple, but both it and the Mayor's court became quite disused. The mayor and sheriffs under Edward IV at once took the Tolzey court on themselves jointly with the bailiffs (which name had been substituted for steward). On the state of affairs at this period some light is thrown by the Mayor's Calendar[1], a book written by Robert Ricart, town clerk from 1479 to about 1508. The Tolzey seems then to have been more generally called the Compter, and it appears that the mayor held a common audience there where 'varyances' were 'set in rest,' but the references to this show that it was not a court, and the court itself may have been held at the Guildhall at that time. Certain items in the earliest corporate audit book (1532) show that the Tolzey was a room, but after 1550 a walk beneath a penthouse roof fixed against the wall of the new council house was the place known as the mayor's or civic Tolzey, and a merchants' Tolzey, or exchange, was built soon afterwards, the merchants having till then met in the open street. Under Henry VII the offices of sheriff and bailiff became united, and the court continued under the authority of the sheriff, being sometimes referred to as the Sheriff's court, but an official called assessor, who had long been attached to the court, came to be known as steward, and to preside as judge until, in 1835, the judgeships of borough courts were transferred to recorders.

Mention must be made of still another court whose business was absorbed by the Tolzey court. This was a Pie Poudre court. When

[1] The Maire of Bristowe Is Kalendar, by Robert Ricart. Edited by Lucy Toulmin Smith. 1872. (Camden Society.)

and how the two became amalgamated is not quite clear. The charter of Edward IV already referred to granted to the mayor and commonalty all fairs and markets in the town, and probably any courts of Pie Poudre then existing came (like the Tolzey court) under municipal control. The Mayor's Calendar speaks of a 'market court' held before one of the bailiffs. A charter of Charles II expressly granted a court of Pie Poudre, but it does not appear that that grant was ever acted upon. At all events the connexion between the two is very ancient, and for the last two hundred years at least they appear to have been practically one court. The ancient great fair of Bristol was held in July, but in the eighteenth century the time was altered to September. Latterly, the Pie Poudre court was held during a fair of fourteen days, commencing in September in a thoroughfare known as the Old Market. For this period the Tolzey court was suspended. This custom looks like a survival from the days when everything outside a fair came to a standstill till it was over. The Pie Poudre court was actually held till 1870 in a covered walk in front of the 'Stag and Hounds,' but adherence to ancient ceremony involved the consumption of undue quantities of liquor, and the affair was suppressed. The court has since existed only as a name forming part of the full title of the Tolzey court. Nowadays one of the serjeants-at-mace simply announces the holding of the court at the appointed time and place, and immediately adjourns it into the Tolzey, but even at the present time writs issued during the fortnight of nominal fair time have the words 'held in the Old Market' added to the ordinary title of the Tolzey court.

The Tolzey court thus became the sole local tribunal, except for courts of request and conscience (established in Bristol as elsewhere), and their successors the modern county court; and it still exists as an active institution disposing of a fair amount of business. It is one of the very few local courts to which the modern procedure under the Judicature Acts has been applied, and this has a great deal to do with its survival. The practice is similar to that of the High Court, but actions for any amount, large or small, can be entertained, and a peculiar feature is that there is no appeal from the judge's decision [1]. The application of the Judicature Rules has left untouched many special features, and a work published half a century ago [2] is still the authority on many points of practice. One point of particular interest may be noted, namely, that the

[1] This has been the commonly accepted opinion, but it would appear from the recent decision in *Darlow* v. *Shuttleworth*, [1902] 1 K. B. 721, that an appeal lies to the King's Bench Division from every inferior court of record of civil jurisdiction when there is no statute regulating the appeal.

[2] Practice and Pleading in the Tolzey Court of Bristol. By Edward Clarke. 1849.

special form here assumed by the procedure of foreign attachment preserves unchanged the Anglo-Saxon practice of compurgation. In the event of the property sought to be attached being goods a levy is made, and on 'the attachment being returned, the plaintiff has a right to file his declaration, in the form of the *concessit solvere*, on the fifth court day exclusive of the day of the return, and at the next court the plaintiff's attorney proves the debt upon oath, and according to the form of the court, two persons appear as pledges, and swear they believe he has spoken truly; he then moves for a judgment against such goods and a warrant of appraisement [1].' This continuity of procedure from the earliest times is very interesting historically, but of course, in modern practice, the two compurgators, or oath-helpers, are simply a couple of officers of the court whose swearing is a mere formality [2].

