OXFORD

AN INTRODUCTION TO English Legal History

Fifth Edition

SIR JOHN BAKER

AN INTRODUCTION TO ENGLISH LEGAL HISTORY

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Preface to the Fifth Edition

This edition retains the structure and coverage of its predecessor, but it has been substantially revised throughout and parts have been rewritten. It might be thought that legal history would not need much revision. In truth, it can become outdated with surprising rapidity. Although historical facts do not change, information which has been known for many years can be reinterpreted or reassembled in different ways, and new evidence is always coming to light. Original source material is now more freely available than ever before through the internet – almost to an overwhelming extent – and yet many sources of the common law remain in manuscript and cannot be found online. In the case of an elementary book such as this, there are added difficulties arising from the wide range of periods and topics addressed: the need to abridge and simplify voluminous and complex matter, with the added dimension of time, presents challenges which can never be fully overcome.

It is gratifying to notice how much legal history has been written since the fourth edition of this book appeared in 2002; but then, to some who will read this edition, that amounts to a whole lifetime. Particular attention should be drawn to the *Oxford History of the Laws of England*, the first volume of which appeared in 2003. Although more than half of the series remains to be completed, the six volumes already in print are a deep store of information and insight, and it is hoped that more will appear in the near future. A great deal of new scholarship has also been gathered in *Comparative Studies in Continental and Anglo-American Legal History*. Some of the most awkward remaining gaps in basic knowledge have been in the area of public law, a subject long neglected by English legal historians. But a new interest in the history of constitutional law was awakened by the commemoration of Magna Carta in 2015, and this is reflected in the author's monograph *The Reinvention of Magna Carta 1216–1616*. Some of that interest has percolated here and there into this edition.

The present edition takes account of relevant new discoveries and interpretations, and of the second (enlarged) edition of *Baker and Milsom*. It would be impossible, however, to incorporate all the new learning into this single volume, which is an introduction rather than an encyclopaedia. The aim of an elementary textbook cannot be to trace the history of every aspect of the law and the legal system, or to weigh all the conflicting opinions on difficult questions, and so the concentration has been on the main characteristics, institutions, and doctrines of English law over the longer term – and particularly the evolution of the common law before the extensive statutory changes and regulatory regimes of the last two centuries. This policy has inevitably resulted in the exclusion of some whole areas of law and practice which have been important in their time, or which have grown in importance in recent times, where their proper treatment would have required major diversions and more pages than these two covers can contain.

Another reservation concerns the relationship between law and time. Law does not develop in a vacuum, because it operates in direct connection with real life, and yet the relationship between legal development and social or economic change is less direct or

automatic than might be supposed. Straightforward cause and effect are most likely to be discernible in the case of legislative reform, where the law is changed deliberately and suddenly in order to address a perceived defect. But even legislation, as will be seen repeatedly throughout the book, was for most periods before the nineteenth century regarded as a way of restoring, repairing, or reinforcing the common law rather than supplanting it with something wholly new. If the common law itself sometimes lagged behind society, it was because judges did not like deliberately to overturn the wisdom of their predecessors. Many of the larger changes in the law came about less through the explicit reversal of settled law than through unconscious shifts in the underlying assumptions. Only changed assumptions can explain, for example, how judges could take a benevolent approach to legal fictions which might otherwise be seen as brazen attempts to undermine the law. But gradual evolution makes for long stories. How far those legal stories can be aligned with the factual state of society in specific periods is the difficulty. Social changes obviously raise new legal questions, but they do not in themselves dictate the answers or indicate at what point in history the answers will be forthcoming. Inclinations towards change were rarely unanimous, and they usually only led to an alteration in the common law once thinking had shifted so generally that it seemed inevitable. In any case, since judges and legal advisers were obliged to operate within the existing frameworks of legal rather than popular thought, they had to find intellectually manageable ways of squaring evolution with inherited wisdom. Even when everyone could see the need for some new legal remedy, the process of finding one – in a system tied constitutionally to the ancient forms of 'due process' – might require considerable ingenuity.

For such reasons as these, it was not practicable for the present purpose to map developments in the law against changes in the temper of succeeding ages by taking one period at a time. It may seem elementary to divide history into periods, and that is the scheme of the much larger *Oxford History*, but in a briefer survey of long-term developments and lines of thought it would mean leaving lots of loose ends at the end of every section. A seamless web is more readily understood by tracing the threads than by cutting it into pieces. This introductory history is therefore, after the initial chapters, arranged by legal or institutional topics, each of which is approached more or less chronologically.

I am grateful to all my colleagues in the world of legal history, and to my wife Liesbeth van Houts, for raising and discussing various questions over the years. Professor Yuzo Fukao's heroic enterprise of translating the fourth edition into Japanese in 2010–11 resulted in many helpful suggestions for improvement to the wording, and sometimes to the thinking as well. Above all, I should record my lifelong indebtedness to the work of Professor S. F. C. Milsom, who died in 2016. I attended his undergraduate lectures over fifty years ago and have never lost my fascination with the subject into which he inducted me. My own attempts to write legal history over five decades have made me appreciate more and more every year the genius of his insights, the elegance of his writing, and the enduring power of his scholarship.

John Baker
April 2018

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From 1963 statutes are cited by the calendar year instead of the regnal years of the parliament in which they were passed: Acts of Parliament Numbering and Citation Act 1962 (10 & 11 Eliz. II, c. 34)

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William IV, 26 June 1830–1837
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House of Saxe-Coburg and Gotha
Edward VII, 22 Jan. 1901–1910

House of Windsor[2]
George V, 6 May 1910–1936
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George VI, 11 Dec. 1936–1952
Elizabeth II, 6 Feb. 1952–

[1] Victoria was a Hanoverian by birth but did not succeed to the kingdom of Hanover because the Salic law of succession barred female inheritance there.

[2] The name was assumed by royal proclamation of 17 July 1917 because an English title was deemed more appropriate during the war with Germany than that derived from Queen Victoria's German husband, Prince Albert of Saxe-Coburg.

List of Abbreviations

AALT	Anglo-American Legal Tradition (aalt.law.uh.edu). This site provides access to photographic images of almost all the plea rolls and Chancery decree books in the PRO up to the 17th century.
Adventures of the Law	P. Brand, K. Costello, and W. N. Osborough (eds.), *Adventures of the Law* (2005). BLHC papers (Dublin).
AJLH	American Journal of Legal History.
Ann. Reg.	*Annual Register* (1758–). References are to the Chronicle section.
B. & M.	J. Baker (ed.), *Baker & Milsom Sources of English Legal History: Private Law to 1750* (2nd edn, 2010).
Baker, *CPELH*	*See CPELH*
Baker, *Magna Carta*	J. Baker, *The Reinvention of Magna Carta 1216–1616* (2017).
BIHR	Bulletin of the Institute of Historical Research (in 1987 renamed Historical Research).
BL	British Library, London.
Bl. Comm.	W. Blackstone, *Commentaries on the Laws of England* (1765–69), 4 volumes. Reprinted, with notes, and a concordance of variant editions, 2017.
BLHC	British Legal History Conference. The conference papers are cited by the short-titles in this table.
Bracton	*Bracton on the Laws and Customs of England* (G. E. Woodbine and S. E. Thorne ed., 1968–77), 4 volumes. Cited by volume and page.
Brand, *MCL*	P. Brand, *The Making of the Common Law* (1992). Collected essays.
Bro. Abr.	R. Brooke [d. 1558], *La Graunde Abridgement* (1573).
C	Chancellor.
Caryll Rep.	*The Reports of John Caryll* (J. H. Baker ed., 109–110 SS, 1999), 2 volumes.
CB	Chief baron of the Exchequer.
ch.	chapter.
CJCP	Chief justice of the Common Pleas.
CJH	Criminal Justice History.
CJKB	Chief justice of the King's Bench.
CLJ	Cambridge Law Journal.
Co. Inst.	E. Coke [d. 1634], *Institutes of the Laws of England* (1628–44), 4 volumes. The first part is cited as Co. Litt.
Co. Litt.	Coke's *Commentary on Littleton*, the first part of Co. Inst. (q.v.), first printed in 1628; latest edn, with notes, by F. Hargrave and C. Butler (1832).
Communities and Courts	C. Brooks and M. Lobban (ed.), *Communities and Courts in Britain, 1150–1900* (1997). BLHC papers (Durham).

Cornish & Clark	W. R. Cornish and G. de N. Clark, *Law and Society in England 1750–1950* (1989).
CP	Court of Common Pleas.
CP 40	Public Record Office, plea rolls of the Court of Common Pleas. Photographic images of the rolls up to 1627 can be found on the AALT website.
CPELH	J. Baker, *Collected Papers on English Legal History* (2013), 3 volumes.
CPMR	*Calendar of Plea and Memoranda Rolls Preserved among the Archives of the City of London* (A. H. Thomas and P. E. Jones ed., 1926–61), 6 volumes covering the period 1323–1482.
CSC	Comparative Studies in Anglo-American and Continental Legal History.
CUL	Cambridge University Library.
D	defendant (in footnotes).
Dialogue of the Exchequer	R. FitzNigel, *Dialogus de Scaccario: the Dialogue of the Exchequer* [1177/89] (E. Amt ed., 2007).
EELH	S. E. Thorne, *Essays in English Legal History* (1985). Collected essays.
EHR	English Historical Review.
English Law and Literature	L. Hutson (ed.), *The Oxford Handbook of English Law and Literature, 1500–1700* (2017).
Essays AALH	Association of American Law Schools, *Select Essays in Anglo-American Legal History* (1907–09), 3 volumes.
Fifoot, *HSCL*	C. H. S. Fifoot, *History and Sources of the Common Law* (1949).
Fitz. Abr.	A. Fitzherbert, *La Graunde Abridgement* (1577 edn). The 1st edn was printed without title in 1514–16.
fo.	folio.
Glanvill	*The Treatise on the Laws and Customs of England commonly called Glanvill* [*c.* 1187/89] (G. D. G. Hall ed., 1965).
Hale, *Selected Writings*	M. Hale, *On the Law of Nature, Reason, and Common Law: Selected Jurisprudential Writings* (G. J. Postema ed., 2017).
HL	House of Lords.
HLR	Harvard Law Review.
HLS	Harvard Law School.
Holdsworth, *HEL*	W. S. Holdsworth, *History of English Law* (1922–66), 16 volumes.
Ibbetson, *HILO*	D. J. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999).
IJ	Irish Jurist (new series).
JCP	Justice of the Common Pleas.
JHB MS.	Manuscript in the writer's possession.

JHCL	J. W. Cairns and G. McLeod (ed.), *'The Dearest Birth Right of the People of England': The Jury in the History of the Common Law* (2002). BLHC papers (Edinburgh).
JKB	Justice of the King's Bench.
JLH	Journal of Legal History.
Judges and Judging	P. Brand and J. Getzler (ed.), *Judges and Judging in the History of the Common Law and Civil Law: from Antiquity to Modern Times* (2012). BLHC papers (Oxford).
KB	Court of King's Bench.
KB 27	Public Record Office, plea rolls of the Court of King's Bench. Photographic images of the rolls up to 1614 can be found on the AALT website.
Kiralfy, *Source Book*	A. K. R. Kiralfy, *Source Book of English Law* (1957).
Law and Authority	M. Godfrey (ed.), *Law and Authority in British Legal History, 1200–1900* (2016). BLHC papers (Glasgow).
Law and Legal Process	M. Dyson and D. Ibbetson (ed.), *Law and Legal Process: Substantive Law and Procedure in English Legal History* (2013). BLHC papers (Cambridge).
Law and Social Change	J. A. Guy and H. G. Beale (ed.), *Law and Social Change in British History* (1984). BLHC papers (Bristol).
Law in the City	A. Lewis, P. Brand and P. Mitchell (ed.), *Law in the City* (2007). BLHC papers (London).
Law, Litigants and the Legal Profession	A. H. Manchester and E. W. Ives (ed.), *Law, Litigants and the Legal Profession* (1983). BLHC papers (Birmingham).
Law-making and Law-makers	A. Harding (ed.), *Law-making and Law-makers in British History* (1980). BLHC papers (Edinburgh).
Law Reporting in Britain	C. Stebbings (ed.), *Law Reporting in Britain* (1995). BLHC papers (Exeter).
Law's Two Bodies	J. H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (2001).
Laws and Customs	M. S. Arnold and others (ed.), *On the Laws and Customs of England: Essays in Honor of S. E. Thorne* (1981).
Laws, Lawyers and Texts	S. Jenks, J. Rose and C. Whittick (ed.), *Laws, Lawyers and Texts: Studies in Medieval History in Honour of Paul Brand* (2012).
Lawyers, Litigation and English Society	C. Brooks, *Lawyers, Litigation and English Society since 1450* (1998). Collected essays.
LC	Lord chancellor.
Learning the Law	J. A. Bush and A. Wijffels (ed.), *Learning the Law: Teaching and the Transmission of Law in England, 1150–1900* (1999). BLHC papers (Cambridge).
Legal History in the Making	W. M. Gordon and T. D. Fergus (ed.), *Legal History in the Making* (1991). BLHC papers (Glasgow).
Legal History Studies 1972	D. Jenkins (ed.), *Legal History Studies 1972* (1975). BLHC papers (Aberystwyth).
Legal Record and Historical Reality	T. G. Watkin (ed.), *Legal Record and Historical Reality* (1989). BLHC papers (Cardiff).
Legal Records and the Historian	J. H. Baker (ed.), *Legal Records and the Historian* (1978). BLHC papers (Cambridge).

LHR	Law and History Review.
Lib. Ass.	*Liber Assisarum* (1679 edn).
Life of the Law	P. Birks (ed.), *The Life of the Law* (1991). BLHC papers (Oxford).
Litt.	T. Littleton, *Tenures*, written *c.* 1460 and first printed, without title, in 1481/82. It is most accessible, in English translation, in Co. Litt. There were many separate editions, the last being by E. Wambaugh (1903).
LK	Lord keeper of the great seal.
LQR	Law Quarterly Review.
Manchester, *MLH*	A. H. Manchester, *A Modern Legal History of England and Wales 1750–1950* (1980).
Manchester, *Sources*	A. H. Manchester, *Sources of English Legal History: Law, History and Society in England and Wales 1750–1950* (1984).
Mansfield MSS	J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (1992), 2 volumes. Based on the Mansfield Notebooks (q.v.).
Mansfield Notebooks	Judicial notebooks of Lord Mansfield as CJKB (1756–88), belonging to the present Earl of Mansfield, Scone Palace, Perthshire, MSS. TD 80/52. Selections have now been published in *Mansfield MSS* (q.v.).
Milsom, *HFCL*	S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd edn, 1981).
Milsom, *Natural History*	S. F. C. Milsom, *A Natural History of the Common Law* (2003).
Milsom, *SHCL*	S. F. C. Milsom, *Studies in the History of the Common Law* (1985). Collected essays.
MLR	Modern Law Review.
ODNB	H. G. Matthew and B. Harrison (ed.), *Oxford Dictionary of National Biography* (2004), 61 volumes.
OJLS	Oxford Journal of Legal Studies.
OHLE	*Oxford History of the Laws of England* (2003–).
OHLE, I	R. H. Helmholz, *Oxford History of the Laws of England*, vol. I: *The Canon Law and Ecclesiastical Jurisdiction from 1597 to the 1640s* (2004).
OHLE, II	J. Hudson, *Oxford History of the Laws of England*, vol. II: *871–1216* (2012).
OHLE, VI	J. Baker, *Oxford History of the Laws of England*, vol. VI: *1483–1558* (2003).
OHLE, XI	W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith, *Oxford History of the Laws of England*, vol. XI: *1820–1914: English Legal System* (2010).
OHLE, XII	W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith, *Oxford History of the Laws of England*, vol. XII: *1820–1914: Private Law* (2010).
OHLE, XIII	W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith, *Oxford History of the Laws of England*, vol. XIII: *1820–1914: Fields of Development* (2010).

Oldham, *ECLM*	J. Oldham, *English Common Law in the Age of Lord Mansfield* (2004).
P	plaintiff (in footnotes).
Palmer, *ELABD*	R. C. Palmer, *English Law in the Age of the Black Death 1348–1381* (1993).
pl.	placitum (case-number within a term).
Plucknett, *CHCL*	T. F. T. Plucknett, *Concise History of the Common Law* (5th edn, 1956).
Pollock & Maitland	F. Pollock and F. W. Maitland, *History of English Law before the Time of Edward I* (2nd edn, 1898; reprinted with an introduction by S. F. C. Milsom, 1968), 2 volumes.
Port	*The Notebook of Sir John Port* (J. H. Baker ed., 102 SS, 1986).
Rast. Ent.	W. Rastell, *A Collection of Entries* [1566] (2nd edn, 1670).
repr.	reprinted.
Rolle Abr.	H. Rolle [d. 1656], *Un Abridgment des Plusieurs Cases* (1668), 2 volumes.
Rot. Parl.	*Rotuli Parliamentorum* (1783), 6 volumes.
RS	Rolls Series.
R.S.C.	Rules of the Supreme Court.
Simpson, *History of the Land Law*	A. W. B. Simpson, *A History of the Land Law* (2nd edn, 1986).
Simpson, *Leading Cases*	A. W. B. Simpson, *Leading Cases in the Common Law* (1995).
Simpson, *Legal Theory and Legal History*	A. W. B. Simpson, *Legal Theory and Legal History: Essays in the Common Law* (1987). Collected essays.
sjt	serjeant at law.
Spelman Rep.	*The Reports of Sir John Spelman* (J. H. Baker ed., 93 SS, 1976).
SS	Selden Society (annual volumes, 1887–).
SS Supp. Ser.	Selden Society Supplementary Series.
Stat.	Statute.
State Tr.	*Complete Collection of State Trials* (W. Cobbett, T. B. Howell, and T. J. Howell, ed., 1809–28), 34 volumes.
Studies in Canon Law and Common Law	T. L. Harris ed., *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Berkeley, CA, 2015).
temp.	*tempore* (in the time of).
tr.	translated, translation.
Treby Rep.	Unpublished reports (1667–72) by Sir George Treby, Middle Temple MS. 2C, two volumes.
TRHS	Transactions of the Royal Historical Society.
Wentworth	J. Wentworth, *System of Pleading* (1795–98), 10 volumes.
Y.B.	Year book. References to Edw. II are to the Selden Society editions. References to Ric. II are to the Ames Foundation editions. References to 11–20 Edw. III are to the Rolls Series editions unless otherwise stated. Other citations are to the

old black-letter editions (reprinted 1679–80), cited by term, regnal year, folio, and placitum. Quotations in English are translations from the French. The 1679–80 edition is available online, with word-searchable paraphrases by Professor D. J. Seipp, via the Boston University School of Law website (www.bu.edu/phpbin/lawyearbooks/search.php).

Printed law reports are cited by the standard references currently in use; there is a guide in P. Osborn, *A Concise Law Dictionary for Students and Practitioners* (12th edn, 2013). Texts of the pre-1865 reports may be found in the *English Reports* reprint (which is also available electronically via HeinOnline and Justis.com). Photographs of most pre-1800 English law books are also available online (Early English Books Online, for books printed before 1700; and Eighteenth Century Collections Online).

PART ONE

1

Law and Custom before 1066

When, in 1470, an English serjeant at law maintained that the common law had been in existence since the creation of the world,[1] it is not improbable that he believed it literally. It was not a wholly absurd notion, inasmuch as the English legal system represented an unbroken development from prehistoric time. There had been no conscious act of creation or adoption. What the serjeant did not perceive was that there had been a time, not so many centuries before his own, when there was no common law at all as he understood it. For him, as for ourselves, the common law consisted of a body of known and uniform principles, and a system of reasoning, improved and clarified by judges engaging with professional advocates in courts. But four centuries before 1470, around the time of the Norman Conquest, England had neither a national judicature nor a legislature in any developed sense, and there were no lawyers. There were decision-making bodies, from the king's council down to the village meeting; but in such assemblies no clear separation could have been made between the processes of adjudication, legislation, and administration. Most decisions settled the matter in hand and were not expected to do more. They could not reach far into the future, or rest upon precedents set in the past, because no official records were kept. That is not to suggest that there was no law. People spoke of law, and of custom. Some of this law was written down; most of it was shared memory as to the way things were done. But it was a long way from the kind of jurisprudence known to lawyers in later medieval England as the common law.

In the absence of centralizing institutions, customs varied from one community to another. To the extent that common features may be discerned, the unifying force was not a common law but the general social and moral assumptions of the age, or perhaps the natural instincts of mankind at particular stages of development: broad parallels are often found to transcend national and geographical boundaries.[2] Going back as far as it is possible to go, our first glimpses of ancient British customs are obtained through Roman eyes. The learned men among the Britons passed on their traditions by word of mouth and thought it inappropriate to commit them to writing. Most of the people were held in servitude to a native military nobility, but there was a caste of priest-judges, called druids, who spent years learning the old Celtic customs by rote (in verse-form) and were called upon to decide controversies both public and private. Julius Caesar, who invaded Britain in 55 BC, wrote a brief description of these druids. Their cult had spread from Britain to Gaul; but of their customs (which included human sacrifice) he related very little.[3] The Romans themselves had a sophisticated jurisprudence, and to

[1] *Wallyng v. Meger* (1470) 47 SS 38, per Catesby sjt. See further Baker, *Magna Carta*, pp. 85–6, 349–50.

[2] E.g. something like the Anglo-Saxon ordeal of hot iron was used in ancient China and, in the 20th century, among the nomads of North Africa.

[3] Caesar, *De Bello Gallico*, vi. 13–16. He says that they resolved *controversia*, including homicide and inheritance, and could dispense both rewards and punishments.

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them the usages of the British had no more than anthropological interest. Whether their colonization of Britain made any lasting impact on native traditions is open to debate. But Roman law was certainly in operation, at least for Roman citizens. The famous jurist Papinian is known to have heard cases in the forum at York, and the first reported English case was heard before Javolenus Priscus, as *legatus juridicus* of the province of Britannia, around 85 AD.[4] When the Romans withdrew from Britain at the beginning of the fifth century they left behind many tangible remains, from stately homes and temples to coins and jewellery, but their law was carried away in their heads. Having cast off the Roman yoke, the inhabitants returned to their old ways without impediment in their various small kingdoms. But there was little or no continuity in the confusion which followed. During the next two centuries the British mainland was subject to repeated waves of immigration from across the North Sea. The Angles and Saxons pushed many if not most of the Celtic people back into the west of the island, into Wales, Cornwall, and Scotland. The Germanic immigrants differed from the Celts in religion, language, and physical appearance, and they brought with them usages which even the Romans had noticed as being different from those of Britain and Gaul. Whether their customs completely displaced those which had prevailed before their arrival, or were to some extent blended with them, is a question which cannot be answered definitively for want of written records. A more uniform influence from the same period was that of the Christian Church, which after the arrival of St Augustine's mission from Rome (597 AD) vied with the old religions for spiritual authority and rapidly prevailed.

The Anglo-Saxons were the first native inhabitants of England of whose legal usages anything much is known, because they were the first to introduce written laws. The earliest surviving English legislation, that of King Æthelberht I of Kent (d. *c*. 616 AD), was put together in about 600 AD and has traditionally been associated with the conversion of that king by St Augustine a few years earlier. The early Christian kings relied on the counsel of their bishops in temporal as in spiritual affairs, and the clergy had the literary skill to initiate the technique of government through the written word. Bede wrote, two centuries later, that the new laws had been made 'according to the Roman example', and some were indeed taken up with ecclesiastical matters. Recent research has raised the contrary possibility that Æthelberht's laws were in fact those of the last pagan king. They were written in Old English, not in clerical Latin; they recorded pre-Christian usages; and it seems likely that by the 'Roman example' Bede did not mean that of the Church but that of the Roman emperors, whom Anglo-Saxon kings sought to emulate by issuing laws as a display of imperial authority.

Whatever their inspiration, the Anglo-Saxon 'codes' did not aim to codify all existing customs; nor did they set down the theoretical or procedural framework within which they operated. Even a careful reading of the codes conveys little sense of how things worked. They were directed at readers who could be presumed to know that already, and offered some rules to govern particular situations where the outcome must previously have rested on memory or discretion. Prominent in them, as in most Celtic and Germanic codes, was the fixing of tariffs for the blood-money payable in lieu of feuding. It was no easy matter for arbitration to assuage the passion for retribution when a

[4] Justinian's *Digest*, D.36.1.48. For law and government in Roman Britain see L. Korporowicz, 33 JLH 133.

person felt dishonoured by a wrong: honour demanded full satisfaction. But it was at least equally honourable to be merciful and to accept suitable monetary emendation. The use of pre-ordained scales of compensation,[5] calibrated according to a complainant's rank and the gravity of the affront, promoted peace without compromising pride. It was also more consistent with Christian teaching than revenge-killing. The written laws could facilitate this process without needing to identify and codify any underlying principles. They assumed a pre-existing range of wrongs but were little concerned with definitions or defences. Questions about blame, accident, mistake, and so forth, must have arisen,[6] but they were presumably dealt with either by discretion, outside the law, or by reference to unwritten norms understood by everyone in the locality. Even more glaring by its absence is any clear guidance as to the forms of property-holding, the transfer of immovable property, or the incidents of lordship. Such matters were either too obvious or too variable to be codified.

The Danish invasions of the ninth century subjected the eastern parts of the island to new Scandinavian influences, the 'Danelaw'. The very word 'law' is believed to have been given to the English language by the Danes (*laga*). The ensuing struggle between the Anglo-Saxon peoples and their common enemy gave King Alfred of Wessex (r. 871–899 AD) his opportunity to begin the unification of the former into the single kingdom of England, a process which was completed under King Æthelstan (r. 925–939 AD). Alfred is reputed to have taken a deep interest in justice, and to have reviewed disputed decisions made by his subjects.[7] In the prologue to the code which he promulgated for the West Saxons in the 890s, it is stated that he and his advisers had studied the laws of Æthelberht I of Kent, Ine of Wessex (d. 726 AD), and Offa of Mercia (d. 796 AD),[8] together with the Bible and the penitentials of the Church, before embarking on their task. This may therefore have been the first attempt to compare and evaluate the miscellaneous customs of the English. Alfred's written laws were still far removed from anything like comprehensive common law. But they were an attempt to impose uniformity in certain limited fields, and as such set a precedent for legislation by the kings of England. The precedent was followed by the Danish King Cnut (r. 1016–35), during whose reign a restatement of the laws was compiled in 1018 by Archbishop Wulfstan of York, and enlarged in the 1020s. The laws of Cnut, especially in the redaction of *c*. 1140 which was fictitiously attributed for political reasons to King Edward the Confessor (r. 1042–66),[9] became the main source of old English usages for legal and historical writers after the Norman conquest. Under the guise of the *Leges Edwardi Confessoris* they

[5] Cf. the contemporary penitential tariffs of the Church, which set out the terms of penance required to expiate a sin.

[6] Hints are found: e.g. Alfred (c. 19) says that someone who lends a weapon used for murder has the defence that he did not know of any criminal intention. And the law about spear-carrying (c. 36) suggests that negligence was relevant.

[7] Alfred's contemporary biographer Asser says he was accustomed to examine judgments and to question the 'judges' (*judices*) if they seemed unfair or biased: *Asser's Life of Alfred* (W. H. Stevenson ed., 1904), pp. 92–3. The Roman term *judex* represented the Anglo-Saxon ealdorman or reeve. One reported intervention by Alfred concerned a judgment as to who should take an oath: *OHLE*, II, p. 44.

[8] The laws of Offa have not survived.

[9] The *Leges Edwardi Confessoris* purported to have been written down under William I. There was also a spurious code attributed to William I himself, the *Leis Willelme*, probably compiled temp. Hen. I. For the interest in preserving the old law after the Norman Conquest see pp. 15, 16, post.

achieved an almost mystical authority which inspired Magna Carta in 1215 and were for centuries embedded in the coronation oath. Nevertheless, despite all this legislative activity, England was still governed more by unwritten and variable custom than by uniform and settled law. The principal reason for the absence of common law at this stage was the absence of any national judicial machinery to require it.

Communal Justice

It is difficult to imagine societies without legal systems of some kind, but all social arrangements must have a beginning. Custom and religion perhaps come first. They are forces in the community to be upheld and maintained as a matter of tradition, social obligation, or religious conviction, or usually all three. But legal sanctions necessitate the imposition of forces which in early societies, as in the state of nature, belong to individuals who have power over others. For people kept in a state of servitude, the will of their master or lord takes the place of law. As between those of autonomous or 'free' status, the suppression of private force can only be achieved by investing a powerful person, or the community at large, with a greater force. If one person takes something from another, the obvious remedy is for the victim to try to take it back and also exact revenge; when it is also the only recourse, no-one has any rights beyond those which he is physically able to protect for himself. In the absence of strong government or judicial control, justice is therefore primarily a matter of self-help: of forcible entries, reprisals, blood-feuds, and private warfare. One of the first causes of a legal system is the desire to prevent or discourage feuding, or at least to regulate it, and to offer some peaceful alternative. It was a slow process.[10] In the first visible stages of the story we see the community playing a role, as a body in public meeting, by encouraging the parties to settle their differences or submit them to honourable arbitration.[11] If the parties could not agree, the community would impose its own solution. It did not decide between them as a court would decide today, by applying rules of law to proven facts; but that is not the only way to resolve disputes.

Procedure and Proof

The 'moot' or folk-assembly,[12] first mentioned in the Kentish laws of the eighth century, was of prehistoric origin. It would be anachronistic to regard it, when the dim rays of history first fall upon its outlines, as a court of law. It was an open-air meeting of the populace to discuss local affairs under the presidency of an ealdorman,[13] or his deputy, assisted in some places by a group of 'doomsmen'. The community issued no writs and kept no records, and in consequence little is known about its doings. Decision-making was certainly on the agenda, and interested parties might be represented by supporters; but there were no legal practitioners.[14]

[10] Blood-feuds did not become illegal until the 12th century, and forcible entries continued to be a problem as late as the 16th.

[11] For arbitration in general see pp. 32–3, post.

[12] The Anglo-Saxon word *mot* (or *gemot*) meant 'meeting', especially a meeting of a deliberative nature.

[13] See p. 9, post.

[14] There are odd references to 'forespeakers', but they did not constitute a distinct class or have a single function. *Forespeca* was a generic term for a supporter, surety, or intercessor, often a patron of higher status: A. Rabin, 69 *Mediaeval Studies* 223.

A communal assembly might be called upon to make different kinds of decision, and historians still puzzle over how far their proceedings in contentious matters rested on law and custom, how far on discretion, and how far on appeals to the supernatural. No doubt it depended on the nature of the business. One kind of decision was about the enjoyment of landed property, and this required a choice between rival claims; factual evidence in support of the claims and of the applicable customs would be considered before deciding how to proceed.[15] Another was about something specific which was alleged to have happened – for instance, a wrong done, or a contract made and broken. Many disputes involved both. Where a case turned on disputed facts known only to the parties, its resolution could not be a matter of policy or discretion. Nor was it decided by evaluating conflicting evidence in order to reach a human verdict. Resort was had instead to 'proof' by oath, which might have to be backed up by a physical test (an 'ordeal'). If the defendant was allowed the benefit of proof by oath, he proceeded to swear on the holy gospels to the truth of his case, in general terms and without cross-examination. In the lesser form of proof known to later generations as wager of law, he was expected to bring with him some neighbours as 'compurgators' or 'oath-helpers' to back up his word. But when a bare oath was deemed insufficient, either because of the gravity of an accusation or the unreliability of a disreputable party's word, it might have to be reinforced by an ordeal. In order to put the defendant to this hazard, a plaintiff was required to establish a prima facie case under oath. In this he would be supported by his 'suit', the group of followers whom he brought with him. The suit had some affinity with witnesses, and they may have been subject to examination as to competence, but their testimony was part of the interlocutory process and did not affect the final outcome.[16] Ordeals involved an appeal to God to assist in the detection of perjury, and they required priestly participation to mediate the necessary rapport with the deity. They were pre-Christian in origin, but several forms of ordeal were recognized by the early Christian Church. In England they usually took the form of fire or water. In the former, a piece of iron was put into a fire and then in the party's hand, or else the party had to plunge his hand into boiling water to retrieve a stone; the hand was then bound, and inspected a few days later: if the burn had festered, God was taken to have decided against the party. The ordeal of cold water required the party to be trussed up and lowered into a pond: if he sank, the water was deemed to have 'received him' with God's blessing, and so he was quickly fished out.

After centuries of acceptance, the ordeal became the subject of a prolonged intellectual debate about both its legitimacy and its efficacy. It was not clear how God could be expected to answer human questions. What if he decided not to intervene at all, but to leave the matter to be settled by his ordinary laws of nature? And how could one ever know whether he *had* intervened? There is some evidence that those who administered ordeals, perhaps because of such doubts, began to feel a responsibility to facilitate the result they considered right: for instance, by using a less hot iron in cases where suspicion was weak, or by interpreting a burned hand liberally. In the last days of the ordeal,

[15] See the famous case of *Lanfranc v. Odo* (1072) 106 SS 8, where Bishop Æthelric – an aged man 'very learned in the laws of the land' – was brought in a carriage at the king's command to explain the 'old customs of the laws' before the whole county of Kent assembled on Penenden Heath.

[16] Suit was absorbed into common-law procedure. See pp. 341, 344, post.

the acquittal-rate was surprisingly high. Some canonists advocated the interposition of a rational approach to evidence, while others considered it inappropriate for priests to become involved with secular justice at all. But there was a more fundamental difficulty. It was doubted whether mortals had any right to invoke God's miraculous intervention in mundane affairs. In 1215 the Lateran Council, after weighing these problems, took the decisive step of forbidding clergy to participate any more in ordeals.[17] This brought them to a sudden end, and led in England to the introduction of the criminal trial jury.[18] The decision had no impact on wager of law, which did not depend on a priest conjuring up immediate divine assistance, or indeed on oaths in general. Proof by simple oath and compurgation therefore survived, and passed into the common law. But compurgation worked in the same inscrutable manner as the ordeal. There was no question of going behind it into the facts of the case, let alone of having to weigh whether the oath (if duly supported) was true.

Both the oath and the ordeal were calculated to obviate a human decision on a disputed point of fact. This is commonly summarized by saying that, under this old system, judgment preceded proof: once it was adjudged that one of the parties should swear or perform a test, there was no further decision to make except whether he had passed it.[19] It has also been characterized as 'irrational', in the sense that it did not involve human reason. But this should not be misunderstood. The wise men of each community needed to know how to regulate disputes, when and how proofs should be imposed on disputants, what liturgy should be used, and what should be done when the result was known. Here was room for argument and human discretion, for consideration of customary rules, and perhaps for the evaluation of merits in deciding which party should swear. If the case was pressed to 'law' (wager of law), the real decision was taken by the compurgators, though they were supposed to focus on the credibility of the party rather than the facts of his case. It was a workable method of resolving disputes, even though the critical decision was not made by a court applying legal reasoning to facts established by evidence. But the proof was the end of a lawsuit; and, in the absence of any possibility of reviewing a judgment of God, of centralization to ensure uniformity from place to place, or of records to ensure consistency over time, the old ways of doing things could never have generated a body of legal doctrine comparable with that of ancient Rome or Serjeant Catesby's England. Legal principles were not worked out in detail, because argumentation was limited to what we now call procedure, modified by discretion. If that seems a weakness, it is so only to later eyes; those who did not know of law as a coherent system of reasoning were impervious to its absence.

The Old English Assemblies

Of the structure and distribution of communities in Britain before King Alfred we have but a faint picture, based largely on archaeology and the study of place-names. There

[17] J. W. Baldwin, 36 *Speculum* 613; F. McAuley, 26 OJLS 473. The ordeal of water lived on in folklore in the custom of 'swimming' alleged witches; this illegal form of trial was used near Chelmsford as late as 1863.

[18] See pp. 547–8, post. The ordeal was not much used, if at all, in 'civil' cases.

[19] The word 'ordeal' is cognate with the German word *urteil* (Dutch *oordeel*), meaning judgment. The judgment was that of God.

were at one time at least a dozen kingdoms, some large and some small. Even when powerful kings in the ninth and tenth centuries began to unify and dominate the greater part of what is now England, we need not suppose that the average inhabitant – except in border territory – thought of himself as English or had much consciousness of anything beyond the little world of his own village and the road to the nearest town.

