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# LAWYERS AND LITIGANTS IN STUART ENGLAND

## A COUNTY SAMPLE

WILLIAM B. WILLCOX

The English of the seventeenth century were a litigious race, who deplored their addiction to lawsuits without attempting to restrain it. They wept, but they went on suing. This fever of the times raged in city and country, among all classes, and its records are the voluminous archives of the courts. It is an interesting characteristic of the period, and its records have an added interest. The archives, particularly those of the London courts, are a mine of information about the English people as they were, a mine which is only beginning to be opened. It is the purpose of this paper to dig an experimental shaft in a new direction: to examine the most illuminating cases in one county during the half century before the Civil Wars, in order to examine through them the men and life of the times.<sup>1</sup>

The county selected is Gloucestershire, at the head of the Bristol Channel and at the foot of the Vale of Severn. It was typical of rural England in the seventeenth century, as it is typical today. It was less remote from national affairs than such counties as Cornwall or Northumberland, and the people were less disposed to the ways of the Middle Ages. For this there were two principal reasons. One was the wool trade, which for centuries had brought wealth to the clothiers and contact with the world of London. The other was geography. Since the days of the Romans, Gloucestershire had been the meeting place of great roads, from London to Wales and from Devon to Scotland. By these roads, bad as they were, the county was subjected to the forces which were changing England from the medieval to the modern.

But Gloucestershire was by no means in the forefront of change. It was a border county on the edge of Wales. The people had behind them a tradition of wars, and violence was in their blood. The law was only slowly replacing more forthright means of settling a quarrel. The central government did its best to maintain its authority, by itinerant justices and privy-council messengers and a special court for the border. But that authority was tenuous, and even local officials were not always subservient to it. The hundred miles to London was a three or four days' journey, and the interests of the county were proportionately distant from those of the capital.<sup>2</sup>

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<sup>1</sup>The advantages and disadvantages of such restriction must be mentioned at the outset. The main advantage is thoroughness. With certain minor exceptions, I have examined all the extant records of the county between 1590 and 1642; the discussion is therefore based on a complete survey of the narrow field. The disadvantages are obvious. A description of cases tends to be anecdotal, and rarely leads to general conclusions. The people who appear from these records are vivid; but they are usually unconnected, acting in different ways, at different times and places, for motives which can seldom be fully apprehended. Their testimony is *ex parte*, and their word is not always reliable. The tendency to group them, and to be omniscient about them, must be steadily guarded against.

<sup>2</sup>This remoteness is well illustrated by a letter from a Londoner, immured in the county

The great issues of the period were slow to wake an echo in rural England. While king and parliament were drifting toward their momentous struggle for power, while Buckingham was blundering and Bacon was musing on his *New Atlantis*, the country people were going their way with little interest in politics or philosophy. Their interest was more local than national. They were concerned with their petitions to the quarter sessions, the doings of the new lord of the manor, the vicar's last sermon, rather than with king or parliament or courtier. They did not trouble greatly with the affairs of the state, and they were unappreciative when the state troubled with theirs.

Litigation was the exception, in which the countryman often abandoned his distrust of "foreigners" in London. He did so for a specific reason, because in one way or another it was preferable to have his case tried in a London rather than a local court. These reasons were inherent in the judicial system of the times, and a brief description of that system is a prerequisite to a survey of litigation. The next step will be to consider how the nature of the courts encouraged lawsuits. The third will be to examine the methods and motives of the litigants: the technique of going to law, the tricks and ethics of the game, the rôle of the country lawyer, the attitude of the players toward each other. This will serve as a background for a survey of the four most interesting types of cases: suits over land, suits resulting from acts of violence, suits over marriage, and suits connected with the vicar.<sup>3</sup> These four groups are four standpoints from which to watch the homely panorama of country life as it was lived.

The humblest of local courts was the manorial, which represented a fusion of the various medieval courts of the lord of the manor.<sup>4</sup> It had lost much of its power, and its principal importance was as the administrative body of the

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in 1600, to a friend in town. "If I stay here long in this fashion, at my return I think you will find me so dull that I shall be taken for Justice Silence or Justice Shallow. Wherefore I am to entreat you that you will take pity of me, and as occurrences shall serve, to send me such news from time to time as shall happen; the knowledge of the which, though perhaps they will not exempt me from the opinion of a Justice Shallow at London, yet I will assure you they will make me pass for a very sufficient gentleman in Gloucestershire. If I do not always make you answer, I pray you do not therefore desist from your charitable office, the place being so fruitful from whence you write, and here so barren that it will make my head ache for invention. . . . You need not to forbear sending of news hither in respect of their staleness, for I will assure you, here they will be very new." S. P. [State papers, domestic series] 12/275/146.

<sup>3</sup>I have omitted two large groups of cases. One is those arising from business disputes, particularly in the wool trade; these belong to economic rather than social history. The second is routine criminal cases, of which the records are not illuminating enough to be worth discussion.

<sup>4</sup>The medieval distinction between the courts baron, customary, and leet had in practice been obliterated by this period; the old court of the hundred, which survived only where it was in private hands, had become fused with this composite manorial court. While lawyers still distinguished its aspects with meticulous care, the practical distinction was negligible. See ANON., ORDER OF KEEPING A COURT LEET & COURT BARON (facsimile of 1650 ed. Manorial Soc. 1914) 5 ff.; 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1922) 134-38, 182; 4 *id.* (1st ed. 1924) 128-30; 1 WEBB AND WEBB, THE MANOR AND THE BOROUGH (1908) 50.

manor; but it tenaciously retained a minor civil and criminal jurisdiction. This tenacity is a measure of seventeenth-century localism. If an offense was committed on the manor, or a dispute occurred, there was a preference for trying it at home, even at the cost of minimizing the action to bring it within the competence of the court. Otherwise it would have to be referred to the Sessions, which were in the hands of J. P.'s with a less intimate knowledge of local affairs than the manorial jurors; or to the Assizes, which were conducted by strangers from London. "Justice, you know, is far from us."<sup>5</sup>

The major local courts were the Quarter Sessions and the Assizes. The Sessions were both a criminal court, and the most important administrative body of the county.<sup>6</sup> The Assizes, held twice a year before itinerant judges from the London courts of common law, were the principal local court of civil and criminal jurisdiction. A large amount of Gloucestershire litigation was evidently settled there, but the Assize records have unfortunately disappeared.

There was another body which had jurisdiction in Gloucestershire. The Council in the Marches of Wales was a miniature combination of Star Chamber and Privy Council. As a court, it had a wide but closely defined jurisdiction in civil and criminal cases, where the plaintiff was debarred from suing at the common law either by his poverty or by the local influence of his adversary. As a council, it was charged with suppressing private incontinence and public disorder, official bribery and oppression, perjury by witnesses or jurors—in short, to make royal authority effective on the border.<sup>7</sup>

Of the numerous central courts at London, only certain ones need mention

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<sup>5</sup>From a letter to a manorial steward, urging him either to have some local trouble-makers tried in the manorial court, or "to deliver them over to the mercy of the Sessions." G. P. L. [Gloucester Public Library] ms. 16,532, 20v.

<sup>6</sup>The criminal jurisdiction of the court embraced all capital felonies other than treason, but the justices in many counties preferred to leave such cases to the judges of Assize. In others they did not, and I have found no explanation of the disparity. In their administrative capacity, the justices dealt with as wide a range of problems for the county as did the Privy Council for the nation. They considered petitions from aggrieved inhabitants; they dealt with bastardy, as an economic rather than a moral question; they supervised the system of apprenticeship; they licensed alehouses and controlled the supply of drink; they suppressed illegal games, and enforced attendance at church.

<sup>7</sup>The government tried several times to delimit the civil jurisdiction of the council from that of the common-law courts. In 1609, for example, it was empowered to try debts and other personal actions involving less than £40, provided that they did not concern land title or chattel real. The same proviso applied to cases involving a larger sum, and two further conditions were added: that the poverty of the plaintiff was formally certified to the council by at least two J. P.'s and "that the said council do not increase any the kinds of suits aforesaid, especially for or concerning lands, tenements, or hereditaments". G. P. L. ms. JF 64; for a fuller discussion of the origin and competence of the council, see SKEEL, *THE COUNCIL IN THE MARCHES OF WALES* (1904) 90-93.

