THE CUSTOM OF LONDON

IN selecting the subject of this paper " The Custom of London " I am conscious that I have selected a subject which has already been touched upon in a previous paper, " The Privileges of the City of London ", but as the subject is so extensive, I trust you may feel that it is worthy of a paper to itself.

When the rules governing admission to the freedom of the City are called in question, and authorities to support them are asked for, the answer is sometimes, " An order of the court of Aldermen," or " An order of the court of Common Council "; but, more often than not, it is simply, " The custom of London ". Orders of the court of Aldermen and orders of the court of Common Council are recorded in the City's books and can be produced, but proof of the custom of London is a much more difficult matter, and may require extensive research. What, then, is the custom of London, and where is it to be found?

As to what it is, the answer is that it is the customary law of the City. As to where it is to be found, it must be looked for in the City's charters; in its Letter Books, Repertories, and Journals; in law reports and the writings of lawyers; in the compilations of chroniclers and antiquaries; and in the official memoranda, casebooks, and writings of the City's own officers.

Let me say at once that it is not possible to enumerate all the customs of London that have existed or that now exist. Their scope and variety are too great, for they have concerned themselves with such diverse matters as orphans, apprentices, feme sole merchants, market overt, foreign attachments, testamentary dispositions, speaking contemptuous words of Aldermen, and the detention and sale of horses by innkeepers.

The earliest confirmation of the Customs of London, is of course, to be found in the famous Charter of William the Conqueror, but the real corner stone of the structure as we know it to-day was laid by Henry I in his Charter of 1132, which was re-affirmed by his grandson, Henry II.

These charters, while they prove the antiquity of the customs, do not, apart from reference in the most general terms, tell us much about their precise nature; and for a very good reason. That eminent historian of the English constitution—Bishop Stubbs— in discussing the Charters of boroughs in the time of Henry I explains that the customs mentioned so constantly in them were the common or customary laws which had existed in the boroughs immemorially as by-laws. These customs were not rehearsed in the charters, partly because of the difficulty of enumerating them, and partly because, as the boroughs were given power to alter and amend them, it would not have been well to have placed them in solemn record in a charter, which might have been regarded as infringed by any attempts at

alteration. The safest way to perpetuate customs, at a time when the whole law of the land was customary, was by oral tradition.

This method has never really been abandoned. It is true that the customs of London have been reduced to writing in the shape of orders, ordinances, acts and resolutions of the court of Common Council and the court of Aldermen, as well as in reported judgments in the City's, and the superior, courts of law; but these sources are looked to only when a custom is disputed. The everyday knowledge of custom that enables the work of certain Corporation offices to proceed is acquired by seeing customs at work and learning to do what has been done before.

Just as we rightly regard the Corporation of London as the mother of Local Government, so it may be said that the customs of London is the mother of the customs of Boroughs and other cities which were directed to refer to London when they were in doubt about what to do. Thus, in 1327, we find London answering a list of questions from Oxford about custom and procedure in London, because it was laid down in Oxford's charter of 1229 that they should be of one and the same law and custom as the citizens of London.

In London the earliest surviving code of by-laws is the " Assize of Buildings ", drawn up in the year 1189. One of its provisions dealt with the obstruction of views from windows by building on adjoining land, and the substance of this provision was pleaded as a custom of London in the 17th century.

Custom is a local law that is contrary to, or not consistent with, the general common law of the realm; but the common law itself is rooted and grounded in custom. When the whole law of the land was customary, customs varied from place to place. Some were good, some bad; some were disputed; and some came into conflict with others. Gradually there was built up in the King's court a body of general custom common to the realm, and this is the beginning of the common law, which grew by subduing and incorporating customs.

The customs of London are therefore local laws that have existed immemorially and have not been incorporated in the common law or destroyed by statute but have survived by reason of their local value and particular application.

The charters—or rather the customs and liberties confirmed and granted by them—were not infrequently seized or " taken into the King's hands ", but were always restored.

The last seizure arose out of a quarrel with Charles II, the upshot of which was that on 4th October, 1683, after proceedings in the court of King's Bench on an information in the nature of a Quo Warranto, judgment was entered up against the Corporation confiscating its privileges and franchises. The Common Council went into abeyance, and the court of Aldermen, eight of whose members were turned out and replaced by nominees of the King, became the governing body of the City. But there was no surrender of the City's charters, as there was of those of the livery companies and of other boroughs.