By the end of the tenth century there was a single kingdom of England, and with an increasingly effective monarchy came a more homogeneous scheme of local government. The whole country was divided into 'shires' (counties),[20] which have remained substantially the same in name and shape down to the present day.[21] Their origin is obscure, and probably not uniform. Some shires south of the Thames, and also Essex and Middlesex, correspond to old Saxon kingdoms, while names such as Norfolk and Suffolk suggest ancient tribal communities. But most counties derive their names from a town at or near the centre, and it is likely that these represent a northward extension of the shiring system from Wessex for military and tax purposes. Cities and boroughs had been established as fortified trading centres, or as royal strongholds against invasion, and in some cases by capture had become the strongholds of invaders; they were therefore focal points in a defensive system under which shires were allocated to provincial royal commanders called 'ealdormen' or earls.[22] The laws of Ine of Wessex (*c.* 690 AD) refer to justice (*riht*) being demanded before the 'shireman' – perhaps the ealdorman's deputy, perhaps the king's reeve – and this seems to indicate a shire moot which included judicial deliberations among its functions. By the time of King Edgar (r. 959–975 AD) every shire gathered twice a year, attended by the ealdorman and bishop, to discuss the weightier affairs of the region.

The laws of the tenth century also mention smaller units called 'hundreds',[23] each of which was under the responsibility of a hundredman. The hundreds were further subdivided into 'tithings', which were notionally groups of ten men (or families) under the responsibility of a tithingman. The sorting of the population into hundreds and tithings was a means of maintaining good order and of raising taxes to support the king. The hundreds held meetings monthly to transact the ordinary business of the community; and twice a year, at what was later called the 'view of frankpledge', the tithings were reviewed to make sure that every free man was 'in borh' (pledged to good behaviour) and that crimes were being duly presented for investigation.[24] Although most hundreds fell exactly within the bounds of a shire, there was no structural relationship between the two institutions; within their geographical limits, their meetings were equally sovereign, in the sense that they followed their own customs without interference from

[20] These were in place by the end of the 8th century. The word 'shire' was used in Wessex as early as the 7th century, but possibly in a different sense.

[21] The principal changes were made in 1972, when a number of smaller counties were abolished and a few new ones created.

[22] In Alfred's Wessex the term was ealdorman, but in the 10th century it gave way to earl. Both titles acquired different meanings in later times.

[23] In some northern parts, where the Danelaw prevailed, the Scandinavian word 'wapentake' was used instead; though said to derive from the practice of taking up and brandishing weapons to signify assent at a meeting, there is no evidence that this was the usage in England. In some parts of the country there were intermediate units: the three ridings (i.e. 'third'-ings) of Yorkshire, the three 'parts' of Lincolnshire (originally 'trithings'), the lathes of Kent, and the rapes of Sussex.

[24] See W. A. Morris, *The Frankpledge System* (1910).

outside.[25] It is likely, however, that only the more important or troublesome matters found their way to the infrequent and solemn shire moots.

The boroughs likewise had assemblies, variously called burghmoots, portmanmoots, or (when held indoors) hustings. They continued to flourish into later medieval times and beyond as expeditious mercantile courts.[26] Since the borough performed similar functions for townspeople, both administratively and judicially, as the hundred performed for country dwellers, borough and hundred were reckoned to be mutually exclusive. In the City of London, the husting was really the equivalent of a shire, and it came to displace the old shire moot. The London equivalent of the hundred was the 'ward', and the administrative division of the City into wards has continued largely unchanged to the present.

The smallest assembly was that of the village. Although it may often have coincided with a tithing, it was not a subdivision of any of the other units but simply a conglomeration of dwellings corresponding in many cases to the later ecclesiastical and administrative unit of the 'parish'. The settlement of a group of families in a village, with open-field farming, must have necessitated at least a communal agricultural policy, and it is possible that a village meeting was once the place to settle it. In the centuries after the Norman conquest the community of the vill exercised police functions, independently of manorial feudalism; but any role it may have had as a forum for small-scale administration was taken over by the manor[27] and (much later) the parish, and it did not survive as a distinct entity.

From Communal to Personal Authority

The earliest forms of justice were not conceived of as emanating primarily from a ruler, from a ruler's councillors, or from a legislative assembly. Anglo-Saxon kings were sworn at their coronation to see equity and mercy done in all judgments, but there was no mention of law-making in their oath; law, of some kind, was a given state of affairs transcending royal authority. After 600 AD the promulgation of laws in writing was practised regularly as a symbolic display of kingship, but such laws presupposed a mass of unwritten customs or assumptions which they were not intended to displace. Even King Alfred's great doom-book was an edition of earlier laws or legal notions, with incidental improvements suggested by recent decisions on particular problems,[28] rather than a work of jurisprudence recording or recasting first principles.[29] There are a few allusions in the royal legislation of the later Anglo-Saxon period to 'folk-right' (*folcriht*),[30] denoting a communal or customary conception of justice, and Alfred's last will mentions an instruction to his own council to apply folk-right in a particular matter. But

[25] Cf. the provision in Cnut's legislation for justice to be sought in the shire, in certain cases, if denied in the hundred: *OHLE*, II, p. 54. This was exceptional: ibid. 64.

[26] For the codification of their customs in medieval times see M. Bateson, *Borough Customs* (18 and 21 SS, 1904–06). For mercantile courts see p. 30, post.

[27] See next section and pp. 30–1, post.

[28] See p. 5 n. 6, ante.

[29] The preamble states that, although the king had pruned away some bad laws, he had not dared to introduce many new ones lest they did not meet with the approval of his successors.

[30] Cf. *ald riht* (old-established justice) in the Laws of Wihtred (*c.* 695 AD), c. 4.

this unwritten law of the people was not expounded or elaborated by judges and jurists. It was administered by those attending shires or hundreds as 'suitors' or as doomsmen. And the position was not greatly different where jurisdiction was allocated to individuals.

The jurisdiction of individuals other than the king was usually expressed in terms of lordship. Eventually political overlordship would merge with feudal lordship and become inseparable from the tenure of land;[31] but Anglo-Saxon lordship could arise from a ceremony of 'commendation' or fealty, or (more usually) from de facto submission to another's rule and protection. That it was the norm in the tenth century is evident from the laws of Æthelstan, in which a lordless man is treated as suspicious. In some places lordship may have evolved from prehistoric traditions of chieftainship or kingship; in others it was doubtless a result of opportunism. The roots of authority lay not in political or legal theory, for of that there was little, but in the fact of personal dominance. The notion of seignorial authority, the authority which went with being a lord, would give rise in the Norman period to a separate system of courts existing alongside the counties and hundreds. But how far this was the position before 1066 is less than clear. By the twelfth century, at any rate, every lord, from the upper levels down to the lowest, seems to have been able to hold court for his 'men'. Most surviving evidence relates to the lowest level. Peasant communities were organized into 'manors', which were the estates surrounding a lord's mansion house or 'hall',[32] small units of feudal government sometimes coterminous with a village but often smaller.[33] The lord's court, or hall-moot, might make social regulations (later called bye-laws), deal with disputes about contracts and torts, and punish minor crimes, in addition to despatching agricultural and feudal business.[34] For most English people it was the main authority that impinged on their daily lives. Yet, however powerful he might be, the lord was not supposed to be an autocrat. The manorial court belonged partly to the feudal and partly to the 'communal' scheme of things. Although the lord or his steward presided, the free men made the decisions, and the court was the means whereby the customs of rural communities were put into effect.

The highest example of the personalization of authority was the ascendancy of the monarchy, and its consequences were far-reaching. Once England had become a unified kingdom, the king established his formal governmental authority in the boroughs, hundreds, and shires by placing in all of them his own officials, called 'reeves', to watch over their operation. The laws of Edward the Elder (d. 925 AD) and Æthelstan (d. 939 AD) make plain the duty of the king's reeves in boroughs and hundreds to see that everyone received the benefit of the customary law (folk-right) and the 'doom-book' (presumably Alfred's code) in those assemblies. Some hundreds, perhaps by royal grant, came under the control of lords, and some hundredal jurisdiction came to belong to lords within their manors; many such lords were said to possess *sake* and *soke*, that is, the right to

[31] For feudal lordship see ch. 13, post.

[32] The Latin word *manerium* originally denoted the lord's dwelling-house. For the origin of manors see T. H. Aston, 8 TRHS (5th series) 59; C. P. Lewis, 34 *Anglo-Norman Studies* 123.

[33] There are allusions under William I and Henry I to *villae* owned by individuals: e.g. 106 SS 39, 207.

[34] Since the Domesday commissioners reported of a particular manor that it 'has its pleas in its lord's hall', perhaps in 1087 this was still unusual: Maitland, *Domesday Book and Beyond* (1897), p. 91. Hall-moots are mentioned, in Latinized English, in charters of the 1150s: 106 SS 291 ('allimotum'), 107 SS 305 ('hallemotum').

hold court, to compel suitors to attend it, and to receive the monetary fines paid by offenders. Even in these cases, however, the king retained some supervisory control and might deprive a lord who abused his authority. The shire remained more closely in the king's direct control, and the king's shire-reeve (or sheriff), first mentioned in the eleventh century but probably of earlier origin, would soon become one of the most powerful officials in the country.

The punishment of crimes was seen from the start as an important aspect of royal government. In the twelfth century all serious crimes would be brought under the jurisdiction of the king or his sheriff.[35] But already in the Anglo-Saxon period there was a notion that some forms of wrongdoing required punishment in the public interest, and that the king had an interest in the process. The king benefited as well as his people, since the jurisdiction brought in a valuable stream of revenue, either collected through sheriffs or granted out to lords as a privilege. It is principally in the criminal sphere that we may detect the beginnings of a body of law common to the whole kingdom, as a result of the king's direct involvement.

By the time of the Norman Conquest of 1066 justice was beginning in fact to be a prerogative of the Crown, even if such words were yet to be invented. The king's concern with justice brought not only crime but also disputes between subjects within the purview of his own court, his council of wise men or *witan*. Since at least the time of Alfred, kings had undertaken the responsibility of looking into disputes, and the coronation oath made clear the royal duty of ensuring equitable judgments. In fact, so many were the complaints reaching King Cnut in the 1020s that he found it necessary to confine recourse to his court to those who had already sought a remedy in the hundred. Failure of justice elsewhere provided the basis for a nascent royal jurisdiction over civil causes, while the king's position as a feudal lord gave him the responsibility to do justice in relation to landholding.[36] If all judicature was thus in one way or another associated with the king, it was a simple progression to regard it as somehow deriving from the king or as being exercised on his behalf.

Another significant innovation in the Anglo-Saxon period was the employment of writing in the business of government, though the full significance of it lay in the future. It has already been mentioned that the Anglo-Saxon kings liked to make show of their royal authority by issuing codes, either clarifying points of law or containing general directions to reeves and lords. Some of their contents, especially in Alfred's code or 'doom-book', look like determinations in real cases. At the highest level, adjudication and legislation were not yet clearly distinguishable.[37] The later Anglo-Saxon kings were also using ad hoc written instruments, occasionally under impressive seals, to confer jurisdiction on individual lords, religious houses, or urban communities, or to confirm their existing privileges in permanent form: charters granting the profits of justice (*sake* and *soke*) or of markets (*toll* and *team*), more specific criminal jurisdiction,[38] or borough

[35] See pp. 541–2, post.

[36] In the time of William I it was settled that all land was held ultimately of the king: p. 242, post. Henry I confirmed in 1108 that all pleas of land concerning his immediate tenants should be held in his own court.

[37] The primary meaning of 'doom' was judgment. Cf. the hybrid status of papal decretals: p. 135, post.

[38] Jurisdiction over crimes otherwise reserved to the king seems to have needed a specific grant: e.g. *grithbryce* (breach of the king's peace), *infangenetheof* and *utfangenetheof* (theft), *hamsocn* (violence in a

status, and writs referring disputes or issuing commands to assemblies of the shire.[39] As yet there was no body of uniform law, as distinct from the customs or folk-right which varied from place to place, and the law which directly concerned the king. There was no unified English legal system. But the seeds of the common law which began to flower in the twelfth century had been sown.

Further Reading

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County, Hundred, and Liberty (including their Later History)[40]

Pollock & Maitland, I, pp. 527–688
F. W. Maitland, *Domesday Book and Beyond* (1897)
W. O. Ault, *Private Jurisdiction in England* (1923)

house), *forsteal* (ambush in the king's highway), *flymenafyrmth* (harbouring fugitives). The main purpose of the grants was not so much judicial as assignment of the revenue received from offenders.

[39] Writs have been traced back to the time of Æthelred (d. 1016), and several survive from the time of Cnut (1016–35).

[40] For manorial courts and customs see pp. 42, 297, post.

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2

The Common Law of England

The conquest of England in 1066 by William, duke of Normandy, was described by Maitland as a catastrophe which determined the whole future of English law.[1] Yet such legal changes as are ultimately attributable to this event did not occur suddenly or through a deliberate Norman policy of destroying the Anglo-Saxon inheritance. William claimed to be king by lawful succession, and one of his first acts was to promise the English that they could keep their previous laws. The old aristocracy were dispossessed for opposing him, enabling a thorough transfer of power and wealth to the Normans, but it was a displacement justified by what was deemed to be treason by his leading English subjects rather than their defeat by arbitrary force. It was indeed a catastrophe, but not a conquest which obliterated everything Anglo-Saxon. England had a developed system of government which there was no need to eradicate. In fact there was every reason to keep it in place. For one thing, it gave the king an efficient means of control over the country and its resources. For another, there was no refined body of jurisprudence, no code of Norman law, to import from France. Henry I, in his Coronation Edict (1100), confirmed the supposed laws of Edward the Confessor, and considerable efforts were made by the French-speaking royal advisers to preserve and understand the legal heritage of which they were now the custodians.[2]

The most significant innovation under William I concerned landholding, and it was necessitated by the need to redistribute to his Norman supporters what had been seized from his English opponents. The outcome was a system of tenure, regularized and recorded with ruthless administrative efficiency in the first twenty years of William's reign.[3] Other immediate changes tended also to divide: new racial discriminations between French and English, an uncouth addition to the ordeals which favoured the warlike (trial by battle),[4] the separation of ecclesiastical courts from the old shires and hundreds, the subjection of vast and growing tracts of forest land to an oppressive and deeply resented 'forest law' protecting the royal resources with ferocious penalties,[5] and a brand of feudalism which gave seignorial jurisdiction a new basis and in its initial workings also sharply divided the French and English. None of this in itself helped produce a 'common' law: if anything, the reverse.[6]

[1] Pollock & Maitland, I, p. 79.

[2] A collection of the old laws, translated into Latin, was compiled temp. Hen. I as the first part of the *Quadripartitus*. The so-called *Leges Edwardi Confessoris* (p. 5, ante) were written not long afterwards.

[3] See pp. 242–4, post.

[4] See pp. 80–1, 252, post.

[5] As much as a third of England may have become forest, including almost the whole of Essex. Large areas of forest, not all wooded, were annexed to the royal demesnes as a result of the forfeitures in 1066.

[6] The forest law was seen in the 12th century as an arbitrary form of justice outside the common law: e.g. *Dialogue of the Exchequer*, i. 11 (p. 91). Even after the *Carta de Foresta* (1217) imposed some restraints, it remained largely autonomous.

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The common law emerged in the course of the twelfth century from the effective transformation of inherited institutions, adapted to accommodate the new-style military feudalism. England, unlike Normandy, was already a unified nation with a central government ruling through sheriffs answerable to the king, and it had the beginnings of a bureaucracy operating through written instruments under the king's seal. To this the Normans, and their Angevin successors, brought a taste for strong government and a flair for administration, so that within a century after the conquest the rudimentary court of the Anglo-Saxon kings had grown so far as to beget two great departments of state (the Exchequer and the Chancery) and a judicial system whereby the king's justice was dispensed on a regular footing, not merely by the king in person but by members of his *curia*.

The effect of these changes on legal administration can be understood by comparing two twelfth-century law books. The state of things in the first half-century after 1066 was described in the compilation known misleadingly as the *Leges Henrici Primi* (*c*. 1118), which was not a law code of King Henry I but the work of an official trying to work out what laws were then current in England. There were three distinct systems in place: the law of Wessex, the law of Mercia, and the Danelaw. But there were differences of detail, particularly in procedure, in each of the thirty-two counties. Oath, ordeal, and battle were universal modes of proof; but their detailed operation varied from place to place and according to the status of the parties. Since all proceedings were oral, legal tradition was unstable. Litigation, according to the author, was as uncertain as a game of dice.[7] The uncertainty is well illustrated by the juristic confusion in the book itself, which mixed up collections of Anglo-Saxon laws with scraps of canon law and personal observations. The writer did, nevertheless, perceive the paramount position of the king, whose enormous power (*tremendum regiae majestatis imperium*) placed him above all other laws. The king's court, for this reason, enjoyed a special position: 'over and above everything stand the pleas of the royal court, which preserves the use and custom of its law at all times, and in all places, and with constant uniformity'.[8]

This last statement seems more legally significant in retrospect than a contemporary could have understood. The financial records of Henry I show that his court was indeed regularly resorted to by suitors, but it was not in constant session and it was in practice beyond the reach of most people. The king's justice was prominent enough, in its harsh dealing with crime and the efficient extraction of revenue; but the growing regularity of procedure which characterized its other work may have been discernible only by insiders. Royal justice was not yet the common property of all subjects, and during the disorders of Stephen's troubled reign (1135–54) it almost slipped away. The foundation of the common law is usually traced to the reign of Henry II (1154–89), who made an effort to restore the firm government of Henry I's days. It may be that the appearance of greater legal activity during his reign is distorted by the increased use of written records; but there was certainly a dramatic increase in property litigation as a result of the preceding anarchy,[9] and to the same period belong the settling of the royal courts, with judges

[7] *Leges Henrici Primi*, vi. 6 (Downer ed., p. 98): *incerta penitus alea placitorum* ('the utterly uncertain dice of pleas').

[8] Ibid. 97, 109.

[9] See pp. 250–1, post.

working to establish uniform justice throughout the realm, and the beginnings of a formulary system of returnable original writs.[10]

The second of our books illustrates the nature of the change.[11] It was a treatise 'on the laws and customs of England', based solely on the workings of the royal court, written in or just before 1189. The treatise, traditionally but questionably attributed to Sir Ranulf de Glanvill (justiciar of England 1180–89), gives the impression that the variety of local customs had not diminished; and so the book avowedly presents only one aspect of the law of the time. But the main contrast with the *Leges Henrici* lay in the author's treatment of the fixed customs of the king's court as constituting *jus et consuetudo regni,* the law and custom of the realm. Whether Glanvill and his contemporaries could actually foresee that the law of the realm would soon virtually displace local custom does not affect the significance of the twelfth-century jurisprudential advance. Just as Gratian, a generation earlier at Bologna, had produced from the conflicting jumble of ecclesiastical canons a coherent system of canon law deriving ultimate authority from the pope,[12] so Glanvill and his fellow councillors under Henry II produced a theoretically coherent system of English justice deriving ultimate authority from the king. Against that uniform system, local custom would thereafter be seen as exceptional – and increasingly exceptionable.

Unlike Gratian, who relied on texts and resolved discrepancies by means of a coherent system of jurisprudence, the author of *Glanvill* isolated the law of England by focusing on the practical workings of the king's courts to the exclusion of all else. His laws and customs of the realm were primarily about how to gain access to those courts and what do when there. It is usually impossible to get beyond *Glanvill* to ascertain how the procedures had been arrived at, or to uncover the legal thinking behind them. Both the organization of the courts, and the formulae to be used in them, were settled by royal legislation since lost: *Glanvill* itself refers to 'assizes' and 'constitutions' of this nature,[13] and also to unwritten laws promulgated by the king's council. Some such laws may have been decisions reached in specific disputes, like case-law, though a sharp distinction between adjudication and legislation would still be anachronistic. Few decisions of any kind were embodied in authoritative texts or records, and so the steps by which the common law of England was brought into being are largely untraceable. It did not happen all at once, but the path became clear under Henry II.

Regional and Itinerant Royal Justice

If the main consequence of the spread of royal justice was to be intellectual, its causes were more mundane. The Crown's first object was to develop the scope of breach of the king's peace in order to preserve public order. Effective criminal justice is the first prerequisite of good government, and the Normans took up and strengthened the Anglo-Saxon system of communal responsibility, introducing safeguards to counterbalance the growing power of sheriffs. Henry II was especially concerned to restore order after

[10] See chs. 3, 4, post.
[11] The transformation is also evident in the contemporary *Dialogue of the Exchequer* (1177/89).
[12] See p. 135, post.
[13] For the Assizes of Clarendon (1166), Northampton (1176), and Windsor (1179) see pp. 137, 252–3, post.

the civil war which had lasted from 1139 to 1149, and the extension of litigation about land doubtless had the same ultimate object. There was an added financial incentive, in that the provision of law and order was profitable. Some pleas of the Crown were purely fiscal, as were the pleas of the forest, but criminal justice bore golden fruit as well, in the form of fines and forfeitures. The rolls of the Exchequer testify to the steady revenue from judicature: for example, the itinerant royal justices in 1218–19 raised over £4,000,[14] and even under Edward I it did not seem incongruous for the government to raise 'great treasure' for the war in Scotland by 'causing justice to be done on malefactors'.[15] The people are said by chroniclers to have groaned under the burden of royal investigations and money-raising judicial expeditions; and yet they flocked to the same judges for the recovery of their possessions, and were prepared to pay money for royal justice. The main attractions for the private litigant were no doubt the effective process and enforcement which royal writs procured, and the availability from the late twelfth century of a central written record which would end dispute for all time. To squabble about weighty matters in local courts was often to waste time to no purpose, because even if a fair hearing was obtained the judgment might be unenforceable, and there was always the risk that the matter would be reopened before the king.

The king's law was not yet universal; but the king's judgments could not be questioned or ignored. Royal justice therefore steadily gained ground over the old 'communal' institutions, not because of new constitutional theories but because it suited both king and litigants that it should do so. Yet it could not have undergone its tremendous expansion if it had continued to depend on the king's personal involvement. The means by which the king's commands could reach far and wide, in a suitably awesome and imperious form, was the writ bearing his name and seal. And the means of extending the king's direct control of justice throughout the length and breadth of the realm – especially during the king's long absences from England – was the practice of delegating royal authority to trusted members of the king's own court. It was this innovation, more than any other, that made possible the common law. It paralleled a similar innovation in the ecclesiastical sphere; the pope introduced delegates at the same period, and for the same reason. The Anglo-Norman equivalent of the judge-delegate was the *justiciarius*.[16]

The twelfth-century chief justiciar was really a viceroy, a deputy of the king empowered to act in royal affairs, and as such was concerned with all matters of state, administrative as well as judicial. The first and greatest justiciars, notably Roger of Salisbury (d. 1139)[17] and Sir Richard de Lucy (retired 1178), were what we should call prime ministers; and their principal monument was the elaborate revenue system centred on the Exchequer. In addition to these justiciars of England, Henry I appointed local justiciars to attend to Crown business in particular counties or groups of counties. This enabled an extension of royal justice without extending the powers of sheriffs. But the idea of locally based royal justice was short-lived, probably because viceregal power was politically dangerous

[14] B. E. Harris, 46 Pipe Roll Soc (new ser.) p. xvii. This represented over 7,000 amercements, and would be about £5M today.

[15] *Croniques de London* (Camden Soc., 1844), pp. 28–9.

[16] The same Latin word was used for the 'justices' of the superior courts of law long after the disappearance of the great justiciars to be mentioned here.

[17] Salisbury, though usually reckoned among the justiciars, was actually styled *procurator regni*.

if severed from the central court. In Stephen's reign it threatened the monarchy itself. Justiciars of England were discontinued altogether in the following century. They were not regularly appointed after 1234, and the last was Hugh le Despenser (d. 1265).

Another method of delegation, which appeared at the same time and was to prove more enduring in a modified form, was to send justices out on an ad hoc basis from the royal household. These travelling justices would form a nucleus of *justiciarii totius Angliae* ('justices of all England'), who had no permanent local roots and would remain members of the king's council, available to transact national business when required. Still this did not constitute a regular system of courts, and one litigant who sought royal justice in the early years of Henry II has left a detailed account of the expense and trouble involved in pursuing the king or his justiciars around the country and overseas.[18]

Following these experiments, Henry II proceeded a step further. Early in 1166 he appointed Geoffrey de Mandeville and Richard de Lucy as justices to tour the whole of England, with a particular view to enforcing the new 'assizes' concerning criminal law and disseisin.[19] Mandeville's death in October 1166 ended the exercise, but the experiment was so frequently repeated between then and the end of the century that it became routine. In 1176 the itinerant justices were organized into six circuits, a scheme which was to be the pattern for the later assizes.[20] The justices, who numbered as many as twenty or thirty at a time in the 1180s, were known at first as *justiciae errantes* (wandering justices),[21] later as *justiciarii in itinere* (justices in eyre). The French word 'eyre', meaning a judicial circuit (*iter* in Latin), became the name of the institution itself. For a time it was the most visible form of royal justice. Every so often a 'general eyre' would visit a county, bringing the king's government with it.[22] Large throngs of people attended, either to account for themselves or to seek justice; special regulations were required to control the rates of board and lodging during the crowded sessions, rooms being requisitioned for the lawyers and clerks. After the writs were read and the justices' authority publicly proclaimed, local officials delivered up their insignia of office as if to the king in person, and the justices started into their long agenda (the 'chapters of the eyre'), investigating crimes and unexplained deaths, misconduct and negligence by officials, irregularities and shortcomings of all kinds, the feudal and fiscal rights of the Crown, and private disputes. Everything they did was written down on parchment rolls, to form a permanent record and to enable follow-up action when required.[23] The general eyres were not merely law courts; they were also a way of supervising local government, and of raising revenue, through itinerant central government. They begat fear and awe in the entire population. Indeed, there were complaints that the eyre of 1198 reduced the

[18] For Richard of Anstey's expenses in 1158–63 see P. M. Barnes, 36 *Pipe Roll Soc.* 1 at 17–23 (repr. in 107 SS 387 at 397–404).

[19] The itinerant justices in 1176 were sworn to 'keep the assizes', i.e. the legislation of Henry II. For this sense of 'assizes' see pp. 20, 252–4, post.

[20] See p. 25, post. The *Dialogue of the Exchequer*, ii. 2 (p. 117), written soon afterwards, says this was intended to restore the laws neglected (*destituta*) during the troubles.

[21] *Dialogue of the Exchequer*, i. 8 (p. 72), ii. 2 (p. 116); *Glanvill*, viii. 5 (p. 98).

[22] Coeval with the general eyres were the forest eyres, which had a wide jurisdiction over matters arising within the royal forests.

[23] The earliest surviving rolls date from 1194, but eyre rolls are mentioned in the *Dialogue of the Exchequer*, p. 117 (before 1189).

whole kingdom to poverty from coast to coast,[24] and we learn of Cornishmen fleeing to the woods to escape the eyre of 1233.[25] Counties might pay heavy fines for lenient treatment, or buy off an eyre altogether. Yet it was the strength, the severity even, of Angevin government which incidentally gave England a body of national law unique in Europe.

Judicial Commissions

The usual means of transmitting authority from the king to his justices came to be a writ or commission under the great seal, though the instructions may once have been given orally. The justices 'in general eyre' acted under commissions to try 'all pleas whatsoever', and were regarded as belonging to the permanent judicial establishment.[26] But a wide range of more limited and temporary commissions developed in the thirteenth century. On the civil side, much business was generated by the 'assizes' of Henry II.[27] The word 'assize' is apt to cause confusion because of its numerous transitions. The French word denoted a session. It was applied in Henry II's reign to specific pieces of legislation (also called 'constitutions') generated at sessions of the Curia Regis,[28] then to the types of inquest sanctioned by the legislation (the 'petty' assizes and the 'grand' assize),[29] then to the assembled 'recognitors' (jurors) who sat on a particular inquest,[30] and finally to a session of the justices overseeing the procedure.[31] Every inquest by an assize required a separate judicial sitting in the appropriate locality to hear the result; justices in eyre could take assizes on their way, but it was more convenient and expeditious for special justices of assize to be commissioned to take them between eyres. Commissions were also used to control criminal justice. To authorize the holding of pleas of the Crown two principal types evolved: oyer and terminer (to enquire into, hear, and determine the offences specified) and gaol delivery (to try or release the prisoners in the gaol specified). Commissions of oyer and terminer could be general, extending to all or most offences committed within a named county or group of counties, or special, extending only to named persons or particular events. We shall see later in this chapter how such commissions governed the administration of criminal justice, both by assize judges and by justices of the peace, until modern times.

Central Royal Justice

The focal point of royal government was the *Curia Regis* (king's court), the body of aristocratic advisers, prelates, and courtiers who attended the king and supervised the

[24] *Chronica Rogeri de Houedene* (RS, 1871), IV, p. 62.

[25] *Annales Monastici* (RS, 1864–69), III, p. 135.

[26] *Bracton*, II, p. 307, distinguishes permanent justices (either 'residing in a certain place, such as the Bench' or 'wandering from place to place') from justices of assize, whose office was temporary.

[27] See further pp. 252–4, post.

[28] E.g. the Assize of Northampton (1176), which introduced the petty assize called mort d'ancestor, and the Assize of Windsor (1179), which introduced the grand assize.

[29] These might better have been called recognitions, as in *Glanvill*, xiii. 1 (pp. 148–9). *Glanvill* says *recognitiones* were 'introduced by a constitution of the realm called an assize'. Cf. *Bracton*, II, p. 301.

[30] The record of an assize began, 'The assize comes to make recognition . . .'.

[31] The writ of novel disseisin referred to 'the next assize when our justices shall come into those parts': p. 583, post.

administration of the realm. It was not a specific court of law,[32] any more than the general eyre was, but the descendant of the Anglo-Saxon *witenagemot* (meeting of the *witan*, or royal advisers) and lineal ancestor of the king's council which later subdivided into Parliament, Star Chamber, and Privy Council. The justices in eyre were usually members of this focal *Curia Regis*, to which they returned when their itinerant duties were performed, besides being in themselves a lesser *curia regis*. But the eyre system did not exhaust the judicial resources of the king's central court, which continued to attract suitors who could not await the next eyre or who wanted the king's personal attention. To the extent that the king delegated this central business, there emerged yet another way of employing justices: instead of sending them round the country, they could remain at the centre to hear suitors coming to them from all parts.

When we speak of the C*uria Regis* as the 'centre' of royal administration, we should remember that the centre was not static. The king himself was given to peripatetic rule, for to stay in one place too long – whether in England or in his continental possessions in France – was not sound policy; and the king's court (in its primary sense) necessarily followed the king wherever he went. Nevertheless, even in the twelfth century there was a tendency for a corps of administrators to settle in one place, usually the palace of Westminster (near London), while the king was away. The Exchequer was the first department to be deposited; the king's treasure and the elaborate revenue service which controlled it were too cumbrous to keep constantly on the move. The department took its name from the place where it settled, a spacious room where accounts were reckoned at a chequered table (the *scaccarium*[33]) and where the chief C*uria Regis* held annual meetings from the time of Henry I. The Exchequer was also the first department to keep a written record, the great roll of the pipe,[34] which was started in 1130. During the long absences from the realm of Henry II and Richard I in the second half of the twelfth century, the 'central' judicial business of the king's court also found a regular home at Westminster, and this required an analogous form of written memory (later called plea rolls).

The Two Benches

The appearance of a stationary royal court, functioning independently of the king's personal presence, marks the origin of the traditional judicial system of England. There is evidence that royal justices were disposing of lawsuits in the great chamber of the Exchequer as early as the 1160s. In 1178 Abbot Benedict of Peterborough recorded in his chronicle that, following popular complaints, Henry II ordered that five judges from his household were to remain *in curia regis* to hear all the lawsuits (*clamores*) of the realm, and not to depart therefrom, and that they should refer only difficult cases to himself.[35]

[32] For the changing concept of a court see *CPELH*, I, pp. 413–31.

[33] The name for a chess-board. Before the introduction of Arabic numerals and arithmetic, accounts were reckoned by moving counters on partitioned boards.

[34] The 'pipe' was originally Exchequer slang for a single membrane, which when rolled up in a pigeonhole resembled a pipe. It was later assumed to be metaphorical, the conduit through which streams of gold and silver were drawn into the Exchequer: Co. Inst., IV, p. 106.

[35] *Gesta Regis Henrici Secundi* (RS, 1867), I, p. 207.

It was a matter of some controversy in the past whether this ordinance established the King's Bench or the Common Pleas, as the two principal royal courts were later called, though it seems better to regard it as one of several ad hoc experiments with the judicial system. What is clear is that under Henry II a central royal court, known from the 1190s as 'the Bench', began to sit regularly at Westminster. *Glanvill* refers to a *capitalis curia* (chief court), and contrasts the justices staying put in the Bench (*in banco residentes*) with those journeying about on eyre. In an expanded but early version of the incipit, the subject of the treatise is defined as being the laws and customs used *in curia regis ad scaccarium et coram justiciis ubicumque fuerint*.[36] This passage was taken by some to indicate three institutions: 'in the C*uria Regis*, at the Exchequer, and before the justices wheresoever they may be'. But it is far more likely that it refers only to two: 'in the king's court at the Exchequer, and before the justices wheresoever they may be'.[37] The *curia regis ad scaccarium* was therefore the same as the king's court of the Bench,[38] the reference to the Exchequer being to the place (or perhaps the occasion) of meeting rather than the financial institution. The Exchequer department did soon develop its own judicial side, with 'barons of the Exchequer' as judges; but that was a distinct revenue court.[39]

The contrast drawn in *Glanvill* between the justices who went on circuit and those who stayed behind was physical rather than juridical. It did not imply any difference of jurisdiction, or even of personnel. It was simply a difference in the manner of deploying the king's justices. In the thirteenth century, however, a new distinction emerged. The typical justices of the Bench, or in eyre, were no longer aristocrats and courtiers but professional judges spending most of their time in the administration of the nascent common law. By way of contrast with this ordinary system, the king and his greater advisers only entertained suits *coram rege seipso* (before the king himself) if they were of particular royal interest. From 1200 some of the legal business *coram rege* was recorded on separate rolls. King John (1199–1216) spent more time in England than his predecessors, especially after the loss of most of his continental possessions in 1204, and encouraged such proceedings before himself. So far did this trend proceed that in 1209 the Bench at Westminster was completely discontinued. Now the king was based in England, the royal justices – when not on eyre – could simply follow his court.

The brief suspension of the Bench in 1209–14 did not amount to the abolition of a court. There was still only one royal jurisdiction, and all John did was to rearrange the sittings of his judges so that none remained at Westminster save when he was there himself. Perhaps, in the sense that the itinerant king was the administrative centre of the kingdom, he saw it as a form of centralization. But the measure was not calculated to suit the public. The need to seek out the king for routine cases was a hardship to plaintiffs and defendants alike. In 1214 the Bench was revived, and the following year John was forced to agree that 'common pleas should not follow the king but should be

[36] *Glanvill*, p. 1, note b.

[37] The invisible comma has been debated since the 16th century: W. Lambarde, *Archeion* (C. H. McIlwain and P. L. Ward ed., Cambridge, Mass., 1957), p. 23. Lambarde's contemporary William Fleetwood thought the Exchequer was the first royal court and that the others split from it: Baker, *Magna Carta*, p. 224.

[38] In later records it was always *curia domini regis de banco*. The King's Bench, by contrast, was not described in records as a bench or court, but as 'the pleas held before the king himself'.

[39] For the Court of Exchequer see pp. 54–7, post.

held in some certain place'.[40] This provision did not refer to any specific court, and it did not mean the 'certain place' to be a fixed geographical location; it meant only that a defendant should be told where to appear. And almost certainly it did not have the Bench exclusively in mind, because in 1215 the itinerant judges were equally part of the ordinary system of royal justice; their sessions were sufficiently certain in location to fall outside the mischief needing to be remedied.[41] The purpose of the statute was not, therefore, to create or entrench any particular tribunal, but to ensure that litigation in respect of common pleas – those not involving the king – was conducted in courts which did not follow the king to uncertain places. As it happened, sittings *coram rege* themselves went into abeyance from 1216, during the minority of Henry III, and were not revived until 1234. During that period the Bench acquired a professional bar, the counters of the Bench,[42] and before the end of Henry's long reign its business was conducted with such legal sophistication that the very arguments of the counters and judges were being reported in books.[43]

After proceedings *coram rege* recommenced in 1234, it is possible to perceive the origins of the two principal courts of common law, the Common Bench and the peripatetic court *coram rege* (or King's Bench). From 1234 there were two distinct series of plea rolls,[44] and well before the end of the century there were two fully separate institutions, each with its own judges and officials. More importantly, the two benches together with the assizes displaced the eyres as the ordinary source of royal justice. The normal interval between eyres had become far too long for them to provide justice on a regular basis in any particular county. The last general eyres went out in 1294,[45] and after a limited revival the eyre system was given up completely in the 1330s.[46] As a consequence the Bench became, by accident rather than design, the principal court for common pleas.[47]

The later history of these courts, which remained in being for over six centuries, will be traced in the next chapter.