Several registers or books of record were kept by the corporation of Bristol for entries relating to the government and trade of the town, and the earliest of these (kept during the fourteenth and fifteenth centuries) has been printed [3]. The entries commence in 1344, but mostly have not much bearing on the present subject. One, however, entitled Lex Mercatoria, consists of a treatise on the laws affecting merchants, written in Latin in twenty-one chapters, and is an interesting evidence of the commercial importance of the place at the time. So also are two other entries, one a copy of the shipping code known as the Laws of Oleron, and the other a statement of the jurisdiction of the Admiralty.

Bristol, among its other courts, had a local Admiralty Court under charters from Henry IV and Edward IV. It appears that the Court of Admiralty assumed jurisdiction over divers matters which did not belong to it, and that this was a grievance in many places, Bristol being particularly affected. A petition was therefore sent to the king, praying that on account of the delays and costs of the civil law (by which the Admiralty Court was then regulated) parties might be allowed to have their remedy at common law. The charter exempting Bristol from the jurisdiction of the Admiralty was the result. The privilege was highly prized, and an attempt to abrogate it once successfully resisted, but by the eighteenth century the right had for some time ceased to be of value, and had been tacitly surrendered.

[1] Practice and Pleading in the Tolzey Court of Bristol, p. 27.

[2] No complete account of the Tolzey Court seems to exist—only scattered references. See the Bristol Charters, by Rev. S. Seyer, 1812; Report of Municipal Corporation Commissioners, 1835; the Annals of Bristol, by John Latimer, &c., &c. I have to thank Mr. Latimer personally for information that was most useful in piecing together the account given above.

[3] The Little Red Book of Bristel. Edited by F. B. Bickley. 2 vols. 1900. It is understood that other volumes will be published in course of time. [Cp. Dr. A. T. Carter in L. Q. R. xvii. 237, 246.]

It is curious that the court in Bristol and the court in Norwich—the two provincial towns which, during the later Middle Ages, stood far ahead of all others as centres of trade—are practically the only examples of such tribunals being known by the name of the place where the court sat. Courts of Record, of Pleas or Portmote, Mayor's courts and others were numerous, but Bristol had the only Tolzey court, and (excepting King's Lynn in Norfolk) Norwich was the only place where 'Guildhall Court' was the recognized name of the local tribunal[1]. This may be mere coincidence, but it seems only natural that the Tolzey and the Guildhall should have greater comparative importance and bulk more largely in the public eye in the places of the greater trade.

The municipal records of Leicester have recently been published[2], but it appears that, though most of the old documents have been carefully cherished, the records of the borough court, known as the Portmanmoot, have been almost totally lost. Only a few have been preserved, the earliest being an undated roll believed to belong to about 1260. Though only short it includes pleas of debt, trespass, unjust distraint, assault, and refusal to warrant possession. Two cases relating to damage to trees are mentioned. There is also preserved a charter dated 1277 for reforming the procedure of the Portmanmoot, already referred to as evidencing the suspension of town business during fair time. A hundred years after this the Portmanmoot was sitting weekly. Another court—the court of the merchant gild—had developed alongside the older tribunal, but many of their functions were then passing to other institutions. In the Portmanmoot, however, conveyances continued to be recorded and debts recovered. The town strove to keep business in its own courts. Several times during the fifteenth century town ordinances were passed imposing severe penalties on any who should bring actions elsewhere when they might have brought them in the local court. This jealousy existed through a desire that the profits accruing from goods being forfeited in the court might not be lost to the town. The attitude of Leicester was not exceptional, there being record of similar ordinances at a later period in Bristol. The Leicester borough court, however, like many another institution, came to the days of its decline, and the opening of the nineteenth century found it verging on disuse.

Exeter is a city whose local courts are very interesting. The place has had a continuous existence since the days when a British

[1] The one instance of King's Lynn is the only exception in the list of nearly two hundred courts given in Appendix H to Fourth Report of Common Law Commissioners, 1832.

[2] Records of the Borough of Leicester. Edited by Mary Bateson. 2 vols. 1899 and 1901.

settlement occupied its site, and the municipal records from the earliest times are, as we have seen, remarkably perfect, though remaining unpublished. The city court has become almost, if not quite, disused, owing to being hampered with old procedure under the Common Law Procedure Acts. Some years ago the citizens made an attempt to obtain an Order in Council applying the provisions of the Judicature Acts, but were unsuccessful. The tribunal is called 'The Provost Court of the City of Exeter,' and the history of the title is interesting. It appears that from the time of the Conquest until the second year of the reign of John the chief officer of the city was called Wic-reeve, Port-reeve, Prae-positus, Provost. The first mayor was elected in 1200, and he was assisted by two officers called provosts. This arrangement continued until 1258, when the number was increased to four, one of whom was to be appointed receiver for the corporation. The name 'provost' was afterwards changed to steward, but the court of the provosts, in which the mayor presided, has retained the name of the Provost Court ever since. Except in Exeter the name 'provost' is not now found in use in English municipalities, though in early times it was not uncommon, and there were also 'prévôts' in France. The name is of course still current in Scotland.

