

panied by a rational theory which will reduce the occurrences to that order which all men feel sure is uniform in the cosmos.

Herein, then, rest our hope and the duty of our scientific leaders. Conservative savants yet hold aloof, but even they are beginning to take notice. The evidence of something, of something which cries out for study, is becoming too copious and challenging for science much longer to pass it by; and upon the decision of science in this field rests the possibility, as Myers long ago pointed out, of our being able to accept the Resurrection and with it a re-born Christianity. If science declares that spirits have appeared to mortals, indeed that they are appearing even now, then we can put credence in Paul's solemn asseveration that Jesus appeared "to Peter, to the Twelve, to myself also." This is our best, nay more, our only hope; and by no means is it slender. Thousands in every land in these sad times of death have found consolation and hope renewed, not in the age-old story of a corpse that revived, but in what seems to them real evidence, observed this day at their own fireside, that their beloved dead do live again. Thus may bloom once more a purified and enduring faith in the Resurrection and the Life.

THE CYCLE OF LAW.

BY HOMER HOYT.

THE quest for legal justice leads to two principles, apparently as wide as the poles asunder. One principle states that unlimited freedom to decide each case upon its merits—according to equity and conscience—is indispensable to justice, while the other principle just as positively proclaims that unlimited freedom to decide cases according to equity and conscience leads to the abuses of the Star Chamber and the Third Degree. One principle decries the rule of precedent as the source of injustice, the other principle lauds it as the very fountain of justice. Thus do the oracles of justice seem to contradict each other and cause laymen to believe that the legal system blows hot and cold at the same breath.

The paradox set forth is no figment of the imagination but a real problem in the growth of law. The opposing principles of justice according to an iron standard and justice according to conscience mark the extreme points between which the law has fluctuated in the course of its development. *The Cycle of Law* embraces the period in which the law has started from a system in which one

of these principles dominated, has gradually changed to a system in which the opposite principle held mastery, and has finally come back again to a condition similar to the starting-point. It is the purpose of this paper to describe this cycle in very briefest compass, to indicate the fundamental forces that have moved through the maze of decisions, statutes, constitutions, codes constituting the outward barometer of the law, to give a hasty glimpse at the general trend of centuries of legal history, omitting from view the vast minutiae of special rules so vital to the individual case, passing swiftly by whole subjects of substantive law, and the entire science of pleading in order that the general contour of the legal woods may stand forth in clear relief.

There is no inevitable beginning nor end to such a study, nor is there any chosen people whose laws have prior claim to such a survey. It is probable that tablets of laws that crumbled to dust before the Code of Hammurabi or the Roman Laws of the Twelve Tables have gone through a process of development similar to that about to be described, but it is needless to search in the ashes of Assyrian cities for the judgment rolls of a forgotten civilization, when evidence written in bold type in the year-books of Edward I tells us the story of the genesis of the very laws under which we are living to-day. The theory of the cycle of law will accordingly be illustrated by the development of the American common law or, rather, its English prototype.

In describing a continuous process that winds back to a place similar to a preceding phase in its course, it makes no vital difference where a start is made. It will be convenient, however, to begin at that phase of the cycle that is characterized by stability and respect for precedent, because a legal system that has crystallized into a definite form presents a tangible substance for analysis and the record of judgments or stone tablets to chronicle the finality of its achievement. A period of static equilibrium was attained by the English law by the end of the thirteenth century. By that time the reaction between the frontier justice of the Anglo-Saxons and the refined law of the Normans had produced one fairly homogeneous system of English law; the blood feud, the wager of battle, and rough-and-ready methods of self-help had been partly eliminated and partly disciplined by technical procedure; scattered local customs, opposing traditions had become merged into the King's justice administered by the King's courts; and the young legal system had grown until its height was measured by its 471 writs and it no longer possessed the power to add another writ to its stature.

At the stage of the cycle which has been arbitrarily selected as a starting-point, the English law had emerged from the unstable period of growth during which its form and content hung in a balance of principles and customs; it had reached the age of assimilation, analysis and codification. The characteristics of a legal system that had arrived at years of maturity could be read in the respect for precedent, the technical rules of pleading, the formality of writs, the dignity and solemnity of judicial procedure, the pompous Latin phrases incomprehensible to laymen, the fees and delays of court trials, the rise of a professional class of lawyers and the codification of the law by Bracton. At that time in its life history, the law delighted to wield the new-found powers that arose out of seal and parchment, writ and oath. It demanded the strict observance of form rather than an inquiry into the fundamental merits of the case; inclining its judgment scales in favor of the debtor when he could successfully pass the prescribed ritual by producing eleven neighbors to swear he did not owe the money, and inclining its scales in favor of the creditor when one false move on the part of the debtor or his aids—a mispronounced word or the lowering of an arm before the proper time—broke the charm of the elaborate symbolism. Thus the static law brought order and respect for authority out of the chaos of Anglo-Saxon law at the expense of equity and conscience.