The Nisi Prius and Assize System

The establishment of regular royal courts, first the eyres and then the two benches, was attended by some practical problems. The eyres had brought royal justice into the counties, but at a considerable cost in terms of delay. Similar work could be done in the

[40] Magna Carta (1215), cl. 17; (1225), c. 11.

[41] Magna Carta (1215), cl. 18, said assizes should be taken in the counties, though the 1217 version (c. 12) provided for adjournment into the Bench. The county was probably deemed 'a certain place': Clanchy, 'Magna Carta and the Common Pleas', p. 223. By 1500 assizes were not regarded as common 'pleas' anyway: see 102 SS 113.

[42] See p. 167, post. For the student 'apprentices of the Bench' (mentioned in the 1280s) see p. 168, post.

[43] See p. 189, post.

[44] For the period before 1272 they became mixed up in an artificial series called Curia Regis rolls; these have all been printed in modern editions up to 1250. From 1272, when they become more complete, they are classed separately as the De Banco rolls (CP) and Coram Rege rolls (KB).

[45] The cessation has sometimes been attributed to the war with Scotland, but a more mundane factor was the reorganization of the assizes in 1293: p. 25, post.

[46] See D. Crook, 97 EHR 241; C. Burt, 120 EHR 1. They were not formally abolished. Eyres were still occasionally held for specific purposes, such as *quo warranto* proceedings: p. 156, post. Chief justices in eyre of the forests were appointed honorifically until 1817.

[47] Already by 1290 the court was associated with Magna Carta, c. 11: 57 SS 11.

interim by the county and hundred assemblies on their own, but to the extent that royal justice was desired in the county on a regular basis the eyres did not provide it. Litigation in the Bench, however, could be expensive and often practicably impossible if all the persons involved had to attend court outside their own county. The former problem proved insuperable, but the second was overcome by two effective expedients. The difficulties of personal attendance were solved for the parties by the appearance in the early 1200s of a class of professional attorneys, who were allowed to represent their absent clients through all the stages of a lawsuit. But the chief difficulty was that both the presentment of crimes and the conduct of trials by assize or jury – which rapidly became a common feature of royal justice – required the presence of twelve or more men from the vicinity where the matter in question occurred. To have required the presence of local juries at Westminster, or before the king's person wherever he might be, would soon have brought the system to the point of collapse. In practice the system was modified so that it did not have to work that way. Another enduring institution of the common law, the assizes, enabled the centralization of royal justice to be reconciled with the need for local investigation and trial.

The means of achieving this reconciliation was the frequent and routine issue of commissions to judges travelling around the country. The use in the thirteenth century of ad hoc commissions between eyres had the result that criminal cases and petty assizes did not normally have to be initiated either in eyre or in the central courts. Indeed, the Magna Carta of 1215 had provided that justices of assize should visit each county four times a year so that assizes should not be taken in the king's court.[48] The same assize system was used to solve the problem of centralized litigation in the benches themselves. Although those courts always summoned juries to appear on a certain day at Westminster, or before the king himself, it became the practice to add 'unless before then (*nisi prius*) the king's justices should have come into those parts'.[49] No one expected the jurors to obey the principal summons, because it was arranged that the king's justices would indeed come into the county first (as commissioners of assize and gaol delivery), so that in addition to their other functions these commissioners could receive jury verdicts for transmission to the court on their return. The nisi prius procedure may have originated in the twelfth century; but it was placed on a regular footing by legislation beginning in 1285.[50] The theory behind it was different from that of the petty assizes. Whereas assize commissioners had original jurisdiction to manage an assize from beginning to end, with power to give judgment or to refer difficulties to the Bench, justices 'at nisi prius' had only a delegated power to proceed on issues referred to them from the benches and could not give judgment. Unlike the other powers of circuit justices, it was not even a power conferred by commission; it was a delegated power tacked on by Parliament to the functions of judges already commissioned to go on circuit for other purposes.

[48] Magna Carta (1215), cl. 18. This was reduced to once a year in Magna Carta (1225), c. 12. It settled down in practice to twice a year.

[49] For a specimen entry see p. 593, post.

[50] Stat. Westminster II (1285), c. 30. An intermediate expedient (until 1285) was to direct that the verdict be received by the sheriff in the county court: R. B. Palmer, *The County Courts of Medieval England* (1973), p. 287.

Despite the variety of these activities, they were all welded together in the thirteenth century into a single and regular system which came to be known as 'the assizes'. It was usual for the active members of commissions to be men of law, often including justices of the benches, and after 1340 the assize commissioners were required by statute to be justices of either bench or serjeants at law. In 1293 the commissioners were organized into four circuits, rearranged into six in 1328. By statutes of 1299 and 1328 it was ordained that assize commissioners should stay on to deliver the gaols in the counties where they sat, and – much later – it became usual for them to be given commissions of general oyer and terminer as well, so that they could deal with accused persons not already in gaol. All this settled into a seasonal cycle which continued down the years until it seemed timeless. Twice a year two judges or serjeants would be assigned to each of the six circuits, through which they rode during the Lent and summer vacations with their clerks, servants, and records. At each county town, or other appointed place, the judges were received by the sheriff with much pomp, and their commissions read out in public; the justices would then proceed to take the assizes, deliver the gaol, and try the nisi prius cases. But the assizes, though moulded into a regular routine, never became a distinct 'court' in the permanent sense. They were founded on the commissions which issued for each circuit; the judges could therefore be regularly changed, and it was perfectly normal for a Common Pleas case to be tried at nisi prius by a King's Bench judge, or vice versa. The nisi prius proceedings were ancillary to the work of the benches – which alone could give judgment following the trial – and were recorded on the rolls of those central courts. On the other hand, the assize business proper was completely divorced from the central system, as was the criminal work. Such cases began and ended in the country, and no central record system was devised. Many assize and gaol delivery rolls have been lost, so that our knowledge of this aspect of the routine business is fragmentary. For all its oddities, the assize system nevertheless proved so useful and adaptable that it remained part of the English way of life until its abolition in 1971.[51] Even since 1971, it is a feature of the English legal system that judges from the superior courts may be sent out to various parts of the country to try the more important cases; but their disposition is once again a matter of administrative discretion.

Effects on Local Justice

It would be agreeably neat if the initial progress of royal justice could be regarded as the result of a predetermined plan to replace the older order of things by the uniform common law of the king's courts. That such was the consequence was not, however, necessarily foreseeable; and it is doubtful whether at any stage in the process kings or their advisers had such a sweeping object in mind. Royal justice was different from communal justice, but it did not immediately supplant it. The communal assemblies and their ancient methods of proof were too deep-rooted for anyone to think of abolition, and so they were allowed to continue alongside the new system as a second tier, subject to

[51] The Courts Act 1971 (c. 23), s. 1(2), abolished commissions of assize but not commissions of oyer and terminer or gaol delivery. Since 1914, however, there had been a short-form composite commission of assize, oyer and terminer, and gaol delivery.

royal authority. Kings were more concerned to assert their grip on existing jurisdictions than to lessen them. Henry I ordained that men should litigate in the shires as they had done before the Norman Conquest. The justices in eyre sat in the county court, and took over its proceedings in the king's name.[52] The justices of assize, too, were enjoined by the Magna Carta of 1215 to sit on the day and at the place of the county court.[53] The central courts were entirely dependent on the sheriffs of counties to execute writs and proclaim outlawries. Neither was there any wish to supplant feudal jurisdiction. Fear that the royal courts might encroach too far on lords resulted in another provision of Magna Carta, that no free man should be deprived of his court by the writ *praecipe*: the king's court could entertain writs of right for land held of subjects only if the immediate lord had waived his court or failed to do justice.[54] The diversion of minor categories of litigation into the royal courts was actively discouraged in the thirteenth century, and some claims under forty shillings were completely excluded, so that such cases had to go to the old local courts. As late as 1278, plaintiffs were directed by statute to sue in the counties as had been accustomed;[55] and for small claims there were advantages in doing so. We shall see later how this restrictive attitude resulted in some awkward limitations of the common law, particularly in the spheres of contract and tort, when the king's law eventually ceased to be exceptional and had to take on work previously excluded.[56]

Although there was no policy of attacking the ancient assemblies, there was a continuing policy under the Normans and their successors of harnessing the power of sheriffs. The Crown's 'incurable fear of the sheriff'[57] was no doubt well founded, for the power which he exercised – as continental experience of analogous officials showed – had the potential to challenge the king's own authority. To prevent the acquisition of excessive local power, the tenure of office was reduced to one year, and sheriffs were subjected to stringent financial supervision at the Exchequer.[58] As early as the 1120s we learn of a sheriff, fearsome and mighty in his own county, trembling in his boots when the time came for his reckoning at the chequered table.[59] The greatest blow was the removal from sheriffs of pleas of the Crown, a process which began de facto with the eyres and was completed de jure by an absolute prohibition in Magna Carta.[60] The prohibition was taken to exclude from the sheriffs' cognizance not only prosecutions upon communal accusation but also civil actions for trespass against the king's peace. It was a serious blow to the standing of the county court. Even in those cases where the county retained jurisdiction it lacked finality, because parties could remove cases into the central courts by writ of *pone*, or (after judgment) by writ of false judgment. The governmental

[52] Henry I's justices simply presided over the county, but the justices in general eyre after 1176 acted as royal commissioners and gave the judgments themselves: Brand, 'Henry II and the Creation of the English Common Law', pp. 202–3.

[53] Magna Carta (1215), cl. 18–19. This was perhaps connected with the 'certain place' policy (p. 23, ante). But it was not in the 1225 charter and never became law.

[54] Magna Carta (1215), cl. 34; (1225), c. 24; but see p. 255, post.

[55] Stat. Gloucester (1278), c. 8. This confirmed the 40s. threshold for royal jurisdiction in trespass cases.

[56] See pp. 50–2, 69–71, and ch. 19, post.

[57] Plucknett, *CHCL*, p. 105.

[58] See J. Boorman, in *Law and Government in Medieval England and Normandy* (p. 264, post), ch. 10. The tenure was laid down by the Provisions of Oxford (1258), though in Westmorland the shrievalty remained hereditary until 1849.

[59] J. H. Round, *The Commune of London* (1899), p. 123.

[60] Magna Carta (1215), cl. 24; (1225), c. 17.

work of the county suffered a coeval decline. Where once the king had toured the counties, either in person or by his justices in eyre, by the end of the thirteenth century the more convenient practice had begun of summoning the counties, by their chosen representatives, to attend the king in Parliament.

These changes left the county, the greatest of the Anglo-Saxon assemblies, bereft of most of its jurisdiction and power. For the remainder of the Middle Ages – and in some counties much longer – it exercised a minor civil jurisdiction in contract and tort. Even in that sphere, the absence of jury trial and the lack of effective final process, coupled with the fifteenth-century interpretation of the 1278 legislation which limited county jurisdiction generally to forty shillings,[61] kept litigation at a low level. The actual decline was intentionally slowed in the thirteenth century by conferring a larger jurisdiction on sheriffs in individual cases by writ. Such writs were called 'viscontiel' (that is, shrieval),[62] and the commonest was the *justicies*;[63] but these were original writs initiating specific cases, and they served to emphasize that the jurisdiction was controlled by the king. Even the jurisdiction conferred by writ seems to have been on the wane by the early fourteenth century, perhaps because of its vulnerability to *pone.* The later medieval county court thus became a court for small claims only, and it survived thereafter mainly because of its exclusive non-judicial functions, particularly in relation to parliamentary elections and outlawries. When John Wilkes was outlawed in 1770 at the Middlesex county court held in the Three Tuns inn, Holborn,[64] it was a far cry from the old grand assembly of magnates, bishops, and leading county figures. So ancient as to be uncertain in its origins, its end was abrupt and ignominious. Shorn of all remaining functions in the nineteenth century, the moribund county court was belatedly laid to rest in 1977.[65]

Peace-Keeping at Local Level

Even though the eyres and assizes could strike terror into the hearts of malefactors, they could not police the countryside, and without an efficient system for bringing crimes to their attention they would have made little impact. The old system of communal responsibility was therefore continued and reinforced. The hundreds remained responsible for presenting offences, and could be made collectively liable for failing to discover the perpetrators of manifest crimes.[66] The representatives of hundreds and vills who were bound to attend and present accusations of crime before the royal judges became the institution known as the grand jury, though it was a body increasingly concerned with examining accusations brought before them rather than informing itself.[67] Another source of information was the 'sheriff's tourn'. Twice a year the sheriff visited each hundred in his county to review the frankpledge or tithing system and to deal with criminal

[61] 94 SS *57*. This was not the original position: J. S. Beckerman in *Legal History Studies 1972*, pp. 110–17.

[62] The Anglo-French word for sheriff was *viscounte* or *viconte* (from the Latin *vicecomes, -item*), indicating that he was originally a deputy of the earl (*comes*). But the English word 'viscount' later denoted a rank in the nobility between baron and earl.

[63] For a specimen see p. 581, post.

[64] *R. v. Wilkes* (1770) 4 Burr. 2527 at 2530.

[65] See p. 31, post.

[66] The main enactment was Stat. Winchester (1285), c. 2, making the people of the hundred answerable for robberies.

[67] See pp. 545–6, post.

prosecutions. But the system broke down in practice as a result both of the curtailment of shrieval power and of the fragmentation of hundredal jurisdiction. After Magna Carta the tourn could not 'hold' pleas of the Crown – that is, try them – and was confined to making preliminary enquiries with a view to presentment before the royal justices. Many hundreds fell into private hands, and their lords usually claimed exemption from the tourn and the right to hold their own 'courts leet' in its stead; these might possess a customary jurisdiction over misdemeanours. The view of frankpledge, or oversight of the tithing system, was kept up by lords possessing leets chiefly as a minor source of income from 'head money'; but as a means of preserving order its only lasting consequence seems to have been the election of constables, a practice maintained with varying degrees of effectiveness until the introduction of a professional police force in the nineteenth century.

The perennial problem of maintaining order was addressed by yet another innovation. As early as 1200 a number of knights in each county had been appointed to 'keep the peace', a phrase which imported a militia or police function rather than one of judicature. As the most reliable segment of the county establishment, these conservators of the peace were frequently employed also on special commissions of oyer and terminer and gaol delivery, to relieve the load on the professional justices of assize between circuits; and by a series of statutes in the reign of Edward III (1327–77) their functions were increased and partly judicialized, so that they became 'justices of the peace', serving under standing 'commissions of the peace'. The principal safeguard against their acquiring excessive local power, from the king's point of view, lay in the use of commissions. Not only was authority distributed, but it was easily revocable. Without a commission the justices could not act, and every new commission – whatever changes of personnel it contained – superseded the last. At intervals a new commission of the peace was drawn up for each county, listing the substantial knights and gentry of the area, and taking care to include men who were wise and learned in the law (*sages et apris de la leye*),[68] charging them both to keep the peace and 'to enquire into, hear, and determine' a long list of crimes, ranging from felonies to economic offences and sorcery. The first of these 'charges' imposed a police responsibility on each justice; individual justices could arrest suspects and commit them to gaol, and could require anyone to give surety for keeping the peace. The second was in effect a general commission of oyer and terminer to any two or more justices (with a 'quorum' of lawyers and other reliable men of business[69]), empowering the justices collectively to hold their sessions of the peace.[70] Directed by statute to be held at four seasons of the year – close to the feasts of Michaelmas (29 September), Epiphany (6 January), Easter (March-April), and the Translation of St Thomas (3 July) – these were known as the general quarter sessions of the peace. The jurisdiction of quarter sessions was virtually coterminous with the criminal side of the

[68] The requirement of Stat. 18 Edw. III, stat. ii, c. 2.

[69] The quorum did not mean a minimum number, but the presence of persons from a specified subset. In the judicial part of the commission the list of justices was followed by a *quorum* (of whom) clause ('of whom A., B., or C. shall be one').

[70] The commission of the peace still has two 'assignations', but since 1973 it has been addressed generally to such persons as may from time to time hold office as JPs; new JPs are now appointed by individual instruments.

assizes, but in reality inferior. For six centuries until their abolition in 1971, the quarter sessions provided a mixed tribunal of lawyers and laymen – latterly of lay members with a legally qualified chairman – to deal with those serious pleas of the Crown which were not reserved for the assize judges. Before the reorganization of local government in the nineteenth century, the justices were also responsible for the administrative duties of the county, such as provision for the poor and orphans, the maintenance of highways and bridges, and the licensing of alehouses. Some of this administrative business, together with the pre-trial police work of the justices, came to be transacted in private between quarter sessions, and some of it in intermediate 'petty sessions', which also became minor courts of law by virtue of legislation giving the justices powers of summary conviction and punishment.[71]

The rise of the justices of the peace corresponds closely with the demise of the county court and hundred as institutions for the despatch of public business, both judicial and administrative. After the hearing of pleas of the Crown was taken from sheriffs, it was passed first to ad hoc commissioners and then to the justices of the peace; and in 1461 many of the remaining powers of sheriffs' tourns followed suit.[72] In effect the Crown had taken the county from the sheriff and put it into commission. Parliament likewise repeatedly ignored the existence of the old county assembly as it heaped new duties of all kinds upon the commissioned magistrates. By the fifteenth century the greater men of the shire – the *buzones* (as *Bracton* had called them), on whose nod the decisions turned – still served their locality, but in new roles. As knights of the shire they now represented the county in Parliament, which was another feat of centralization. And as justices of the peace they continued the judicial and administrative work of the shire, but under commissions through which alterations in personnel and duties could be made by the central government. The reality of this continuity was such that the old assembly did not need abolition: the leaders of the county could afford simply to ignore it. What had once been the privilege of attending the shire-moot turned into an unwelcome burden cast off onto tenants of certain pieces of land; and a combination of exemptions, powers of attorney, and evasions, enabled the effective withdrawal of those who now wielded their influence at Westminster or in the sessions. The multifarious county customs mentioned almost with despair by the twelfth-century writers had largely disappeared in the process.[73] Once again, no one had decreed that the common law should prevail; but a stream of expedients had gradually produced a situation in which the old ways of doing things faded away.

Local Civil Justice

The communal jurisdictions endured longest at the level of borough and manor, perhaps because at that level they were independent of the sheriff. Some of them outlived even the King's Bench and Common Pleas, which were abolished in 1875. The local customs under which they operated were allowed by the common law provided they

[71] See pp. 551–2, post. Some of these lesser powers did not require a court hearing at all.

[72] Stat. 1 Edw. IV, c. 2. The tourn was not abolished till 1887.

[73] The last county customs to survive were those governing the distribution of personal property on death: p. 411 n. 62, post.

were reasonable.[74] But here, too, the nominal continuity with earlier times concealed another victory of the common law.

Most city and borough courts continued actively until the Tudor period, and many a good deal longer; a few were still flourishing when the axe of uniformity cut them down in 1971.[75] They were patronized chiefly by urban tradesmen seeking swift remedies in mercantile disputes. In addition to the permanent courts, every fair had a court of piepowder[76] to resolve mercantile disputes arising during the fair. These courts were said to apply the 'law merchant', though for the most part this was not a distinct body of law so much as an expeditious procedure.[77] Their speed offered a distinct advantage. Whereas an action at Westminster might drag on for a year or more, a suit in a piepowder court might be disposed of in a day.[78] Yet their geographical reach was limited, and they lacked the sanctions available to the royal courts through the sheriffs. In Tudor times merchants began to transfer their allegiance to the King's Bench, to which municipal courts were subordinate. The record of a borough court could be challenged by writ of error, on the grounds that the law and custom of the realm had not been complied with,[79] and the threat of reversal must have encouraged borough courts to assimilate their practices to those of the central courts. The result was that these valuable small-debt jurisdictions, invariably from the fifteenth century presided over by recorders bred in the inns of court, became local courts of common law.

The higher feudal courts, those of baronies and honours, mostly disappeared at an early date;[80] but humble manorial courts flourished well beyond the Middle Ages. All manor courts had a feudal jurisdiction over the tenants. By royal grant or (more usually) immemorial usage, many manorial courts also enjoyed 'franchises' giving them jurisdiction in other matters, such as contract and tort; and some, as we have seen, claimed to have the public jurisdiction of hundred and tourn within the precincts of their leets. These franchises varied greatly from one manor to another, but they were all eaten into by the trends mentioned in this chapter, and they were subjected to royal control. Even the feudal jurisdiction over land, the right apparently assured to lords by Magna Carta, was overtaken by the common law.[81] The royal courts assumed jurisdiction over the writ of right for land either through lords failing to claim their courts or by the allegation – increasingly unchallenged, and therefore tacitly fictitious – that they had waived them. A wide range of other remedies in the royal courts curbed the suzerainty of lords to such an extent that they became free to decide only as the king's law allowed them,

[74] See pp. 31–2, post. For early-modern borough courts see *OHLE*, VI, pp. 291–319.

[75] Courts Act 1971 (c. 23), ss. 42–43, abolished the Mayor's and City of London Court, the Norwich Guildhall Court of Record, the Salford Hundred Court of Record, and the Tolzey Court of Bristol.

[76] I.e. *pied poudré*, referring to the dusty feet of the merchants.

[77] See *CPELH*, III, pp. 1233–84.

[78] E.g. the Colchester case of 1482 where a plaintiff began his suit at 7 a.m., the defendant (after a proper summons and precept) appeared at 9 a.m., and the pleadings were completed in the afternoon: *OHLE*, VI, pp. 312–13.

[79] See B. & M. 324; *OHLE*, VI, p. 310. This was not an objection if a reasonable local custom was shown; but in the absence of such a custom the common law applied.

[80] The principal survival is the duchy of Lancaster, which since 1399 has belonged to the sovereign as a separate inheritance. It owns property throughout England, and not merely in the county palatine of Lancaster. It still has a council, but its court (the Duchy Chamber) has long been defunct.

[81] See pp. 250–5, post.

and the result was that the 'feudal' land law became the cornerstone of the common law. Feudal control, tempered by manorial custom, was imposed a good deal longer on the unfree tenants; but royal justice reached them as well in the fifteenth and sixteenth centuries,[82] when 'tenancy according to the custom of the manor' became a species of tenancy at common law (called copyhold). Although manorial courts retained some importance until 1925, they did so not as deliberative tribunals but as providing the only machinery for conveying copyhold land. As courts of law their day was long gone.

By the nineteenth century the accidents of history had left an uneven pattern of local civil jurisdiction across the country, though it differed from the common law only in procedure. The counties palatine were still to some extent miniature kingdoms, immune to the changes affecting ordinary counties; Durham and Lancaster had their own regalian courts (with benches, exchequers, chanceries, and judicial commissions) until 1875, when they were merged with the High Court.[83] In some towns, borough courts or municipal courts leet continued to provide speedy justice; in others all semblance of judicature had ceased. In rural areas the chances that a court leet or franchisal court had survived were slender, and in any case few of them offered civil remedies except in minor matters. A number of later statutory experiments with 'courts of requests' had been made in the larger towns, with varying success.[84] In 1846 uniformity was introduced with a nationwide system of 'county courts', in which small civil claims could be tried by professional judges.[85] The new county courts bore no relation to the old shiremoot, or even to counties,[86] save that their jurisdiction in 1846 had similar limitations. Their jurisdiction has been steadily extended since then by statute,[87] and all competitors swept aside. The manorial courts, counties, hundreds, leets, courts of piepowder, and various other obsolete jurisdictions, were finally put down in 1977.[88]

Justice outside the Common Law

Custom

The common law applied by the king's justices, and transmitted throughout the realm by a burgeoning legal profession, rapidly displaced local customs. But it was always in theory a default system, applied where there was no definite local custom, or where the same custom was thought to prevail so universally that it was 'common' to the whole realm. A uniform body of English law had obvious advantages over a profusion of local

[82] See pp. 326–8, post. For villein status and manorial custom see p. 503, post.

[83] The Chester courts went first (with the Great Sessions in Wales) in 1830: pp. 38, 58, post. The title of vice-chancellor of the county palatine of Lancaster is the last survival, but since 1987 it has always been held by a High Court judge from the Chancery Division.

[84] See W. H. Winder, 52 LQR 369; M. Slatter, 5 JLH 97; H. W. Arthurs, 5 JLH 130.

[85] P. Polden, *A History of the County Court 1846–1971* (1999); *OHLE*, XI, pp. 876–906. The courts had equitable as well as legal jurisdiction.

[86] Their jurisdictional areas were not coterminous with counties. Since 1971 judges of county courts have been known as 'circuit judges', not because they go on circuit but because they were first assigned to areas called 'circuits'. But in 2014 the courts were replaced by a single County Court, with jurisdiction throughout England and Wales. The names and titles are therefore misleading.

[87] In 2014 the monetary limit on County Court jurisdiction was set at £75,000. Since 1967 there has also been a divorce jurisdiction.

[88] Administration of Justice Act 1977 (c. 38), s. 23, Sch. 4; S.I. 1977 No. 1589.

usages, and the early common-law judges disliked local peculiarities unless they were well entrenched. There were no parts of England completely outside the common law, governed solely by local custom. Only the county of Kent preserved a corpus of local customs, which were known as gavelkind; these were accepted by the royal justices, but they dealt with only a limited range of matters.[89] Many boroughs also had ancient usages codified in written custumals, and since they had their own courts they did possess some legal autonomy, though here again the customs were far from comprehensive in their subject-matter and did not exclude common law.[90] There was thus no room for regional customary systems of law in England, but simply a tolerance of specific local rules which differed from the rules of common law. A customary rule could be established anywhere if it had been observed since time immemorial,[91] so that it was deemed to be coeval with the common law, provided it was certain both in its terms and in respect of the locality in which it operated. The judges would only reject it if they deemed it unreasonable, for instance if it was extortionate or unfair in its application. That is still the law in England, though the last customs of practical significance were those manorial customs which until 1925 affected the devolution of land on death.[92] Custom in this specific legal sense operates differently from customary norms which guide decisions without having legal force.[93] It is permanent local law, just as binding as common law, and not changing with the times. It is to be sharply distinguished from trade usages, and the like, which do not have to be timeless and can only have legal effect to the extent that they are incorporated into dealings by contract. Usages must be consistent with the common law.[94] By contrast, a customary rule can never be established by agreement, because it is by definition divergent from the common law and it binds parties regardless of their personal wishes.

Arbitration

Another survival which operated, and still operates, alongside the common law was informal dispute-resolution. In fact it preceded legal systems of any kind. Early writers taught that a love-day (*dies amoris*), on which matters might be settled by mutual agreement, was always preferable to a doom's-day, an imposed judgment. It removed the rancour of litigation, and indeed it was sometimes explicitly directed as part of a medieval concord that the parties should give each other the kiss of peace, or a mug of ale,

[89] See *Statutes of the Realm*, I, pp. 223–5; Pollock & Maitland, I, pp. 186–8; N. Neilson, 38 *Harvard Law Rev*. 482.

[90] See *Borough Customs*, ed. M. Bateson (18 and 21 SS); Hudson, *OHLE*, II, pp. 812–43. The main surviving customs were ubiquitous: the devisability of land held by burgage tenure, the actionability of covenants without writing, and less formal court procedures.

[91] The beginning of legal memory came to be fixed arbitrarily as 3 Sept. 1189, the beginning of Richard I's reign. This was conveniently close to the beginning of central legal records. Only in relation to the rights of tenants in ancient demesne was recourse allowed to an older record (the Domesday Book of 1086).

[92] E.g. in some manors land went to all the sons equally, in a few to the youngest: p. 285, post. Most towns had customs allowing land to be left by will, which the common law did not allow.

[93] For this kind of custom see pp. 249–50, post. Cf. also the rule of the road, p. 439, post.

[94] For the 'law merchant', which is not an exception to this but is really a branch of the common law, see p. 387 n. 8, and p. 394, post. The London Assurance Chamber, a 16th-century tribunal for insurance cases, followed mercantile usages (some of them international) but derived its authority from contract. See G. Rossi, *Insurance in Elizabethan England* (2016).

and be as friends. Little is known about wholly informal forms of mediation, which would not necessarily bar subsequent legal proceedings. But arbitration was an everyday institution, accommodated by the common law. It might be a first resort, to avoid the courts altogether, or it might be a way of ending a lawsuit which had already been commenced.[95] As courts came to be overburdened with suits, they might themselves recommend or direct a 'reference' to arbitrators as the best way forward; and sometimes, to achieve a more equitable outcome, a case would be referred to some of the judges themselves, to settle informally. Arbitration could resemble litigation, as lawyers came to be employed both as arbitrators and as counsel. But it had many advantages over proceedings in courts, besides relative expedition and cost-saving. The parties could choose their own judges, with an umpire in case of disagreement. The arbitrators were judges of fact as well as law. They might apply the common law, but they were not confined by legal rules or procedures and could take account of set-offs, counterclaims, and equitable defences, or in cases of doubt split the difference, whereas in a suit at law the winner took all. Moreover, if the parties so agreed, the award would determine all disputes between them 'since the creation of the world', something which a lawsuit could never do.

The standard procedure from the fourteenth century onwards was for the parties to execute mutual bonds[96] to abide by the award of named arbitrators. The contract of submission could be as detailed as the parties chose, specifying the matters to be investigated, the timetable and procedure, the form the award should take, and the manner of dealing with subsequent questions about its meaning or application. The courts of law would enforce these bonds, thereby giving the force of law to the whole process, and yet they would not interfere with or review the arbitrators' decisions if properly made within their authority. The parties had effectively set up their own legal system to deal with the matters in hand, and so long as they had done so freely and without infringing the law there was no need for courts to interfere with it.[97] The story of arbitration is a different kind of legal history from that recounted in this book, but it is salutary to remember that throughout all ages countless disputes were resolved without recourse to law courts, and also that the vast majority of the disputes taken to court have never been pursued as far as judgment.

The Reach of the English Common Law

The common law of the realm was known by that name in the late twelfth century,[98] and was alternatively styled the *jus regni* (law of the realm) or *lex terrae* (law of the

[95] The majority of lawsuits, in all periods, did not end in a judgment. But their settlement normally rested on mutual compromise rather than arbitration.

[96] A conditional bond was a contract under seal, with a penalty for non-performance: p. 345, post.

[97] From the second half of the 17th century it was also possible to embody an award in a rule of court, so that it could be enforced by imprisonment for contempt; this became common after the Arbitration Act 1698 (9 Will. III, c. 15).

[98] *Dialogue of the Exchequer*, pp. 90, 176, 178. It was probably a conscious borrowing from the canon law, in which *jus commune* meant general law as opposed to local customs or privileges. The Anglo-French *commune ley* is found in 13th-century law reports and statutes, sometimes contrasted with *ley speciale* (legislation).

land).[99] By the middle of the thirteenth century it was a fully fledged juristic entity, with its own specialist practitioners, its own technical language and literature, and its own law school.[100] It was to prove remarkably durable. It survived civil wars and changes of dynasty. At various times it was seen as delimiting the authority of the king, Parliament, and the Church. The establishment of constitutional monarchy, the separation of the Church of England from Roman interference, and the recognition of individual liberties, were all at various times assisted by the common lawyers' ways of thinking. And, with few outward signs of struggle, the common law withstood two waves of Romanist influence which swept across the Continent. The rediscovery of Justinian's *Digest*, and the explosion of Roman legal studies in the universities of the twelfth and thirteenth centuries, made Roman law the common currency of university law faculties throughout Europe, including Oxford and Cambridge.[101] Early royal judges were in touch with that new learning, and may have absorbed some of its premises; but (as Brunner put it) the effect was prophylactic, serving to immunize English law against fatal infection later.[102] The scheme of writs described in *Glanvill* and the attendant procedure and terminology, the developed notion of pleas of the Crown with all the machinery for the discovery and trial of criminals, the feudal land law, and the existence of central and itinerant royal courts capable of subjecting the whole nation to the king's law and government: all these things were in being before the university law schools could exert much influence. And so, 'while the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history; it was developing a formulary system which in the ages that were coming would be the strongest bulwark against Romanism and sever our English law from all her sisters'.[103] The second wave of 'Romanism' struck at the end of the Middle Ages, when Renaissance humanism drove out older forms of litigation from continental courts and encouraged the application of rational legal principles derived from Roman law. But, once again, England had anticipated the rest of Europe without recourse to scholastic learning. Through the process called 'pleading', the common lawyers had built their own elaborate and rational system of law around the procedures which governed the business of the royal courts.[104] Their law schools were located not in the universities – which were not interested in national law – but between London and Westminster Hall, and their study did not centre on classical or academical texts but on writs and pleading and the law of real property.[105] Not that England escaped the rapid social and legal changes of the Renaissance period; but the common-law system accommodated them with little or no recourse to foreign jurisprudence.[106]

[99] For *lex terrae* see Magna Carta (1215), cl. 39; (1225), c. 29. English lawyers did not observe the Roman distinction between *lex* (written law) and *jus*. In law French, *ley* encompassed both kinds of law, whereas *droit* had the different sense of 'right' (e.g. title to land) or justice.

[100] See chs 10, 11, post.

[101] For the English doctors of law see pp. 180–1, post. The study of Roman law was a preliminary to reading canon law, which was the principal kind of 'other' law administered in England: see ch. 8.

[102] *Essays AALH*, II, p. 42. This has been misinterpreted in North America, where the first adjective has acquired a more specific connotation.

[103] Pollock & Maitland, II, p. 558. For the possibility of Roman influence on the English formulary system in its infancy see D. J. Seipp, in *Legal Record and Historical Reality*, p. 9; 7 LHR 175.

[104] See pp. 83–7, post.

[105] See pp. 168–71, post.

[106] See further *CPELH*, III, pp. 1460–77; *OHLE*, VI, pp. 3–52; pp. 46–7, post.

Having stood its ground in the land of its birth, the English common law became a force to rival the Civil law beyond the seas. The men who sailed for the new world in the seventeenth and eighteenth centuries, and those who built the British Empire in the eighteenth and nineteenth centuries, took the common law with them as a matter of course. And thus, by an astonishing twist of fate, the insular learning of the small band of lawyers who had argued cases in a corner of Westminster Hall became the law by which a third of the people on the earth were governed and protected. Within Europe, on the other hand, England remained an island in law as well as in fact. There are obvious reasons why this should have been so, despite extensive travelling and trading contacts. The common lawyers occasionally owned elementary Roman law books but had virtually no intellectual rapport with their Continental counterparts. Their law-French dialect would not have been understood in Paris. Their system of law was so embedded in the procedure of the king's courts as to be largely incomprehensible outside them. Even its more abstract doctrines were not easily transportable to countries which had different systems of courts and knew nothing of writs or juries, or the distinct terminology used in England.[107] And so English law evolved in isolation from Europe, and even from other parts of Britain and the British Isles. We should now look at the immediate peripheries.

The Sea

The jurisdiction of the common-law courts ended at the sea, because it was dependent on sheriffs and juries, and they had no authority or cognizance with respect to anything beyond the county boundaries. Matters arising at sea were for the courts of admiralty, which were English but did not follow the common law.[108] It was asserted around 1300 that the area of common-law jurisdiction included the coasts of the sea,[109] which were reckoned to extend three or four miles out from land, as well as ports, tidal rivers, and creeks;[110] but by 1600 it was agreed to end where the shore met the tide.[111] The narrower definition was the outcome of numerous wrangles with the admiralty, but it also recognized that jurisdiction was not directly related to the concept of territorial waters. The limits of national sovereignty over the seas surrounding the realm were a matter of international relations. Whether, and to what extent, states could own parts of the sea became controversial in the seventeenth century,[112] but it was not for courts to settle.

Norman Law and the Channel Islands

After 1066 the kings of England were simultaneously dukes of Normandy, and both countries were subject to common influences. Many of the legal developments and experiments

[107] There was a story that Thomas More had in 1521 silenced a know-all in Brussels, who offered to answer questions on any point in law or humane letters, by asking 'whether cattle taken in withernam are irreplevisable': *CPELH*, II, p. 612.