The City remained in the King's hands until October, 1688, when its privileges and franchises were restored by a deed of restitution under the great seal. This was not enough, and in 1690, after the accession of William and Mary, Parliament enacted the statute 2 William and Mary, chapter 8. This statute annulled the judgment on the Quo Warranto; it ordained that the mayor, commonalty, and citizens of the city of London should for ever remain and be a body corporate and politick " in re, facto, et nomine " by the name of the mayor, commonalty and citizens of the city of London; it made void all charters and like instruments granted to the Corporation and to the livery companies since the judgment on the Quo Warranto either by Charles II or by James II; and it declared, in words that are worth remembering, that the mayor, commonalty, and citizens should have and enjoy all " their rights, gifts, charters, grants, liberties, privileges, franchises, customs, usages, constitutions, prescriptions, immunities, markets, duties, tolls, lands, tenements, estates, and hereditaments whatsoever," which they lawfully had at the time of the pretended forfeitures. " This ", says one historian of the City, " being the last confirmation of the rights and privileges of the citizens, ought justly to be known by all."

We must always remember that custom is a living thing capable of the modification and extension inherent in the process of growth.

General customs may be extended to new things which are within the reason of those customs. Thus, in 1595 the custom of London that allowed an executor to be sued for the debt of a deceased citizen was held to extend also to an administrator.

Or again, take the custom, still in use, that allows service at sea or in the king's wars to count as part of the term of an apprenticeship. In 1751, the clerk of the Chamber noted in his casebook of precedents: " all service at sea being allowed is a modern custom, it anciently using to be in the King's service only ".

So much for the power to amend; now for the manner in which it is exercised. The clause in Edward III's charter directs the mayor and aldermen, with the assent of the commonalty, to ordain fit remedies for hard and defective customs and make provision for matters newly arising.

Any amendment of a custom should, according to the charter, be made by the mayor, aldermen, and commonalty in the form of an ordinance. An ordinance, in modern practice, is an act of Common Council, which, like an act of Parliament, is introduced as a Bill and read three times, thereupon becoming one of the laws of the City binding on the citizens in general. Yet one notable amendment did not take the form of a by-law, because the law officers of the Corporation reported against the expediency of such a course. In 1835 the court of Common Council agreed by resolution to vary an established practice sanctioned by a 400-year-old ordinance, and permit admissions to the freedom of the city to take place without the intervention of the companies. But to make provision for a natural consequence of that resolution—the binding of apprentices to

freemen not belonging to the companies—an act of Common Council was passed.

The next point to be considered is the manner in which customs are extinguished or destroyed. The common law may be summarised as follows: " Custom, being in effect local common law within the locality where it exists, can only be abolished or extinguished in the same manner as other laws can be abolished, namely, by Act of Parliament. An Act of Parliament may abolish a custom either by express provision or by the use of words which are inconsistent with the continued existence of the custom ".

There are many instances of abolition by express provision. Perhaps one of the best known is the Act II George I c. 18, which abolished all restrictions on testamentary dispositions in London. Until the passing of this act, custom allowed a freeman who had a wife and children the free disposal by will of only a third part of his personal estate, the other two thirds being divided as to one half for his wife and as to the other half for his children in equal shares. There were restrictions, too, on the disposal of his real estate. The custom of London in this matter was originally the common law of the land, which survived in London long after it had been abolished elsewhere by act of Parliament. Because it survived, it came to be looked upon and treated as a local law or custom.

As to the abolition by the use of words inconsistent with the continued existence of the custom, a modern instance is provided by the Sex Disqualification (Removal) Act, 1919. The custom of London did not permit a married woman to enjoy the freedom. If she was free before being married, her freedom was in suspense during coverture, and was restored to her if she survived her husband. The act of 1919 enabled a married woman to exercise a public function. That meant she was eligible for the Common Council, and to be of the Common Council she had first to be free of the City, which custom forbade. The law officers of the Corporation gave it as their opinion that, as the Act clearly intended a married woman to be eligible for the Common Council, the custom of London forbidding her admission to the freedom could no longer be set up by the Chamberlain as the only reason for refusing to admit her. So, in 1923, the court of Common Council passed a resolution to that effect. It was, however, only a formal placing on record of an amendment implied by the words of an act of Parliament—not an attempt at amendment on the part of the Common Council itself.

The Corporation by virtue of Edward III's Charter, claims the power to abolish customs, and there are many instances of its exercise.

An outstanding one was in 1856, when the Corporation by act of Common Council abolished all laws and customs prohibiting any other persons than freemen from carrying on business by retail or exercising any handicraft or other lawful trade or calling within the City and liberties.

Three further matters call for particular mention. The first is that a custom is not destroyed by being embodied in a by-law of an

ancient corporation, or by being sanctioned by an act of Parliament. Neither the by-law nor the act takes the place of the custom, which is still pleadable.