The jurisdiction of the council over the border counties was disputed as early as 1604. The dispute continued until 1641, as a minor skirmish in the battle between equity and common law. The council was attacked by the common-law courts and lawyers, with considerable backing from the House of Commons. It was defended not only by the crown, but also by a large section of local opinion. While its authority was questionable and its justice often slipshod, it was a nearer, cheaper, and speedier court than those at Westminster. See SKEEL, *op. cit.*, at 133-41, 145, 160, 167-68; 1 HOLDSWORTH, *op. cit. supra* note 4, at 510-12.

here. Some of the others played an equally important part in litigation, but their records are not sufficiently revealing to contribute to the discussion. Among the common-law courts, the only one of interest is the Exchequer. Its jurisdiction had been limited to cases concerned with the royal revenues, but by the end of the sixteenth century it had acquired a general jurisdiction in equity and common law.<sup>8</sup> Among the prerogative courts, the most important are Chancery and Star Chamber. The Court of Chancery was "the altar and sanctuary for such as against the might of rich men, and the countenance of great men, cannot maintain the goodness of their cause."<sup>9</sup> It was also, as we shall see, a means whereby rich men could evade an action at the common law. Star Chamber was the great prerogative court of criminal jurisdiction. This offshoot of the Privy Council had been created to curb oppression and disorder, and for Gloucestershire it was still fulfilling its purpose. The number of local cases which came before it was enormous, and their variety will be apparent from subsequent pages. The court must have dispensed rough justice, but it was a justice which was often sought.<sup>10</sup>

While the Star Chamber had grown out of the Privy Council, the council had not surrendered its judicial power to the court. If a man felt that justice had been denied him, he could get action more promptly and more cheaply by a petition to the council than by a suit in the court. If his petition was accepted, the council would issue an injunction, instruct a local official to intervene, or bring informal pressure to bear on the offender.<sup>11</sup> By legal

<sup>8</sup>1 HOLDSWORTH, *op. cit. supra* note 4, at 231-42; Thompson, *The Development of the Anglo-American Judicial System* (1931) 17 CORNELL L. Q. 9, 35-36. The records of the other two courts of common law, the King's Bench and Common Pleas, are of negligible value.

<sup>9</sup>Quoted by Barbour, *The History of Contract in Early English Equity*, in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (1914) 78. The other major prerogative courts which I have omitted, because their records are not of great value, are the Court of Requests and the ecclesiastical Court of High Commission. For a concise summary of them, and of the origin and jurisdiction of Chancery, see Thompson, *op. cit. supra* note 8, at 206-229, 245-247, 401-402.

<sup>10</sup>The popularity of the court at this period is attested by the practice of alleging a riot or illegal entry, in order to bring before Star Chamber an action which would normally have been outside its jurisdiction. For a description of the court, see Thompson, *op. cit. supra* note 8, at 229-244.

<sup>11</sup>An example of injunction is the case of the registrar of the Gloucester diocesan court. In 1590 he complained to the council that the diocesan chancellor had ousted him unjustly and would ruin him before he could get redress through the courts. The council enjoined the chancellor from proceeding with the ouster and stigmatized his conduct as "very foul and contrary to all right and equity, and in any man not to be allowed, much less in one of his functions and calling". DASENT, ACTS OF THE PRIVY COUNCIL, Eliz., xx, 286-287; the case was later brought into chancery, C/ [ms. records of the court of chancery] 24/222, Blackleeche *respons. v. Jones*. (The records of the London courts are preserved in the Public Record Office; in citing them, I have used the system of reference of that office.)

I shall discuss later the intervention by local officials. An instance of informal persuasion is the case of a man in Gloucester, who complained that Lord Berkeley had seized some land of his, and that he dared not sue because of Berkeley's "quality and calling". The council wrote to Berkeley, explaining that a land case was outside its sphere, but urging him (with remarkable humility) to submit the matter to arbitration. Dasant, *op. cit. supra*, Eliz., xxiv, 314-315.

process and personal influence, the council endeavored to make the way of the bully more difficult.

This judicial system had two general characteristics, both of which tended to foster litigation. The first was the number of courts, which in itself gave almost limitless opportunities for prolonging a legal battle. There was no system of appeal in the broad modern sense. But it was possible to transfer cases from one court to another before trial, or to nullify a defeat in one court by a later victory in another. If a man's action was coming to trial at the Assizes, for example, he might find grounds for having it transferred into Chancery. Or if it was tried and lost at the Assizes, he might succeed in having his opponent and his opponent's witnesses, as well as the Assize jurors, convicted and fined by Star Chamber. This in turn would be likely to precipitate one or more countersuits, so that from one disagreement there might grow a tangle of simultaneous actions in the London and Gloucestershire courts<sup>12</sup>—a tangle which was obviously lucrative for court officers as well as lawyers, and proportionately difficult to discourage.

This complication of cases and the crowded dockets which it entailed may explain the second characteristic of the courts: their caprice in postponing trials or refusing to postpone them. Either course might produce a parody of justice. Sometimes an action was heard so promptly that one of the principals did not have time to appear and lost his case by default.<sup>13</sup> At other times there were so many postponements that one side or the other grew unwary, and was caught off guard by the actual trial.<sup>14</sup> The ways of a court were unpredictable, and the attempt to predict them made gamblers of the litigants.

So much for the nature of the courts. They undoubtedly did their part in encouraging litigation, but the main reasons for its prevalence lie in the character of the litigants. What moved men to go to law with their neighbors?

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<sup>12</sup>An instance in point is a quarrel between Lord Berkeley and Sir Thomas Throckmorton. "The suits raised between them were many, and in most of the Queen's courts together, whereof the Star Chamber in the 22nd and 23rd of Elizabeth were [*sic*] at one time possessed with 13 several bills, the King's Bench [*sic*] and Common Pleas with 12, and the Chancery had her share. Trials by jury . . . were more than too many; indictments for riots and forcible entry at several Assizes and Quarter Sessions . . . were almost numberless." 2 SMYTH, *THE BERKELEY MANUSCRIPTS* (1883-85) 310.

<sup>13</sup>St. Ch. [Ms. records of the Court of Star Chamber] 5/C/31/3.

<sup>14</sup>An Exchequer suit is illustrative. The trial was often postponed, either because one side or the other was unready, or because the local jury failed to appear. Time after time the defendant brought his witnesses from Gloucestershire to London, engaged his counsel, and prepared his evidence; time after time he had his trouble for his pains. When the trial was actually held, it took him by surprise; he had neglected his usual preparations, and realized his error too late. "The chiefest of his former counsel were retained in other causes, and could not attend that trial on that day. Whereupon new counsel were retained, who by reason of the shortness of time could not be thoroughly instructed and informed in the said cause." E [Ms. records of the Court of Exchequer] 134/8 Jas. I/E/33a.

The answer seems to have been as wide as it is today, embracing everything from serious provocation to idle malice or the hope of a few shillings. The small motives accounted for a large number of cases and may be considered first. "We are now fallen into the declining, or rather dotting days of the world, which now setteth shifting, idle fellows on work to whet their wits, to dive into every man's estate to see if they can catch never so little color to work upon, that they may draw some money from other men."<sup>15</sup>

This is not mere rhetoric. Barratry was a common practice, and the men who indulged in causeless litigation might come from any walk of life. At the bottom were those who tried to make a hand-to-mouth living from it, either by informing or by bringing suits themselves in minor courts. Much as they differed in technique, their motive was that of the modern ambulance-chaser; they might or might not have a case, but there was always the chance of some gain.<sup>16</sup> The same purpose inspired many of the gentry, although on a larger scale.<sup>17</sup> The principal use of barratry, among men of means, was to obstruct or impoverish a poorer opponent, in order to force him to a settlement. This could be done in a number of ways. A plaintiff might be browbeaten, by threats and writs, into abandoning his action.<sup>18</sup> A common law suit in a local court might be overshadowed by an equity suit in London.<sup>19</sup> If these simple expedients failed, a man might wear his opponent out of purse by bringing against him the largest possible number of simultaneous actions.<sup>20</sup> Litigation was a dangerous game for the poor.

<sup>15</sup>G. P. L. ms. RF 354.23, 32. There is a suggestion of champerty in this quotation. I have found little evidence that it was a common abuse, and only one case in which there is a strong suggestion of a champertous bargain: St. Ch. 5/B/97/31.

<sup>16</sup>The favorite stage for such Gloucestershire cases was the Council of Wales. The cost of litigating was less than in London, and the results almost as effective. If the trouble-maker was poor, he could accomplish his ends by giving information to the king's prosecutor; the crown would then sue, and the "relator", or informer, would have his share of whatever fine was recovered. "Relators, of all men, be favored there, because you know by their means their court is still upholden. Take away relators, their court can hold no pleas." G. P. L. ms. 354.23, 29.