The movement away from the static equilibrium—like all organic movements—grew out of the very conditions of stability. The crystallization of causes of action into 471 specific forms had practically closed legal machinery to new causes of action, because as these various forms became related to each other by a net-work of logical analysis so that they grew into an organic whole, it became more and more difficult to graft an alien on to the existing system. The forces of habit, tradition and inertia under the guidance of clerks and lawyers schooled in the prevailing forms also tended to keep the law within its accustomed channels. While the law was thus steeling itself against change through external pressure, the power of forces of change was rapidly increasing. Even in the customary society of the thirteenth century some new legal situations would unavoidably arise out of the permutations and combinations of social dealings, but when the Black Death and the Peasants' Revolt produced great upheavals in the quiet flow of English life, the number of adjustments not provided for by the old legal system was bound to increase at a progressive rate.

The first external evidence of a movement away from a condi-

tion of fixity was noted by the statute of Westminster II (A. D. 1285) which provided authority for new remedies to meet new causes of action. This was only a partial solution of the problem, however, for the statute was directed against well-established habits and interpreted by hostile judiciary so that its actual purpose was limited to such narrow ground that it was almost made nugatory. The increasing inflexibility of law as contrasted with the growing needs of the times forced some changes by underground channels. When a change was camouflaged in an elaborate fiction, the pride of technicality was either appeased or the blind side of the judges successfully approached, for many changes crept into the fold of the common law disguised under old forms. The requirement that no title to land could be transferred without a deed was avoided by the fiction of lost grant—allowed claimants of land by adverse possession—wherein the litigant would brazenly allege that a deed had been granted to a remote ancestor, but that it had been lost. The court would wink at these and many other subterfuges of like nature, and by refusing to allow any investigation of their truth practically inaugurate a new rule of law. Thus the common law became more artificial and technical as society receded from it.

The rigor of the common law finally forced another system to spring up side by side with it—a system which embodied the contrary principle of jurisprudence, namely the decision of each case on its merits. The pressure of suitors unsatisfied by a system of common law that had now become decadent forced the development of a court of chancery or equity which sought without reference to precedent or form to achieve substantial justice between the parties. The court of equity was established by the king under the authority of his undistributed reserve power to decide cases when the common law courts could not afford relief. The new equity courts had jurisdiction of the person, their orders were binding on the conscience and could be enforced by jail sentences. Their power was not limited to existing forms but they could devise any new remedy to meet any new situation, and their decrees were binding on even the common law courts, for they could enjoin any judgment which was against their ideas of justice. The common law courts continued in existence without interruption, and handed out decisions based on precedents the same as before, but they were now subject to the control of another court which could set them at defiance when a proper case for equity arose. The anomaly—so hard for a layman to understand—of two systems of law, common law and equity, administered in the same place over the same

subject-matter sometimes by different courts and sometimes by the same court or the same man sitting on the same bench, thus crept into our legal system because of the inevitable antagonism between the two fundamental principles mentioned in the opening paragraph.

The common law, however, could not remain shut up in an air-tight compartment when confronted by equity. The common law judges found it to their self-interest and to the self-interest of their science to moderate the fixity of the common law in order to extend their jurisdiction before equity arrived. Consequently a race began between the common law and the chancery courts to liberalize their views and to grant new remedies. The whole equitable doctrine of quasi-contracts was developed by the common law under the spur of the competition with equity. Thus the interaction between equity and the common law finally produced a situation in which far more attention was paid to deciding cases on their merits than ever before. By the time of the seventeenth century, the half of the cycle was completed and law was at its greatest period of flux.