[108] See pp. 132–3, post.

[109] 108 SS clxxi–clxxii, 24–30.

[110] If the opposite shore was visible, it was not sea: *Eyre of Kent 1313–14* (24 SS), p. 133 (River Medway).

[111] I.e. the furthest reach was the low-water mark when the tide was out: *R. v. Lacy* (1583) 108 SS 92; 2 Co. Rep. 93.

[112] John Selden argued in his *Mare Clausum* (1631), contrary to the opinion of the Dutch jurist Hugo Grotius, that the sea could be appropriated in the same way as land, by exclusive control.

mentioned in this chapter were also paralleled in the ducal court of Normandy. Nevertheless, the customs of Normandy were recognized to be different from those of England, and institutions and procedures which had the same names developed in different ways in the two countries. The process whereby the common law was crystallized through the formulary system brought about a similar crystallization of Norman law. Not long after the laws and customs of England were summarized in *Glanvill*, a Norman counterpart was written, *Le Très Ancien Coutumier de Normandie* (*c*. 1200), followed in the middle of the thirteenth century by *Le Grand Coutumier*.

Despite the de facto loss of mainland Normandy and other continental possessions to the king of France in 1204,[113] the kings of England maintained their claim to the duchy,[114] though only the Channel Islands remained in their actual possession. The islands have continued since then to be annexed to the Crown in right of the duchy of Normandy, with the legal result that, although their inhabitants are British subjects, the islands themselves are not part of Great Britain or subject to English common law. Their customary law is still Norman, though since 1204 it has developed independently from the law of mainland Normandy and (like the common law) it has become heavily overlaid by Westminster legislation.

Although most lawsuits in the Channel Islands were heard in its local courts, where decisions were made by lay jurats,[115] a few eyres were held between 1299 and 1331, and a handful of early cases were taken to the King's Bench. The judges applied Norman customs, not the common law of England, but their influence in the islands was short-lived. The eyre system collapsed in the early fourteenth century, and in 1368 the King's Bench decided that it could not hear writs of error from the islands' courts. The king still retained ultimate judicial authority as duke; and, since he had no separate duchy council, the king's council in 1495 assumed an appellate jurisdiction, providing a model in later times for appeals from the more distant dominions.

Wales and the Common Law

The kingdom to which the Normans succeeded in 1066 did not in reality include the Celtic strongholds in Wales, Ireland, and Scotland. The Celts in Wales had defiantly preserved the titular kingship of Britain until the death of King Cadwallon in 634 AD, and all the Celtic peoples preserved their language, culture, and customs after they had been driven back into the western and northern extremities of the islands. It is tempting to think that the Welsh bards and Irish 'brehons' who preserved the Celtic customs by memory and verse continued the druidical mnemonic tradition noticed by Caesar, though this cannot be proved. The earliest extant manuscripts of the Irish and Welsh

[113] Until Henry III the kings of England continued to use French titles (duke of Normandy and Aquitaine, earl of Anjou and Poitou), and from 1340 to 1800 the kings of England and Great Britain were also formally styled kings of France; but there were few if any remaining footholds on the Continent. The town and marches of Calais, in Picardy, were regained by conquest in 1347 and retained until 1557; they were subject to a limited oversight from Westminster but not to English law. Henry VIII's exploits resulted in brief conquests of Tournai (1513–19) and Boulogne (1544–50).

[114] Possession was actually recovered by Henry V in 1419, but retained only until 1450.

[115] The name, like juror, derives from *jurare*, to swear an oath. But jurats are judges of law and fact, sworn on taking office to render justice to all, whereas jurors are sworn to render a true verdict in a particular case.

laws date from the twelfth century, but their contents are older and may provide a link with prehistoric Britain. The Welsh customs which were codified in medieval times as the 'laws of Hywel Dda'[116] superficially resembled the Anglo-Saxon codes in their use of compensation payments to discourage feuding, but they stressed the ties of kinship more prominently than those of community or lordship, and there was no mention of ordeals.[117] Early Welsh law was not a law of counties, hundreds, and feudal lords, but of tribes, families, and chieftains. Yet the customs were not static. The codes themselves were agglomerations of matter from different periods, and Welsh kings altered some of the rules within historical memory.

Wales was still not unified in the thirteenth century. The princes of North Wales enjoyed a dominant position and rendered homage to the king of England, whereas the lords of the marcher territories retained independence. By 1258 Llywelyn ap Gruffydd claimed to be prince of all Wales, and it was this principality which Edward I seized on Llywelyn's death in 1282 and annexed to the English Crown, either by conquest or through forfeiture for treason.[118] The English affected to regard Celtic custom with contempt, and Archbishop Peckham advised Edward I that the laws of Hywel Dda were irrational and came directly from the Devil. It was therefore decided in 1284 not only to extend the English system of counties, sheriffs, and justices to Wales by statute, but to try to codify some of the principles of English common law for the use of Welsh officials.[119] The statute did not apply to the marcher lordships, which were not part of the principality forfeited to the king but continued to possess the regalian rights of the old Welsh rulers as independent territories. When in 1354 the marches were made attendant to the English Crown,[120] they still kept their own customs, which varied from one lordship to another. In some of them, however, judicial institutions developed which mirrored those of England.

The statute of 1284 did not make Wales part of the realm of England, and did not therefore extend the jurisdiction of the English central courts to Wales. The English judges generally declined to try any dispute arising there, so that even the most serious crimes were outside their jurisdiction.[121] Welsh customs therefore continued in operation, albeit with increasing English influence on the modes of tenure of land.[122] Indeed the influence of English law was such that by the sixteenth century the Welsh laws seemed to many of the inhabitants themselves to be outmoded, perhaps even a mark of inferiority. There was no outcry when, in 1536, Wales was declared to be 'incorporated,

[116] Hywel Dda ('the Good') was king of most of Wales by the time of his death *c*. 950 AD, and he may have been inspired by Alfred's laws, though parts of the code with his name were added later. For the extensive literature see Watkin, *Legal History of Wales*, p. 215 n. 10.

[117] Some of these features may reflect lingering Roman influence: T. G. Watkin in *Legal History in the Making*, pp. 1–9; D. B. Walters, 15 *Recueils Soc. Hist. Droit* 67.

[118] 92 SS 23–5. Since the 14th century it has been settled in perpetuity (together with the duchy of Cornwall and earldom of Chester) on the princes of Wales, revesting in the Crown whenever there is no prince of Wales. Unlike the duchy of Cornwall, it does not yield any revenue to the prince or the Crown.

[119] Stat. Rhuddlan [or, of Wales] (1284), 12 Edw. I. For a specimen (dealing with contract) see B. & M. 309–10.

[120] Stat. 28 Edw. III, c. 2.

[121] See *R. v. Owain Glyn Dwr* (1401) 88 SS 114; *Dolbyn v. Ap Tudor* (1534) Spelman Rep. 156; 94 SS 340.

[122] Welsh custom favoured coparcenary among males, as opposed to the primogeniture of the common law.

united, and annexed to' the realm of England, the 'sinister usages and customs' of the Welsh (such as partible inheritance) were abrogated,[123] and Welsh subjects were granted the same laws and liberties as the English, including representation in Parliament.[124] The marcher lordships were done away with, and five new counties introduced. In 1541 a new system of superior courts – the Great Sessions in Wales – was set up, with justices 'learned in the laws of this realm', and this was confirmed by statute in 1543.[125] From this period the Welsh gentry began to send their sons to the inns of court.

The new courts were to sit twice a year in four circuits, each comprising three counties, and to have the same jurisdiction in Wales as the King's Bench and Common Pleas had in England. Under the 1543 Act the king had the power to legislate for Wales without the consent of Parliament – an early example of delegated legislation, sometimes regarded as the original 'Henry VIII clause'. It was meant to continue the old tradition of prerogative government in Wales. In the event it was not much used, except to regulate the Council in the Marches,[126] but it required a considerable political effort to repeal it in 1624. Writs of error, and certiorari in criminal cases, lay after 1536 to remove Welsh cases into the King's Bench at Westminster. A Welsh cause of action could still not be tried by an English jury, but after 1543 it was accepted that the process of the English Chancery and Exchequer would run into Wales, and eventually (after much controversy) it was established that King's Bench process would run there also.[127]

In 1830 the Great Sessions were abolished, so that by complete procedural assimilation England and Wales became one unified jurisdiction, two extra circuits being added to the English assize system. Since 1998 there has been a Welsh Assembly, authorized by the United Kingdom Parliament to make laws for Wales within defined areas of competence,[128] but Wales otherwise remains subject to the same laws and legal system as England.

Ireland and the Common Law

Ireland belonged to the Crown of England from the late twelfth century, but it was never incorporated into the English court system. In 1210 King John ordered that the law and custom of England be observed in Ireland, and thereafter there were royal courts in Dublin, closely analogous to their English counterparts, which followed the common law and its procedures. Indeed, Ireland was the first common-law jurisdiction outside the realm of England. But it was a separate dominion or kingdom,[129] with its

[123] A law commission was to report on all the laws of Wales so that the Council could decide which of them should be approved; but this never happened.

[124] Stat. 27 Hen. VIII, c. 26. This did not abolish reasonable local customs, which could be proved in the same way as in England: *Anon.* (1579) Dyer 363.

[125] Stat. 34 & 35 Hen. VIII, c. 26 (1543), confirming ordinances issued in 1541 under powers contained in the 1536 Act.

[126] See p. 130, post. The Council was controlled by executive instructions from the Privy Council.

[127] *Whitrong v. Blaney* (1677) 2 Mod. Rep. 10, Vaugh. 395; *Lampley v. Thomas* (1747) 1 Wils. 193; *Penry v. Jones* (1779) 1 Dougl. 213.

[128] Government of Wales Act 1998 (c. 38). The National Assembly for Wales meets at the Senedd in Cardiff.

[129] The dominion was declared in 1537 to be 'united, knit, and belonging to the imperial Crown' of England. Henry VIII assumed the title king of Ireland in 1541. See *CPELH*, II, pp. 901–22.

own Parliament, and it was a thorny question how far acts of the English Parliament applied there *proprio vigore*.[130]

The Irish had possessed ancient laws of their own long before 1210. The principal law text was the *Senchas Már* ('Great Tradition'), which contains material from as early as the eighth century, and there are glosses and commentaries suggesting that it was studied and taught over many generations. The native customs were of little concern to the English settlers in Dublin, who at first treated the Irish as being of inferior status, and there was no official interest in preserving them. By means of general charters and specific grants of denization, and through the application of English statutes to Ireland, the privilege of English justice was gradually extended to most Irishmen who wanted it. This process left the old Irish law, or 'brehon law', to operate in some areas beyond the 'pale' of Dublin as local custom; but, as with English local custom (or Welsh local custom after 1536), individual customs could be rejected by the royal courts if they offended common-law standards of reasonableness.[131]

By 1300 the king's court had branched out, as in England, into a 'Chief Place' (or Justiciar's Bench, presided over by the king's lieutenant or justiciar), a Common Bench, an Exchequer, and a Chancery (presided over by the chancellor of Ireland). The jurisdictional boundaries were not as distinct as in England, because the 'common pleas' provision of Magna Carta did not extend to Ireland;[132] but by 1500 the 'Four Courts' in Dublin operated in a similar way to their Westminster namesakes. Their judges were lawyers who had studied in the English inns of court, and occasionally under the Tudors and Stuarts they were Englishmen. After 1541 Dublin had its own society of lawyers, called the King's Inns, though it offered no educational facilities and Irish barristers were still required to learn their law in England.[133] In 1615 the first Irish law reports were published in Dublin, being the work of the Englishman Sir John Davies, who had been posted there as attorney-general.[134] It was a long time, however, before any more Irish reports appeared in print. There was no distinct jurisprudence to record. The establishment of royal courts on the English pattern, with judges and advocates bred in the common law, had resulted in an effective transplantation of English law. The full details of the history of royal justice in Ireland are nevertheless wanting, because in 1922 the Four Courts in Dublin were blown up and centuries of legal records were destroyed.

The four Dublin courts were never wholly independent, for they were the king's courts and their decisions were subject to review by the king. Error lay to the King's Bench in England, and from thence (at any rate after 1719[135]) to the English House of Lords. The jurisdiction to hear error from Ireland was taken from the King's Bench in 1783, and

[130] Poynings Act (1495), passed by the Irish Parliament, declared that 'all statutes late made' in England, if they concerned the public weal of Ireland, should apply there; but it was unclear exactly to what statutes this referred, and it was only retrospective. See *OHLE*, VI, pp. 109–10.

[131] *Case of Tanistry* (1608) Dav. Ir. 78. There is reason to think that the court in this case failed to understand the custom under review.

[132] As to whether any of Magna Carta applied to Ireland see Baker, *Magna Carta*, p. 33 n. 181.

[133] See P. Brand, 32 *Irish Historical Studies* 161; C. Kenny, *King's Inns and the Kingdom of Ireland* (1992); Baker, *The Men of Court*, I, pp. 33–4.

[134] For Davies see H. H. Pawlisch, *Sir John Davies and the Conquest of Ireland* (1985).

[135] Controversy on this point, which resulted from the existence of two parliaments, was ended by Stat. 6 Geo. I, c. 5. The occasion was a recent case in which one party had appealed to the Irish HL and the other to the HL at Westminster.

after the Act of Union 1800 (which abolished the Irish Parliament) appeals lay directly to the House of Lords of the United Kingdom Parliament. When Ireland was divided, new courts for the province of Northern Ireland were set up in 1921 in Belfast, with appeal to the House of Lords.

The Law of Scotland

Although the Scots may be supposed originally to have followed customs similar to those of the Irish and Welsh, with their emphasis on the clan, the percolation into Scotland of Anglo-Norman feudalism, together with sheriffs, justiciars, eyres, and the writ system, gave Scotland the framework of another common-law jurisdiction akin to those of England and Ireland. But close liaison was prevented by war.[136] Throughout later medieval times the Scots were alien enemies in England, and so the common law of Scotland, unlike the law in Ireland, developed independently of professional English influence and in a distinctively different way. For instance, although Scottish 'brieves' (writs) such as the brieve of right, novel dissasine, and mortancestry, were modelled on their earlier English namesakes,[137] they operated differently in the absence of any shared understanding or exactly analogous judicial institutions.[138] The centralization of justice in the king's courts was also achieved more slowly. Access to royal justice increased after 1426 with a steady flow of petitions to a royal council in Edinburgh called the Session. This at first paralleled the development of the bill-jurisdiction of the Council and Chancery in England, in that the late-medieval Session was free from the procedural constraints imposed on the regular courts by the brieves but was not permitted to deal with cases of serious crime or freehold property. In 1532, however, the Session was refounded as the College of Justice and given jurisdiction over all civil actions, as an ordinary court distinct from the secret or privy council.[139] The ordinary court nevertheless retained a conciliar character, half of its members being clergy, and there was no separation between law and equity. Soon after 1532 the lawyers authorized to practise before the Court of Session formed themselves into a Faculty of Advocates, and they began to generate a professional literature in the form of law reports and treatises on practice ('practicks').[140] In view of their university education, it was natural that, when refined procedures began to call for legal doctrine, these men should have followed Continental practice by drawing on the legacy of Rome. But Roman law was not treated as authority in itself; it was a conceptual framework upon which the unwritten customs

[136] For border problems, and the laws of the Anglo-Scottish marches, see H. Summerson in *Legal History in the Making*, pp. 29–42; C. J. Neville, 109 EHR 1. The borough of Berwick, on the border, was within the dominion of England but outside the realm; by charter of Edward III of England it was subject to the law of Scotland: see Baker, *Magna Carta*, pp. 299–302.

[137] They were all known in Scotland by the mid-13th century at the latest. Writs with the same names were used in Normandy.

[138] The principal link was that the earliest treatise on Scots law, the early 14th-century *Regiam Majestatem*, was based on *Glanvill*. But *Glanvill* no longer represented English law by the time *Regiam* was written.

[139] Separate registers of the Privy Council of Scotland begin in 1545. The justiciar's court continued to deal with ordinary criminal cases; it was reconstituted in 1672 as the High Court of Justiciary.

[140] The earliest, John Sinclair's *Practicks*, collected over 500 reported cases from the 1540s. Sir James Balfour's *Practicks* (*c*. 1580) is a systematically arranged treatise augmented with cases and statutes. Numerous others followed. They circulated only in manuscript.

of Scotland could be rationalized and systematized. In the two centuries after the refoundation of the Court of Session, a coherent and autonomous body of Scots law was developed, in large measure through the efforts of the 'institutional' (text-book) writers of the seventeenth century. The classic *Institutions of the Laws of Scotland,* by Lord Stair (written in the 1660s, published in 1681) and the more compact *Institutions* of Sir George Mackenzie (1684), were founded on Scots practice and case-law and betray no visible hint of English influence.

The merger of the crowns of Scotland and England in 1603 might have led to a merger of laws. King James I of England (James VI of Scotland) said in 1604 that he wished to leave 'one country entirely governed, one uniformity in laws'. But the English lawyers, championed by Sir Edward Coke, were fearful of what this might mean – not least because of the unlimited power which Roman law was thought to give the king[141] – and the Scots did not care for the idea either, fearing that English law would become dominant.[142] The king did assume the title king of Great Britain, against the wishes of the House of Commons and the judges, but his scheme for legal union foundered. Proposals for unification later in the century were decidedly Anglocentric, and were successfully resisted on that ground from north of the border. When full political union between England and Scotland took place in 1707, there was no question but that Scots law should be preserved, subject to any future alterations by the newly constituted Parliament of Great Britain.[143] Since 1707 appeals have been allowed from the Court of Session to the House of Lords, but the decisions on such appeals are binding in England only if the matter is one where Scots and English law are the same.[144]

Further Reading

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[141] James had written a treatise in the 1590s on the divine right of kings and claimed (inter alia) the authority to overrule his judges.

[142] See Baker, *Magna Carta*, pp. 339–43, and the works cited there. For the status of Scots after 1603 see p. 500 n. 11, post.

[143] Act of Union (1706), 6 Ann., c. 11 [= 5 & 6 Ann., c. 8, in *Statutes at Large*], art. 18–19. The old Parliaments of Scotland and England were merged at the same time. See A. J. MacLean, 4 JLH 50. By virtue of the Scotland Act 1998 (c. 46) there is now a Scottish Parliament, which meets at Holyrood in Edinburgh; but it is of a different legal character, exercising legislative powers devolved from the United Kingdom Parliament.

[144] See R. S. Thompson in *Law and History in the Making,* pp. 109–24. There have been no criminal appeals from Scotland since 1765.

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3

The Superior Courts of Common Law

Westminster Hall, built for William Rufus in about 1099 and enlarged under Richard II around 1395, was the home of the superior English courts until they moved to the Strand in 1882. The interior of the hall is still best viewed from the great north door. On the far side, flanking what is now a flight of steps, stood the Court of King's Bench and the Court of Chancery. To the right, on the west side of the hall, was the Court of Common Pleas. The Exchequer was a large adjacent chamber which connected with the hall through a passage. Each court occupied a space marked out by a wooden bar at which counsel stood, and in the centre was a massive oak table covered with green cloth[1] at which court officials sat and spread their records. Against the wall, on a raised platform or bench beneath tapestries with the royal arms, sat the judges. At the sides were railed enclosures, and by the seventeenth century raised wooden galleries, for student observers.[2] Until the eighteenth century there were no seats for counsel, nor any partition-walls to divide the courts from the open thoroughfare; each court was scarcely out of earshot of the others, and speakers had to compete with the noise made by the throng of suitors, lawyers, shopkeepers, cutpurses, sightseers, and dogs, in the body of the hall.[3] This arrangement, with only slight modifications, was a feature of English public life for six centuries. It survived two civil wars, and even in times of rebellion the judges and counsel kept up their attendance, sometimes with armour beneath their robes. Only in times of plague or flood did the courts leave Westminster Hall, after a formal adjournment by proclamation. A story, doubtless apocryphal, is told of Sir Orlando Bridgman, chief justice of the Common Pleas in the 1660s, that he would not even have his court moved back a few feet to avoid the draught from the north door, lest the relocation would infringe Magna Carta.[4] The outward appearance was of complete immunity to change. Yet, beneath this timeless exterior, there occurred between the thirteenth and the seventeenth centuries a transformation of the common-law system.

Magna Carta and Common Pleas

We have seen that the result of chapter 11 of Magna Carta (1225) was the permanent fission of the two benches. The Court of King's Bench was in contemplation of law held 'before the lord king wheresoever he should be in England' (*coram domino rege ubicumque fuerit in Anglia*), and was therefore excluded from hearing 'common pleas'. Common

[1] The features are shown in the miniatures (*c.* 1450) in the Inner Temple library, MS. Misc. 188. In later times the Exchequer had a chequered cloth on the table.

[2] See p. 168, post.

[3] Screens were added in the 18th century. For the courts in Westminster Hall see *CPELH*, II, pp. 797–811.

[4] R. North, *The Life of Francis North* (1742), p. 97. In fact the old court was demolished and rebuilt in 1741. For the awkward adjournment procedure on flooding see *Memorandum* (1629) Hutton 108.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

pleas for this purpose were all suits in which the king had no interest. As a corollary, the Common Bench (or Court of Common Pleas)[5] had an exclusive jurisdiction over such suits, including all *praecipe* actions[6] to recover property or debts, the majority of all civil cases. The petty assizes[7] were not caught by Magna Carta, and could in proper cases be brought in the King's Bench,[8] but they were more usually brought before commissioners and, in cases of difficulty only, adjourned into the Common Pleas for argument. Actions of trespass and replevin[9] were shared with the King's Bench. There was nothing in Magna Carta to prevent the Common Pleas from sharing pleas of the Crown as well, since the prohibition was one-way, and in its early days it did indeed sometimes entertain appeals of felony; but its traditional jurisdiction, as settled in the fourteenth century, excluded felony. It nevertheless continued to be used by the king for his own civil actions. It also had a supervisory jurisdiction over inferior courts not of record.

By the fourteenth century the jurisdiction of the King's Bench was equally settled. The Crown side had unlimited criminal jurisdiction throughout the realm, either as a mobile court of first instance or as a forum into which indictments could be removed from other courts for review or further action. The 'plea' side was occupied mainly with actions of trespass, appeals of felony, and suits to correct errors by courts of record (including the Common Pleas). The criminal jurisdiction was in practice exercised only in a small proportion of cases,[10] and the work-load of the King's Bench before Tudor times was slender. Its records filled only a few hundred skins of parchment a year, whereas those of the Common Pleas filled a thousand or more.

Once the eyres disappeared, the Common Pleas was the focus of the legal system, and was the court which more than any other shaped the medieval common law. It had usually four or five judges, a select bar of serjeants at law, and a large staff of officers: the keeper of the writs (*custos brevium*), who filed the original writs, the prothonotaries and filazers (who kept the rolls, and the files of judicial writs), the exigenters (who enrolled outlawry process), and numerous other clerks and under-clerks. It was the place where students attended to learn their law.[11] Whatever of note fell from a judge or serjeant in the Common Pleas was likely to be remembered or written down for future reference; the year books were taken up chiefly with the debates in this court, and it was not until the sixteenth century that the work of other courts was regularly reported.[12]

Changing Functions of the Medieval King's Bench

This uneven sharing of business made sense while the King's Bench was literally *coram rege*, since it was in effect a meeting of the king's council for occasional legal business of importance.[13] Under Edward I, however, the king's personal presence ceased to be

[5] It was usually called 'the Bench' or 'the Place' in medieval times. The name Court of Common Pleas was not used until Tudor times.

[6] See pp. 65–6, post. [7] See p. 19, ante; pp. 252–4, post.

[8] For property in the county where the court was sitting: 57 SS xliii.

[9] For replevin see p. 257, post. According to *Bracton*, II, p. 439, it was a plea of the Crown. Early trespass writs alleged a breach of the king's peace.

[10] Most gaol deliveries were conducted by the assize judges or the justices of the peace, and only a small minority of the cases were removed in KB.

[11] See p. 168, post. [12] See pp. 191, 194, 439, post.

[13] During the king's personal absence in 1253–54 its style did become *coram consilio* (before the council).

usual,[14] and in 1305–18 the court stayed put in Westminster Hall. In the century after 1318 it still embarked on judicial expeditions, but these were sorties away from home and usually independent of the king's movements. At its 'trailbaston' sessions[15] in the country it investigated pleas of the Crown, assizes, and private complaints (brought by bill), and in this peripatetic phase of its history it was filling part of the gap left by the demise of the eyre system. But the need for mobile royal justice of that irregular kind was fast being removed by the regularization of the assizes and quarter sessions, and most of the court's time in the fourteenth century was in fact spent at Westminster. For the whole of Henry IV's reign (1399–1413) it was stationary, and its last local visitations were in 1414 (Leicestershire, Staffordshire, and Shropshire)[16] and 1421 (Northamptonshire). Thereafter the King's Bench settled down for good in Westminster Hall (which was then in the county of Middlesex), and its first-instance criminal jurisdiction became confined to Middlesex cases, appeals of felony, and indictments removed by *certiorari*. De facto it had come to rest in a certain place, and the spirit of Magna Carta would hardly have been infringed had it then assumed a share of the work of the Common Bench or even merged with it; yet the permanence of its domicile was a fact of which the law could take no notice. The style of the court remained *coram rege*; its process continued to be returnable 'before the lord king wheresoever he should be in England', and until 1876 the full designation of a judge of the court was 'one of the justices assigned to hold the pleas before the queen herself'. Whatever the reality, therefore, the King's Bench was not in law held in a certain place and was therefore still restrained by Magna Carta from hearing common pleas.

The Common-Law Courts Challenged

During the fifteenth century the superiority of the common-law courts was felt, rightly or wrongly, to be facing a challenge from the newer jurisdictions associated with the king's council and the chancellor. Some have even seen these jurisdictions as threatening the common law itself with eclipse. Not only were they attracting suitors, but they did not administer the common law. The medieval chancellors were mostly doctors of law, and in the later fifteenth century many of the masters in Chancery and officials of the council were also Civilians. Might these courts have done the Romanizing which in Germany was carried out by the equivalent Imperial Chamber Court (Reichskammergericht)?[17] The question now seems inapt. Any threat which they presented was not of a 'Reception of Roman Law', any more in England than in Germany.[18] The newer courts were as English

[14] At first the *coram rege* formula was modified to indicate his absence, but by the 14th century it was fictitious: 57 SS lxiii–lxv. The *Articuli super Cartas* (1300), c. 5, required the court to follow the king's person; but this was generally ignored, except during a parliament.

[15] So named from the club-wielding gangsters (*trailbastons*) against whom the sessions were primarily aimed: see 74 SS liv–lxvi.

[16] Leicester because a parliament was being held there, Shropshire because of reports that it had the highest homicide rate in the country.

[17] The question put, and tentatively answered, by F. W. Maitland in *English Law and the Renaissance* (1901).

[18] Since 1901 the so-called Reception of Roman Law on the continent has been reinterpreted: see Baker, 'English Law and the Reception', *OHLE*, VI, pp. 4–13.

as the two benches, and did not follow foreign law. The practitioners in them were common lawyers, who led their clients to use them because of their relative informality, the ease with which defendants could be arrested, and the inquisitorial method of investigation which by-passed the sheriff and the jury. In their inquisitorial procedures some Roman influence is visible; but it was embodied in an English form, the bill of complaint and subpoena. The history of these courts will be considered later.[19] Their relevance here is that their initial success was viewed at the time with some anxiety by the judges and officers of the common-law courts. Livelihoods, rather than jurisprudence, were at stake.

Cause and effect are difficult to establish in such matters. Between 1460 and 1540 there was certainly a steady downhill slide in the number of cases brought in the older courts, coinciding with a steep climb in the number of cases going to the newer; but modern research has shown that the increase of the latter was nowhere near matched in number or weight by the decline of the former.[20] The cause of the slump in common-law litigation was economic, while that of the rise in bill litigation was its novelty, opening up new avenues of justice. However, even if the threat to the common law seems in retrospect to have been greatly exaggerated, its perception at the time was real. Motivated as much by pessimism as by idealism, the judges and clerks of the benches concluded that there needed to be reforms, both in law and procedure, to win back the patronage of litigants through the lawyers who advised them. The problem would have seemed most acute to those dependent on the fortunes of the King's Bench, which lacked the staple business of debt and the real actions which Magna Carta assigned exclusively to the Common Pleas; certainly the rolls of the former became very thin during the fifteenth century. In 1481 Fairfax J urged pleaders to develop remedies which would maintain the King's Bench jurisdiction, so that 'subpoenas would not be used as often as they are at present'.[21] Lawyers needed little encouragement to exploit alternative remedies, and already by 1500 the process of reform was well under way. By 1550 the tide had turned, swelled by a flood of litigation in all jurisdictions in the mid-Tudor period. Within a century the King's Bench had developed its own bill system, with swift process and procedure to vie with that of the Chancery, and acquired a jurisdiction over most common pleas by a combination of procedural devices.

It was then the turn of the Common Pleas to fret about change. It grew suspicious of the explosion of activity in the King's Bench, and for the second half of the sixteenth century adopted a reactionary approach to the changes which the King's Bench was introducing into the legal system. The legal disputes of the later sixteenth century took on the appearance of an internecine struggle for business between the common-law courts themselves, in which chapter 11 of Magna Carta might have seemed to be the charter of liberties of the disgruntled clerks of the Chancery[22] and the Common Pleas[23]

[19] See chs 6 and 7, post. [20] See Brooks, *Pettyfoggers and Vipers*, pp. 85–7.

[21] *Sarger's Case* (1481) B. & M. 565 at 566. The subpoena was the initial process in Chancery.

[22] Not the clerks of the court, but the clerks (called cursitors) who issued the writs to originate CP cases. They suffered significantly from the KB bill jurisdiction, for which writs were not needed. For original writs see the next chapter.

[23] They received modest, regulated fees, but the total income could be considerable. By the 1630s the office of chief prothonotary of CP was worth around £7,000 per annum (equivalent to £1.3M today): *CPELH*, II, p. 791.

rather than of the litigants. The outward appearances, however, should not deceive us into misinterpreting the impression of hostility. The principal competitors were not the judges or officers themselves but plaintiffs and their lawyers, shopping for the most advantageous forum. If the King's Bench personnel had a private stake in the amplification of its jurisdiction, they were at the same time furthering ends – such as the payment of debts or the recovery of property – which were in themselves uncontroversial. If the Common Pleas personnel disliked what was happening, it was because they did not feel so beleaguered by the newer courts and preferred the status quo.

The Resurgence of the King's Bench

Bill Procedure

The revival of the King's Bench was effected by the exploitation of its bill procedure. A bill, in this sense, was a petition addressed directly to a court in order to commence an action. Procedure by bill was more convenient for litigants than obtaining a writ from the Chancery to set the proceedings in motion.[24] It blossomed in the Court of Chancery and in the Council between 1350 and 1450, but it had a still older history in Parliament and in eyre, and had been adopted by the King's Bench in its first trailbaston sessions of 1305–07. When an eyre, or the King's Bench, sat in a county, the sheriff of that county was personally attendant and there was no need to apply first to the Chancery for a writ ordering the sheriff to initiate proceedings. When the King's Bench settled at Westminster, the bill procedure was available for Middlesex cases, and was commonly so used by 1420; but cases from other counties required writs. Although the use of bills was convenient, it did not by itself enlarge the jurisdiction of the court, even in Middlesex cases, since common pleas were within chapter 11 of Magna Carta whether or not they were commenced by bill. Almost all Middlesex bills contained complaints of trespass against the king's peace, which was clearly in accordance with the charter. But that is only the beginning of the story.

Bills could also be used to commence personal actions against court personnel and prisoners. Such persons were deemed to be already attendant on the court, and therefore no process was needed to bring them in. For that reason, chapter 11 did not apply to them; and so a clerk of the King's Bench, or a prisoner in the custody of the marshal of the Marshalsea,[25] could be sued in personal actions such as debt, detinue, or covenant, without infringing the great charter. Wise attorneys kept a careful watch on the gaol calendar, because they might be able to save their own clients' time and money by taking advantage of process commenced by someone else.[26] Even more usefully, plaintiffs could combine the procedures themselves. If *A* wished to sue *B* for trespass, detinue, and debt, he need only sue one writ for the trespass, returnable in the King's Bench, upon which *B* would be arrested and committed to the marshal; *A* could then start his

[24] For original writs see pp. 60–71, post.

[25] The marshal was the gaoler to the court, appointed by the earl marshal. The Marshalsea Prison was across the river in Southwark, but the marshal attended the court and his prisoners were deemed to be always in custody 'before the king himself'.

[26] Thus in 1442 a creditor brought a bill of debt against a prisoner who had been arrested in another suit brought by Fortescue CJ: 6 JLH 91.

debt and detinue actions by bill against his prisoner without resorting to the Common Pleas, which would have required a writ. Around the middle of the fifteenth century it occurred to attorneys that the like advantage could be obtained even if there was no genuine complaint of trespass: the writ secured the arrest, whatever the facts. Some encouragement for the use of a fictitious action may have been taken from decisions under Fortescue CJ, around 1450, that a bill lay against anyone in de facto custody and that the court would not enquire how the defendant came to be there.[27] Custody was secured by an unsworn ex parte complaint of a wholly imaginary trespass with swords and staves. That was enough to warrant an arrest, and once the defendant was in custody – which included being out on bail[28] – and had been impleaded in the true action by bill, the action of trespass could be quietly discontinued before it came to trial. The brazen falseness of the complaint of trespass was therefore never officially known to the court.[29] This practice, if ethically questionable, became common form, and gave the King's Bench a jurisdiction over common pleas such as debt.[30]

In order to utilize this jurisdictional dodge, the defendant had to be arrested and put into the Marshalsea. An original writ of trespass from the Chancery would do it,[31] since the mesne process was a *capias* to arrest the defendant, and this alone made it cheaper than an action by writ of debt in the Common Pleas; but there was a means of short-circuiting the Chancery altogether. Since the alleged trespass was fictional, the plaintiff might as well make it a trespass in Middlesex, the county in which the court now invariably sat. The defendant could then be arrested following the mere presentation of a bill of trespass, known as the bill of Middlesex.[32] By the use of two bills, the first alleging an imaginary trespass in Middlesex to secure arrest, the second a genuine complaint of debt against the person in custody, the King's Bench litigant was enabled to sue in debt without a writ.[33] The popularity of this device is evident from the disproportionate number of filed bills alleging trespasses to land in Westminster (after 1540, Hendon). It mattered not a whit whether the plaintiff or defendant had ever set foot in Hendon, or even in Middlesex, though the logic which required the first *capias* to go to the sheriff of Middlesex necessitated a pointless rigmarole in cases from the rest of England. In the common case of a return by the sheriff that the defendant was 'not found' (*non est inventus*) in Middlesex, the plaintiff had to inform the court of the county where the defendant 'lurks and roams about' (*latitat et discurrit*), that is, where he actually lived;

[27] *Kempe's Case* (1448) Y.B. Mich. 27 Hen. VI, fo. 5, pl. 35 (a bill lies against a prisoner unlawfully arrested); *Selly v. Gegge* (1452) 23 JLH 212–13 (a bill lies against a prisoner on bail, even if there is no record of his committal). The 1452 pronouncement was a confirmation of earlier practice: S. Jenks, 23 JLH 197.

[28] Bail were people who took the party into their custody and gave surety for producing him when required. See further p. 43, post.

[29] After 1531 most defendants could be awarded costs if suits against them were discontinued, but the statute studiously excluded trespass actions, to protect the bill procedure: Stat. 23 Hen. VIII, c. 15; *OHLE*, VI, p. 153.

[30] This was noticed in 1483 by Morgan Kidwelly, citing Fortescue CJ: 132 SS 106. Cf. the CP case of 1498 noted in *OHLE*, VI, pp. 154–5.

[31] Not a writ of debt, which was prohibited by Magna Carta, c. 11.

[32] When the court adjourned to Hertford or St Albans in time of plague, the invented trespass was set in Hertfordshire.