<sup>17</sup>Another purpose, common to all classes, was the satisfaction of malice. A poor man might vent his spite by informing in the Council of Wales, like an unpopular yokel who "threateneth the neighbors of Arlingham that seeing they do not love him, he will make them hate him for something"; his greatest achievement was to have the whole village sued by the crown about its common. (G. P. L. ms. 16,533, 95.) A man of means might achieve the same purpose, on a larger scale, by furnishing information on which the Attorney General could bring suit in Star Chamber. For examples of such informers at work, see HISTORICAL MSS. COMMISSION, 12 *CECIL MSS.* 45-46; HARWARDE, *LES REPORTES DEL CASES IN CAMERA STELLATA* (1894) 234-35, 242, 331-32.

<sup>18</sup>See G. P. L. ms. RX 354.27.

<sup>19</sup>When a man had a case coming to trial at the Gloucester Assizes, for example, his opponent took it into Chancery "of mere purpose by injunction or some other dilatory course to detract and hinder my cousin's trial at common law. . . ." The Lord Keeper was requested to leave the entire matter to the Assizes, or at least to allow the trial there to proceed. (Harleian ms. 6995, 173.) Such a transfer from common law to equity had the effect of eliminating the jury, and this in itself might be decisive. When a landlord, for example, sued his tenants in 1627, he asked the Chancellor to assume jurisdiction because it was "a popular cause, wherein a country jury will incline to favor and partiality for tenants against the lord." G. P. L. ms. RZ 152.1, 10.

<sup>20</sup>One of the masters of this technique was John Smyth of Nibley. He was a lawyer,

Its dangers were in one respect greater than today: the unsuccessful litigant often ended in a debtor's prison. If it were to his opponent's interest to keep him there, a series of new lawsuits would serve the purpose. The result, for the victim of such barratry, might be long years of imprisonment. Take for example the case of a Bristol merchant, who testified that he had been impoverished by losses from pirates. An enemy at once began a number of causeless suits against him, in order to "lay this examine up in prison, where he should remain". Remain he did, while his opponent used every legal device to prevent a trial, and meanwhile enjoyed the income of the lands in litigation. "The plaintiff laboreth . . . to weary out this examine, being a very poor man and worn out of all his means by the delays and multiplicity of suits of the plaintiff."<sup>21</sup>

Such tactics as these were the more respectable forms of shady dealing, but not the only ones. The lawyers and litigants of three centuries ago could have learned little from the most brilliant modern shyster. The forms of trickery were different, but its substance was the same. An old woman is tricked into giving her land to a neighbor, because she is too illiterate to know what she is signing.<sup>22</sup> A guest claims that his host made him drunk in order to cheat him.<sup>23</sup> A young man offers, for £20, to steal evidence from his uncle.<sup>24</sup> To judge by such samples as these, the ethics of the litigious public were not beyond reproach.

Were they better than those of the lawyers themselves? The question cannot be answered from the writers of the time, because the lawyer had long

manorial steward, and country gentleman in one, and his attitude toward litigation is particularly interesting. In practice he was one of the most litigious men in the county, and one of the most successful in making money from it. In theory he deplored recourse to law, and bemoaned "the country malice and envy that rageth in this age with the inferior sort. They recourse to Westminster Hall (our cockpit of revenge) upon each poor action and occasion, the civil wars of my days there raging, wasting more treasure and time than the disunion of the houses of York and Lancaster . . . , one of the main causes why my neighbors grow poor with more, when their fathers grew rich with less."

<sup>1</sup> SMYTH, *op. cit. supra* note 12, at 242.

<sup>2</sup>G. P. L. ms. 16,529, 67-68. The enemy was John Smyth; most of the G. P. L. mss. cited are his private papers.

<sup>22</sup>One Margaret Sparry had some land which was coveted by a gentleman. He summoned her, gave her a drink, and then asked her to sign a paper. When she asked him what it was, he merely replied, "No harm to you, Mother." She then protested that she was too lame to hold a pen, but he "took her hand within his, and ruling both her hand and pen, made some mark, and forthwith put up the same writing, and gave the same Margaret 2s." She thought she had given him a power of attorney, but it turned out to have been a release of her land. From then on she lived in poverty. C 21/G/32/17.

<sup>23</sup>C 21/F/5/6.

<sup>24</sup>This is the only instance I have found of the triumph of ethics (or possibly prudence) over temptation. John Smyth testified that some documents, which were essential to his suit, were offered him by the nephew of his opponent. He questioned the young man, and when he realized "that he intended secretly to take them out of a chest in his mother's said house, by the help of a maidservant there dwelling, this examine resolved rather legally to come by the said forged deed, than to give way to any such suspicious obtaining of it. And so refusing to give one penny, they broke up and parted." G. P. L. ms. 16,529, 59.

been a conventional butt for criticism.<sup>25</sup> The records might be expected to give an answer, but their evidence about the country lawyer is far more meager than that about his client. In view of the vast number of cases, it is surprising how little can be discovered about the men who prepared them. The bulk of legal work in the county was done by local solicitors, yet without leaving any imprint of themselves beyond precise handwriting and formalized English.

The normal position of a country solicitor seems to have been that of legal handy-man, usually for a single client. He might be steward of a manor, in charge of holding its courts; he might be busy searching for his client's title deeds, or ransacking the muniment room to find and copy deeds for other landowners; he might be expected on occasion to act as detective, to prevent a theft or recover stolen property. If his client held a government position, he would also act as his clerk, to keep his papers, write his letters, and make out his various warrants. If he was steadily useful, he was likely to be given a yearly retainer, and to be rewarded at his client's death by a bequest or an annuity.<sup>26</sup>

It is apparent that preparing cases was often the smallest part of a solicitor's life. But even gathering evidence exposed him to ethical problems, and actual litigation must have exposed him to many more. The question of his ethics is an interesting one, but the answer is conjectural. There is only one case of a lawyer who was accused of malpractice, and no conclusions can be drawn from it.<sup>27</sup>

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<sup>25</sup>Such criticism as this, from John Smyth: "Clients, witnesses, jurors, counsel, and judges are men and no angels, . . . neither will be otherwise so long as men are men. . . . Any man may innocently fall by the law: as by ignorance or misprision; by his attorney or counsellor; by practice or combination of the adversary; by perjury of witnesses; by forgery of deeds; by subornation or corruption of witnesses, jurors, or officers in courts; by affection, inclination, or corruption of the judge; and by many other and black ways. . . ." 2 SMYTH, *op. cit. supra* note 12, at 312. There is nothing about this catalogue which is unfamiliar today.

<sup>26</sup>When Henry, Lord Berkeley, was made a justice of the peace, he brought his servant "into equal authority with him, whereby his own unaptness was less perceived, and the business of the country not worse discharged." 2 SMYTH, *op. cit. supra* note 12, at 287; for further references to country lawyers, see *id.*, at 310-11, 333, 343, 349, 355, 371. Smyth's accounts of his disbursements as Lord Berkeley's steward also contain some illuminating entries: a 20s. "reward" to a solicitor "to find our tenure of Cromhall, in his father's office, to be of Berkeley Castle by knight service"; an item of £4 11s. 6d. for "charges at several times . . . about bargains with Bitton men, holding leets and halimotes, and in searches for evidences for Severn, etc., . . . and in reward about the common at New Ham, etc., and for intelligences." G. P. L. ms. 16,525, 32 (3), 35.

<sup>27</sup>A Gloucestershire solicitor was haled before Star Chamber, on the charge of tampering with witnesses in a suit in Common Pleas. He was accused of telling opposing witnesses not to go to London when trial was due, and of bribing one of them to give "faint evidence" against his client; of concocting stories for his own witnesses to tell, and of lending them money; of commenting during testimony, "This goeth well!" He denied all the charges, and admitted only that while he was in London, "some of the said witnesses coming into the company where this defendant and others were, they did then drink together, they being this defendant's neighbors." St. Ch. 5/W/11/1 and 5/W/15/35.

In view of the widespread concern today with preventing the unauthorized practice of the law by corporations, notaries public, and the like, the following decision of Star

This case is significant, however, because of its isolation. Government officials and private citizens, in every walk of life, were constantly being sued on almost every conceivable ground. The lawyers were in the thick of this, and their opportunities for misconduct were obviously legion. The fact that there is almost no record of such misconduct is suggestive. It may be argued that the men who knew the law were just the men to break it with impunity. But they were acting under the eyes of watchful adversaries, and it is logical to assume that malpractice by one lawyer would have been ferreted out by his opponent as often as it is today. The conclusion suggests itself that the ethics of the country lawyer, at least in Gloucestershire, were higher than those of his client.