From this high water mark of justice according to conscience, unimpeded by precedent, the law again returned to a static equilibrium. Again the retrograde movement began while the very reign of equity was at its height. Complaints began to be made that the Court of Equity enjoyed complete freedom from any salutary control, and that decisions according to conscience varied with the conscience of each Chancellor which varied, as was later said by Selden, with the length of the foot of each Chancellor. The decisions of the Chancery Courts were unwritten, and no attempt was made to consult or follow precedent, the Court of Chancery being similar in this respect to the notorious Star Chamber. While complaints against the uncertain and capricious nature of equity were thus being made, equity was more or less unconsciously imitating many common law forms and among them a leaning toward precedents. Gradually equity crystallized into a definite form just as the common law had before it, the chancery cases were printed and acquired binding authority as precedents just as the common law cases had become binding. Equity, while not so formal as the common law, finally described its metes and bounds with the same care as the common law, and the conscience of the chancellor ceased to be the varying moral ideals of individuals and became the incorporated conscience of generations of chancellors. Thus equity in turn became closed to new forces and reached maturity. In the meantime by a process of judicial legislation under Lord Mansfield,

the common law had assimilated the Law Merchant which for a long time existed as an exotic system, unrecognized by the common law. Thus renovated and enlarged, the combined system of common law and equity by the middle of the eighteenth century again reached a static equilibrium and a complete cycle had been transcribed.

The cycle which succeeded the long period which spanned the thirteenth and the eighteenth centuries has proceeded much more rapidly. After an interval of quiescence—the period of static equilibrium in which precedent and custom held the throne—lasting in England to the middle of the nineteenth century and in America to the beginning of the twentieth century, the complete swing of the pendulum from stability to equity—covering half the cycle—was made in a few decades. Discontent with the fundamental assumptions of law elaborated after five hundred years of painstaking effort was precipitated by the industrial revolution which suddenly showered titanic changes upon society so as to disrupt old relationships and to usher in new legal problems in ever increasing numbers. The common law, adjusted to pre-revolution times, could not keep pace, even by judicial legislation and the twisting of old rules, with the demands created by the presence of machinery, widening markets, the growth of cities, large-scale production, trade unions, and the woman's movement. In the nineteenth century, the return to the principles of justice according to equity and conscience began through legislation and the movement rapidly gained in volume and intensity until by the early part of the twentieth century—in the present day—the flood of statutes has probably reached its high water mark. In the course of this "rain" of statutes, even the equity courts themselves, the original fountains of justice according to merit, were thoroughly renovated and purged of the accumulations of precedent which prevented them from fulfilling their particular function, and new administrative bodies with wide discretionary powers were created to supply the needed elasticity in our legal system. At last, however, the career of statute-law which has almost become an epidemic seems to have reached its zenith, and after the wildest experiments in legislature, we seem now ready to return to more stable and scientific standards. Already some legislators are beginning to recognize that their power is not omnipotent, and that there is a limit to the good that can be accomplished by a mere fiat—and this is a sure sign that we are receding from naive confidence in our ability to fly to the social paradise by passing a law. It is probable, however, that we shall not return to another

static equilibrium without a thoroughgoing reconstruction of the fundamental premises which underlie present legal theory.

The moral told by the Cycle of Law is probably unwelcome to the reformers who hope to bring about the social millennium by a single stroke of legislation, for a common law that has withstood the shocks of equity reform and the deluge of statutes and codes undoubtedly has sufficient toughness to meet the strain of future storms. On the other hand, since the longevity of the common law has been due to the fact that its elasticity permitted it to bend under a weight that would have crushed a rigid substance, the moral can afford but little comfort to the reactionaries who expect to keep an iron lid pressed down upon forces of change. In the far-reaching panorama of legal history that has been flashed before the reader, all the apparent contradictory elements in law appear as part of one great movement. Statutes, equity, judicial legislation, are the methods by which the law grows and expands, while common law decisions, and constitutions are the ways in which the new growth is assimilated to the old system. Thus the law grows like a sturdy oak, adding successive rings of sap to the inner heart wood until it develops strength and stability without losing its capacity to add new branches and to stimulate the flow of sap that keeps the whole organism alive.

Law attains its golden mean when it supplies a remedy for every injury while adhering to stable principles, when it represses violence and unstable conditions with one hand and dispenses new theories of justice to fit new conditions with the other, in short when it coincides with the predominant aspirations of society by happily uniting the opposing principles of stability and equity. The law fluctuates above and below this golden mean, the magnitude of the oscillations being great when society is in a state of flux and small when society is bound by custom, but whether the deviations are large or small the law tends ever to seek its level despite the dams interposed by legislatures or courts.

“ARE YOU GOING BACK TO JERUSALEM?”

BY CHARLES CLEVELAND COHAN.

ON the very day that the word came flashing along of General Allenby's capture of Jerusalem I met a Christian friend of mine who greeted me with the words, “Well, the Holy City has been delivered from the Turks. Are you going back to Jerusalem?”

I merely smiled at him and remarked that considering the fact