The Mayor's Court of Exeter has already been referred to in speaking of foreign attachment. It has long been obsolete, but the rolls of the court from 1263 are among the city records. It was once a court of record where almost everything was done that was done in the courts at Westminster. The proceedings in the Provost court were enrolled upon the records of the Mayor's court until 1308, from which date the proceedings were recorded upon separate rolls down to 1700. There are also books in which the proceedings in the Provost court are recorded from 1507 to the present time. A thorough examination of these records would doubtless reveal many instructive facts, but, as they are very voluminous, that would be a heavy undertaking. The present procedure of the Provost court retains no special feature except the custom of foreign attachment.

These particulars of the courts in Bristol, Leicester, and Exeter will serve to indicate some of the salient features to be found in the histories of similar tribunals throughout the country. No mention has been made of criminal jurisdiction, but it was exercised in some boroughs, and there are many other points on which much might be said. Certain exceptional local courts, such as those of Liverpool and Salford, still dispose of much business, but, apart from these, the day both of fair and borough courts is past, however interesting they may be historically. The fairs had retained

considerable importance until the Stuart period, but they were then declining. The modern concentration of population was commencing, and from that period also dates the introduction of the turnpike system, under which the country, till then almost without means for wheeled vehicles to travel, was covered with a network of roads. Within two hundred years from the passing of the first Turnpike Act in 1663, some 30,000 miles of turnpike road were constructed, and the improvement in transport facilities thus effected was the deathblow to the fairs. With them went their Piepowder courts [1], and it may be doubted whether such a court is now held anywhere in England. It appears that one survived until recently at Hemel Hampstead, which was incorporated in 1359 in order that the body corporate might hold a fair. Latterly its bailiff and jury had little judicial work to do, and when the town was re-incorporated in 1898 the court was not continued, though it had been held till then. It was probably the last of its kind to survive. Many fairs came under municipal control, and this would tend to terminate the separate existence of the Piepowder courts. The court of fairs at Leicester appears to have become a burghal court in the fourteenth century, and we have seen how the same thing occurred at Bristol. At Cambridge, too, the court of Sturbridge Fair was held before the mayor and bailiffs of the town. The courts of the London fairs disappeared with the fairs themselves. The longest to survive was Bartholomew Fair, which did not finally cease till 1855. Its court sat to the last in Cloth Fair, being held in the 'Hand and Shears' public house. Although courts of Piepowder are extinct, the custom is kept up to this day at Newcastle-upon-Tyne at the Lammas Fair, and also at the St. Luke's Fair, of making public proclamation with considerable ceremony, in the presence of the mayor and town clerk of the opening of the fair, and 'that a Court of Piepowder will be holden during the time of this fair, that is to say one in the forenoon, another in the afternoon, where rich and poor may have justice administered to them according to the law of the land and the custom of this town. God save the King.' Notwithstanding the proclamation no court is in fact held.

It is needless to repeat here the reasons for the decay of the borough courts to be found in the Report of the Municipal Corporation Commissioners. Close upon two hundred of these courts have flourished at various times in England and Wales. Many are of most ancient origin, but others owe their existence to royal charters granted in some cases as late as the time of George III,

[1] See, as to these courts generally, The Law of Markets and Fairs, by Pease and Chitty. 1899.

and, remembering how some places were made boroughs simply to control the parliamentary majority, we are not surprised to find borough courts in unimportant places, and in a condition of never having had any business worth speaking of. Neither disfranchisement nor mere non-user extinguishes a court, so these continue a nominal existence. Those of the borough courts which remain now in active operation are, however, generally tribunals of immemorial foundation. Their continuance diminishes the uniformity of our modern system of administering justice, but they have often served a useful purpose even in recent times in some of the larger towns, and one may doubt the wisdom of the policy pursued in recent years in several instances by the central authorities of throwing obstacles in the way where local feeling desired revival and modernising of procedure so that a borough court might again be brought into frequent use.

SANFORD D. COLE.