[33] This second dodge had no bearing on geographical jurisdiction: the court always had jurisdiction throughout England, but the bill procedure (against defendants at large) was only available for actions laid in Middlesex. Once the defendant was in custody, he could sued by bill in respect of matters arising in any county in England.

the court then issued a species of *capias* called a *latitat* to the sheriff of that county, who was able to effect the arrest. Of course, no one had ever expected the sheriff of Middlesex to go looking for a defendant who was known not to be there, so the initial *capias* was a waste of time and sealing wax, and a further procedural refinement around 1540 enabled the latitat to become effectively the first process, without troubling the sheriff of Middlesex at all. By that time, the King's Bench business was beginning to increase substantially.

The King's Bench bill procedure offered the plaintiff advantages over litigation begun by Chancery writ, particularly in that the latitat (unlike an original writ) did not tie the plaintiff to any particular cause of action, and so defendants could be arrested to answer whatever kind of complaint the plaintiff chose to put into his true bill, or even a multitude of complaints. The avoidance of a writ also saved fees in Chancery, although that particular advantage was partly curtailed, first by means of Chancery injunctions to stay suits until a fee was paid,[34] and then (after 1608) by collection of the fee in the King's Bench itself. But saving fees was not the main point of the new procedure. The principal benefit was that 'money need not be spent upon advice till it appeared upon the arrest that the defendant would stand suit':[35] that is, there was no need to formulate a particular cause of action until the defendant's bail application showed that it was worth proceeding. As one attorney put it, 'the latitat is like to Doctor Gifford's water, which serves for all diseases, and so it holds one form in all cases and actions whatsoever'.[36] Well might a Common Pleas attorney associate the latitat disparagingly with quack medicine, though it provided an effective antidote to Magna Carta and made the King's Bench a more popular source of new remedies for common pleas than the Common Pleas itself. The Common Pleas litigant continued to need an original writ from the Chancery, for which he paid a fine proportional to the debt claimed; when the defendant was in court, more ink and parchment was required than in the other court, and a serjeant's fees were needed for any oral proceedings. The King's Bench wooed litigants with competitive costs, and even lowered some of its fees in order to increase the overall takings. By 1600 the effect on its jurisdiction was strikingly apparent. From a trickle of latitats at the end of the fifteenth century, and a few hundred rolls a year, within a century the court was issuing – according to a contemporary estimate – 20,000 latitats a year and filling 6,000 rolls.[37] Between 1560 and 1640, in particular, the number of King's Bench suits rose at least tenfold.[38]

Substantive Law Reform in the King's Bench

In parallel with the procedural changes which facilitated its revival, the King's Bench also led the way in improving and broadening the range of substantive remedies it

[34] This was a common practice between the 1550s and the 1590s, when Egerton LK stopped it: N. G. Jones, 22 JLH (no. 3) 1. However, injunctions were used only in a small minority of cases. The saving in costs may not in any case have been substantial if the debt was under £40: *OHLE*, VI, p. 152 n. 59.

[35] North CJCP in Yale, *Lord Nottingham's Two Treatises*, p. 171. The solvency of the defendant would be ascertained upon the bail application.

[36] T. Powell, *The Attourneys Academy* (1623), p. 166.

[37] BL MS. Lansdowne 155, fo. 35.

[38] There was a massive general increase in litigation, and the CP continued to entertain more suits; it was the KB share which increased: p. 52, post.

could offer. This was the technique which Fairfax J had recommended in 1481; and, as he had also suggested, the main vehicle of reform was the action on the case.[39] When Fyneux CJ announced in 1499 that actions on the case could be used to enforce parol promises, he took care to stress that it rendered unnecessary a Chancery suit by subpoena.[40] Also in the time of Fyneux CJ were developed the action on the case for not paying debts, which had procedural advantages over the older action of debt,[41] and another for defamatory words, which had previously been remedied only in the ecclesiastical courts.[42] In the 1530s came the action on the case for trover and conversion, which replaced for most purposes the action of detinue.[43] During the same period the King's Bench planted the seeds of what proved to be a fruitful commercial jurisdiction, using actions on the case, and its chief justice began to hold regular nisi prius sittings at the Guildhall in London to try City cases. The court even overcame the major limitation on bill procedure, that it could not be used for actions to try title to land. It achieved this by developing a species of trespass, called ejectment, in which (by a decision of Fyneux CJ in 1499) land could be recovered in addition to damages. The full exploitation of this remedy followed the introduction of another set of fictions in the sixteenth and seventeenth centuries.[44]

It can hardly be coincidence that much of the reform was initiated under Sir John Fyneux, who presided over the court from 1495 to 1525 when its fortunes were at their lowest ebb. He appointed his son in law John Rooper as chief clerk in 1498, and the Rooper family made its fortune from the office between then and its retirement in 1616. The modern observer might be inclined to criticize the judges and clerks for making the court a family business, retailing justice for private gain, since they undoubtedly had more than a professional interest in the success of the procedures under their control.[45] But they were not accused at the time of disingenuous behaviour, and it is a fact that most of the innovations made during this period were accepted as beneficial and became embedded in the law thereafter. Moreover, neither the substantive nor the procedural reforms did bring substantial profit in the short term. It was nearly a hundred years after its invention (in the mid-fifteenth century) before the fictitious bill of Middlesex helped reverse the decline of business, a reversal which neither Fortescue CJ nor Fyneux CJ lived to see. Nor did Fyneux CJ see the triumph of ejectment over the old real actions, which belonged to the reign of Elizabeth I. Even the innovative development of actions on the case had only a modest immediate effect on the improving fortunes of the court, because the chief increase in King's Bench suits in the early Tudor period occurred in actions of debt and was attributable to the new bill procedure rather than the use of newer forms of action. It was, nevertheless, a significant step in the development of the common law. The debt-collecting side of litigation was largely a routine business conducted out of court; only bail applications by debtors normally

[39] B. & M. 566. For the development of actions on the case see pp. 69–71, post.
[40] Dictum in Gray's Inn, B. & M. 442; p. 359, post.
[41] See pp. 363–8, post. Wager of law was not available in an action on the case.
[42] See pp. 467–70, post. [43] See pp. 423–5, post.
[44] The action was for leaseholders, and that had been Fyneux CJ's only concern. The extension to freeholders was achieved by making a collusive or fictitious lease. See pp. 320–2, post.
[45] This is the theme of M. Blatcher, *The Court of King's Bench 1450–1550* (1978).

came to a hearing. In the contentious business which occupied the time of judges and counsel with motions and trials, there was a transformation in legal thinking which owed much to the triumph of trespass. The recasting of the common law which occurred in the sixteenth century seems at the very least to have been speeded – if it is too much to say caused – by the innovative approach of those who hoped to restore the fortunes of a court which had seemingly lost its purpose.

Reaction by the Common Pleas

While the King's Bench saw itself, and came to be regarded, as a fountain of new legal remedies, the Common Pleas took a reactionary – and for a time distinctly jaundiced – view of such novelties. When the latitat was first extended by fiction, the Common Pleas officials had little cause for concern. They had up to ten times the business of the King's Bench, probably more than they could easily cope with, and could afford to share some of it. A more even sharing of business made good administrative sense, since the work of trying the cases at nisi prius was divided equally between the judges of both benches. In any case, the Common Pleas did not lose business in absolute terms. In fact its business increased considerably during the sixteenth and early seventeenth centuries,[46] albeit at a slower rate than that of the King's Bench, as increased litigiousness and dissatisfaction with local courts brought plaintiffs in their droves to Westminster. For all that, the legal philosophy of the Common Pleas began to diverge markedly from that of the King's Bench, particularly in relation to the development of actions on the case,[47] and by the end of the century their differences turned into open hostility. The warmest quarrel over substantive law took place in the context of contract, where after years of dissension the King's Bench won a close-run victory in 1602.[48]

The same period brought opposition to the procedural and jurisdictional reforms in the King's Bench. The Common Pleas attorneys could not retaliate by copying the same tricks, because their court had no trailbaston power to hear bills of Middlesex and could not order arrests without the prior authority of a Chancery writ. The best they could do was to sue out fictitious *writs* of trespass to land, so as to secure the arrest of the defendant on a cause which could be dropped. This gave them the same advantage of flexibility, in that it was not necessary to disclose their case until the defendant was arrested and bailed, and it enabled multiple actions to be commenced on a single process; but the Common Pleas could not escape from the need for a writ, and it failed to make substantial reductions in its own scale of costs, allegedly because the three prothonotaries could never reach agreement on any specific proposal for cuts.[49] Given its disadvantages, it is remarkable that the Common Pleas survived the competition at all. The chief reason for its so doing was that it continued to have at least ten times as many

[46] The CP was the first court to fill 1,000 skins of parchment in a term (in 1551); by 1620 it commonly used over 3,000, written on both sides (about a mile of abbreviated Latin).

[47] E.g. *Anon.* (1543) B. & M. 456; and perhaps *Anon.* (1535) ibid. 485; *Anon.* (1535) ibid. 688. The conservative tradition may have begun under Bryan CJCP (1471–1500): *OHLE*, VI, p. 126.

[48] *Slade's Case* (1602) B. & M. 460; pp. 366–8, post. There were similar disputes over trover (pp. 424–5, post) and nuisance (p. 454, post).

[49] Although the chief prothonotary of CP had some special prerogatives, there was effectively a triumvirate of chief clerks. In KB there was only one prothonotary or chief clerk.

attorneys as the King's Bench, many of whom practised in the country and brought in clients to whom King's Bench attorneys were inaccessible or unknown.

During the Interregnum the Common Pleas received a welcome boost from the abolition of fines upon original writs; but this temporary relief was to precipitate the final collision of jurisdictions when in 1660 the fines were revived, for 'then the very attorneys of the Common Pleas boggled at them and carried all their finable business to the King's Bench'.[50] In 1661 either the Chancery or the Common Pleas sought to stop this trend by procuring an Act of Parliament which forbade special bail in any action where 'the true cause of action' was not expressed in the process.[51] This was designed to stifle latitats based on fictions, since special bail were practically essential in recovering debts.[52] The King's Bench was shaken by this legislative attack, which is said to have had a noticeable effect;[53] but its imaginative genius was not spent, and by the 1670s it had devised an ingenious evasion.[54] The statute said only that the true cause of action had to be 'disclosed' in the process, not that the complaint giving rise to the process had to be true. The clerks therefore added the requisite dash of truth to the bill and latitat: the defendant would now be arrested to answer a complaint of trespass in Middlesex (which was still fictitious) 'and also (*ac etiam*) to a separate bill of debt to be exhibited according to the custom of the court'.[55] The bill of Middlesex with *ac etiam* did not directly complain of debt, which would have infringed Magna Carta, but it did 'disclose' – artfully switching to the future tense – the true cause of action which was to follow in the second bill, thus satisfying the letter of the 1661 statute and enabling the plaintiff to hold the defendant to special bail. The effect on the distribution of business is said to have been dramatic.[56]

The *ac etiam* clause clearly defeated the intention of the 1661 legislation, but who was to correct the King's Bench? The obvious solution was to enlist the support of the lord chancellor, whose officers were losing their share of the fines for writs. There were precedents from Elizabethan times of injunctions, and writs of *supersedeas*, to stay latitats on the ground that they were intended to defraud the Crown of such fines, and in the 1660s Lord Clarendon C was persuaded to sanction a general form of *supersedeas* to stay latitats containing the *ac etiam* clause in delusion of the statute.[57] But Lord Nottingham C in the early 1670s saw that this policy would not work. The Common Pleas officers' objections were not to the bill procedure on its merits, which were beneficial rather than injurious to the public, but to the harm they suffered themselves through the devaluation of their investment in a jurisdictional monopoly with no justifiable

[50] North CJCP in Yale (ed.), *Lord Nottingham's Two Treatises*, p. 172.

[51] Stat. 13 Car. II (sess. ii), c. 2. A similar measure had been proposed in 1549: Blatcher, *King's Bench,* p. 105.

[52] Special bail were property-owners who entered into recognizances to pay the debt themselves if the defendant was condemned and failed either to pay or to surrender himself to the marshal. After the statute of 1661 a debtor sued by latitat was entitled to be released on common bail (the fictitious John Doe and Richard Roe, yeomen).

[53] In 1668 a law reporter noted that the court had little to do: 1 Sid. 365.

[54] This chronology is from Roger North (n. 56, post), which omits any dates. Cf. 1 Keb. 296, which suggests the *ac etiam* was in use as early as 1662; but this may be an interpolation.

[55] For a specimen latitat with *ac etiam,* see p. 586, post.

[56] R. North, *The Life of Francis North* (1742 edn), pp. 99–101.

[57] 'Reasons against the Latitat', Hertfordshire Record Office, Verulam MS. XII.A.30 (from the papers of Sir Harbottle Grimston, MR 1660–85).

purpose. And the King's Bench, to avoid extinction, might well have chosen to defy the *supersedeas* and punish sheriffs who tried to execute it. There was no guarantee that the Common Pleas and Exchequer would not develop similar practices as well, and if all the courts had their proceedings stayed for the profit of the Chancery it might cause an embarrassing public outcry. The Chancery therefore decided to stand aloof. As a consequence, the *ac etiam* seemed to threaten the Common Pleas with decline, especially in a period when litigation in general had begun to diminish. The pessimism which seems to have been endemic among legal officials even led to predictions of eventual extinction. There were estimated in the 1670s to be twenty latitats for every original writ issued, and the loyalty of the attorneys – the only actual protection for the Common Pleas – was breaking. Sir Matthew Hale, chief justice of the King's Bench from 1672 to 1676, conceded that the Common Pleas would be 'in effect destroyed', and that this would be too drastic a turn. When Sir Francis North became chief justice of the Common Pleas in 1675 he found the court unable to occupy more than a quarter of its sitting time, and he sensed impending disaster. Having failed to persuade Lord Nottingham C to help directly, he adopted the only remaining solution and (around 1678) reluctantly sanctioned the use in his own court of *ac etiams* in conjunction with fictitious writs of trespass.[58] To this compromise Lord Nottingham and the Chancery assented. A century of competition was thus ended.

The bill of Middlesex could not be used against peers or corporations, because they were not liable to arrest by *capias* or *latitat.* It was also discovered that an original writ made a King's Bench judgment proof against reversal by the Exchequer Chamber, on the basis that the statute erecting that court only gave it jurisdiction in suits 'first commenced' in the King's Bench,[59] and a suit commenced by writ was in literal terms commenced in Chancery. In avoiding these difficulties, the original writ made a modest comeback.[60] But the great majority of King's Bench suits were commenced by bill until the reforms of 1832. The bizarre legacy of fiction, though requiring plaintiffs to assert untruths as a matter of daily routine, had at least brought improvements in procedure which might not otherwise have occurred.

The Exchequer of Pleas

The Court of Exchequer was the oldest of the three common-law courts. The *Dialogue of the Exchequer*, written between 1177 and 1189, praised the new department not only for its advanced accounting methods, but also for its power to conduct judicial enquiries when needed, with specialist judges called barons. Yet it was the last to achieve the position of a regular court for common pleas. Something should now be said of its development.

[58] When North CJ refused to grant a habeas corpus in 1678, saying 'we will not make ourselves a court of King's Bench', Atkyns J retorted that he had recently done just that in sanctioning the *ac etiam*, 'to which the chief justice replied not one word': IT MS. Barrington 5, p. 376.

[59] 27 Eliz. I, c. 8; p. 147, post. The words were probably meant only to prevent a writ of error upon a writ of error from CP.

[60] W. Tidd, *The Practice of the Courts of King's Bench and Common Pleas* (9th edn, 1828), I, p. 102. Judgments in cases begun by writ could still be reversed in the HL.

In the thirteenth century the Exchequer divided into two 'sides', overseen by its two principal clerical officers. The lord treasurer's remembrancer was concerned with the fixed revenue of the Crown, for instance from feudal incidents, and with routine auditing and debt-collecting. His side was called the 'Exchequer of Receipt'. The king's remembrancer was concerned with casual revenue, and with litigation in the court called the 'Exchequer of Pleas'.[61] From Tudor times there was also an 'equity side'.[62] Litigation in the Exchequer consisted not only of Crown business but also of actions by those subjects who enjoyed the privilege of suing there. These private actions were from 1236 recorded in plea rolls, kept separately from the memoranda rolls recording Crown business. The Exchequer of Pleas was independent of Chancery control and could summon defendants by original and judicial writs under its own seal, kept by the chancellor of the Exchequer. Suits were commenced by a writ of *venire facias ad respondendum* or a writ of subpoena; but officers and prisoners could be sued, as in the two benches, by bill.

The attraction of the court to litigants needs little explanation: it was obvious that the methods used by the king to collect his own revenue must be the best. Plaintiffs therefore sought to harness its procedures for private purposes, and by 1290 the court even styled itself a court for common pleas before the barons (*communia placita coram baronibus de scaccario*).[63] But attempts were already being made to stop it from moving too far in that direction, because suits by private litigants were impeding the king's business. Whether anyone in 1225 had thought that chapter 11 of Magna Carta would reach the Exchequer is questionable; it was not then an issue. By 1280, however, it was being deployed for this purpose, on the ground that the Exchequer (like the King's Bench) was held *coram rege* and was therefore not, in contemplation of law, in a certain place. Any doubts about this were ended by legislation making it clear that the court was not for common pleas.[64] On one view it was not even a court of common law.[65] As a result, the Exchequer of Pleas throughout the fourteenth, fifteenth, and early sixteenth centuries exercised a relatively minor civil jurisdiction limited chiefly to actions by or against Exchequer personnel, sheriffs, and a few other officers who were bound to render accounts at the Exchequer. Actions could also be brought by debtors to the Crown, who were allowed to recover their own debts or damages in order to be able to satisfy the king. The writ used in such cases was called *quominus,* because it alleged that by reason of the debt or damages due to the plaintiff he was so much the less able to satisfy the king with respect to the debts owed at the Exchequer (*quo minus nobis satisfacere valeat de debitis quae debet ad scaccarium*).[66] The royal interest meant that such suits were not common pleas, and also that a debtor could not evade liability by waging law.

[61] For the procedure on this side, in the Tudor period, see *OHLE*, VI, pp. 161–5. In the 16th century much of it was taken up with prosecutions by 'common informers' to enforce penal statutes.

[62] W. H. Bryson, *The Equity Side of the Exchequer* (1975). Coke thought this might have derived from the Exchequer having a chancellor (Co. Inst., IV, p. 119), but it seems rather to have been a result of allowing Crown debtors to pursue equitable claims on the *quominus* principle (post).

[63] E.g. 48 SS 123.

[64] *Articuli super Cartas* (1300), c. 4. The so-called 'Statute' of Rutland (1282), a writ containing instructions for the barons of the Exchequer, had included a similar provision at the end.

[65] 57 SS lix (1340); Morgan Kidwelly's reading on Magna Carta, c. 11 (1483) 132 SS 115, line 6.

[66] For the form of writ in full see p. 586, post.

These were the ground rules of jurisdiction, which did not change. But the actual jurisdiction proved no more constant than that of the two benches. The first means of evading the limits was to bring suit as the servant of an Exchequer official; the number of merchants claiming in the fourteenth century to be such servants raises a strong suspicion that the claims were being made fictitiously.[67] This device seems to have been stopped, and it was to the *quominus* that thoughts turned when other jurisdictions came under stress in the Tudor period. Suppose a plaintiff wishing to sue in the Exchequer alleged fictitiously that he was a debtor to the king: was that a refutable assertion, or would the assertion alone give the court jurisdiction? There is evidence that the fiction had been tried out in the time of Henry VII,[68] and that it became common form in the mid-sixteenth century, its chief use then being to provide a much needed remedy against executors for their testators' debts.[69] But it did not immediately lead to the kind of expansion which took place in the King's Bench, because for a century the barons obstructed the fiction by allowing defendants to challenge it.[70] The court also refused, in 1588, to allow a lessee of the queen's lessee to sue there, 'or else by such means all the causes of England might be brought into the Exchequer'.[71] That is what indeed was going to happen.

The fiction passed into routine practice in the course of the next century, perhaps during the Interregnum. Sir Matthew Hale, as chief baron in 1665, scrupulously attacked it, and also questioned the assumption that a man could recover the whole of his demand even if it exceeded his liability to the Crown, for 'to make the king's prerogative a stale to satisfy other men's debts would be unreasonable, inconvenient, and mischievous to the subject'.[72] But by then it was too late, and this particular prerogative became common property. Despite Magna Carta and the subsequent legislation, and despite the better judgment of some of the barons, the Exchequer of Pleas had been turned by litigants into a third court for common pleas. No sooner had this development occurred, but the writ of *quominus* itself went largely out of use; plaintiffs found it easier and less expensive to use the Exchequer *subpoena,*[73] albeit still on the disingenuous supposition that they were Crown debtors.

Meanwhile the status of the barons had advanced. Until 1550 only the chief baron was usually a serjeant at law. The junior barons were commonly chosen from among the remembrancers and clerks steeped in Exchequer practice, and until the fifteenth century were sometimes clerics. After 1500, however, they were usually benchers in the inns of court,[74] and from 1579 the judicial barons[75] were always appointed from the

[67] See Ball, 9 JLH at 310.

[68] *OHLE*, VI, p. 167 n. 69.

[69] B. & M. 239 n. 10, 465, 485. Executors could not be sued elsewhere in debt on simple contracts (i.e. not under seal), because they could not wage law; but wager of law was not allowed in a *quominus*.

[70] *Ragland v. Wildgoose* (1580) Sav. 11. Since the assertion went merely to jurisdiction, the fiction could not be objected to once the defendant had pleaded: *Jervas's Case* (1582) Sav. 33.

[71] *Calton's Case* (1588) 117 SS 124.

[72] *Att.-Gen. v. Poultney* (1665) Hard. 403 at 404. (A 'stale', originally a decoy, meant a pretext for something underhand.) Cf. *King v. Lake* (1667) Hard. 470; Hargrave, *Law Tracts*, p. 278.

[73] Bl. Comm., III, p. 46, says the *quominus* was still the basis of all Exchequer proceedings in the 1760s, but the guides to practice state that it was disused much earlier: *The Compleat Sollicitor* (1668), p. 417; *The Compleat Clerk in Court* (1726), p. 193.

[74] Some were associate benchers, but from the 1520s the junior barons were usually benchers who had graduated in the normal way.

[75] There was also a 'cursitor baron', an accountancy specialist who occupied an inferior place in the court. The office was introduced in 1549 because by then the other barons were all lawyers lacking in-house expertise. It was abolished on the death of Bankes B in 1856.

serjeants at law.[76] The 'barons of the coif'[77] were qualified to belong to one of the Serjeants' Inns and to be assize judges, often trying cases from the King's Bench and Common Pleas as well as from their own court.[78] From being experts in the mysterious 'course of the Exchequer' they had become fully fledged common-law judges, equal partners with the justices of the two benches.

Uniformity and Abolition

The outcome of all these developments was that by the end of Charles II's reign the three central courts of law had acquired co-ordinate jurisdiction over most common pleas and had developed procedures which, though divergent in outward forms and in costs, worked much alike in practice. Each court nevertheless retained some specialist functions. The King's Bench still had a supervisory role, through error, habeas corpus, *mandamus*, and *certiorari*,[79] and occasionally entertained criminal trials at bar. The Exchequer continued its proper revenue jurisdiction. The Common Pleas kept a monopoly of the true real actions, because the King's Bench bill procedure was confined to personal actions and the Exchequer *quominus* was available only to recover money which could be applied in paying a notional Crown debt. Yet in reality the monopoly had come to mean very little, because the real actions had been replaced for most purposes by the supposedly personal action of ejectment. Even the Exchequer could hear ejectment, although its main object was to recover land, because the damages claimed would support a *quominus* clause. The only actions, therefore, in which the Common Pleas retained a true monopoly were those used for forms of real property which could not be leased and therefore could not be recovered by ejectment: principally *quare impedit* (for an advowson), the writ of partition (for a division of property between coparceners), and the writ of right of dower *unde nihil habet* (for a widow's unassigned third share of her husband's land).

By the eighteenth century it was customary to speak of the 'twelve judges' – the judges of the three courts – as equal in status and authority and function, and to regard their assignment to separate tribunals as little more than an accident of history. The burden of trying cases was shared equally and indiscriminately between them as assize commissioners, and they sometimes assembled as a body to hear difficult cases.[80] Only questions of law arising after trial would normally reach one or other of the courts sitting at Westminster in term time. The prospect of a legal difficulty at that stage might sometimes have influenced the plaintiff's choice of court; but probably the choice more often depended on the sphere of practice of the client's attorney,[81] on subtle differences in costs, or on minor procedural advantages.

[76] The new convention was recognized in 1587 when Robert Clarke of Lincoln's Inn was created serjeant immediately on appointment as a junior baron.

[77] The coif was worn by serjeants at law: p. 167, post. The cursitor baron was never a serjeant.

[78] The nisi prius legislation applied only to the benches, and in medieval times Exchequer cases were tried by jury before barons or auditors at special sittings. In later times special commissions enabled the assize judges to try them.

[79] The CP also assumed a jurisdiction in respect of these prerogative writs (but not error) temp. Coke CJ: p. 154 n. 57, post.

[80] See pp. 149–51, post.

[81] From the 18th century, however, attorneys commonly obtained practising certificates for all three courts, and many were admitted as solicitors as well.

Despite the near parity of jurisdiction, the business was still not equally distributed. Litigation in Westminster Hall declined steadily between the 1680s and the 1750s, and when it began to pick up in the second half of the eighteenth century the King's Bench captured the lion's share. As in the Tudor period, we may suspect the force of personalities: Lord Mansfield, chief justice from 1756 to 1788, responded creatively to the needs of a burgeoning commercial community, and the vitality of his court contrasted dramatically with the 'sleepy hollow'[82] of the Common Pleas. In 1828 Henry Brougham MP complained in the House of Commons that, so long as there were three courts, unevenness was inevitable: 'it is not in the power of the courts, even were all monopolies and other restrictions done away, to distribute business equally, as long as suitors are left free to choose their own tribunal'; there would always be a favourite court, its business would draw the best lawyers and judges, and this would entrench its favoured position.[83] That, he argued, was an uneconomic use of judicial resources. A commission was appointed to enquire into the practice and procedure of the courts of law. But the only reforms at that time were the abolition of the separate Welsh courts (in 1830) and the introduction of uniform process, in place of the latitat, *quominus,* and Common Pleas *capias* (in 1832).[84] Tackling the division of work between the central courts was left for another generation. In 1867 a Judicature Commission was appointed to enquire into that division with a view to ascertaining whether improvements could be made, and the outcome was the Judicature Act 1873. In the teeth of some strong judicial representations,[85] the decision was taken to abolish all the central courts and transfer their jurisdiction to a single High Court.[86]

The Supreme Court of Judicature[87] which came into being on 1 November 1875 was composed of a Court of Appeal and a High Court of Justice. The latter had five divisions, three of which corresponded to the Queen's Bench, Common Pleas, and Exchequer. That was not part of the permanent plan, but was a temporary expedient to avoid the compulsory retirement or demotion of the chief justice of the Common Pleas (Coleridge) and the chief baron of the Exchequer (Kelly), which might have broken the constitutional principle that superior judges were irremovable. By chance, Cockburn LCJ (president of the Queen's Bench Division) and Kelly CB (president of the Exchequer Division) both died in 1880, and on 16 December 1880 the Common Pleas and Exchequer Divisions were abolished by Order in Council.[88] The Queen's Bench Division thereupon became the sole representative of the old courts of common law, and the office of Lord Chief Justice of England[89] (then held by Lord Coleridge) absorbed

[82] J. B. Atlay, *The Victorian Chancellors* (1906), I, p. 453.

[83] H. Brougham, *Present State of the Law* (1828), p. 10.

[84] Uniformity of Process Act 1832, 2 & 3 Will. IV, c. 39.

[85] Coleridge CJ complained of the 'absolute destruction of the old system of common law': *OHLE*, XI, p. 769.

[86] Stat. 36 & 37 Vict., c. 66. This came into force on the same date as the Judicature Act 1875, which made further provisions.

[87] There was a precedent for this name in New York, where a Supreme Court of Judicature was created in 1691 with the same jurisdiction as the central common-law courts in England. When the new Supreme Court of the United Kingdom was introduced in 2009 (p. 153, post), the former Supreme Court was renamed 'The Senior Courts'. This solecism ('senior' means older) was evidently a mistake for 'superior', the proper sequence in ordinary language being high – superior – supreme.

[88] The Order was unsuccessfully opposed in both houses of Parliament. In the United States there are still Courts of Common Pleas in Delaware, Ohio, and Pennsylvania.

[89] The title used informally since *c.* 1500 for the CJKB, but since 1875 a statutory title. Until 2005 the holder was president of the Queen's Bench Division, and since then head of the judiciary.

the offices of the other two chiefs. Common pleas have thereafter been tried by the judges of the Queen's Bench Division, an irony compounded in 1971 by the creation of a new Crown Court to do the work which had once been appropriated to the King's Bench. But the irony is superficial. There is, once more, a single Curia Regis.[90]

Further Reading

Milsom, *HFCL*, pp. 52–55, 60–70
G. O. Sayles, 'The Evolution of the King's Bench before 1272' (1936) 55 SS xi–xl; 'The Jurisdiction of the King's Bench' (1938) 57 SS xxxiv–lxxii; (1955) 74 SS xxvi–lxvi
M. Hastings, *The Court of Common Pleas in 15th Century England* (1947)
J. S. Cockburn, *History of the Assizes 1558–1714* (1972)
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J. H. Baker, 'The Changing Concept of a Court' (1986) in *CPELH*, I, pp. 413–31; 'The Courts' [1483–1558] (2003) in *OHLE*, VI, pp. 125–70
P. Brand, 'Judges and Judging 1176–1307' (2012) in *Judges and Judging*, pp. 1–36

Common Pleas and King's Bench
Tract, probably by Sir Matthew Hale, in F. Hargrave (ed.), *Law Tracts* (1787), I, pp. 357–76
Tract by Sir Francis North in *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (D. E. C. Yale ed., 1965), pp. 169–74 (and Lord Nottingham's response, pp. 158–9)
C. A. F. Meekings, 'King's Bench Bills' (1977) in *Legal Records and the Historian*, pp. 97–139; 'A King's Bench Bill Formulary' (1985) 6 JLH 86–104
M. Blatcher, *The Court of King's Bench 1450–1550* (1978)

Fluctuations in Business
E. W. Ives, *The Common Lawyers in pre-Reformation England* (1983), pp. 199–207, 212–16
C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth* (1986), pp. 48–111; 'Civil Litigation in England, 1640–1830' (1989) repr. in *Lawyers, Litigation and English Society*, pp. 27–62; 'Litigation and Society in England 1200–1996' (1998) repr. ibid. 63–128
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D. Klerman, 'Jurisdictional Competition and the Evolution of the Common Law' (2007) 74 *Univ. Chicago Law Rev.* 1179–226

Exchequer
H. Jenkinson, *Select Cases in the Exchequer of Pleas* (48 SS, 1932), introduction
H. Wurzel, 'The Origin and Development of Quominus' (1939) 49 *Yale Law Jo.* 39–64
J. Guth, 'Notes on the Early Tudor Exchequer of Pleas' in *Tudor Men and Institutions* (A. J. Slavin ed., 1972), pp. 101–22
R. M. Ball, 'Exchequer of Pleas, Bills and Writs' (1988) 9 JLH 308–23

Later History
Manchester, *MLH*, pp. 125–35
Cornish & Clark, pp. 23–6, 38–45
P. Polden, *OHLE*, XI, pp. 569–640, 760–4, 780–4, 809–33

[90] This was Lord Selborne LC's observation in introducing the Judicature Bill of 1873: *Parliamentary Debates* (H.L.), vol. 214 (3rd ser.), cols. 336–7. The Crown Court was established by the Courts Act 1971 (c. 23) to take over the jurisdiction of the assizes and quarter sessions.

4

The Forms of Action

In the mind of the modern lawyer pleading and procedure are ancillary to the substantive law, and law students may complete the academic stage of their studies without consulting the elephantine *White Book*[1] or becoming immersed in precedents of pleading. Law is treated as a body of abstract rules which are applicable to given factual situations. The rules under which litigation is initiated and pursued, though of much practical importance, are seen as separate from the substantive rules which the courts apply once the facts are established. In real life the relationship between law and fact is not as clear cut as that, but it is true to say that large parts of the law can be understood as having an intellectual existence independent of the judicial system. To some extent this was always so. Most basic legal ideas have originated outside the legal sphere, and even a medieval lawyer was capable of seeing principles in the abstract. Yet, between the thirteenth century and the reforms of the nineteenth, procedural formalities dominated common-law thought. As far as the courts were concerned, rights were only significant, and remedies were only available, to the extent that appropriate procedures existed and were strictly followed. No doubt, in the earliest stages, some legal thinking must have been anterior to the forms; and eventually a means was found of introducing new remedies through a relatively formless action, so that Holt CJ could declare in 1703 that wherever there was a right a remedy must be found.[2] But the formulae through which justice was centralized and administered by the king's courts in the twelfth and thirteenth centuries came to be seen as part of the 'due process of law' and the 'old law of the land' guaranteed by charters of liberties.[3] They became constitutionally set in stone; and they gave rise to a formalistic culture which affected legal analysis at every turn.

Originating an Action

In their earliest form, legal proceedings were commenced, or 'originated', when a plaintiff made his complaint or demand before a court in due form. At one time the plaint itself was enough to set the process of justice in motion, and it did not have to be written. In the early days of itinerant royal justice, when complaints were made orally before the justices in eyre, this was merely a continuation of existing procedure in the county. The use of bills of complaint gave written expression to the same process. Where, however, a plaintiff wished to originate a suit in the Common Pleas, or in the King's Bench when sitting in a different county from that where the facts arose, he had to purchase a

[1] An annual guide to practice in the High Court and County Court, so called from its white covers.
[2] See p. 461, post. The means was the action on the case: pp. 69–71, post.
[3] Due process of law is mentioned in statutes of 1354 and 1368 explaining Magna Carta (1225), c. 29: 28 Edw. III, c. 3; 42 Edw. III, c. 3.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

royal writ from the king's Chancery[4] to authorize it. The reason is that the two benches, though destined to become the ordinary and regular courts of law, were at first exceptional. In them the king was not merely taking over a traditional system, rooted in the county court, but was offering a new and separate form of justice. This alternative justice was a royal favour before it became a right, and those prepared to pay for the advantage of suing outside the regular system had to obtain a grant of that favour in the form of an 'original writ'. The writ worked like a pass admitting a suitor to the court, and to the kind of justice for which he had paid, and there were different kinds of pass for different purposes. By 1200 many types of writ had become common form in the Chancery and were issued on payment of a regulated fee; whether standard or specially devised, the writ was increasingly commonplace, and in the course of the thirteenth century (as eyres declined) it would become the normal prerequisite to litigation in Westminster Hall.

It has been suggested that original writs evolved from writs containing executive commands to persons in authority to do justice between the parties or to take some specified action. Such writs were used in Anglo-Saxon times, and the pipe rolls of Henry I show them still in regular use at the beginning of the twelfth century.[5] The writ of right patent retained this form, being a command to the feudal lord of whom the plaintiff claimed land; and the viscontiel writs similarly conferred judicial authority on the sheriff.[6] Some other writs of later date, such as habeas corpus, prohibition, and mandamus, also used an executive form and became known as 'prerogative writs'.[7] But in these cases the command was a preliminary to proceedings in a royal court.

Even though numerous early examples of writs survive, it is difficult to tell how they worked in practice. When an executive writ commanded a final result, it could have been intended to enforce a decision already made rather than to originate proceedings. But where a writ ordered the recipient to do something 'justly', this seems to have meant that it should be done only if its justness was first established by due enquiry.[8] Such a writ was therefore in reality an original writ. The earliest kinds of writ to originate actions in the king's court either ordered an enquiry into facts or combined an executive command with an option. Writs of the first type, known as the 'petty assizes', ordered the sheriff to summon men of the vicinity to answer a question framed in the writ, and to summon the defendant to be there to hear the answer.[9] They were invented in the second half of the twelfth century. It has been suggested that a prototype for the assize of novel disseisin was an executive command to the sheriff to reseise a plaintiff (*praecipio ut resaisias* P), which came to be 'judicialized', first by adding the word 'justly' (*juste resaisias* P), and then by adding an explicit direction to investigate the question

[4] For the secretarial role of the Chancery see p. 107, post.