But whatever his ethics, he was obviously not the man to discourage his client from suing. It was not only the Inns of Court which had a vested interest in the prolongation and multiplication of suits; every country solicitor stood to profit by them. The more writs, the more fees; the more cases in London, the more business in Gloucestershire. "Upon Monday morning last, Mr. Wintour's man came down post with a *precedendo*; whereat I . . . presently dispatched a footman for London, with order that if he missed my friend to whom I had given order to bring another writ . . . , that then he should bring a writ of error. . . ." <sup>28</sup>

Such a bustle was lucrative for the lawyer. His client might be impoverished, even by victory; but the most he himself could lose was a client, and there were always more of those.

To return then to the clients themselves and to their motives for going to the "cockpit of revenge". One motive has already suggested itself, and it is one which has nothing to do with revenge. A large number of lawsuits, then as now, originated in the simple desire for profit, and were conducted on a wholly mercenary basis. Many were not, of course, and these will be considered later; for the moment, the purely business side of the law is worth attention. In an age when the market for capital was limited, many men invested in litigation much as they would today in speculative stocks. A suit was risky, but so was any other form of investment; there were no gilt-edged securities.

The clearest evidence of this motive is the friendliness which often existed

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Chamber has an especial interest. An attorney was acquitted in 1605, but censured "for that he would intermeddle in soliciting or following any cause in any court but where he is an attorney. For no man can be a general solicitor, and the law takes knowledge of none to intermeddle with law businesses but *homo consiliarius* and *in lege peritus* . . . , and they must do it for their fees. Neither can they disburse money for fees or copies but in their own causes. . . . Yet if a man write unto an attorney to instruct or retain counsel, or take out process for him, it is so common and necessary for the poor of the country, that albeit it be an offense against the law, yet this court will not sentence it." HAWARDE, *op. cit. supra* note 17, at 331-32.

<sup>28</sup>G. P. L. ms. 16,531, 69.

among the litigants. "Come on, fellow Kecke, you and I are old companions; we will not fall out for this matter."<sup>29</sup> A sentiment with which many men agreed and which came out in many ways. When a suit over land was pending between John May and Christopher Stoakes, May sent a man to tell Stoakes "that if he pleased to have the matter in controversy between him and the said John May referred [to arbitration], he was willing. If not, that they might go on fairly in a fair proceeding, without any tricks or advantages on either side." Stoakes replied that "he would go on fairly, according to his desire. And thereupon he, this deponent, brought them together, and they dined together that day at the house of the said complainant in Codrington." In the long run they were unable to agree to arbitration, and the suit went amicably on its way. There was no sign of animosity, and no hint that even prestige was involved.<sup>30</sup>

The use of arbitration was a widespread custom, since a settlement out of court was an obvious economy. In some cases it could be effected by a conference of the lawyers on the two sides.<sup>31</sup> In others the arbitrators were selected with elaborate care, and the two parties furnished bonds to abide by their decision.<sup>32</sup> If arbitration was not agreed to voluntarily, it was likely to be imposed from above. When a case was carried before the Privy Council, or even one of the regular London courts, it was often referred back for settlement to some person of importance in the county. If the arbitrator could

<sup>29</sup>C 21/G/32/17. Even John Smyth was not an indefatigable litigant. "Know of Mr. Wyn," he wrote, "what he intendeth in his suit against me, that I may provide accordingly. . . . I will endure no suit, but provide the £600 as shall be fit." G.P.L. ms. 16,528, 24.

<sup>30</sup>C 21/M/11/11. Such friendly litigation was of course no novelty. For examples of it in the 15th century, see Barbour, *op. cit. supra* note 9, at 142.

<sup>31</sup>"If you call the matter in question by law, I shall be ready to answer it. If you hold it the better course to let your counsel and some of mine to talk of it, I doubt not but to satisfy you thoroughly. I have written to our Mr. Baber of Bristol, one of my learned counsel, to be ready to meet you or any of your counsel. . . ." Additional ms. 24,783, 113.

<sup>32</sup>The procedure is best illustrated by one of John Smyth's quarrels. He and his uncle wrote their opponent a letter (in the third person) in which they stigmatized his conduct as "against all law, conscience, and justice, a lawless proceeding unheard of [and] unwarrantable before God and man." But they had no wish for a trial. "In avoidance of suits and expenses, and the unkindness that accompanieth suits in law, they offer that let all the names of the sergeants at law, or readers in court, or of any one house be (after the lottery fashion) written in several papers. Draw you out of the hat any one, to be sole arbitrator; and they will be bound in £1000 bond or more to stand to his end, you doing the like." (G. P. L. ms. 16,533, 115 and v.) In a similar case between two brothers, each bound himself to submit to the award of a group of local gentry chosen by them both. C 24/350/18.

The use of arbitration seems to have come into England with the law merchant, and the method of choosing arbitrators "after the lottery fashion" was an accepted part of that law. See MALYNES, *LEX MERCATORIA* (3d ed. 1686) 305-07; 6 HOLDSWORTH, *op. cit. supra* note 4, (1st ed. 1924) 635, note 11. Arbitration was not recognized by the common law, and the requirement of a bond from each party was the only way to make sure that the award would be enforceable. Even then there were likely to be difficulties which were outside the law, and injustices for which the only recourse was to equity. This was true by the 15th century, but does not seem to have decreased the popularity of arbitration by the 17th. See Barbour, *op. cit. supra* note 9, at 141-42.

not settle it, as he frequently could not, it would be assigned to another local dignitary, and so on until it was settled. A favorite candidate for this sort of work was the lord lieutenant; judges of Assize might also be used, or even a J. P. This seems to have been the only way in which the courts tried to relieve their overloaded calendars, and it had the result of shifting the load to equally overworked county officials.<sup>33</sup>

This discussion of methods and motives leaves open the question of why there was so much litigation; the final answer lies in the nature of the people and the times. But it has clarified some of the tricks and ethics of litigating, and it has suggested that the law was often no more than a form of gambling. This general background can best be filled in by examining the four categories of cases which throw the most light on the life of the times.

By far the most fruitful source of litigation was, of course, the land. Since property engenders dispute, and since the most important form of property was still the earth, lawsuits grew from it like warriors from the dragon's teeth. The question at issue might be the ownership of a good part of the county, but it might equally well be a coalpit in Kingswood Forest, or a warren of rabbits on Eastbury Hill; if the earth had been gold, it could scarcely have caused more trouble. Was this merely because men were quarrelsome? Here is a question which can be answered, and the answer is no.

The major reason for the number of suits over land was the widespread uncertainty of title. This in turn seems to have been due to two factors: the increasing complexity of tenure, and the consequent complexity of the law which governed it. Neither of these factors is within the sphere of this discussion, but their results are. A large part of the land in the county had changed hands many times in the century before 1640, some of it with bewildering rapidity. There was no system of registering titles, and the only proof of ownership was a bundle of leases or conveyances. Any one of them

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<sup>33</sup>For examples of informal arbitration by the council, see Dasent, *op. cit. supra* note 11, *Eliz.*, xix, at 160, 269-70; xxii, at 459-60; xxiv, at 81; xxxi, at 113. For the use of the lord lieutenant as arbitrator, see *id.*, xx, at 254; xxiii, at 91; xxv, at 19. Arbitration by a J. P. is described at some length in a chancery case. The privy council referred a complaint against one Edward Trotman to a local justice, with instructions either to settle it or to bind over Trotman to appear before the council. The J. P. took the latter course, and the council referred the matter to another arbitrator; he reported in favor of Trotman, who was thereupon dismissed. C 21/T/2/14.

A case of arbitration imposed by a common-law court is worth description. A man was sued in Common Pleas for having thrown beer in the face of one William Atwood, "wherewith by mischance the body of the . . . glass did break off from the foot thereof, and so fell upon or near the said Atwood's eye . . ." The court transferred the case to the Gloucester Assizes, where one of the judges "did mediate an end . . . which this defendant and the said Atwood yielded unto." The defendant claimed that he paid Atwood £40 in full settlement of the trespass, but he was later sued in Star Chamber for the same offense. St. Ch. 8/34/14.

The use of local officials as arbitrators, imposed on litigants by the courts or council, seems to be an unexplored aspect of the subject. I have found no mention of it in contemporary or modern authorities, and can only conjecture about its prevalence.

might be lost or stolen, and one missing link might break the chain of proof. Even if the chain were complete, which it rarely seems to have been, a troublemaker might produce an alternative deed, or a claim that the land had reverted to the crown and been regranted without the knowledge of its occupant. It is not uncommon to find some such entry as this, on the margin of a manorial survey: "There is a lease made to John Butler, 29 H. 8, for 70 years, which if it be good, then all Cowles' estate is void."<sup>34</sup> The best title might be called in question, on the off chance of gain to the questioner, and even the most complete records could not always provide a sure defense.