The second is that charters granted to the Corporation provide that the customs of London cannot be destroyed by non-user or abuse. The common law draws a distinction between the right that forms the subject matter of a custom and the user and enjoyment of that right. No amount of non-user, not even a period of 150 years, will extinguish a right that is found to exist; but an interruption of the right, no matter for how short a period, will extinguish it. In other words, non-user does not destroy, but abuse can. So the saving in case of non-user granted by the City's charter gives no protection denied by the common law; but the saving in case of abuse does. An illustration of the working of the latter is provided by the case of the Loriners' Company. This company has a limited livery, and in 1933 it was discovered that the number of its liverymen on the Common Hall register was, and had been for 50 years, well in excess of the limit set by the court of Aldermen. The company contended that the Corporation, having accepted as fully qualified voters in Common Hall all the liverymen returned by the company, was estopped from denying the company's right to have elected them. It was not necessary, however, for the Corporation to argue the merits or demerits of this contention—and there was much to be said for it as well as against it—because " it had been repeatedly laid down in charters issued and confirmed by acts of Parliament that there can be no estoppel either from non-user or abuse of the rights, privileges, and authority of the Corporation." In due course, to regularise the position, the company was granted an increase of livery to cover the numbers already elected.

The third is that the courts will not accept a custom that they judge to be unreasonable. Two authorities may be quoted. When the mayor and aldermen returned a custom to disfranchise and commit a freeman for speaking opprobrious words of an alderman, the court ruled that a fine might be imposed in such a case, but the custom would not hold good, notwithstanding the act of confirmation of the City's custom, which does not extend to unreasonable customs. In another case, Lord Chief Justice North said, " we can overrule a custom, though it be one of the customs of London that are confirmed by act of parliament, if it be against natural reason."

And a final word as to how the customs of London are ascertained and proved. The method of ascertaining a custom may be described briefly as a search for precedents, and the best precedent is a reported case in a superior court in which the custom has been certified by the Recorder and accepted by the court as valid. Failing that, the next best precedent is a reported case in which the custom has been accepted by the court *and* the parties to the action as settled law without the Recorder's certification of it. An interesting illustration of the latter method is to be found in the case of the Poulters' Company v. Phillips, Common Pleas, 1840, in which Chief Justice Tindal in the course of his judgment on a matter arising upon

the validity of a by-law of the Poulters' Company said, "It was agreed by both the learned Counsel who argued the case that before a person can be admitted a Liveryman of any of the companies he must be a freeman of the City of London."

This case constitutes an acceptance by the Court and the parties to the action of a well-established custom.

If both these sources fail, then the custom can be ascertained only by tracing it as far back as possible in the City's records. The method of proving a custom of London is peculiar to London. Generally speaking, it may be said that to prove an ordinary custom it is necessary to satisfy a jury that the alleged custom has existed immemorially, in other words since the year 1189; that it is both reasonable and certain; and that it has continued without interruption since its immemorial origin. The customs of London, on the other hand, being the laws of the City, are, when disputed, referrable to the City, which is privileged to state its own laws by word of mouth of the Recorder to the court, the court accepting it as good law or rejecting it as bad law without submitting it to a jury. If the custom as stated to the Court is accepted, then the party relying on it receives the benefit of it without having had to prove it.

The only exception is where the corporation is a party to the action in which the custom is alleged, or is interested in the outcome of the action, when the ordinary rules for proof of a custom must be applied.

This exception rests on the authority of a 17th century judgment given in the court of Common Pleas, and is in direct conflict with the provision of Edward IV's charter of 1462, which allows the mayor and aldermen to certify their customs even though they themselves are parties to the action. In this particular case, the point argued before the court was whether it was a good custom that allowed the mayor and aldermen to certify a custom which concerned the interest of the corporation. The Judges held that it was "against right and justice, and against natural equity to allow them (the mayor and aldermen) their certificate, wherein they are to try and judge their own cause."

A custom is never certified by the Recorder in the City's courts of law, because the customs of London are part of the *lex loci;* they are a part of the law that is administered in those courts.

In conclusion may I say that it has become with me a habit of thought to liken the Custom of London to the ubiquitous Plane Tree which by a continuous process of shedding its bark preserves in the midst of our congested City its health and strength.

So with the custom of London. So long as it is prepared by a continuous process to shed the superfluities when they cease to accord with the ever changing conditions of life of the Citizens, while at the same time jealously guarding the essentials, so long will the custom of London, or for that matter the very Corporation itself, live and flourish.