[5] See *Bishop of Worcester v. Abbot of Evesham* (*c.* 1080) 106 SS 37; *Abbot of Ramsey v. Eustace* (1087) ibid. 89 (writ to summon a county; cf. p. 125); *Staverton v. Abbot of Thorney* (*c.* 1110) ibid. 155 (writ to a feudal lord). Cf. *Abbot of St Augustine's, Canterbury v. Sandwich* (1122) ibid. 194, where a writ of right in the form *praecipio quod plenum rectum facias* appears to be addressed to the tenant rather than the lord.

[6] Both were in the form *praecipimus tibi*: for specimens see p. 581, post. For the writ of right see p. 250, post.

[7] See pp. 154–60, post.

[8] *Modbert's Case* (1121) 106 SS 192.

[9] See pp. 66, 252–4, post. For specimens see pp. 582–5, post.

asked.[10] But the distinctive characteristic of the assize was the enquiry by jurors, which is not mentioned in the earlier writs. The second type of writ (called a *praecipe*) ordered the sheriff to convey a command to the defendant, coupled with the alternative of coming before the king's court to explain why the command was not obeyed. This type was also introduced in the twelfth century. A third kind of formula, slightly later in date, ordered the sheriff to take pledges from the defendant to appear in court to explain himself. This appears to represent a further stage in which the option of carrying out a royal command was removed as otiose, and it was designed for dealing with allegations of wrongs already committed, especially wrongs against the king's peace. Of these principal classes of writ there will be more to say presently.

These writs addressed to the sheriff did not, like an eyre or assize commission,[11] confer jurisdiction on a court directly, but authorized the initiation of proceedings by the sheriff. An original writ was 'returnable' into a specified court: that is, the sheriff had to send the writ to the court, endorsed with a report (called the 'return') on the action he had taken. It was only on receipt of the returned writ that the justices acquired jurisdiction over the matter, and only to the extent mentioned in the writ; but they could themselves issue further returnable writs (called 'judicial writs') to secure the attendance of the defendant and continue the action through its further stages. Each returned writ was placed on file as the court's warrant for the next step taken.

Writs were at first designed to regulate justice, not to limit it. According to *Bracton* there were as many writ formulae as there were types of action,[12] and well into the thirteenth century new forms could be drafted when need arose by the chancellor and his senior clerks (the masters in Chancery), sometimes in consultation with the king's council and judges. In this formative period, we find some writs in use which did not survive into later practice, and there is no need to suppose that those who devised new formulae necessarily intended them to last unalterably for centuries, let alone to embody unexpressed rules of law. What caused the original writs to become fundamentally important to the common law was the early tendency for the formulae to become fixed. Once a writ had been issued it became a precedent for the future, and there was a reluctance to change a formula which was found serviceable. A plaintiff did not, therefore, concoct his own writ. He had either to find a known formula to fit his case, or apply for a new one to be invented, which would then be available to others. Already in the time of *Bracton* there were substantial collections of precedents (called 'registers of writs') to guide the Chancery clerks and the emerging legal profession.[13]

By the middle of the thirteenth century the register of known formulae had grown so great that the uninhibited invention of new writs had come to be seen as a grievance. Some check was felt necessary. *Bracton* recognized this in stating that new forms of writ must be consonant with law and approved by the council. That is tantamount to saying that royal jurisdiction could not be extended without legislative and judicial

[10] Van Canegem, 77 SS 267 et seq., 444–64. For an early writ of reseisin, brought against a plaintiff in a writ of right who had taken seisin without waiting for judgment, see *Abbot of Thorney v. Staverton* (*c.* 1110) 106 SS 156. For 'seisin' see pp. 247–8, post.

[11] These were also issued under the great seal.

[12] *Bracton*, IV, p. 286. [13] See p. 187, post.

sanction, and the idea may have been connected with the provision in Magna Carta that people should not be imprisoned or proceeded against 'except by the law of the land'.[14] This principle underlay complaints in 1244 that the chancellor was issuing writs against justice or contrary to law,[15] and the request by a defendant in 1256 that the court should quash a writ as 'novel, unheard of, and against reason'.[16] What thus seems already to have become the orthodoxy was put into writing in 1258. Under the Provisions of Oxford (1258) the chancellor was to be sworn to issue no writs other than writs of course ('nul bref fors bref de curs') without the consent of the king's council.[17] This was ambiguous, since writs of course might be taken to include new formulae intended for general use. But it was taken to refer to writs already approved: in 1267 a defendant objected to a new form of writ that 'no one need answer for his free tenement to a new form of writ unless it was framed by the common council of the whole realm' (that is, Parliament).[18] After this period, although occasional innovations were sanctioned by Parliament, the categories were more or less closed. The effect was momentous. Finding the right formula was no longer simply a matter of consistency and routine. If a would-be plaintiff could not find a writ in the register, he was without remedy as far as the two benches were concerned. That is not to say that he was without any remedy at all. The benches did not have exclusive or even comprehensive jurisdiction, and the denial of access to them in particular cases was often deliberate policy. Indeed, it was feared that, if the old system of local justice was deserted, the royal courts would be swamped with business they were not equipped to dispatch. Nevertheless, as the common law administered in the two benches gradually became the ordinary law of the land, so the law of the land came to be circumscribed by the range and wording of original writs which had been predicated on its being extra-ordinary. Formulae which had been drafted for more or less administrative purposes, to authorize the impleading of an adversary before an exceptional royal tribunal, were now seen as defining and delimiting all the rights and remedies known to the common law, and thus as fixing the common law within an immutable formulary framework.

The choice of original writ governed the whole course of litigation from beginning to end, since the procedures and methods of trial available in an action commenced by one kind of writ were not necessarily available in another. The classification of writs was therefore more than just a convenient arrangement of precedent books for reference purposes; it was a classification of actions, and in course of time a map of the substantive outlines of the common law.[19] The original writ, said Stonor J in 1315, was the 'foundation of law';[20] and in a moot at the end of the fourteenth century the bench said that the common-law writs were 'positive law' and that no one could question

[14] Magna Carta (1225), c. 29; p. 506, post.
[15] M. Paris, *Chronica Majora* (RS, 1872–83), IV, pp. 363, 367.
[16] *Abbot of Lilleshall v. Harcourt* (1256) 96 SS xxix, 44. The case was settled.
[17] 'Annales de Burton' in *Annales Monastici* (H. R. Luard ed., RS, 1864) I, p. 448.
[18] *Hide v. Flavel* (1267) KB 26/180, m. 24; P. Brand, *Kings, Barons and Justices* (2003), p. 186.
[19] See Table A on p. 77, post.
[20] *Horthwait v. Courtenay* (1315) 45 SS 5, per Stonor J ('bref original est fondement de ley'); repeated in 104 SS 142 (1320).

where they came from or why they possessed their particular characteristics.[21] Later lawyers referred to the compartments of law and practice associated with different writs as the 'forms of action'. The phrase itself is not much encountered in the medieval period,[22] though the concept is implicit in frequent discussions of the differences between one action and another. The forms of action inevitably became the first object of legal study. The two earliest treatises on the common law, *Glanvill* and *Bracton*, were essentially books about writs and the procedures generated by them. And the first stage in a late-medieval law student's training was to learn the principal writs, doubtless by rote. The fourteenth-century *Natura Brevium* ('The Nature of Writs') was the students' primer, the text for basic exercises in the inns of chancery. When the renowned legal author and judge Sir Anthony Fitzherbert published a *Novel Natura Brevium* in 1534 he wrote in the preface that the writs were the 'fundamentals on which the whole law depends'.[23]

Types of Original Writ

A writ (*breve* in Latin, *brief* in French) was a strip of parchment containing a letter in the name of the king, usually written (until 1731) in Latin,[24] and sealed with the edge of the great seal.[25] That is as much as can be said by way of generalization about the nature of writs, because their contents varied from one form of action to another. After 1833 there would be only one type of original writ, the plaintiff inserting his own particulars into a stereotyped form. But the main classes of common-law writ before then were different from each other in conception. The most fundamental difference depended on the rudimentary distinction between a right and a wrong. Assertion of a right – a *demand* – received different treatment from the complaint of a wrong – a *plaint*.[26] A right was continuous, perhaps even eternal, and it was necessary that its vindication be accomplished with care and caution; the highest solemnities of royal justice were accordingly lent to the protection of rights, especially those of a proprietary nature, for then the decision would bind the parties and their successors in title for ever. A wrong, on the other hand, was something past and beyond undoing, and in earlier days it concerned the royal courts only in so far as it infringed the king's peace. The consequences of serious wrongs might be just as grave as the loss of rights, but the philosophy with which alleged wrongs were approached was necessarily different. Enquiries into misdeeds were usually less perplexing than enquiries into rights, they needed dealing with promptly, and they were peculiarly appropriate for determination by jury. Minor wrongs were not at first within the ambit of the king's justice at all.

[21] 105 SS 42 (*c.* 1380/90), drawing a contrast with writs based on statutes, which could be challenged if they were *ultra vires*.

[22] E.g. *R. v. Bishop of Coventry* (1499) Y.B. Pas. 14 Hen. VII, fo. 21, pl. 4, at fo. 27, per Danvers J.

[23] For these works see also pp. 185–7, 197, post.

[24] Early privy-seal writs were sometimes in French. For the conversion to English in 1731 see p. 95, post.

[25] Once writs became routine, impressions of the full great seal (about 5 inches in diameter) were used only for charters and letters patent.

[26] A similar division is seen in viscontiel writs (p. 27, ante) between the *justicies* (to order the defendant to do something) and the *audias* (to hear a complaint of misconduct).

Praecipe Writs

The forms of action for pursuing demands belonged to the category of writs which it was suggested above may have developed from executive commands. The sheriff was told to command (*praecipe*) the defendant to do what was demanded by the plaintiff or demandant, or else to come before the king's justices to explain why (*ostensurus quare*) he would not. The king's court acquired authority to hear the case through the 'or else' clause, in default of acknowledgment of the supposed right by the defendant. Presumably at some stage the option of performance had been real; but it became fictional.[27] The disappearance of the reality of the option made the *praecipe* writs truly original, in that they were treated as originating an action from the time of their issue rather than from the moment of non-compliance; there was no need to prove a refusal before process could issue.

The classical *praecipe quod reddat* formula was in use by the 1150s, and there were soon a number of different species. The principal type, perhaps the prototype, was used to claim land; the sheriff was to command the defendant to 'render' or yield up to the demandant the land which the latter claimed as his right.[28] There were variants of this formula for claiming other kinds of real property, such as advowsons, and derivative forms (such as writs of entry and formedon) for claims under differing kinds of title. The *praecipe quod reddat* formula was also used to claim chattels or debts which the defendant unjustly withheld, or the performance of a covenant, or to obtain an account of moneys received. And there was a negative version, *praecipe quod permittat,* under which the defendant was to be ordered to permit the demandant to have or to do something: to have an easement or profit (*quod permittat habere*), to knock down a nuisance (*quod permittat prosternere*), to present a clergyman to a benefice (*quod permittat praesentare*, usually called *quare impedit*), and various others. This *quod permittat* group shows how a number of entirely different kinds of legal claim could be fitted within a common formula: the form suited different circumstances, and there was no need to connect the varieties by legal analysis. The *quod permittat* writs all mentioned wrongdoing, in the form of the obstruction or nuisance, and yet they were in substance demands of right, the rights being such as required remedial action by the demandant himself rather than the defendant. All the *praecipe* actions therefore have this in common, that they look primarily to the restoration of some right rather than compensation for misconduct; they are prospective rather than retrospective, in the subjunctive mood rather than the indicative, and in the present tense rather than the past. Where practicable they resulted in specific recovery, enforced by a writ to hand over the thing in demand or to do (or allow) what was asked.

As these were the oldest and most solemn of actions, the procedure which accompanied them was of the earliest kind, solemn and often slow. Much parchment and wax was needed to secure the appearance of the defendant, who could safely ignore several initial stages in the process against him and was also allowed various excuses

[27] For an explicit statement of this in the 1480s see the Inner Temple moot in Keil. 116, pl. 57.

[28] This was addressed to the sheriff only where land was held in chief, or where the lord waived his court: pp. 250, 255, post. But the writ of right patent to the lord contained a similar 'or else' clause, which gave the sheriff jurisdiction by default: pp. 251, 580, post.

(called 'essoins') for not appearing. In the writ of right, trial was originally by battle, the judgment determined by God. In debt and detinue, and to begin with in covenant, trial was by oath-taking (wager of law), the most familiar mode of proof in the old communal courts. The *praecipe* actions were therefore connected with the oldest ways of conducting litigation, and in consequence the first to seem outmoded. An obvious reform might have been to modify the procedures to bring them into line with current notions of efficacy. In the twelfth century that was still thinkable, and in 1179 Henry II did indeed introduce the 'grand assize', a form of jury, as an alternative to battle at the option of the defendant in a writ of right. By Edward I's time, however, the conservatism which accompanied the rise of the legal profession, and the concept of due process enshrined in Magna Carta, had put paid to radical procedural change. As neither their wording nor the concomitant procedures could be modified, the *praecipe* writs became less and less usable, and their fate was to be gradually superseded by whatever newer and more effective remedies could be found to bypass them. One solution was found in the bill procedure of the Chancery and conciliar courts. But alternatives existed within the common-law forms of action, and principally in the second main class of writs, those concerned with the redress of wrongs rather than the vindication of rights.

Plaints of Wrong

Mention has been made of the petty assizes, which fell between the two classes. One of them, novel disseisin, was effectively an enquiry by jury into wrongdoing; the bringer of the action was a 'plaintiff' – an 'appellant' in *Glanvill* – instead of a 'demandant', the general issue was 'No wrong' (*Nul tort*), and damages could be recovered for the wrongdoing. At the same time as novel disseisin was invented to deal with a particular form of misconduct,[29] we find other procedures (one of them likewise attributed to an 'assize') to deal with what we call crime. Complaints of violent wrongs could be made either by the community, through the grand jury (a written 'indictment'), or by the victim or his next of kin (an 'appeal', which began as an oral complaint).[30] The most serious appeals were those alleging felony, but there were once appeals of trespass for other breaches of the king's peace; these latter gave way on the one hand to actions of trespass,[31] and on the other to indictments for misdemeanour. Although the appeal did not require a writ for its commencement, it became increasingly common to use a writ of attachment to produce the defendant in court to answer the charge against him.

A third mode of proceeding against a wrongdoer was by a writ in the form *pone,*[32] whereby the sheriff was ordered to 'put the defendant by gage and safe pledges' (*pone D per vadium et salvos plegios*) to come before the king's justices and show why (*ostensurus quare*) he had committed some specified misdeed. It will be recalled that the *ostensurus*

[29] See p. 253, post. [30] See pp. 543–6, post.

[31] See p. 67. In 1241 an appeal for carrying away hay was quashed on the ground that an action by writ was available: *Crown Pleas of the Wiltshire Eyre 1249* (C. A. F. Meekings ed., 1961), p. 83. And in 1321 knocking a door down was said to be too 'simple' a trespass for an appeal on the Crown side of the eyre: 85 SS 93.

[32] The *pone per vadium* formula also occurred in novel disseisin. It was different from *pone ad respondendum* used to remove cases from inferior courts: p. 251, post.

quare formula had already been used in the 'or else' clause of the *praecipe* writs, where the defendant was summoned to come and explain his disobedience of the command; but here it was elevated into an immediate command to come and answer an allegation of wrong. The direct *ostensurus quare* formula possessed various subspecies, such as the writ of replevin,[33] the writ of waste,[34] and the writ of deceit (for misconduct in legal proceedings). But the broadest category of all comprised the writs of trespass.

Trespass

'Trespass', the law-French word for *transgressio* (wrongdoing), was not in the beginning a term of art. In Tyndale's 1526 translation of the Lord's Prayer – 'forgive us our trespasses' – the word is used both for the *peccata* (sins) and the *debita* (debts) of the Latin Vulgate.[35] Trespass was a broad enough category to embrace at various times felony, criminal misdemeanour, and disseisin, as well as those wrongs remedied by the later actions of trespass and trespass on the case – including, ultimately, the non-payment of debts. It acquired a technical meaning in the law as the name of a huge family of original writs. None of these writs actually contained the word 'trespass',[36] but they were interrelated by virtue of the basic formula and common procedure. They were also linked by an approach which distinguished them from the *praecipe* actions. Whereas a *praecipe* writ ordered the defendant to accede to a demand or justify himself, a trespass writ brought the defendant directly to court to answer for alleged wrongdoing: as Blackstone put it, whereas a *praecipe* writ was 'optional', trespass was 'peremptory'.[37] The concern was not with vindicating rights, or undoing wrongs, but with punishment and amends. As with the assize and the appeal, trial was by jury. And the outcome of a successful suit was damages, with a fine to the king in serious cases.

The peremptory *ostensurus quare* formula appeared in the decades before 1200, though trespass writs were not numerous before the middle of the thirteenth century. It seems highly probable that such actions developed in tandem with the appeal, in which the writ of attachment to answer a criminal accusation mirrored the *ostensurus quare* formula but included words alleging felony. Appeals of felony continued in use as a means of recovering stolen goods, or of achieving the execution of an aggressor; but the appellor ran the risk of having to fight a battle, or of being severely punished if the appeal failed. The appeal of death apart, appeals could usually be converted into actions for damages by omitting the words of felony.[38] The phrase 'with force and arms and against the king's peace' was taken from the appeal. The writ of trespass for taking and carrying away goods (*de bonis asportatis*) was closely similar in wording to the appeal of larceny, and that for assault and battery was similar to the appeal of mayhem. Yet the

[33] See p. 257, post. For the notion that replevin was a plea of the Crown see p. 45, ante. In 1310 Bereford CJ said replevin was a writ of trespass: 22 SS 195.

[34] Waste (and a number of other writs concerning property, such as *quare ejecit* and ravishment of ward) were not in the form *pone,* but contained a summons *ostensurus quare:* see the form, p. 584, post.

[35] Matthew, vi. 12, 14; cf. Luke, xi. 4 ('sins' and 'debtors'). Wycliffe (*c*. 1380) used 'trespasses' and 'sins'. The King James version has 'trespasses' and 'debts'. See also p. 363, post.

[36] It did occur in the 14th-century general plea, 'He did not trespass' (*Non fecit transgressionem*). This gave way to Not Guilty.

[37] Bl. Comm., III, p. 274.

[38] *Bracton*, II, p. 411, explicitly says this.

writ was wider in scope than the appeal, since it could also be brought for trespass to land (*quare clausum fregit* and ejectment).[39]

It was settled in the course of the thirteenth century that writs of trespass – in whichever bench they were returnable – would be issued by the Chancery only in respect of wrongs committed 'with force and arms' (*vi et armis*) and 'against the king's peace' (*contra pacem regis*), or which infringed royal franchises.[40] Only such wrongs were deemed suitable for the attention of the king's justices, as opposed to local jurisdictions, and there was a policy of discouraging private disputes in the highest courts about lesser forms of wrongdoing. Thus in 1278 it was enacted that actions of trespass should be brought in the county as in the past, and that no one should have a writ of trespass unless he swore that the claim was substantial.[41] The restriction of writs of trespass to wrongs *vi et armis* and *contra pacem* did not reflect any narrow understanding of the scope of the law of wrongs; it was merely a fetter on the jurisdiction of the central courts. But the desire for remedies in those courts soon came into conflict with this limitation, which in the fourteenth century was seen as obstructing justice with little countervailing benefit. Since local courts were generally forbidden to entertain suits for more than forty shillings without royal permission,[42] there would have been a failure of justice if non-violent trespasses involving a greater sum were excluded from the king's courts as well. Local courts, moreover, while having the advantage of relative expedition, had weaker sanctions at their disposal than those available through sheriffs, and no sanctions at all beyond their geographical boundaries.

A centralized legal profession was fully aware of the desirability of extending the scope of royal jurisdiction and eager to find ways of achieving it. The pressure for change is first seen in attempts to use *vi et armis* writs fictitiously, or at least by taking an elastic view of 'force',[43] in the hope that no exception would be taken. A series of actions for injuring horses' hooves with force and arms, brought against defendants identifiable as smiths, suggests irresistibly that the complaints were really of shoeing accidents;[44] and actions for forcibly chopping up timber, brought against men described as carpenters,[45] look like attempts to aggravate the negligent performance of building contracts. When the truth came out in evidence, some plaintiffs met with a helpful court,[46] but others did not, especially where the essentially non-violent nature of the wrong appeared from the plaintiff's own count.[47] The necessity for the plaintiff to allege force in order to achieve access to royal justice was becoming awkward.

[39] As in the case of the woman whose door was knocked down: p. 66 n. 31, ante.

[40] The writ of deceit might also be considered a species of trespass: here the king's interest was in the integrity of his justice.

[41] Stat. Gloucester (1278), c. 8.

[42] This was a common-law rule of uncertain date: J. S. Beckerman in *Legal History Studies 1972*, p. 110.

[43] The 'arms' – routinely particularized in the count as a variety of weapons (e.g. swords, staves, bows, and arrows) – were almost always fictitious. But 'force' was not defined.

[44] See Milsom, 74 LQR at 220–1, 586; Palmer, *ELABD*, pp. 364–5. (The defendant in these actions is commonly called Smith or Ferrour.) For selling contaminated wine *vi et armis* see *Rattlesdene v. Grunestone* (1317) B. & M. 341.

[45] Palmer, *ELABD*, pp. 182, 334. The *vi et armis* in such cases was dropped in 1369.

[46] E.g. *Anon.* (1304) B. & M. 338; *Petstede v. Marreys* (1310) ibid.

[47] E.g. *Anon.* (1313) B. & M. 340 (deceit in selling); *Toteshalle v. Orfevre* (1321) ibid. 342 (conversion by a bailee); *Houton v. Paston* (1321) ibid. 343, per Herle J (accident).

Trespass on the Case

The *vi et armis* restriction was openly abandoned in the 1350s, when the Chancery clerks began regularly to issue writs of trespass in which the phrase was replaced by the special facts of the plaintiff's 'case'.[48] Orthodox teaching from the mid-sixteenth to the mid-twentieth century was that the innovation was sanctioned by a statute of 1285, which authorized the clerks of the Chancery to devise new writs 'whenever henceforth it should happen in the Chancery that a writ is found in one case but none is found in a like case (*in consimili casu*) falling under the same law (*cadente sub eodem jure*) and requiring a like remedy'.[49] The words *casus* and *cadens* clearly refer to special cases, but no connection between the statute and writs 'on the case' was explicitly made in medieval times, and historians now disagree as to whether the statute played any role at all in the introduction of the newer forms of trespass. It was nearly seventy years after 1285 before the general abandonment of the *vi et armis* requirement in practice, and the fictions resorted to in the interim would have been unnecessary if the statute had already sanctioned the change. It may be that the statute simply removed the need for an exact precedent when issuing new writs, and that by a process of accretion the corpus of trespass formulae grew little by little until eventually the force and arms could be dropped. However, it is not obvious that a writ for a non-forcible wrong would have been thought 'in like case' to a writ for a forcible wrong, or as 'falling under the same law'. The facts suggest a more sudden reversal of policy in the 1350s, especially in the context of occupations, and it may have been occasioned in some way by changed social and economic conditions in the wake of the Black Death. No official decision is recorded, but such a major change was almost certainly sanctioned by the king's council.[50]

The new writs differed significantly from the vast run of *vi et armis* writs. They embodied the same *ostensurus quare* formula; but whereas the *vi et armis* writs were mostly 'general', accommodating wide spectra of facts within simple stereotyped forms,[51] all other writs of trespass had to set out the plaintiff's circumstances with some particularity in what was called his 'special case'. The special facts were recited in a *cum* (whereas) clause, following immediately after the words *ostensurus quare*, and preceding the direct assignment of wrongdoing.[52] The *cum* clause is first found in a few special *vi et armis* writs, in the thirteenth century, as a way of adding aggravation or explanation; and there were precedents long before the 1350s of trespass with *cum* clauses showing the breach of some royal interest, such as interference with a franchise, in lieu of force.[53] There was also a line of cases in which special writs were brought for

[48] The relaxation began earlier with bills: e.g. *The Oculist's Case* (1329) B. & M. 381 (eyre of Nottingham); *The Humber Ferry Case* (1348) ibid. 399 (KB at York); p. 351, post.

[49] Stat. Westminster II (1285), c. 24 (*in consimili casu*). The statute also said that if the clerks could not agree, they should refer the problem to Parliament; but a 15th-century reader said this was of no effect (BL MS. Lansdowne 1138, fo. 104).

[50] The council is known to have sanctioned the action on the case against innkeepers: B. & M. 604, per Knyvet CJ. Cf. also the proclamation of 1349 whereby the king delegated to the chancellor matters concerning the common law and his 'special favour': Palmer, *ELABD*, pp. 108–9, 130–1.

[51] Thus the battery formula (p. 584, post) could embrace wrongs as diverse as shooting or running down with a horse and cart. See pp. 429–32, post.

[52] For specimens see p. 584, post; B. & M. 385–6, 427–8.

[53] E.g. *Prior of Coventry v. Grauntpie* (1309) B. & M. 669 (franchise of market).

flooding through non-repair of sea-walls, culminating in a leading case of 1344 in which such a writ was described as being 'a formed writ conceived on his case' (*in suo casu conceptum*); it is difficult to account for this exception to the *vi et armis* rule, but here the extension had begun even before the statute of 1285.[54] When writs without *vi et armis* suddenly became more common in the 1350s, enabling actions to be brought for negligence, breaches of contract, deceit by sellers, damage caused by dangerous animals, and the loss of goods from inns, the *cum* clause (with the special facts) was indispensable. Early descriptions of such writs – for instance, 'a writ according to his special case' – betoken formulae specially created for individuals,[55] and their variety, even when dealing with similar factual situations, makes it probable that the wording of the *cum* clause was settled by the plaintiffs' own counsel rather than by the Chancery clerks.[56] Once the general category had been approved, the Chancery clerks would issue specific writs including these clauses devised by plaintiffs themselves to suit their facts, without guaranteeing that they would work.[57] As they became more common, the whole family of non-forcible trespass actions was given the generic name of 'trespass on the case', 'actions on the case',[58] or later just 'case'.

The difference between trespass *vi et armis* and case represented no more than an accident of jurisdictional history. The general writs had been invented first, and the plaintiff who could not find one suitable for his purpose had to use a special one with an explanatory clause. At first any other differences were minimized, for instance by retaining the *contra pacem* formula for actions on the case, though this soon ceased to be necessary as well. The conceptual unity is in fact more striking than the differences. For instance, it might have been supposed that a trespass which was not against the peace was a common plea and therefore outside the jurisdiction of the King's Bench, and this was certainly discussed in the inns of court; but the point was not pressed and had no practical effect.[59] It was also arguable that jury trial was not de rigueur in trespass on the case, as it was in trespass *vi et armis*, and in 1374 the argument nearly prevailed;[60] but by the 1380s it was clear that wager of law was not acceptable in any writ of trespass if deceit was alleged,[61] and thereafter wager of law is not known to have been offered in any trespass action. Indeed, it was taught in the inns of court that compurgation was not available in any action on the case.[62] The exclusion of wager of law was a precondition for the prominent part which actions on the case were to play in legal

[54] Milsom, 74 LQR 430–4; *Bernardeston v. Heighlynge* (1344) B. & M. 381. Cf. the reference in 1317 to a writ *secundum suum casum* for interfering with a watercourse: 93 SS 348.

[55] E.g. B. & M. 401 ('special writ according to the case', 1369), 384 ('writ according to his case', 1372), 422 ('writ formed on his special case', 1400), 425 (trespass *sur le matter monstré,* i.e. on the facts set out, 1425).

[56] Cf. the later practice: *OHLE*, VI, pp. 325–7.

[57] E.g. writs alleging a passive failure to perform a promise ('nonfeasance') became common form long before the judges declared in 1400 that they were bad: p. 354, post.

[58] For 'action on the case' see B. & M. 671, per Skrene (1410), 439 (1449).

[59] 94 SS *57–9*; 132 SS lxii, 95, 151.

[60] *Stratton v. Swanlond* (1374) B. & M. 402 at 403, per Cavendish CJ ('This writ does not suppose force and arms, or *contra pacem*, and so it seems wager of law is quite acceptable'). However, the defendant withdrew the wager of law and accepted a jury.

[61] *Aylesbury v. Wattes* (1382) B. & M. 556 at 557, per Belknap CJ; *Rempston v. Morley* (1383) ibid. 557 at 558. In *Garrok v. Heytesbury* (1387) ibid. 558 at 559, the point was again raised, but not pressed.

[62] See the anonymous 15th-century lecture on Magna Carta in 132 SS 244. There is no mention here of deceit.

development over the next four-and-a-half centuries. Another potential difference concerned mesne process; but in 1504 any previous doubts were ended by the enactment that the same process was available in case as in trespass.[63]

As late as 1610 it could be said that trespass was a collective name, comprising the two species trespass *vi et armis* and trespass *super casum.*[64] Such, nevertheless, became the dominance of form over substance that in later ages lawyers convinced themselves that 'trespass' and 'case' were distinct entities, that they must have been distinguished for a reason (even if no one knew what it was), and that they ought not to be confused. Suing by the wrong writ was fatal, and so different did trespass and case become in the legal mind that they could not even be joined in one action.[65] Rationalization of 'force' made the test one of directness.[66] An action of trespass for fixing a spout so that it directed rainwater onto the plaintiff's house was on this basis struck down in 1725 because the proper action was case. The fixing was a direct act but the consequential damage was not. Fortescue J explained the distinction with a simple example: a man who threw a log into the highway and hit someone was liable in trespass, whereas one who left a log in the highway, where someone tripped over it, had to be sued in case.[67] Such distinctions seem inordinately scholastic; but the prevailing philosophy, according to Lord Raymond CJ, was that 'we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion'. This particular boundary had been elevated into a principle of law as unnecessary as it was historically mistaken, and it would require much effort and artifice to steer round it.[68]

Judicial Writs

Mesne Process

Process is the name given to that part of the machinery of justice whereby persons are brought to justice and judgments enforced. The details of the process available in different forms of action are points of practice which have little fascination for posterity; but such things were of real importance to litigants, and may often have affected their choice of action and the development of the law. Process was governed by writs, but not writs from the Chancery: they were issued under the seal of the court where the suit was pending, in the name of the chief justice, and were therefore called judicial writs.

Since a lawsuit could not proceed in the absence of a defendant or his attorney, the first stage was to secure the defendant's appearance, or (if he did not appear) to outlaw him. This was achieved by 'mesne' process, so called because it was intermediate between the original writ and the judgment. As soon as an original writ was returned into the Common Pleas or the King's Bench it was taken to an officer of the court called a 'filazer', who thereupon issued all the writs of mesne process until the appearance of

[63] Stat. 19 Hen. VII, c. 9; B. & M. 384.

[64] *Cox v. Gray* (1610) B. & M. 393. In the 15th century, actions on the case were often referred to simply as 'trespass': e.g. B. & M. 425, 560, 640, 669, 671.

[65] See this argued in *Haukyns v. Broune* (1477) B. & M. 691 at 692, per Townshend sjt.

[66] A similar distinction appears in *Berden v. Burton* (1382) Y.B. Trin. 6 Ric. II, p. 21, pl. 9.

[67] *Reynolds v. Clarke* (1725) B. & M. 395 at 396; quotation from 1 Stra. 634.

[68] See further pp. 439–40, post.

the defendant or the commencement of outlawry. The principal forms of mesne process were the writ or precept of attachment (under which the sheriff either seized goods or took personal sureties from the defendant for his appearance),[69] the *distringas* (under which the defendant was distrained by seizure of his property), and the *capias ad respondendum* (under which the defendant was arrested). The *capias* was the most effective. Though its use was limited at common law to suits for breach of the king's peace, by statute it was gradually extended to other personal actions.[70]

Judicial writs resembled originals in that they too were addressed to the sheriff and were returnable in court. The effectiveness of process therefore depended largely on the sheriff. Unable as he was to claim expenses, and liable in damages if he made mistakes, the temptation for him to do nothing was considerable. The sheriff could return to a *distringas* that he had found nothing to distrain, or to a *capias* that the defendant was ill or not to be found. Whether he had actually looked was a question one was not allowed to ask. These returns therefore became common fictions for use by under-sheriffs who could not be persuaded to take positive action, or who hoped by delay to prise some douceur from the plaintiff. There was, in any case, a succession of judicial writs to be issued in due sequence before any real sanctions began to bite. Even where a *capias* was available, three successive writs went out before further steps were taken, and the plaintiff still could not seek judgment by default but had to resort to outlawry.[71] Outlawry was an elaborate rigmarole, requiring the sheriff to 'exact' the defendant by calling upon him to come forth at five successive county courts. But it was not as terrible as it sounded. It could be reversed for formal slips, and technical escape routes seem to have been left open almost as a matter of course; if all else failed, an outlawry could be pardoned on payment of a pound or two to various officials. The Robin Hood legends have preserved an image of outlaws as desperate outcasts lurking in dark forests; but by 1400 outlawry was not usually much of an inconvenience, and even royal officials could continue in office after being outlawed in civil actions.[72]

Moderate delay in litigation was often defended as a desirable feature of royal justice in an age when communications were slow. Certainly, no one could accuse the common-law system of denying opportunities for delay, which were built into it at many points. Some arose from the division of the legal year into terms during which formal business had to be transacted. Terms originated in the twelfth century, when the Exchequer began to hold its major accounting sessions at Easter and Michaelmas. The council was assembled for these sessions, and the justices stayed afterwards to dispose of judicial business. Two further terms were probably added in the 1190s when the Bench became firmly established. The terms were separated by four vacations, periods when the Church prescribed holidays, when the king's justices took time to make their circuits, or when everyone went home. All Sundays and certain saints' days were

[69] In actions of trespass the order to attach the defendant was in the original writ ('put by gage and safe pledges'). Another writ of attachment was used against someone in contempt of court.

[70] In 1285 to account, in 1351 to debt, detinue, and replevin, in 1504 to case, and in 1531 to covenant: B. & M. 384.

[71] Judgment in default of appearance was not introduced in personal actions until 1725.

[72] Numerous members of the inns of court were put in exigent for not paying their dues: *The Men of Court*, I, pp. 9–12, 55–6. Elizabeth I is said to have complained at the number of outlaws sitting as members of Parliament.

non-juridical (*dies non juridici*) at common law. The three religious seasons of Christmas (with Advent and Epiphany), Lent (with Easter) and Trinity (with Whitsun and Corpus Christi) account for three of the vacations; while the fourth, the 'Long Vacation', kept the summer months free for country pursuits when hot weather could make town life unsafe. Thus was the legal year divided into the four terms during which the courts sat at Westminster:[73] Michaelmas (in October and November), Hilary (in January and February), Easter (in April and May), and Trinity (in May and June). The total number of working days in the year, as late as Elizabeth I's time, was only 99;[74] later reforms took away about ten more days, so that for as much as three quarters of the year there were no common-law courts sitting at Westminster.

Each term was divided into four or more 'returns', each return-day being a week apart. All writs were made returnable at one of these days, and at the return the plaintiff had to take his next step. There were three days of grace, and a provision for late entries on payment of a fine after the fourth day; but if the plaintiff missed the return altogether his action was 'discontinued' and he had to give up or start again. If the sheriff or the defendant defaulted at the fourth day, the plaintiff would ask for the next judicial writ to be issued, returnable after a prescribed interval at another return-day, often the next term. It was the function of the attorneys to watch their clients' causes to make sure that steps were taken at the proper days. But the system was typified by delay. It was possible for a year to pass before a defendant appeared. This was one of the main reasons why, if there was any choice, plaintiffs preferred those forms of action which needed the fewest writs to procure an appearance, especially trespass with its immediate *capias*.

If the parties pleaded to an issue of fact, further judicial writs were required to produce a jury: first the *venire facias juratores*, repeated if it had no effect, then the *distringas juratores* (to distrain the jurors), and finally the *habeas corpora juratorum* (to produce their bodies). If insufficient of the jurors appeared, or too many were challenged off the panel, a writ of *octo tales* or *decem tales* could be sent to the sheriff to produce eight or ten more.[75]

Final Process

Execution of a judgment was likewise achieved by judicial writs addressed to the sheriff. The appropriate writ depended on the form of action and the nature of the judgment. In real actions the judgment was usually to be put in seisin of the land demanded, and the writ of execution was then the *habere facias seisinam* ('cause [P] to have seisin').[76] A judgment for money, whether for a debt, damages, or costs,[77] was primarily

[73] The legal year originally began on the octave of Michaelmas (6 October), but from 1752 on 3 November (cras. Animarum, the morrow of All Souls). The calendar year began on 25 March (Lady Day) until 1752, when it was moved to 1 January. But the year used for legal dating purposes was the regnal year, commencing on the date of the current monarch's accession.