Care in preserving documents was therefore a matter of rudimentary wisdom. John Smyth, in this respect, was wise beyond his generation. He was meticulous in keeping every scrap of written evidence which came his way and assiduous in gathering more. His own records were in perfect order, and even from a distance he knew where each one was. "The statute is in a bundle of bonds on the little shelf in the study, on my right hand as I sit; which take out and safely lock the door again."<sup>35</sup> He was equally zealous in augmenting and preserving the Berkeley muniments in his charge, and had the love of a miser for "these ornaments, more beautiful than Solomon's curtains."<sup>36</sup> But even John Smyth, as we shall see, could not be sure that his bundles of evidence would secure him tranquil tenure.

And Smyth was the exception. The normal landowner kept his old account-books, much as we keep canceled checks; they were a convenient record of payments and receipts.<sup>37</sup> But he does not seem to have been so careful as Smyth about collecting and preserving other documents. It may be conjectured that the carelessness of the average man was a contributing factor in land litigation.

This carelessness is most evident where it is least to be expected, in corporate bodies of the city of Gloucester. At the cathedral, in 1617, "the evidences and other writings of the church lie in a heap together, and are very hard to be found when they should be used."<sup>38</sup> The corporation of the city was even

<sup>34</sup>Lansdowne ms. 885, 105v. For examples of complicated tenure in Gloucestershire, see 3 SMYTH, *op. cit. supra* note 12, at 116-17, 151, 302.

<sup>35</sup>G. P. L. ms. 16,528, 24. "There was never such liberty given, I verily suppose, to search into ancient records as this our time affordeth." Duport to Smyth, in a letter already quoted. G. P. L. ms. RF 354.23, 32.

Most of my evidence about land litigation is for the period before the statute of 1623 (21 Jas. I, c. 16), which established the 20-year rule of adverse possession; see 4 HOLDSWORTH, *op. cit. supra* note 4, at 484-86; 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW (4th ed. 1925) 20. The effect of this statute, during the remainder of the period, is a matter on which I can throw no light.

<sup>36</sup>Smyth to Lady Coke, sister of Lord Berkeley and daughter-in-law of Sir Edward Coke, C. J.; G. P. L. ms. 16,532, 40.

<sup>37</sup>When a Mr. Bartlett, for example, claimed £10 from a yeoman on his bond, the latter answered that he had already paid it to Mr. Bartlett's father. "Why," said Mr. Bartlett, "if it were so, my father would have set it down *received* in his almanac." He looked it up, found the entry, and returned the yeoman his bond. C 21/R/2/8.

<sup>38</sup>Some prebendaries were therefore ordered to catalogue the documents by date. "At

more lax, and at one time found itself in the embarrassing position of having mislaid its charter. A commission from the Council of Wales arrived to enquire for it. The document could not be found, but the enquiry jogged the memory of the dean of the cathedral. "Remembering himself that there was in his little closet over the stairs at his gallery a long patent book, wherein he had not looked what was contained, and conceiving that that cha[rter] might be there, he thereupon took occasion to search therein; and found it to be this charter, and so restored it." Not long after, and quite possibly as a result of this *contretemps*, the widow of the town clerk was promised £30 if she would deliver to the mayor, upon her oath and that of her son, all that she possessed or could come by in the way of written records "which of right do or may concern, belong, or justly appertain to the said city."<sup>39</sup>

So much for the factors which created uncertainty of title. That uncertainty was widespread, and in its turn created numberless opportunities for lawsuits. There is no need to discuss the various county battles over land; their nature can best be illustrated by one example, which is typical in its general form and illuminating in some of its details. John Smyth, as might be expected, was involved in its later stages; the case was what he called "this *tristam et vexatam questionem*, this long controverted and perplexed title" to the manor and school lands at Wotton-under-Edge.<sup>40</sup>

These lands had been in possession of the Berkeley family for centuries, and had been involved in one of the most famous examples of land litigation. This was the great battle between the Berkeleys and the Lises, which was fought in and out of court for 192 years; it cost the lives of a number of the principals, and more than four times what the inheritance of the disputed lands was worth.<sup>41</sup> The title to Wotton was frequently questioned during this time, but always, apparently, a Berkeley bribe would silence the questioner.<sup>42</sup>

The Berkeley-Lisle controversy was settled in 1609. Meanwhile the Wotton lands had been acquired by John Smyth, who was both the Berkeley steward and a gentleman of means. Almost immediately his holdings were in

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all times when the . . . prebendaries shall rise from their sitting, and come out of the treasury, they shall shut all windows, and leave the heap of evidences as safe as they can from either weather or moist places." Ms. cathedral act book, No. 1, 24-24v.

<sup>39</sup>Ms. corporation records (minute books), 1450, 234; 1451, 196.

<sup>40</sup>G. P. L. ms. RX 354.32, 14.

<sup>41</sup>See NOBLESTEIN, *ENGLISH FOLK* (1938) 284-88, 302, 305-11; MacLean, *The Great Berkeley Law-Suit of the 15th and 16th Centuries*, 3 *TRANSACTIONS OF THE BRISTOL AND GLOS. ARCHAEOLOGICAL SOC.* (1878-79) 305-24; 2 SMYTH, *op. cit. supra* note 12, at 288-308, 331-33.

<sup>42</sup>These questioners "have always been sent away by one means or other without having their purpose, as it seemeth, yet not altogether without recompense." (E 134/14 Jas. I/M/28.) Such tactics are typical of the secret moves in this lawsuit. Another example is that of a bargain which was to be closed under cover of darkness: "the less that you . . . are seen in this business, the better the cause is like to speed." G. P. L. ms. RF 354.23, 12.

jeopardy. He discovered, quite to his surprise, that some of the land had been claimed for the crown in Elizabeth's time, under the Statute of Charitable Uses; there had been an inquisition, the land had reverted to the Queen and been regranted by her, and the heirs of the grantees now had a good claim to it. He bought them out, on advice of counsel, and may well have hoped for quiet possession.<sup>43</sup>

He was disappointed. There was another claimant, Benjamin Crokey, who brought suit in Chancery and took possession of part of the land. At once there was a spate of litigation. Smyth sued him for trespass, "proceeded to trial without Crokey's privity," and won the action by default. The result was numerous suits and counter-suits, punctuated with occasional violence. Crokey petitioned Parliament to consider his wrongs, which he described with such emphasis that Smyth sued in Star Chamber for libel. The court ordered the petition burned at the Gloucester Assizes; the printer was fined £100, while Crokey was fined £500 and imprisoned.<sup>44</sup> Smyth was at last secure in his Wotton lands.

This case sufficiently illustrates the difficulty of obtaining a clear title. If it took John Smyth more than 15 years to get one, the difficulty needs no further emphasis. The history of the land in the previous century had been complex, the attitude toward written evidence was casual, and complications in the law and in the courts made speedy settlements almost impossible. With these general observations we may well leave the field of land litigation, and examine a second type of case.

To say that litigation was often a business does not imply that anger and hate were not equally often a part of its fabric. The category of suits arising from acts of violence is obviously the one in which emotional motives predominate. The men of the border counties came of a fighting stock; their tempers were short, and bloodshed was natural to them. Duels among the

<sup>43</sup>G. P. L. ms. RX 354.32, 18-20.

<sup>44</sup>G. P. L. ms. RX 354.20. For the resultant libel suit, see GARDNER, REPORTS OF CASES IN THE COURTS OF STAR CHAMBER AND HIGH COMMISSION (Camden Soc. 1886) 38-40. Some of the remarks in the course of this suit are worth repeating, as indications of what was considered slanderous. At one point Crokey said of Smyth "that I was a church-robber, a Jesuit, and had a black conscience (most maliciously spoken)." (G. P. L. ms. 16,529, 71.) At another point an unnamed opponent, presumably Crokey, called him a Machiavellian, Achitophel, hell-hound, base-born brat; he asserted that the devil would take him and his partisans, and marveled that the ground had not already opened to swallow him up. To round off his insults, he said "that I was running into Virginia." (G. P. L. ms. SF 19.6, 2v.)

The last accusation is typical of a common attitude. Emigration to America was a desperate gamble, often taken as an alternative to a debtor's prison or suicide. "If she would not agree to the selling of the lands in question, he would sell all that he had and go into Virginia. . . ." (C 21/M/11/11.) "God send me to go. If his will be, I shall die, for I had rather die with credit than live with shame. Stick to me, and I hope God will not forsake us. . . . By all means let me go; else shall I have a great loss and shame. . . ." (G. P. L. ms. 16,531, 64.) If Virginia was regarded as the haven of the desperate, the charge that a man was emigrating might well be considered as slander.

gentry seem to have been going out of fashion, perhaps because the refusal of a challenge exposed the challenger to prosecution.<sup>45</sup> But if formal dueling was becoming rarer, informal assault was as common as ever. It often touched off lawsuits which illustrate the temper of the countryman.