[74] Meekings, in *Legal Records and the Historian*, p. 111 n. 1.

[75] After 1543 assize judges could order a *tales de circumstantibus*, without a writ, to complete a panel without delay from persons standing around: Stat. 35 Hen. VIII, c. 6. *Tales* means 'such like'.

[76] In ejectment, when a term of years was recovered (see p. 320, post), the writ was *habere facias possessionem*.

[77] A plaintiff was generally entitled to costs in all cases where he recovered damages: Stat. Gloucester (1278), c. 1. Later statutes provided that in certain cases costs should not exceed the damages: e.g., p. 437, post. Successful defendants were first given costs in 1531: Stat. 23 Hen. VIII, c. 15.

enforced at common law by the writ of *fieri facias* (fi. fa.), which ordered the sheriff to seize the defendant's chattels[78] and cause the sum to be 'made up' (that is, raised by sale). Freehold land was not liable at common law to execution for a money judgment, except in an action by the king, or against an heir sued on his ancestor's bond, or against a recognizor.[79] In 1285, however, Parliament introduced an alternative procedure called *elegit*, under which a judgment creditor could elect instead of fi. fa. to have the defendant's goods and a moiety of his lands delivered to him as a security.[80] In practice it came to operate like a mortgage, the debtor remaining in possession and paying an assessed rent until the debt was paid off. In those actions where mesne process was by *capias*, the plaintiff had the further option of suing execution by the writ of *capias ad satisfaciendum* (ca. sa.), under which the defendant was incarcerated until the plaintiff was satisfied: a technique which depended for its limited success largely on the hope of intervention by friends.

These writs proved remarkably durable, and they were unaffected by the Common Law Procedure Acts. The abolition of imprisonment for most civil purposes in 1869 put a virtual end to the fearful ca. sa., though it remained available in rare cases until 1981.[81] *Elegit* was actually enlarged in scope in 1838, so that *all* the defendant's lands were made liable to execution; only in more recent times has it been replaced by the more flexible charging order.[82] Fi. fa. and writs of possession are still in common use, and (retaining much of their common-law form) have turned out to be the principal survivors of the medieval writ system,[83] though since 2014 the fi. fa. has been renamed a 'writ of control'.[84] More modern forms of execution – designed chiefly to reach a wider range of assets than tangible property – derive either from statute[85] or from Chancery procedure.[86]

End of the Forms of Action

Much of the variety described in this chapter came to an end as a result of the triumph of trespass and case, which shared a common procedure from beginning to end, over most other actions.[87] Debt remained numerically the most important cause of action, but from the Tudor period onwards the usual mode of commencing suits for debt was not a writ of debt but a bill of debt, which depended on a fictitious action of trespass to

[78] This included leaseholds: see B. & M. 210.

[79] In these cases a *levari facias* was used, allowing the profits of land to be taken as well as chattels. For recognizances see p. 331, post.

[80] Stat. Westminster II (1285), c. 18. The tenancy by *elegit* was a freehold, but was treated as a chattel for succession purposes, passing to personal representatives together with the debt itself.

[81] Debtors Act 1869 (32 & 33 Vict., c. 62); Supreme Court Act 1981 (c. 54), s. 141.

[82] Judgments Act 1838 (1 & 2 Vict., c. 110), s. 11; Administration of Justice Act 1956 (c. 46).

[83] In 1991 alone 100,942 writs of fi. fa. were issued to enforce Queen's Bench Division judgments: *Judicial Statistics Annual Report 1991* (Cm 1990), p. 34. Since the late 1990s the number has fallen to *c.* 45,000 a year.

[84] The writ is still issued in the queen's name, ordering an enforcement officer (no longer the undersheriff) to take control of goods and raise therefrom the sum mentioned.

[85] E.g. charging orders, introduced by the 1838 Act as a means of levying execution against stocks and shares; and attachment of debts (including bank accounts and earnings), introduced in 1854.

[86] E.g. sequestration (see p. 112, post) and receivership.

[87] In one form of trespass (ejectment), mesne process was altogether dispensed with by the use of fictions: see p. 321, post.

land and therefore used the trespass process, or an action of trespass on the case.[88] The expansion of trespass and case provided the common law with a temporary escape from the formulary system, an opportunity to melt down the law and recast it in new moulds. Most of the common law as we know it today was shaped by this process. After the redistribution, the commonest types of trespass and case became the basis of a new scheme of actions: principally, trespass to land or chattels, battery, false imprisonment, *assumpsit* (for breach of parol contracts, and also for restitutionary claims), trover (for interference with personal property), defamation, negligence, nuisance, and ejectment (to recover possession of real property). These were not distinct forms of action but subdivisions of one form of action which had no precise edges. There was therefore less of the restrictiveness and procedural nicety which beset the *praecipe* actions.

The progress towards uniformity was carried to a conclusion by nineteenth-century legislation. Most of the forms of action, as distinct procedures, were abolished in 1832 and 1833. Actions were thereafter commenced by one same form of writ, in which the nature of the action was merely inserted in the space provided. The assimilation and simplification of mesne process at the same time was mentioned in the last chapter. After 1852 it became unnecessary even to state the 'form of action' in the writ,[89] and different causes of action could thereafter be joined in one writ.[90] The 1852 legislation also improved the procedure for obtaining judgment in default of appearance.[91] The return-days were abolished,[92] and eventually the services of the sheriff were dispensed with for all preliminary stages, so that parties served their own writs and pleadings within set time-limits. In 1875 the form of the original writ was again changed, principally by adapting the Chancery subpoena (which it also replaced); the substance of the claim was endorsed on the back, but not in any technical phrases. Then, in 1980, the immemorial writ formula itself was finally abandoned, except for final process, Lord Hailsham LC having formed the view that sending a command from the queen herself was too intimidating and might dismay a layman. The last original writ in the queen's name was issued on 2 June 1980. A document called a 'writ' was still used for another twenty years, though it was in fact a simple notice to appear. It has now been replaced by an informal 'claim form'.[93]

'The forms of action we have buried,' said Maitland at the turn of the twentieth century, 'but they still rule us from their graves'.[94] The posthumous rule of the forms of action did for a time threaten a form of tyranny which in life they were never permitted, in that the main analytical categories of the common law were seemingly frozen by their abolition in 1832. Although the legislative reforms were purely procedural, and

[88] See pp. 49–50, ante; 363–8, post.

[89] Uniformity of Process Act 1832 (2 & 3 Will. IV, c. 39); Real Property Limitation Act 1833 (3 & 4 Will. IV, c. 27), s. 36; Common Law Procedure Act 1852 (15 & 16 Vict., c. 76), ss. 2–3. For the new form see p. 591, post.

[90] Common Law Procedure Act 1852, s. 41.

[91] Ibid., s. 27. In the absence of pleadings, the plaintiff had to endorse the writ with particulars of his claim; this was appropriate only for debt and liquidated money-claims. This system was preserved in R.S.C. 1875, Ord. 13 (later Ord. 14).

[92] The terms were abolished by Judicature Act 1873 (36 & 37 Vict., c. 66), s. 26. Curiously, the vacations were not abolished; the periods of business between vacations are now called sittings.

[93] See p. 102, post.

[94] *Forms of Action,* p. 2.

not intended to alter any of the substantive law which was enforced through the forms of action, the law had become so inseparable from the writs that the disappearance of the latter left conceptual conundrums. One difficulty was that the fictions which had proved necessary in order to force new causes of action into the old forms were not always easy to translate into principles of substantive law.[95] Another problem arose from the fact that so many of the writs had come to overlap. For example, there had sometimes been an election between trespass and case, so long as the wrong complained of was not wilful.[96] But is there any remaining substantive distinction between trespass and case?[97] The election between conversion and detinue remained legally significant until a statute of 1977 declared curtly that 'Detinue is abolished'. But what exactly was thereby abolished?[98] Then again, is there still a substantive distinction between debt and *indebitatus assumpsit*?[99]

The passage of nearly two centuries since their abolition has greatly diminished the influence of the forms of action. Occasionally their ghosts are reproached for 'clanking their spectral chains',[100] though one judge has asserted that 'if one is not unduly timorous one may find that they are waving one along the path of justice'.[101] On either view, they can no longer operate as procedural traps. Long experience has shown that clearly defined procedures are good servants but may turn out to be uncharitable masters. Although the classification of causes of action and remedies is still valuable for purposes of clarity, it is no good reason to defeat a just claim that a party's lawyer has selected the wrong form.

Further Reading

Pollock & Maitland, II, pp. 558–97
Milsom, *HFCL*, pp. 33–8, 243–46
F. W. Maitland, *The Forms of Action at Common Law: A Course of Lectures* (A. H. Chaytor and W. J. Whittaker ed., 1909; repr. 1962) (as to which see S. F. C. Milsom, 'Maitland', 60 CLJ at 268–9)
R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (77 SS, 1959)
S. F. C. Milsom (ed.), *Novae Narrationes* (80 SS, 1963)
D. Sutherland, 'Mesne Process upon Personal Actions in the Early Common Law' (1966) 82 LQR 482–96
G. D. G. Hall and E. de Haas, *Early Registers of Writs* (87 SS, 1970)
J. H. Baker, 'Commencing an Action' [1483–1558] (2003) in *OHLE*, VI, pp. 323–34
A. H. Hershey, 'Justice and Bureaucracy: The English Royal Writ and "1258"' (1998) 113 EHR 829–51
P. Brand, 'Chancery, the Justices and the Making of New Writs in Thirteenth-Century England' (2013) in *Law and Legal Process*, pp. 17–33

[95] Note particularly the history of restitution, ch. 21, post.

[96] *Williams v. Holland* (1833) 10 Bing. 112; p. 440, post.

[97] Until 1959 there was thought to be a remaining procedural distinction: *Fowler v. Lanning* [1959] 1 Q.B. 426.

[98] See p. 426, post.

[99] Arguably there is, at least in the Antipodes: *Young v. Queensland Trustees* (1956) 99 C.L.R. 560; *Pavey & Matthews Pty Ltd v. Paul* [1985] 3 N.S.W.L.R. 114, (1987) 69 A.L.R. 577, on which see Ibbetson, 8 OJLS 312.

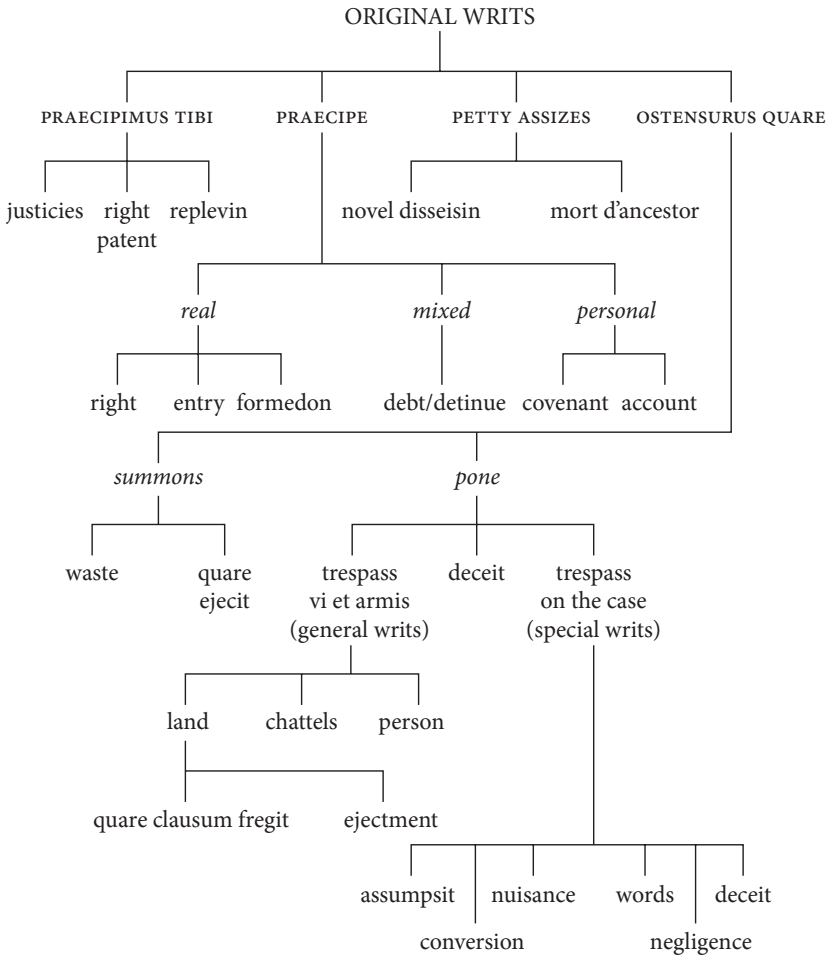
[100] *Leakey v. National Trust* [1980] 1 All E.R. 17 at 26, per Megaw LJ, echoing *United Australia Ltd v. Barclays Bank Ltd* [1941] A.C. 1 at 29, per Lord Atkin. For the continuing influence of forms of action (of a different kind) in public law, see pp. 163–4, post.

[101] *Sir Robert McAlpine & Sons Ltd v. Minimax Ltd* [1970] 1 Lloyd's Rep. 397 at 422, per Thesiger J.

Trespass and Case

H. G. Richardson and G. O. Sayles, 'The Writ of Trespass' (1941) 60 SS cviii–cxxxiv
A. K. R. Kiralfy, *The Action on the Case* (1951), pp. 1–54
S. F. C. Milsom, 'Not Doing is no Trespass: a View of the Boundaries of Case' (1954) 12 CLJ 105–17 (repr. in *SHCL*, pp. 91–103); 'Trespass from Henry III to Edward III' (1958) 74 LQR 195–224, 407–36, 561–90 (repr. in *SHCL*, pp. 1–90)
M. J. Prichard, 'Trespass, Case and the Rule in Williams v. Holland' (1964) 22 CLJ 234–53
T. G. Watkin, 'The Significance of "In Consimili Casu" ' (1979) 23 AJLH 283–311
A. Harding, 'The Origins of Trespass, Tort and Misdemeanour' (1981) 96 SS xxxii–lviii
R. C. Palmer, *English Law in the Age of the Black Death 1348–1381* (1993), part 3

Table A. Principal types of original writ



5

The Jury and Pleading

When the medieval law student had learned the writs, the next stage of his education was to learn pleading, the process of defining exactly what was in dispute between the parties so that it could be determined. 'It is one of the most honourable, laudable, and profitable things in our law,' Littleton advised his son, 'to have a knowledge of fine pleading'.[1] This was no overstatement, even in the fifteenth century. Pleading was not originally, as now, an exercise in draftsmanship pursued in chambers; it was the core of the advocate's art, the prime task undertaken by a lawyer in open court, the end to which legal training was for several centuries directed. Even when written pleading supplanted the oral procedure, it remained central to legal practice.

The occasion for the creation of this arcane science was the appearance of another English institution, the jury. Systems of justice which depended on general oaths, and supernatural tests of oaths, had no need of pleading in any refined sense. God might indicate who was lying, but he could not be interrogated about the particulars of a case. Divine intervention, even for those who believed in it, necessarily stopped short of finding specific facts or making law. Juries, too, would be asked to choose between parties without explanation; their verdicts were as inscrutable as ordeals. Yet they were set more complex questions than were submitted to God, and as human beings they could raise questions as well as ask them. Lawyers had to make sure that the questions referred to these 'lay folk' were questions they could understand, or would be least likely to misunderstand. Technical questions thought to be outside the competence of the jury had to be raised in advance before the judges. This was pleading in the legal sense: not advocacy in front of a jury, but advocacy before a jury was summoned. The common law was refined and clarified in medieval times in discussions which occurred before the facts were tried.

Although the original writs became, more by accident than design, fundamental to the common law,[2] they provided no more than a bare framework on which detailed law might be constructed. The wording of the *praecipe* writs showed that a man was entitled to recover his 'right and inheritance', his chattels, or his debts, was entitled to have his covenants performed, and so on. The trespass writs showed that a man was entitled to redress for being beaten or imprisoned, or for having his goods taken or his land trodden on, and so forth. But the writs did not say, and it was not their business to explain, what an inheritance was, let alone a 'right'; they did not indicate what circumstances made someone a debtor to another, what constituted a covenant, or when a contract might be void; they did not hint at whether a person might be beaten or imprisoned lawfully (as, by process of law), whether goods might be taken lawfully (as, by distress

[1] Litt., s. 534. This was printed in 1481, but written in the 1450s or 1460s.
[2] See ch. 4, ante.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

for rent), or whether there might be justifications for going on another's land (as, by invitation); they made no mention of defences such as infancy, insanity, or the exercise of due care. Until the relevant facts could be brought out for discussion, there could be no body of law in any advanced sense. Yet, before the introduction of juries and pleading, such questions could not be framed formally. And so long as legal procedure did not require or even permit the rational analysis of disputes into their component elements, the key words used in the formulae of litigation – ordinary words like 'inheritance', 'owe', 'covenant', 'force and arms' – remained innocent of legal meaning and incapable of precise definition or refinement. Inheritance only became a legal concept when the pedigree was discussed, and a descendant's right to succeed determined by the identification and application of rules governing all like cases. Owing could only become a legal concept when the circumstances of a transaction were looked into in order to establish whether they resulted in a debt. And this is true of the whole law. 'Legal development consists in the increasingly detailed consideration of facts.'[3]

From 'Proof' to 'Trial'

The older methods of resolving factual disputes, in use before the twelfth century, are better referred to as methods of 'proof' than of 'trial', because trial suggests the weighing up of evidence by a tribunal acting judicially. Resolutions reached through supernatural proofs and compurgation were unfathomable. No legal questions were asked of God or the compurgators, no reasons given, no rules declared. Written procedure was unnecessary, records were not kept, and in consequence the workings of early law and custom are elusive. This was equally true of early royal justice, because decision by proof was not confined to the ancient local courts. It was the only system anyone knew. The king's judges did not start out in the twelfth century with an inspired vision of things to come; they simply took over and continued what must have seemed the eternal order of things. The Anglo-Saxon ordeals and compurgation, and the Norman judicial combat, thus became part of the procedure of the royal courts in their earliest phase. Nevertheless a different, more investigative, approach began to appear in the twelfth century in certain kinds of case, and its obvious advantages soon made the older ways obsolescent.

The Rise of the Jury

A jury was a body of men sworn to give a true answer (*veredictum*, verdict) to some question. Swearing people to furnish true information was an old idea and not peculiar to England. It was the only way of collecting verified data for fiscal or administrative purposes:[4] God could not be asked to name suspects, count oxen, or settle boundaries. The inquest had roots in Scandinavia and in the old Carolingian empire, and was known before 1066 in both England and Normandy. Under the Norman kings use was

[3] Milsom, 17 *Univ. Toronto Law Jo.* 1 (repr. in *SHCL*, p. 171).

[4] E.g. *Abbot of Ramsey v. King of Scotland* (1127) 106 SS 213 (hundred jury asked to settle a boundary); *Bishop of Hereford v. Regem* (1136) ibid. 242 (jury of 12 to investigate afforestation). See Macnair, 17 LHR 535.

still made of the Anglo-Saxon jury of accusation, sworn to name suspected criminals without hiding anything;[5] but the suspects so named were tried in the old way, by water or fire. Use was also made of sworn inquests to uncover other information of use to the Crown, an early instance being the enormous Domesday survey of the country's land-holding in 1086.[6] Under the Normans the jury might indeed have been seen as an instrument for relentless government prying rather than as the bastion of liberty which later tradition made it. Yet what was found effective for kings was also attractive to subjects, and kings were willing to provide it in suitable cases. Long before Henry II we hear of juries of twelve being sworn in at the king's behest to settle difficult property disputes, perhaps again adopting pre-conquest practice.[7] Under Henry II the grand assize and the petty assizes each provided an escape from battle, a Norman institution already losing favour in the twelfth century.[8] The assize in this sense was simply a form of jury, taking its name from the ordinance ('assize') under which it was introduced.[9] It was a group of twelve free and lawful men, called recognitors, who were summoned to 'make recognition' of relevant facts – meaning to discover and declare them.[10]

The classical form of trial jury (or 'petty jury') appeared first in criminal suits around 1220, as a direct result of the decision of the Church in 1215 to stop participation in ordeals.[11] When appeals of felony and actions of trespass separated in the thirteenth century,[12] the mode of trial remained the same in each kind of proceeding. It was also used upon indictments for crime, and sometimes in *praecipe* actions as well. In such proceedings, when parties pleaded to issue – nearly always by the defendant simply pleading Not Guilty – a writ of *venire facias* was sent to the sheriff commanding him to cause twelve men of the neighbourhood, unrelated to the parties, to come before the court to enquire into the matter and state the truth therein. This body of twelve was called a jury (*jurata*), because it was put on oath before giving its verdict; its members were jurors (*juratores*), persons who have been sworn.

The jury grew to prominence as the old forms of proof were laid aside, but its complete triumph was delayed by entrenched survivals. Judicial combat was unaffected by the decision to end ordeals; although the Church disliked it, the procedure was less mystical and required no clerical participation. Battle therefore remained available in appeals of felony. Even so, being distrusted by complainants and judges alike, it went out of general use for criminal cases at an early date.[13] Battle survived also in theory in writs of right; but demandants chose alternative remedies to avoid it.[14] Hidden away in

[5] This became the 'grand jury', a permanent institution from Henry II's time until the 20th century: pp. 545–6, post.

[6] See p. 243, post.

[7] See *Bishop of Rochester v. Picot* (*c.* 1077/87) 106 SS 50 at 51 (jury of 12 sworn in the county court); *Bernard's Case* (1133) ibid. 257 (land 'deraigned' by oath of 12).

[8] *Glanvill,* ii. 7. *Glanvill* refers to both kinds of assize as royal favours (*beneficia*). The grand assize was the more solemn of them: four knights were summoned to elect 12 sworn knights.

[9] See p. 20, ante.

[10] For the petty assizes see pp. 138, 253 (utrum, 1164), 253 (novel disseisin, 1166 or late 1170s), 253–4 (mort d'ancestor, 1176), post. For the grand assize (1179) see p. 252, post.

[11] See p. 8, ante; pp. 547–8, post. It was 'petty' in the sense that it was smaller than the grand jury.

[12] See p. 67, ante.

[13] See pp. 66, 67, ante; p. 544, post.

[14] See pp. 252, 255, post. For a minute description of the procedure see *Staunton v. Prior of Lenton* (1330) 98 SS 546; M. J. Russell, 1 JLH 111.

retirement until the nineteenth century, no one could be bothered to abolish it until a gauntlet was thrown into a startled Court of King's Bench in 1818.[15]

The one ancient method of proof which survived to any consequential extent in the royal courts was wager of law,[16] or compurgation, which was regularly used in actions of debt and detinue until the beginning of the seventeenth century.[17] The defendant took an oath that he did not owe the money, or withhold the chattels, and produced eleven compurgators to testify to his credibility. The system had made good sense when the compurgators were neighbours. Parties were not themselves allowed to give evidence and, if the facts were not notorious, the neighbours could judge better than anyone else which side to believe. But a system which worked well enough in local courts, and in the eyre, did not adjust to the centralization of royal justice in the two benches. The nisi prius system was never extended to enable compurgators to appear at the assizes, and it was unrealistic to expect eleven men to be brought from far afield in routine cases. At Westminster, therefore, the difficulties came to be eased by the toleration of a charade. A defendant could hire professional compurgators to help him out, and by the end of the sixteenth century it was part of the official duty of the court's door-keepers to provide them, for a fixed fee. Wager of law thereupon became, in reality, the single oath of the defendant, coupled with a little ceremony for which the defendant – if he had enough cash in his purse – had to pay. This discouraged plaintiffs, who naturally disliked having to rely on the consciences of their debtors, and the means of avoidance was found in the extension of actions on the case, with jury trial, to recover debts.[18] Wager of law thereupon became obsolete, and the manner of doing it all but forgotten, so that by 1680 it could be noted with satisfaction – in an unusual case where law was waged – that 'none could be persuaded or hired' to act as compurgators.[19] The anachronism was permitted to linger until the nineteenth century, alongside battle, only as another disused relic which hardly deserved the trouble of abolition.

The story would have been very different if the 1374 opinion had prevailed which allowed wager of law in actions on the case.[20] But the opinion was rejected because of a preference for the jury in all cases of wrongdoing, and that rejection facilitated great and unforeseen changes – through the medium of trespass on the case – in later centuries. Over the course of time those who advised plaintiffs would display much inventiveness in expanding artificially the concept of trespass, and it was the popularity of the jury, more than any other factor, which explains the eventual concentration of most of the common law within the sphere of trespass actions.

[15] *Ashford v. Thornton* (1818) 1 B. & Ald. 405; Stat. 59 Geo. III, c. 46. The last previous wager of battle in a writ of right was in 1638, but the fight was stopped at the last minute: *Claxton v. Lilburn* (1638) Cro. Car. 522. See also 94 SS *116.*

[16] Originally the 'lesser law', the greater being the ordeal.

[17] As with battle, the defendant was allowed to choose jury trial if he preferred, and many did (p. 344, post).

[18] This was finally approved in 1602: see pp. 363–8, 370–1, post.

[19] *Cristy v. Sparks* (1680) B. & M. 244 (which also mentions 'special compurgators' where the debt exceeded £20). Cf. *Cook v. Grebbett* (1671) Treby Rep., II, p. 592 (compurgators questioned on oath as to their knowledge). Either through error or indulgence, the courts came to require only 5 or 6 compurgators (counting 2 hands each) instead of 11: W. Style, *Practical Register* (1657), p. 349; *Anon*. (1690) 2 Vent. 171; *City of London v. Vanacker* (1699) 1 Ld. Raym. 496 at 500, per Holt CJ.

[20] See p. 70, ante.

Trial by Jury

It was obvious from its inception that the jury would operate differently from an ordeal. The jurors were independent neighbours, summoned by the sheriff, who were supposed to search their memories and use their minds in deciding whether factual allegations were true. Their oath to say the truth was not greatly different from that of a witness. Like witnesses, and indeed compurgators, their chief qualification was that they were supposed to know somewhat of the matter in question before they came to court. That is why they were required to be drawn from the vicinity where the facts were alleged (the 'venue'). But were they to speak collectively and inscrutably, like compurgators, or were they to be examined individually like witnesses? *Bracton* was clear that, at least in criminal cases, the judges should examine the jurors one by one and evaluate their answers.[21] Early plea rolls occasionally show judges putting questions to different jurors and even to different juries in the same matter, reserving to themselves the final decision. The judges could not themselves know local facts, but they were ready to delve into them by interrogating the jurors in order to inform their own judgment. On the other hand, they did perceive some difference between jurors and witnesses, for we hear already of evidence being given to the jurors in court, and *Bracton* speaks of jurors as having a judicial function.

During the fourteenth century it was the collective, judicial character of the jury which prevailed. The duty of the jury was not merely to answer the judge's questions, but to hear and try sworn evidence in court before doing so. Potential jurors were still allowed, even expected, to inform themselves in advance of the trial,[22] and yet by the 1370s it was seen as an irregularity to communicate with them once they were sworn other than by giving evidence in open court.[23] If the jurors were spoken to by either party, or treated to food and drink, their verdict could be quashed and a new trial ordered. It therefore became standard practice to sequester the jury, in order to reduce the danger of improper influence, and this was enforced with such rigidity that its members became as prisoners to the court. After their charge, the jurors were confined 'without meat, drink, fire, or candle', or conversation with others, until they were agreed; and if they could not agree they were supposed to be carried round the circuit in a cart until they did. The merest suspicion of misbehaviour was punishable, and we read in the sixteenth century of jurors being punished for eating their own sweets.[24] So far was the quasi-judicial theory of jury trial carried, that by the middle of that century it was

[21] *Bracton*, II, p. 404. There is a mordant allusion to Pontius Pilate, who accepted a verdict without satisfying himself as to the facts.

[22] In 1427 it was agreed that parties in assizes should be given the recognitors' names in advance so that they might provide them with information: Rot. Parl., IV, p. 328, no. 30.

[23] See *Prior of Kenilworth v. Swafeld* (1371) CP 40/441, m. 94d (jurors fined for receiving a document not shown in evidence); *Griffith v. Weston* (1387) Y.B. Trin. 11 Ric. II, p. 29, pl. 10, at p. 35; *Anon.* (1389) 100 SS xxviii–xxix; *Raynell v. Cruwys* (1389) Y.B. Pas. 12 Ric. II, p. 182, pl. 21, at p. 185; *Pole's Case* (1391) 88 SS 64; *Wantley v. White* (1391) ibid. 80. See also D. Seipp in *JHCL*, at pp. 80–4.

[24] E.g. *Earl of Arundel's Case* (1500) Rast. Ent. 268 (jurors imprisoned for eating comfits, dredge, sugar-candy, raisins, prunes, and dates, from their own purses); *Mucklowe's Case* (1576) Plowd. at 519 (juror fined for possession of a little box of sugar-candy and liquorice). Jurors could be allowed refreshment by permission of the court: *OHLE*, VI, pp. 365, 368.

irregular even for jurors to inform each other of facts without giving sworn evidence in open court.[25]

The denial of comforts was intended to encourage prompt unanimity as much as independence. Although traces are still found until 1346 of the earlier view that the judges were to resolve any disagreements, if necessary taking majority verdicts,[26] all the verdicts in the rolls were recorded as being the unqualified verdicts of twelve. A leading case of 1367 put the matter beyond doubt, when a verdict by eleven jurors was rejected as void.[27] Thorpe CJ said it was well established as law that the consent of all twelve was required, and that even if the court was shown a dozen precedents to the contrary they would not be followed. The decision stood for six centuries.[28]

Maitland thought the judges had adopted the unanimity requirement as 'the line of least resistance',[29] in that it saved them from having to make awkward decisions on facts. Even so, it was turned into a constitutional principle sacred to generations of Englishmen, and later to a new world as well,[30] that factual issues should be tried by jury and that judges should not meddle with fact.[31] The most far-reaching effect of this was the elaboration of substantive law. If jurors were going to find the facts upon which judges could judge, it was important to decide what questions of fact were proper to be left to them in a particular case; and that necessitated a preliminary decision as to what the relevant law was. This brings us back to the history of pleading.

Medieval Pleading and Legal Argument

In the medieval courts of law, pleading began when the defendant appeared at the bar of the court, in person or by attorney, and the plaintiff stated his demand or complaint. The plaintiff's opening pleading was called a 'count', the French word for a tale or story (*narratio* in Latin). Its main object was to amplify the matter outlined in the writ, and to reveal the factual details relied upon as the cause of action. Before the middle of the thirteenth century a profession of counters (*narratores*) had emerged,[32] whose original business was to compose counts and pronounce them before the judges, using the French 'words of court', the set forms which had to be used in the royal courts. Numerous written collections of precedents of counts (the *Narrationes* and *Novae narrationes*) were produced in the thirteenth and fourteenth centuries.

In the earliest days of royal justice, drawing the count correctly was the chief part of pleading. The defendant had merely to deny (*defendere*) everything in the count to

[25] *Anon.* (1557) 110 SS 410, pl. 37; *Graves v. Short* (1598) Cro. Eliz. 616.

[26] E.g. Fitz. Abr., *Verdit*, pl. 40 (eyre of Nottingham, 1329); *Anon.* (1346) Y.B. Mich. 20 Edw. III, pt II, p. 555, pl. 110.

[27] Y.B. Mich. 41 Edw. III, fo. 31, pl. 36; also in Lib. Ass., 41 Edw. III, pl. 11. The assize judges sent the dissenting juror to prison and accepted the verdict of 11, but the CP released the juror and ordered a new trial. For earlier cases see D. Seipp in *JHCL*, p. 88.

[28] Majority verdicts were reintroduced in England by the Juries Act 1974 (c. 23), s. 17.

[29] Pollock & Maitland, II, p. 627.

[30] The United States Constitution (1787), art. 3, required crimes to be tried by jury, and the 6th Amendment (1789) required 'the right of trial by jury' to be preserved in civil actions for more than $20.

[31] See, e.g., p. 512, post.

[32] The counters of the Common Bench became in the 14th century the 'serjeants at law': p. 167, post.

reach the proof stage. But pleading soon became more complex,[33] especially once the full implications of jury trial had become apparent. The defendant's pleader could proffer an 'exception', for instance to the jurisdiction, or to the form of the writ or count, or to a 'variance' between the writ and count. This could lead to sophisticated argument on points of law, wrapped up in procedure. But where the action could not be stopped in its tracks on technical grounds, the chief concern was to formulate the best question for the unpredictable lay folk, whose verdict would usually be decisive. This was called reaching or 'descending to' the issue, which was the substantial question on which the dispute turned. The general denial remained in use, and was indeed the defendant's usual course; it produced the 'general issue', under which the truth of every material allegation in the count was put in question. A common example was the plea of Not Guilty in trespass. But a more precise issue could be produced if the parties agreed to stake everything on a more specific point, and framing the pleadings would then require careful attention. *Bracton* referred to such a move as a jeopardy (*jocus partitus*), a chess term meaning an evenly divided game. In the thirteenth century it was also called (using the Roman term) a 'peremptory exception', because its determination would dispose of the case.[34] It was later known as a plea in bar of the action.

Cases were won or lost at the pleading stage; and it was there, rather than before the jury in the country, that lawyers concentrated their efforts. Medieval law reporters were, from the beginning, focused on the process of oral pleading, and students were immersed in its intricacies through the exercises in the inns of court. *Bracton*'s chess metaphor was well chosen. Whereas twelfth-century writers had referred to litigation as a game of hazard, it had now become a game of intellectual skill, played out at the bar of the Common Bench by the grand masters of pleading.

Reaching the Issue

The issue (*exitus*) was the end and object of pleading in bar, and the way out from Westminster into the country, where the answer would be found at nisi prius. A case only reached this stage when the parties had fixed on a point which would settle the matter one way or the other, and logic taught that this occurred when (and only when) some affirmative assertion of fact was met by a direct negative. The logic worked simply. The plaintiff first narrated his facts. The defendant could then either deny those facts (or one of them) or admit them all and show that they did not entitle the plaintiff to succeed. This dual option provided him with four possible pleas. A denial of all the facts was called a general traverse, and it produced the general issue. The denial of one material fact was a special traverse, and it put that fact alone in issue. If the defendant admitted all the facts, there was obviously no issue of fact; but there were again two options. One was to deny that in law the facts as agreed amounted to a case against him; this was a demurrer, and it produced an issue of law. The other was to introduce further facts to explain away the agreed facts; this was a confession and avoidance. This fourth

[33] The system of pleading about to be described did not apply to criminal cases: p. 540, post.

[34] The procedural exception was called a 'dilatory exception' (later a dilatory plea), because it merely delayed proceedings. For this usage see Brand, 123 SS clix.

kind of plea still did not produce an issue, because there was as yet no dispute of fact or law; the plaintiff had to reply to the avoidance (the defendant's new facts), using the same four logical choices. The pleadings continued in this way until an issue resulted, either from a denial of fact or a demurrer in law. Since a party could not vary from anything he had previously pleaded, or plead more than one matter,[35] only a few moves were usually necessary.[36]

An example will illustrate the various possibilities in relation to factual issues. Suppose a plaintiff brought an action of trespass for beating his servant so that he lost her services. The defendant could tender the general issue by pleading Not Guilty, so that every factual allegation in the count had to be proved. Or he could traverse a single point, for instance by denying that the person beaten was the plaintiff's servant; this would mean an implied admission of the beating itself. Or he could admit beating the plaintiff's servant and allege new facts: perhaps that he was a sheriff arresting her by virtue of a *capias*.[37] Only in this third case was there no issue, because nothing was yet contested, and so the plaintiff had to answer the new facts. He could reply generally, so that every new allegation in the plea could be disputed at the trial: for instance by showing that the sheriff was not acting as a sheriff but merely brawling. Or he could traverse a single point, perhaps by denying that the defendant *was* sheriff when the beating occurred. Or he could confess and avoid: for instance, by admitting that the sheriff had a *capias* to arrest the servant but asserting that he used excessive violence. And so on, until an affirmative was negatived. All assertions which were not denied had to be treated by the court as if they were true, because their truth could not come into question if the parties themselves did not make an issue of them.[38] A fortiori, the court could not possess judicial knowledge of anything which was not pleaded, nor could such a matter be put to the jury. The pleadings, therefore, defined conclusively what was in dispute.