Take the case of Thomas Malyn. He became involved in an altercation with his neighbor, Edward Trotman, who referred to him as "dog-face". Malyn answered, not illogically, "that he had a Christian man's face as well as he." Trotman's son then entered the quarrel, by charging at Malyn with an iron-covered stave. The result was a battle royal. Malyn was badly beaten, and apparently helped home by a servant. The next day this servant encountered Trotman, who insisted on his saying, "Edward Trotman reigns in Eastwood like a king". When he refused, Trotman turned him over to one of his henchmen, who beat him to the ground and tried to strangle him. Bystanders cried, "Part them, for shame!" But Trotman answered, laughing, "Let them alone; it is but with fists." His next move was to sue Malyn at the Gloucester Assizes, for assault and battery. The judge tried to direct a verdict for the defendant, which the jury ignored: the plaintiff was awarded nominal damages and costs. Trotman's victory was complete, at least until his conduct was later reviewed in Chancery.<sup>46</sup>

The treatment of Malyn's servant is typical of what a man might expect if he helped another, either with his fists or with his testimony. The danger of being a witness, in fact, was much the same in those days as in these. The methods of the seventeenth century gangster were less effective than the modern, because less deadly, but their intent was the same. If a witness could not be intimidated into silence before he gave his testimony, he could be assaulted later as punishment for it.

An example is a case which concerns a tucker of Minchinhampton. He deposed that he was coming home one evening "fromwards his work", carrying on his back a bag of meal. He was overtaken in a narrow lane by a man with a pike, who said to him,

"Aha, sirrah, art thou here! Thou art one of my father's former witnesses . . . , and didst swear against me in my former commissions. By the wounds of God, I will cut off thy head!"

"And with that struck at him, this deponent; but by means of having the said bushel of wheaten meal upon his neck (stumbling down that narrow lane in haste), by good fortune that stroke of the said plaintiff's bearing bill happened to fall upon the said sack on this deponent's neck,

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<sup>45</sup>Such a case occurred at Tewkesbury, for example, when John Bray challenged Thomas Copley for slandering him. Copley refused, "having wife and many children", as he later explained, "and some estate to lose". Bray then rode through Tewkesbury at market time, and proclaimed in the most crowded parts of town that his enemy was "a backbiting, lying, cowardly knave". He was driven away by Copley's angry neighbors, and subsequently was haled before Star Chamber. (St. Ch. 8/104/2.)

<sup>46</sup>C 21/T/2/2.

by means whereof this deponent then escaped without any hurt. But therewith greatly terrified and amazed, got himself off from the said place into the wood near that place, and went home the nearest way he could to his own house in Minchinhampton aforesaid."<sup>47</sup>

This sort of bullying could of course be most easily practised when the victim, like Malyn's servant, was lower in the social scale. A third case is an instance in point. It is not typical; the records of county litigation contain nothing else like it. But while it is impossible to generalize from it, its implications are suggestive. It shows how far bullying could be carried when the bully was a noble, and there is a flavor of the middle ages about it.

A village yeoman, by the name of Jones, refused to lend money to a son of Lord Stafford of Thornbury. Young Stafford therefore bore him "a privy grudge and displeasure"; he satisfied it by having some men steal Jones' cattle and drive them into Thornbury Castle, "thinking by greatness of birth and by color and pretense of some authority from his said father, to oppress and wrong your said subject, [being] but of small means and power to withstand his outrageous violence." Jones went to the castle to reclaim his property. He was admitted, but only to be beaten, robbed of his money and watch, thrown into a dungeon, and in general treated as "the Turks scarce use the like toward their galley-slaves". He finally escaped, and went into hiding from his persecutors; the cattle meanwhile were either killed or sold. This proceeding "moved all the said country to admiration and great fear", because young Stafford justified it by the claim that Jones and others "were villeins to the said Lord Stafford, and held of him by villeinage tenure of his manor of Thornbury (to the intolerable disgrace, infamy, and hindrance of your said subject)." It was indeed a startling claim. Villeinage had survived longer in Gloucestershire than in most parts of England, but even there it had been ended in 1574. The date of Stafford's assertion was approximately 1602, and its effect on the country folk suggests that they took at least a generation to realize that villeinage was extinct.<sup>48</sup>

So much for violence as a cause and effect of litigation. It was unquestionably an important factor; but it was only one of many, and should not be overemphasized. It can best be put into perspective by considering next a

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<sup>47</sup>Req. [Ms. records of the Court of Requests] 2/190/47. The intimidation of witnesses before trial is best exemplified at the time of the riots in the Forest of Dean, in 1631. Public opinion was on the side of the rioters, and the authorities were instructed by the Privy Council to take great care "that the witnesses to be used for the commission of the delinquents be not withdrawn, either by terror or other practice." Ms. acts of the Privy Council, xli, 158. In spite of all efforts, almost no one was apprehended either as a delinquent or a witness. "I assure you the great fault in these cases is that none will appear to complain, be the fault never so foul and apparent; and so the offenders escape unpunished." S. P. 16/195/9.

<sup>48</sup>Jones sued young Stafford in Star Chamber. (St. Ch. 5/J/19/37.) For the extinction of villeinage see 2 PAGE, *THE VICTORIA HISTORY OF THE COUNTY OF GLOUCESTER* (William ed. 1907) 165.

field of personal relationships in which litigation was rampant, in which emotions were often roused to a fever pitch, but in which violence played little part. This field is the family.

The great majority of suits within the family arose from disputes over marriage. There are numerous cases of other sorts: fathers who are involved in their sons' litigation, a fool who is cozened by his brother-in-law, a spend-thrift who becomes a remittance man rather than waste his estate. But a footnote must suffice for this miscellany.<sup>49</sup> Lawsuits over marriage are the most illuminating as well as the most numerous, and the discussion will be confined to them.

An interesting question arises at the outset. How was such litigation regarded by public opinion? Was it frowned upon as bad form, or tolerated as a pure matter of business? The large number of cases would suggest that no great social stigma was involved, but specific evidence is meager. There is only one case which bears directly on the point. It is obviously insufficient to answer the question, but it is suggestive. A young man discovered, not long after his wedding, that his father was not going to fulfill the marriage agreement made with his wife's father, who by this time was dead. The young husband did not wish to sue his own father, because of "the ill opinion that might perhaps be conceived of your subject's undutifulness and disobedience towards his father, to attempt or prosecute any suits against him in his own name". He therefore arranged to have his mother-in-law sue in her name, as administratrix of her late husband. She did so, and he paid the cost. The suit was dropped, and he discovered that his father had compounded with her to stop it. He then abandoned his scruples and brought suit against both his father and his mother-in-law for conspiracy.<sup>50</sup>

A marriage contract was business of the highest importance. Occasionally it was arranged by the parties themselves, if they had reached an age of discretion; more often it was a matter for their parents, or for friends of

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<sup>49</sup>An entertaining example of a father's involvement is that of Sir John Popham, C.J. He wrote to a man who was suing his son, requesting him to drop his case; "he should have from him anything that was due unto him without law." The plaintiff obeyed. He apparently received less than he thought was his due, but remarked resignedly that "he must rest himself satisfied until it pleased God to take away the Lord Chief Justice." E 134/16 Jas. I/M/19.

The case of the fool has to do with the young lord of a manor, who was "subject to fair words and persuasions". His brother-in-law expressed the fear that "one odd companion or other will cozen the ass of his living", and apparently justified his fear by trying to steal the manor for himself. When asked what would become of his victim, he answered, "Let the fool alone: he was born to die under a hedge." As for his children, "let them learn to beg while they be young!" C 24/237, *Fysher v. Fysher*.

The wastrel offered to will his lands, if he died without issue, to his mother and step-father and their heirs; presumably he would bind himself to maintain the inheritance during his lifetime. In return, he asked for a yearly payment of £10 for life. (C 21/H/22/5.)

<sup>50</sup>Req. 2/190/47.

the family. *Mariages de convenance* were the rule rather than the exception, and the difficulties were in determining the criteria of *convenance*. This was a particularly ticklish matter for the parents of a marriageable daughter. In the first place they had to find a husband, if none appeared of his own free will; they might be unable to do this by themselves and have to call on friends for suggestions.<sup>51</sup> Once the man had been selected and had accepted, the terms of the bargain were discussed with his parents. They might offer, as their son's marriage portion, land to which they did not have a clear title; it was wise, therefore, to have the deeds examined by a lawyer before the contract was signed.<sup>52</sup> Even then the bargain might be canceled at the last minute. Or if the wedding were held, the terms of the contract might later be broken, and the marriage broken with them. The nature of these difficulties and dangers can best be illustrated by the story of a yeoman who married into the gentry.

The central characters are the yeoman, Milles, the girl, Rose Badger, and a brother-in-law of the girl, William Brode. The conditions of the contract were that Rose was to have a £200 dowry, and Milles was to provide a jointure of lands worth £50 a year. As the engagement went on, Milles "seemed not forward to proceed therein, desiring to protract it for a year to see if her affection to him would continue firm and constant." Some time before the date of the wedding, he asked Brode "whether she (the said Rose) was not persuaded by her friends to marry with him . . . ; whether her show of affection to him did not proceed from the persuasion of her friends and not of herself . . ." Brode evaded answering, and accused Milles of being "a cold wooer, in that he had not sent any token unto the said Rose in all the time that he had been a suitor unto her." Milles thereupon gave him a 20s. goldpiece to deliver to his fiancée.

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<sup>51</sup>One such suggestion is worth quoting, as indicating the sort of personal and financial qualifications which were taken into account. A friend writes the father that he has found "one in my judgment that will be a competent, fitting match. . . . The father is a discreet sober man as any in the parts where he lives, and in as good esteem. His estate is £700 a year (all in one parish or near), his son an handsome young man near 20 years of age, and is now of the Temple a student. His father would deliver in possession and make his wife jointure of £300 per annum, and deliver him a very fair house lately built and furnished in present also. Excuse my boldness. . . . If you think well of the motion, you shall . . . receive notice where to have conference both with the father and the son. But this I pray think of: his son is none of these hiffing, fluttering lads, but a sober, hopeful youth, to make a good husband for his wife, and an honorable, staid man, to do his country good service. . . ." G. P. L. ms. 16,532, 74.

<sup>52</sup>Take for example the case of Miss Strange. She had a wedding portion of £700, and her family and friends were determined that the groom's father should be proportionately generous. He assured Mrs. Strange that he would leave his son, in his will, an estate "answerable to the parentage and portion of her said daughter". Another son, however, claimed that part of the land was his. The father was furious, and produced a deed to prove his ownership; the friends of the prospective bride had this examined by a lawyer before they would go on with the match. But the father died soon after the wedding, the brother laid claim to the land, and the family quarrel was taken to court. C 21/C/56/19.

But the "cold wooer" had more substantial reasons for his hesitation. On the day of the wedding, "at the very instant when the said marriage was to be solemnized, and the friends on both sides, with the minister, ready to go towards the church," the bridegroom refused to go on with the ceremony unless he were assured of getting his bride's dowry. He insisted that Brode should give him, there and then, a bond of £500 for the payment of the £200. Brode did so, and the wedding was held. But the marriage begun under such auspices did not last out the month. Milles claimed that Rose was already with child, and refused to carry out his side of the contract. She returned to her father's house, retaliated with the claim that her husband was impotent, and brought suit to have the marriage annulled.<sup>53</sup> It is impossible to say that this marriage went on the rocks because of difficulties with the marriage contract, but that is the strong implication of the testimony.

The contract was not the only source of litigation. Another group of cases, of even more social interest, has for its focus the wedding: attempts to bring it about, attempts to prevent it, attempts to annul it afterward. These cases are heterogeneous, and have little in common beyond the fact that most of them were argued in Star Chamber.<sup>54</sup> They can be discussed only by describing those which most merit attention; three have been selected, and will be dealt with in turn.

The first is the case of a yeoman who was courting a widow. He distrusted his own charms, and enlisted the help of some neighbors. To each he gave a bond of £15 or more, payable if they succeeded in making the match. They did nothing about it, except to offer him a love-philtre which was said to have great potency. He declined, but concealed the offer in order to protect himself from "the disgrace and jest of such as should understand thereof", among whom he particularly feared to find his lady. The holders of his bonds were not slow to capitalize on this fear. They demanded interest, although the condition had not been fulfilled; he paid to keep them quiet. They then milked him as richly as he deserved, until he brought the matter into court.<sup>55</sup>

The second case deals with attempts to prevent a widow from remarrying. Margaret Baugh decided to marry John Burrough, of whom her daughter cordially disapproved: Burrough wanted nothing but her mother's money, which otherwise would come to her. She did her utmost to prevent the marriage, even to imprisoning her mother and forcing her to sign docu-

<sup>53</sup>St. Ch. 8/208/4. A wrangle of two fathers over a marriage contract is vividly depicted in G. P. L. ms. 16,531, 76, 78, 81.

<sup>54</sup>Star Chamber was a favorite court for marriage disputes, when they involved offenses which brought them within its jurisdiction. Routine cases, of course, were settled in the ecclesiastical courts; while a decision there was pending, the Council of Wales might assume temporary jurisdiction. For a case in point, see Hist. Mss. Com., *op. cit. supra* note 17, at 463-64, 480.

<sup>55</sup>St. Ch. 8/303/28.

ments. The widow was impressed by this vehemence, and had a servant look into Burrough's past. Rumor painted it in lurid colors. He had been "a wild man in his youth", but this was not the half of it. "Let her take heed what she doth, for he is not for her turn. For he was laid from the pox in a tub up to his chin, and therefore [I] would wish she should bless herself from ill company." She gave up her plans, "and thanked God that she was delivered out of the snare." But Burrough must have had a way with him: she changed her mind again, the wedding took place, and the daughter had to defend her conduct in court.<sup>56</sup>

The third case is a tangle of suits which arose from an illegal marriage. We see it first through the eyes of a J.P. who provided the license. A husbandman by the name of Wade came to him with a girl, Mary Dyer; they asked for a license, and he had one of his clerks make it out. It was to be taken to the chancellor of the diocese, whose approval and seal were required to make it valid. The license contained the proviso that the marriage might be performed only if it appeared to the clergyman that the couple were of lawful age, and had the consent of parents, and that there was no legal impediment. Wade, according to law, gave a £100 bond with sureties that there was no such impediment. The justice doubtless thought that he had protected himself in a routine procedure, and must have been surprised to be haled before Star Chamber.

For there were enough legal impediments to stop the marriage twice over. The bride was under 14, was first cousin to the groom, and had been forced into the wedding by the grossest coercion. But let her mother take up the story: Wade was a poor servant in her house, who was "somewhat allied unto her" (he was supposed to be her nephew, although he may have been illegitimate). He was set on marrying into the family. When the mother refused him, he made gestures at suicide, and frightened her into discharging him. Since he pretended to be ill, she sent her young daughter with him to carry his things to his mother's house. He and his mother kidnapped the girl. He tried to seduce her, and threatened that if she would not marry him, she would be summoned before the chancellor for living incontinently with him. "She should be whipped on the morrow at a cart's tail up and down the said city of Gloucester, and also should stand at the Cross there in a white sheet all the market time." The child finally gave way. The pair obtained their license, and were married by a "simple and unlearned" minister.

Mrs. Dyer complained to the ecclesiastical authorities. The minister was excommunicated, along with the others involved. She began suit, through an agent, in the Court of High Commission, presumably to have the marriage annulled. Her agent took £20 from her to prosecute the suit, but got

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<sup>56</sup>St. Ch. 8/84/7; see also 9/16.

money from Wade to drop it; with these funds he disappeared. The harassed widow than appealed to Star Chamber.<sup>57</sup>

These examples of marital difficulties lead naturally to the final category of suits to be considered: those which deal with the church. These come under a number of headings, but most of them may be dismissed for various reasons. The study of litigation in the church courts is in general unrewarding, because of the nature of the records. Litigation about recusants and non-conformists occasionally came into the civil courts; the cases are interesting, but too few and disparate to be discussed as a group. There remains a collection of suits which has for its focus the country vicar, and to him the discussion will be confined.

The vicar's position in the community was influential, but it also made him peculiarly vulnerable to his parishioners' dislike. "For my neighbor [the curate], I hold that I have not such an enemy upon the earth. . . . To deal plainly with you, I hold him rather a Machiavel than a politician; and yet he is generally held the greatest politician in Gloucestershire, and covereth all his hidden treachery *sub pretextu pietatis, de quo plus postea.*"<sup>58</sup> A person of this sort—and there were plenty of them in the county—stood an excellent chance of being embroiled with his parishioners.

The most obvious cause of friction was the tithe. The nature of tithe offerings was as confused as the nature of land tenure, and the confusion bred almost as many lawsuits. The vicar was involved in them, wherever he still retained his claim to tithes. While some pastors refused to go to law with their flocks, the normal vicar seems to have been anxious to collect every penny or pig or egg or chicken of his due.<sup>59</sup> The parishioners often became

<sup>57</sup>St. Ch. 8/4/8 and 8/59/29. Another case of annulment is the only example I have found of bigamy. A woman heard that her daughter's husband had one or two other wives living, and asked one of her tenants to investigate. He did so; after much trouble and expense he discovered the other wives, procured "an annulment and divorce", and had the bigamist arrested. The mother then asked him to marry her daughter himself. He consented, on consideration of £10 a year. C 21/P/6/13.

<sup>58</sup>Duport to Smyth, 1608; G. P. L. ms. RF 354.23, 11. The subject of this diatribe was Mr. Staunton, the curate of Wotton-under-Edge. Some 30 years later another native of Wotton remembered (and was ready to prove) that Staunton had been accused of begetting a bastard, and in turn had forced his accuser to desert his family and leave town. In the case of Staunton's successor, the tables were turned: "being accused for living a long time in adultery, [he] quite forsook his country." S. P. 16/354/122.

<sup>59</sup>A genial example of forbearance is Henry Bishop, vicar of Ampney Crucis. He believed that tithes were due him not only on produce, but also on wages at the rate of 2½%; the parishioners, on the contrary, believed that they owed him mere voluntary offerings at Easter. Bishop was not inclined to press the point. When one man offered him 4d., he complained, "Is this all I shall have?" And in regard that he was a poor servant, he did accept thereof. . . ." To most he merely said, "Come, what shall I have?" And what they gave him he would take, which was of some a shilling, of some 6d., and of some less. . . . For he was of a mild nature, and would hardly find fault with any that did him wrong, or did detain any dues from him, and much less sue any man in the law." E 134/16 Chas. I/E/17; see also E 134/16-17 Chas. I/H/4.

adept at evading payment. Sometimes they would resort to tricks; sometimes they would question the legality of the vicar's claim; sometimes they would merely refuse to pay. Any of these courses might produce a lawsuit in an ecclesiastical or civil court. Or they might produce angry words or blows, which in turn would cause a suit. One example will indicate how this worked.

Henry Baynham, the new vicar of Frampton Cotterel, believed that he was entitled to a tithe of wheat from his neighbor, Mathew Buck. The latter claimed that it had been commuted by custom into an annual payment of 2s. 8d.; he continued to pay in kind, but "rather of courtesy than of right". Relations between the two men were strained. Finally the vicar dined with Buck, apparently in an unsuccessful attempt at reconciliation. According to Buck's story, the vicar became drunk and abusive during dinner, and had to be helped home. On the way he railed against Buck, "saying he was a better man than Mr. Buck, and kept better cheer at his table; and he scorned Mr. Buck's victuals." At this moment Buck appeared by chance, overheard him, and replied, "Thou sayest true, Parson. Come, we will go drink a pipe of tobacco. . . ." The parson answered, "I care not for thee nor thy tobacco!" He rounded this off by insulting Buck, and refusing to give him the wall. The result was a free-for-all fight, during which Buck or one of his servants bit off the vicar's ear. In this way there grew, from a few bushels of wheat, a lawsuit in Star Chamber.<sup>60</sup>

Another fruitful source of trouble was the vicar's sermons. If there were black sheep in the parish, it was his duty to make them at least grey. When private persuasion failed, his last resort was to denounce them from the pulpit. This was dangerous, for the black sheep of the period had means of retaliating. The most obvious method was to match denunciation with slander or libel.

"It is generally reported in Oxford and here

That Mr. Knollis is a papist and frere [friar] . . . .

A mumbling priest our parson is,  
And indirectly got his benefice."<sup>61</sup>

Such words, as might be expected, were often inadequate to express the countryman's anger. When the vicar himself was capable of violence, it is no wonder that his cloth did not protect him from retaliation in kind; meekness was an almost unknown beatitude. A quarrel would lead to slander,

<sup>60</sup>St. Ch. 8/75/6.

<sup>61</sup>The presumed authors of this libel later made doubly sure that it would be a Star-Chamber matter. They went to an alehouse, where they "did then and there, drink, bowse, and debowse, until they were all very near drunk and cupshot." In this state they broke into the village church of Withington, and rang the bells for half an hour. When the parishioners had assembled, one of the drunkards made a proclamation: "Know all men that [we] rang the bells for Knollis' calf, and we rang them backward because it was a bull calf." As a result the vicar sued them. St. Ch. 8/190/34.

slander would lead to blows, and blows would lead to the courts. The best illustration is the scandalous affair at Barnsley.

The vicar had denounced a number of his parishioners from the pulpit. One of them retaliated by calling the vicar's wife a collier's daughter. She answered this by having him soundly beaten by some men of her acquaintance, a proceeding which the vicar endorsed. "His wife, being a young woman and a gentlewoman, could do no less than she had done, in regard of her reputation and credit." The fat was then in the fire, and the village quarrel was blazing merrily. The vicar's enemies denounced him with Rabelaisian thoroughness. They called him, among other things, a fool, ass, dolt, puppy, black dog; a shameless fellow, vile in his life; a wicked slanderer, a horrible liar, an impudent slave and caiff; a proud Pharisee and dishonest idiot; a simple, shallow-pated fellow; a common preacher of seditious doctrine, a common goer from house to house to make dissension between men and their wives, and a common quarreler and infringer of his Majesty's peace. The counterblast from the vicarage is not recorded, but it seems to have been colorful enough to anger the other side beyond mere words. A group of men waylaid the vicar in the street, "and did rend and tear your said [subject's] gown from his back, and forcibly and most barbarously hale, drag, and pull your said subject up and down the street, and through the dirt and mire, and thrust and pull your said subject into a most filthy and loathsome sink in the same way." There we have our last sight of this particular member of the church militant.<sup>62</sup>

Vicars of this sort were as likely to be at odds with each other as with their neighbors. Two men might lay claim to the same vicarage, and fight it out in the streets and in the courts much as Smyth and his opponents fought over the manor of Wotton.<sup>63</sup> A man might be removed from his living by the ecclesiastical authorities, and then barricade himself in the vicarage against his legally appointed successor.<sup>64</sup> These pastors were of their time; if their calling made them more peaceable than their neighbors, there is no

<sup>62</sup>St. Ch. 8/38/5.

<sup>63</sup>A case in point is the quarrel over the rectory of North Cerney, in 1634-36. The two claimants fought even in church, until the Privy Council intervened to make peace by the mediation of local J.P.'s. Two years later the incumbent was violently ousted by his rival; he in turn was ousted by the J.P.'s, and the matter was referred to the courts. Ms. acts of the Privy Council, xliv, 88-89; xlv, 161-62, 209-10; xlvii 138-39.

<sup>64</sup>Such a case occurred in Minchinhampton. The rector was a man of strong temper. He abused the town constables, "and said they came out of a meal-bag (they being bakers by their trade)". He accused some J.P.'s of bribery, "and further publicly said that he did think in his conscience there was never a gentleman nor justice of peace in the shire indued with the spirit of God, but [they] were dissembling hypocrites." He was removed as rector in 1618 by the Court of High Commission. When the undersheriff came to evict him, he found some 20 men barricaded in the rectory. They defied him, and told him that the matter "will set the king and the bishops and the best in England together by the cars shortly." The undersheriff went away to get help, and also to consult the nearest lawyer about the validity of his writ. Reinforced and reassured, he came back and violently ousted the occupants. St. Ch. 8/85/13.

evidence to prove it. Their blood was thicker than their cloth, and that blood was quick to anger and violence.

This glimpse of the country vicar may well close the survey. It has raised a number of questions about litigation, and answered some of them. But this is incidental to its purpose, which is to bring to life people who have been dead for three centuries. Those people left behind them few hints about themselves; by our standards they were a laconic lot. But because they loved to go to law, they had to tell the lawyer and the judge something of their nature, and these homely revelations were filed away in the archives of the courts. The depositions in Chancery or Star Chamber, if read in their entirety, would be more illuminating than all the printed sources for the period. Men and women are seen as they were, talking about their troubles and angers and chicaneries, speaking almost as they spoke, coming alive even through the stilted English of the lawyers. But no reader or group of readers, in a lifetime, can know all these people through all their testimony; there is too much of it. It must therefore be sampled in some way. The sample of a county does not seem to have been tried before, and the results are provocative: from hundreds of dusty pages, a country community emerges and takes substance. In its own small way, this community was helping to mould our modern heritage of English law. For history, and the law as a part of it, have been made by forgotten men as well as famous ones, and these quarrelsome folk by the Severn were of the stuff of English history.