Oral and 'Tentative' Pleading

When the science of pleading was at its zenith, pleadings were formulated orally by counsel at the bar. It was only after the clerk enrolled them on the parchment record, turning the French words of speech into Latin, that they became binding and unamendable.[39] Until that happened, oral pleas were flexible and hypothetical, advanced tentatively for discussion rather than peremptorily and irrevocably. The possibility of making 'tentative' pleas,[40] with a view to potential withdrawal after discussion, enabled questions of law to be debated in court at the pleading stage. Suppose, in our example of battery, that the plaintiff wished to question the amount of force that could be used in effecting an arrest. This had to be approached as a matter of pleading. Was it for the

[35] See p. 96, post.

[36] The names of the stages in pleading were: count *or* declaration (P), plea *or* bar (D), replication (P), rejoinder (D), surrejoinder (P), rebutter (D), surrebutter (P).

[37] Or that he was her husband chastising her: *Green v. Horpole* (1373) 100 SS 100 (P replies that D, the husband, knew about the retainer in service).

[38] E.g. *Dunman v. Weldon* (1329) B. & M. 233, per Scrop CJ.

[39] The critical moment was not the writing down, but the handing in of the rolls at the end of term.

[40] This helpful expression was coined by Maitland: 20 SS lxvii.

defendant to say that he used no more force than was appropriate, or for the plaintiff to reply that the force was excessive, and in either case what precise words should be used – for instance, should the force be justified in terms of necessity, or only of reasonableness, and would malice be relevant? In deciding such questions, the serjeants and the court were primarily thinking ahead to the trial and the practicalities of proof; but they would inevitably have to make assumptions, or engage in argument, as to the applicable law. The wording, as finally settled, reflected the state of legal thought at the time. Suppose, again, that our plaintiff wished to say in his replication that the *capias* was improperly obtained or invalid. In deciding whether he could so plead, and if so how, it might have to be decided whether process could be invalidated in law by extrinsic circumstances, whether sheriffs were excused even if they executed invalid process, and whether sheriffs had to verify their authority at their peril. These are sophisticated questions of a kind which could never have been contemplated in the days of ordeals. They came to be asked because they were beyond the knowledge of common jurors, who were summoned to speak only to the facts, not to find and apply the law.

Instead of continuing the pleadings in this way, a party had the option of demurring in law: that is, admitting all the facts alleged by his opponent and saying that the law did not compel him to respond to them because they amounted to nothing.[41] That raised an issue in law for the court alone to decide. For example, the first time trespass was brought for beating a plaintiff's servant, so that he lost the services, it might be worth staking the whole case on an objection that no such action lay for the master; however, once it became certain that it did, demurrers would have to be on finer points.[42] From the fourteenth century demurrers were sometimes entered of record, so as to become the sticking point which the word suggests;[43] but the judges were reluctant to decide them, and the usual effect of a formal demurrer was to confirm and perpetuate the uncertainty which had occasioned it.[44] What happened more often in practice was that the demurrer was made tentatively, so as to generate the kind of unrecorded discussion already mentioned. If opinion seemed against the demurrer, it would be withdrawn and the plea pleaded; if in favour, the disputed plea would be withdrawn and another plea tried out.

Since legal argument of this kind preceded trial, the facts discussed in court were not facts that had been ascertained but abridged formulations in French or Latin of supposed facts which could be put to proof later.[45] And, since the discussion occurred at

[41] *Demurrer* in law French meant to abide or dwell, the original sense here being that of sticking with one's pleading, despite objection, instead of moving on. In later usage it was the opponent of a pleading who demurred, and the proponent then 'joined in demurrer'.

[42] E.g. whether an action lay for beating a child too young to be a servant: *Swayn v. Hunt* (1388) 100 SS 104.

[43] The form as used from the 14th century ('To the plea pleaded he has no need by the law of the land to answer') was based on the earlier plea in abatement of the writ. The possibility of binding demurrers is evident when we hear of counsel not 'daring' to demur: e.g. Brand in *Judges and Judging*, p. 21 (1299); Y.B. Hil. 4 Edw. II (26 SS), p. 61, pl. 33; Pas. 12 Edw. II (81 SS), p. 23, pl. 36; 100 SS xxvi.

[44] Judge Arnold estimated that only 1 in 3 were decided in 14th-century trespass cases: 100 SS xxvii. A rough analysis of the 12 rolls for 1493–95 gives a similar figure for all cases (4 out of 13). In the period 1514–23 the proportion had risen to about 40 per cent., and it was closer to half by the 1550s: *OHLE*, VI, p. 390. Since judgments for defendants were rarely entered, these may not be true figures.

[45] For a modern analogy see *Donoghue v. Stevenson* [1932] A.C. 562, where the appeal was on the pleadings. No one will ever know whether there was a snail in the ginger-beer bottle, but this factual uncertainty makes no difference to the force of the precedent.

the interlocutory stage, the judges did not at that point give judgments disposing of the case. Their role was to guide the parties towards an acceptable issue by ruling on what facts could be pleaded.[46] Such a ruling was called an 'award', not a final judgment, and it was off the record. The final judgment was entered on the record after the trial, usually in the following term, but it came without reasons. It followed automatically from the jury's verdict and could be entered up in chambers by the clerks.[47] Law reporters of the fourteenth and fifteenth centuries had no interest in judgments, because they threw no light on the law. Lawyers wanted to know what happened to tentative pleas when they were tried out before the assembled legal expertise of Westminster Hall, and law reports were an essential guide because the record did not tell them. It is therefore from these rambling, technical, and often inconclusive, debates about hypothetical situations, distorted by the French shorthand of the reporters, that we have to extract the nascent learning of the common law.

Judge, Jury, and Medieval Legal Development

If we can view the process of tentative pleading as making law, then any law which resulted was made informally, off the record, and in a way which did not bind anybody. But perhaps we should do better not to view the system as regularly 'making' law at all. The advancement of jurisprudence was of no interest to the parties and was not the concern of lawyers who took part in litigation, unless they saw therein a means of advancing their clients' interests. Nor was it the chief concern of judges. Medieval judges seem to have been as embarrassed by new questions of law as they were by questions of fact, and did what they could to avoid making decisions on unfamiliar points if there was any division of opinion on the bench. How far it was appropriate to delve into the facts of particular cases in order to make new distinctions was not predetermined, and on the whole courts preferred, in the interests of clarity and certainty, not to allow it. It was better, said the judges, to suffer a 'mischief' (hardship) in an individual case than the 'inconvenience' (inconsistency or unpredictability) which would follow from admitting exceptions to general rules.[48] Special pleading was therefore restricted, and wherever possible parties were driven to plead the general issue, leaving all to the jury. The jurors were expected to do substantial justice, in the light of contemporary local standards, and unlike judges they could do so without any fear of altering the law. Special pleading was needed only when it was clear that the lay folk would otherwise be 'blinded' – that is, led astray through ignorance of the law. This would be so where the merits were more technical than factual, for instance where they depended on a point

[46] In the 13th century such interchanges were sometimes recorded on the roll, so that there was a less clear distinction between interlocutory ruling and formal judgment: see Brand, in *Judges and Judging*, pp. 19–21. Such matter disappears from the record in the 14th century.

[47] A judgment upon demurrer was different, but uncommon. It was equally formulaic, but it did involve a legal decision and needed oral explanation from the judges.

[48] See 94 SS *38*; and the quotation on p. 346, post. For a modern analogy see *The Chikuma* [1981] 1 All E.R. 652, [1981] 1 WLR 314, per Lord Bridge (urging the courts, in commercial cases, to follow 'clear and consistent principles and steadfastly refuse to be blown off course by the supposed merits of individual cases').

of property law, or where it was desirable to narrow the issue by a justification.[49] Thus, if a defendant in battery wished to plead self-defence, he had to plead it specially, because on a general plea of Not Guilty the jurors could only be expected to investigate the fact of beating: indeed, in 1321 Stanton J rebuked members of a jury as 'wicked rascals' for seeking to return a verdict of self-defence on a plea of Not Guilty.[50] Similarly, if a defendant in trespass to land sought to rely on some property interest, it had to be pleaded specially, to divert the jurors' attention from the physical act complained of in the count, which was not in dispute, towards the facts relating to the title. Such exceptions were made for practical reasons, not on the ground that it would be useful to know the law. In time, special pleading found its own standard forms – such as the plea of self-defence – and attempts to raise new kinds of question by special pleading were warmly contested. The longest survival of the old attitude is in the criminal trial, where to this day special pleading is forbidden. The defendant always took the general issue, Not Guilty, leaving everything to the jury; and as a consequence criminal law could not be revealed or refined through tentative pleading.[51]

It was all very well to cast the burden of decision on to the jury, in order to bury legal questions, but what if the jurors themselves demanded to know the law before deciding? They had every moral right to do so, at least in those actions where they were liable to serious penalties if they gave a false verdict. 'We are not men of law', bemoaned a jury in 1314 who had been asked to find whether land granted by an abbot to a layman was 'free alms' or lay fee.[52] They might therefore wish to give a 'special verdict': that is, to state the facts in detail and 'pray the discretion of the court' as to the result. A statute of 1285 made it the right of jurors in an assize of novel disseisin to refuse to give a general verdict, 'so that they do show the truth of the deed and pray aid of the justices'.[53] There was a particular reason for allowing this latitude in novel disseisin: it was an action in which there was no pleading, because the issue was fixed by the words of the writ. In other actions, the special verdict was virtually stifled by the middle of the fourteenth century.[54] If jurors were given complete freedom to throw questions back at the court, the courts would have been forced into making formal legal decisions, on the record, which they preferred not to make. The refusal to accept special verdicts did not in itself prevent the interrogation of juries, to focus their minds on the points of law in arriving at a general verdict.[55] But the less formal partnership between judge and jury which had prevailed in the thirteenth century was giving way to a clear separation between the process of fact-finding and the judicial role. The trial judge might still instruct the jurors on the relevant law when they were charged to give their verdict, after the evidence

[49] I.e. where the defendant admitted the act complained of but asserted facts which in law exonerated him.

[50] *Lacer v. John, servant of Serjeant Cambridge* (1321) 86 SS 142 at 143. After this rebuke they found the defendant guilty of battery. See also 100 SS xiii–xv.

[51] See pp. 540, 562–4, post.

[52] *Abbot of Tewkesbury v. Calewe* (1314) 39 SS 158 at 161. After a thoroughly mystifying discussion, Bereford CJ told them, 'Say what you feel'.

[53] Stat. Westminster II (1285), c. 30.

[54] See Arnold, 18 AJLH 270–4; 100 SS xx–xxii. See also Rot. Parl., II, p. 203, no. 22 (rejection in 1348 of a petition to allow special verdicts more widely).

[55] For examples of this in the 14th century see Arnold, 18 AJLH 267–80; 100 SS, pp. xxii–xxiii; Baker, *CPELH*, II, p. 976.

had been heard.[56] Unlike a special verdict, however, the direction was unrecorded and therefore could not become a source of later argument in the same case or a precedent in future cases. Directions were eventually to become subject to scrutiny after trial,[57] and in the sphere of criminal law they would be the principal vehicle for legal development. But between the thirteenth century and the seventeenth the machinery for such scrutiny did not exist. Nothing said at the trial, either by the judge or the witnesses, was part of the record, and therefore it could not be considered in banc.[58] Trials, moreover, were seldom reported.

The nisi prius system was a sensible and practical way of providing a nationwide system of justice without intolerable inconvenience, but it brought profound unintended consequences by insulating the court in banc procedurally – and, indeed, physically – from the fact-finding stage.[59] The court in Westminster Hall could only decide questions of law and procedure, and it could do so only in relation to facts found by juries or admitted by parties. Whether it was dealing with hypothetical formulae before trial or formulae which had been verified by a jury after a trial, its mental horizon was firmly circumscribed by the Latin text of the plea roll. The evidence adduced at nisi prius was irrelevant to its deliberations, even though the trial judge had heard it, because it was not recorded. Where special pleading was outlawed, questions which the particular facts might have raised were kept away from legal consideration altogether. That is why, for instance, questions of fault in trespass remained largely unexplored before the nineteenth century.[60] And in actions of debt on a contract, since defendants invariably pleaded the general issue, there could be no elaboration of the law of contract. The medieval law of debt was a law of procedure and little more, because it was a survival of the ancient pattern of lawsuit.[61] Even in cases where special pleading was allowed, everything turned on the precise words on the roll, and an ambiguity or inconsistency could prove fatal.

The System Transformed

In the sixteenth century profound changes occurred in the workings of the common-law system of procedure, albeit without changing the underlying rules. The most visible result was that pleading became the beginning of the litigation lawyer's task rather than the end. We now take this for granted. It has been widely accepted since Tudor times, and more recently declared on high legal authority,[62] that it is generally a more economical arrangement to try the facts first if they are unclear. The change has often been attributed to the introduction of paper pleadings during the fifteenth and sixteenth

[56] The 'charge' is mentioned in the 13th century and is presumably coeval with the jury. It was always necessary to inform a jury of the point to be decided, and that would require legal guidance of some kind.

[57] See p. 93, post.

[58] A single judge was not in medieval times allowed to inform the court, from his own experience, of matters occurring elsewhere which were not of record: see p. 146 n. 9, post.

[59] Occasionally a case could be tried 'at bar' in Westminster Hall, but the court in banc followed the nisi prius logic and did not invade the province of the jury.

[60] See pp. 429–32, post. [61] See p. 344, post.

[62] *Tilling v. Whiteman* [1980] A.C. 1 at 17, 25; *Allen v. Gulf Oil Refining Ltd* [1981] A.C. 1001 at 1010, 1022.

centuries, on the supposition that their use marked the end of tentative pleading before trial. But the supposition was mistaken.

Written drafts saved trouble when common forms were used, and aided the memory when complex matter was pleaded; moreover, they focused attention on the Latin words as they would be entered on the roll, not the French as spoken. Their use can be traced back as far as the thirteenth century.[63] But they have no bearing on the change under consideration because a draft written plea was no more binding than an oral plea; its use did not preclude discussion and modification in court. The real change came when draft pleas could no longer be debated in court, with the possibility of amendment, so that tentative pleading went out of use. This did occur during the sixteenth century, and it may have been an unintended consequence of the Statute of Jeofails 1540.[64] The statute had been passed in the hope of preventing objections to trivial errors of form in pleading, by providing that formal exceptions could only be taken on demurrer. The party disposed to quibble about form therefore had to admit all the facts and stake his case on the technicality, and it was thought this would seldom be risked. But the measure backfired, since it actually led to an increase in formal demurrers. The courts then decided that it would prejudice any decision they might have to make as judges if they gave opinions on pleading before demurrer, and so tentative pleading was disallowed. Elizabethan courts were still asked on occasion to give advice on pleas, but it was already rare, and by Charles I's time the year-book type of discussion was a thing of the past.[65] Had this happened in isolation, the result would have been to stifle legal discussion in court. In fact it was consequent upon changes which facilitated legal discussion after trial instead of before.

The sixteenth century saw a new judicial confidence, a willingness to make authoritative decisions, and a corresponding desire in the legal profession and its clientele to have the law clearly stated upon known or admitted facts. Although the formal demurrer was one way of achieving that result, it was not the best way for a party with a meritorious case, since it involved abandoning any case he might have on the facts.[66] But there were other ways of discussing the legal effect of facts after they had been found by the jury. None of the devices was new; it was a matter of adapting old procedures to new ends.

Motions in Banc

There was scope for argument after the trial by means of motions 'in banc' to the court at Westminster.[67] This procedure existed in medieval times, but it was at first limited to badly joined issues (jeofails) or formal defects in the trial, such as misconduct by jurors.

[63] See 57 SS ci–cii (1290s).

[64] Stat. 32 Hen. VIII, c. 30. For its shortcomings see *OHLE*, VI, pp. 346–8.

[65] *Anon.* (1641) March N.C. 156, pl. 224. See also *OHLE*, VI, pp. 387–9. As late as the 1590s there are examples of counsel asking for and receiving advice in open court.

[66] Coke learned this lesson in his first case, *Lord Cromwell's Case* (1581) 4 Co. Rep. 12 at 14 ('never at first demur in law when after the trial of the matters in fact the matters in law will be saved to you'). In the year books, counsel were sometimes pressed to move on in pleading with the assurance that a point would be saved to them ('Save vous soit').

[67] For the mechanics of the procedure see pp. 148–9, post.

In the fifteenth century it began to be extended so as to enable substantive questions of law to be argued after verdict. There were three principal species of motion in banc after trial: the motion in arrest of judgment, the motion for judgment *non obstante veredicto*, and the motion for a new trial.

The motion in arrest of judgment was at first the commonest. It was made by the defendant, after a verdict for the plaintiff, on the ground that the facts alleged by the plaintiff, though conclusively found to be true, disclosed no cause of action on which the plaintiff could succeed. Such a motion would have been of no use in connection with the old actions of debt or trespass *vi et armis,* because the facts were stated in the count in general words and in common form, so that unless a plaintiff had experimented with some fanciful novelty in his count there was nothing new to argue about. A motion in arrest depended on special facts, which had to be on the record. Two developments brought the procedure into its own. One was the rise of actions on the case, for in them the plaintiffs 'special case' was infinitely variable and fraught with legal questions. In medieval times a new action on the case had been assailable either by a 'plea in abatement' to quash the writ as invalid, or by a demurrer to the count;[68] but by 1500 it was found more convenient to take the objection by motion in arrest of judgment, so that the defendant could have a trial first.[69] Much of the early-modern common law was shaped by the arguments upon such motions, as actions on the case gradually replaced the *praecipe* actions in which tentative pleading had made little impact.

The second development was the resurgence of the special verdict. In the late medieval period, lawyers had sometimes achieved the same object by means of a 'demurrer to the evidence'. If it turned out at the trial that the real dispute was one of law, a summary of the facts as proved was entered on the record in Latin, with a demurrer; the jury was then discharged and the decision left to the court.[70] The demurrer did not set out the evidence itself, other than documents, since the court in banc could not evaluate it; the effect was similar to that of special pleading. In the mid-sixteenth century, however, this procedure was rendered largely obsolete as the courts began to allow special verdicts to be given in all actions, even upon issues defined by special pleading.[71] By Coke's time it was a rule that the court could not refuse a special verdict in any action. The terms of such a verdict were settled by counsel, approved by the jury, and entered on the roll, so that the full facts could be placed before the court in banc. This became a common procedure for raising points of law, displacing demurrers to the evidence except where jurors were unwilling to cooperate by agreeing to the verdict.

[68] E.g. *Dalton v. Mareschal* (1369) B. & M. 400 (plea in abatement); *Somerton v. Colles* (1433) B. & M. 427, 430 (plea in abatement); *Shipton v. Dogge* (1442) B. & M. 434 (demurrer to bill).

[69] E.g. *Sarger's Case* (1481) B. & M. 565; *Johnson v. Baker* (1493) ibid. 441; 115 SS 135 (and other examples on pp. 187, 195, 217, 294, 504); *Pykeryng v. Thurgoode* (1532) B. & M. 452.

[70] See 100 SS xxvii (rare in 14th century); *OHLE,* VI, pp. 397–400 (slightly more common in early Tudor period). An example, the object of which is unclear (no new facts having been adduced), is *Orwell v. Mortoft* (1505) B. & M. 448. Another example the same year is *Langstone v. Dyne* (1505) Caryll Rep. 440, 450.

[71] *Anon.* (1531) Bro. N.C. 289 (special verdict refused); *Anon.* (1553) Benl. 37, pl. 69 (allowed only on the general issue); *Brydges v. Warnford* (1553) Dalison Rep., 124 SS 40 (availability still arguable); *Barham v. Hayman* (1561) Dyer 173; stated as a general rule in *Dowman v. Vavasor* (1586) 9 Co. Rep. 7 at 11–14. See further *OHLE*, VI, pp. 400–3.

After the mid-seventeenth century, a similar result was commonly obtained by persuading the trial judge to reserve a point of law for the court in banc. A general verdict was taken for the plaintiff, but with leave to set it aside if the court decided in the defendant's favour. If the point arose on facts not of record, the parties settled a 'special case' or 'case stated' for the opinion of the court. This was an agreed written statement of the facts, signed by opposing counsel, and it operated in practically the same way as a special verdict. It was less expensive, however, since the case was not entered on the record and no verdict was entered up until the point of law had been resolved.[72] It later became common for the judge to put specific questions to the jury in order to ascertain the factual basis of their verdict;[73] the answers were not part of the verdict, which was still recorded in general terms, but could be used in banc.

A motion for judgment *non obstante veredicto* was made by the plaintiff after a verdict for the defendant.[74] Its scope was far more restricted than the motion in arrest, because the only situation where the plaintiff was entitled to judgment despite an adverse verdict was where the defendant had confessed a good cause of action and pleaded an avoidance which was bad in law. Moreover, it was not allowed where the defect in the plea could be rectified by amendment; in that case, a 'repleader' was ordered, leading to a fresh trial of the correct issue.

The court could not upon motion increase or mitigate the damages awarded by the jury, since the award was based on facts not on the record; the only exception was in the case of personal injuries which were apparent to the sight.[75] Nevertheless, plaintiffs often remitted part of their damages, by a recorded *remittitur*, under pressure from the court in banc to mitigate awards considered excessive.[76] And the court routinely awarded an increment of costs when the judgment was drawn up; this was meant to cover costs incurred since the verdict, but it became the practice to tax all the costs at the end of the proceedings.

The motion for a new trial was the last, and in the end the most far-reaching, of the methods of raising questions of law after verdict. Until the seventeenth century it retained its medieval purpose of upsetting verdicts by reason of procedural defects on the face of the record, such as recorded misbehaviour by jurors.[77] The judges felt unable otherwise to interfere with a verdict, since they could not take notice of any facts not on

[72] See Prichard, [1960] CLJ at 92–5; and p. 149, post. Special verdicts remained in use where parties wished to reserve the possibility of a writ of error by having the facts recorded. A special case could, with leave of the court, be fictitiously turned into a special verdict for that purpose.

[73] Cf. the earlier practice of interrogating juries (p. 82, ante), which had the different purpose of guiding them towards a correct verdict.

[74] For a rare case of a plaintiff moving in arrest of judgment, on the ground that his own count was bad, see *Blyth v. Topham* (1607) B. & M. 625. This was done to save costs.

[75] *Trypcony v. Chynnowith* (1554) KB 27/1169, m. 84, reported in Dyer 105; and other cases noted in *OHLE*, VI, p. 380. The court would only intervene if all the material facts were available: *Burford v. Dadwel* (1669) B. & M. 377. For the general rule see *Bonham v. Lord Sturton* (1554) 1 Dyer 105; *Hawkins v. Sciet* (1622) Palm. 314.

[76] R. H. Helmholz, 103 LQR at 629–34; Palmer, *ELABD*, p. 101; Baker, *OHLE*, VI, pp. 381–3. The court would simply decline to enter judgment until the plaintiff remitted some of the damages awarded by the jury.

[77] E.g. the cases cited on p. 82, ante. In such cases the facts were recorded in the *postea*, the document containing the verdict sent back to Westminster.

the record.[78] But from the 1640s onwards – perhaps as a result of the abolition of the Star Chamber and the consequent loss of punitive controls over juries[79] – the courts edged back from this principle by allowing motions in respect of matters off the record, either on the trial judge's certificate that he considered the verdict contrary to his direction on the law,[80] or contrary to the evidence,[81] or on the basis of affidavits of misconduct.[82] This permitted control both of the substantive finding and of the award of damages. It also offered a means of redress for irregularities in the trial,[83] and by the eighteenth century a new trial could be obtained on the ground that the trial judge himself had erred in his direction to the jury or in ruling on the admissibility of material evidence.[84] It became the regular practice in such cases to require a report from the trial judge to the court in banc, and this accounts for the judges beginning in the eighteenth century to take notes of evidence. The judge's views were generally followed as to whether a verdict was against the weight of the evidence, though the full court could refuse a new trial at its discretion.

The new procedures were seized upon by Lord Mansfield CJ as a means of refining commercial law. Mansfield would state to the court in banc 'very particularly and minutely, from his own notes taken down at the trial (which he read to the audience verbatim), the exact state of the facts as they came out upon the evidence', so that the question could be argued there.[85] Mansfield's techniques were not without contemporary controversy,[86] especially when he tried to extend them to the control of criminal juries.[87] Like the priests who had tinkered with ordeals in which they had lost faith, the judges had begun to impose controls on the authority of the jury lest they should err in exercising 'an absolute despotic power'.[88] The motion for a new trial went much further in this direction than the other procedures, by throwing the whole case before the court in banc and not merely the formalized phrases of the record; and, since the judge's version of the facts potentially carried more weight than the verdict, it prepared the way for the demise of the civil jury.

[78] *Hall v. White* (1607) 1 Bro. & Goulds. 207; *Martyn v. Jackson* (1674) 3 Keb. 398.

[79] Cf. *Slade's Case* (1648) Style 138, where Bacon J said the CP had already begun to allow such motions, but the KB thought it 'arbitrary'.

[80] *Wood v. Gunston* (1655) Style 486 (award of damages); *Pritchard v. Boyle* (1696) Dodd Rep., ed. Bryson, p. 167.

[81] E.g. *St Bar v. Williamson* (1674) 3 Keb. 351.

[82] E.g. *Goodman v. Catherington* (1664) 1 Sid. 235 (one juror showing written evidence to the others). Verdicts were quashed where the jurors had tossed a coin or drawn lots, which was said to have become common in London: *R. v. Fitzwater* (1675) 2 Lev. 139 at 140; *Foster v. Hawden* (1677) 2 Lev. 205.

[83] E.g. *Rands v. Tripp* (1677) 2 Mod. 99 (trial court so crowded and noisy that witnesses could not get in and D's counsel could not be heard for hissing; new trial awarded).

[84] E.g. *Anon.* (1702) 2 Salk. 649, 6 Mod. Rep. 242; *R. v. Poole* (1704) Cas. t. Hard. 23.

[85] *Sanderson v. Rowles* (1767) 4 Burr. 2064 at 2067. Cf. Lord Mansfield's own remarks in *Bright v. Eynon* (1757) 1 Burr. 390. His notebooks survive: see J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the 18th Century* (1992).

[86] Eldon also attacked Mansfield's use of the special case procedure, as effectively stifling the possibility of appeal: p. 150 n. 31, post.

[87] *CPELH*, II, pp. 997–9; p. pp. 512, 559, post.

[88] *Ash v. Ash* (1696) Holt 701 at 702; Comb. 357, per Holt CJ. Cf. *Smith v. Frampton* (1695) 1 Ld Raym. 62, where Holt CJ declined to grant a new trial, though dissatisfied with the verdict, because the jurors were 'judges of the fact'.

Decline of the Common-Law System

By the seventeenth century the science of pleading had begun to degenerate from its original simplicity into 'a piece of nicety and curiosity'.[89] Hale CJ attributed this decline to the end of oral pleading, for 'anciently pleading was at the bar, and then it did appear plainly what was stood upon; and if the party did demur, he knew what he did. But pleading is now got all into paper and since that, of late, men make it but a snare and trap and piece of skill.'[90] The reports amply bear him out. In the year-book period difficulties were eradicated before issue joined, and cases were rarely lost beyond salvation on points of mere form. The essence of good pleading was legal coherence, common sense, and grammatical clarity.[91] It was indeed ironic if the result of the Statute of Jeofails 1540 had been to increase the use of catching demurrers and to accelerate the end of special pleading. Yet the line between form and substance was not easy for a lawyer to see. There is a safety in forms and precedents which readily commends itself to any professional who has to advise clients, and the judges who were responsible for the state of affairs lamented by Hale had conceived it their duty to maintain the forms of law. Sir Edward Coke, writing in the 1620s, acknowledged that 'more jangling and questions grow upon the manner of pleading, and exceptions to form, than upon the matter itself, and infinite causes [are] lost or delayed for want of good pleading'. But the lesson he drew was not that there should be a return to informality: rather that lawyers should be more precise. If form were neglected, he wrote elsewhere of writs, 'ignorance, the mother of error and barbarousness, will follow, and in the end all will be involved in confusion and subversion of the ancient law of the land'.[92]

The inflexibility and artificiality of special pleading after the sixteenth century were the chief reasons for the decline which we must now trace.

Latin and Court-Hand

When the plea rolls first started it was unthinkable that they should be in any language but Latin, the learned language of all Christendom, a language of elegant conciseness used for records of every kind. Their physical construction was designed to last: a clear formal hand written on good parchment. Many of the earliest rolls have survived in almost pristine condition, a feat which will not be matched by the flimsy paper and electronic records of our own day. Both the language and the set hand became immutable requirements of the common law. In 1588 a sheriff was fined for returning a writ in ordinary handwriting. The judges had good reason: court-hand can be read when very worn, whereas plain writing 'would be so worn in a dozen years that no man can read it'.[93] There was less justification for treating the use of English as an error for

[89] M. Hale, *History of the Common Law* (1971 edn), p. 111.

[90] *Anon.* (1672) Treby Rep., II, p. 717. He added, 'It does not become a man that wears a gown to make a demurrer that is only dilatory and frivolous…I would never do it. I would rather eat horse-flesh.' The rebuke was aimed at Edmund Saunders (later his successor as CJKB), an expert pleader but disliked by Hale because of his sottish lifestyle.

[91] *OHLE*, VI, pp. 344–9.

[92] Co. Litt. 303; *Blackamore's Case* (1610) 8 Co. Rep. 156 at 159.

[93] Goulds. 111.

which judgments could be reversed.[94] This was attributed to the loose wording of a statute which was actually intended to promote English,[95] though the need to render statements of fact into a dead language with exact grammar did at least have the advantage of encouraging economy of words and precision of thought. Whatever the justifications, however, such features of the common-law system tended to alienate the lay public, and they were carried too far.

The preciseness of Latin meant that the omission of a single down-stroke or contraction sign, or an error of Latin accidence, were fatal mistakes in a writ. Even the learned author of the *Novel Natura Brevium* once brought a writ which turned out to contain a grammatical error.[96] The slightest slip could affect the sense: thus in 1533 a convicted murderer was saved from the gallows by a single letter in the indictment, because it introduced a fatal ambiguity.[97] Moreover, the rendering of present-day things into Latin was an endless source of trouble. English words could be used in conjunction with an *anglice* ('in English…') or *vocatus* ('called…'). The former was used to clarify an equivalent word: for instance, *tres argentei pixides pro nicotiano anglice* 'tobacco boxes'. The latter was used if there was no exact equivalent: for instance, *duo pocula vocata* 'teapots'. In cases of real difficulty, the two were combined, as in *quatuor pocula more Japanie picta duplicatis marginatis anglice vocata* 'Japanned double tipped mugs'.[98] The clerk's worst headaches were eased by the publication in 1685 of a useful manual of 'words Latinised which you cannot find any Latin for in any dictionary', such as foot-ball-match (*pilae pedalis lusus*) or cork-screw (*cochlea suberea*, which surely suggests a screw made of cork).[99] A dead language, for all its virtues, imposed real practical difficulties on the living.

When eventually, in 1731, Parliament abrogated the use of Latin and court-hand,[100] the remedy hurt almost as much as the disease. Pleaders thought it unsafe to depart from the grammatical constructions and syntax of the past, and so English pleadings read like schoolboy translations, with verbs in the wrong place. The Latin names of writs had to be restored by amending legislation, because writs of 'he lurks' (*latitat*) or 'have his body' (*habeas corpus*) sounded ridiculous. More seriously, the literacy of attorneys declined, and many lawyers were cut off from any real understanding of the precedents on which they remained dependent. One nervous pleader detected such a decline that 'if our laws, pure and unsullied in themselves, receive many more changes, our properties will be as precarious in the hands of the most skilful lawyer as our lives are in the hands of the physician'.[101]

[94] E.g. *Grisling v. Wood* (1588) Cro. Eliz. 85.

[95] J. H. Baker, *Manual of Law French* (2nd edn, 1990), p. 2.

[96] *Fitzherbert v. Welles* (1532) Spelman Rep. 15. Note also *Cooke v. Wotton* (1571) 109 SS 202, where Dyer CJ noted with wry amusement the reaction of Sir Anthony Cooke, a classical scholar, on learning that his writ had been quashed because of an error concerning relative pronouns.

[97] *R. v. Rogers and Walker* (1533) Spelman Rep. 52 (*quidam* for *quidem*).

[98] Examples from *A Treatise on Trover* (1721), pp. 398–9. For an objection to Arabic numerals see *Hawkins v. Mills* (1674) 2 Lev. 102.

[99] G. Meriton, *Nomenclatura Clericalis* (1685).

[100] Stat. 4 Geo. II, c. 26. There had been a similar measure in 1650, but it was disregarded at the Restoration.

[101] J. Mallory, *Modern Entries* (1735), II, fo. 367v.

Double Pleading

It was an axiom of the common law that a special plea could only be taken on a single point, so that one issue resulted.[102] Numerous explanations have been offered. In the Anglicized law French of 1667 it was alleged to be 'pur avoider le stuffing del rolls ove multiplicity de matter'.[103] Another view was that it helped to keep the laymen's task within their frail comprehension. Another was that it deterred dissemblers. None of these is wholly convincing. The parties paid for the parchment. Jurors were often asked to try the general issue, and would then need to understand every facet of the case. And it was not always the case that double defences were mutually inconsistent: the buyer of a horse might honestly respond to a debt-claim that he was an infant, that the debt was statute barred, and that he had in fact paid. The chief reason why the common law set its face against double pleading is that it was the only logically certain way of bringing the parties to a decisive issue. If there were two issues, there would be a problem if each party won one of them. Moreover, to each of two pleas a plaintiff might make two replications, and then in theory the pleadings might multiply in geometric progression. The single-point rule prevented this nightmarish possibility; and when it was first established, in the early fourteenth century, it may also have met the technical point that complex issues were not permitted to be tried at nisi prius.[104] Even so, the rule could sometimes work injustice if it prevented consistent defences from being raised, and it seemed incongruous when plaintiffs were able to frame their declarations in several alternative ways.[105] In 1705, therefore, legislation was passed to enable defendants to plead several distinct pleas to the same cause of action with leave of the court.[106] The statute was widely used, and leave seems rarely to have been refused. It was even possible to plead generally and specially in the same action, or to plead mutually inconsistent pleas. But the statute did not extend to plaintiffs' replications, and it did not allow a party both to plead and to demur. Neither did it, in strictness, permit double pleas; it permitted multiple pleas, but doubleness in a single plea remained demurrable.

General and Special Pleading

Pleading had originated as a means of controlling juries in advance, by narrowing their terms of reference and excluding problems of law from their consideration. The new procedures, however, and especially motions for new trials, enabled juries to be controlled after they had pronounced, or even made them practically redundant – as where a formal general verdict was taken subject to a reserved point of law, or a special verdict was drawn up by counsel. Special pleading was thereby rendered less necessary, and there was a resurgence of the general issue. The courts encouraged this by relaxing

[102] The rule only applied to each cause of action. In trespass to three cows the defendant could plead a different plea as to each cow, but not that he had distrained the three cows and (in the alternative) that he had bought them.

[103] *Churche v. Brownewick* (1667) 1 Sid. 334.

[104] Stat. Westminster II (1285), c. 30. See 100 SS xii.

[105] The practice of framing multiple 'counts' in a single declaration seems to have begun in the 17th century: B. & M. 511–14.

[106] Stat. 4 & 5 Ann., c. 3 [= c. 16 in *Statutes at Large*], s. 4.

earlier rules of evidence which had restricted the defences which could be proved under the general issue. Under the new dispensation, a defendant in trespass could plead Not Guilty and show in evidence what amounted to a confession and avoidance (such as self-defence).[107] And in ejectment, which had replaced the old real actions, the defendant was actually obliged to plead the general issue, so that questions of title, long enmeshed in the intricacies of archaic rules of pleading, became a matter of evidence to the jury.[108] During the Interregnum there was even a move to enable the general issue to be pleaded in all cases. That was not to be – for the present – but Parliament recognized and assisted the trend, making provision for pleading the general issue in over a hundred statutory actions introduced between 1600 and 1750. The change is manifestly apparent in the Georgian books of pleading precedents, which reveal a preoccupation with declarations in actions on the case and contain few special pleas. As the general issue returned to favour, the reasons for wanting to plead specially changed. A special plea might alter the order of speeches at the trial; it might restrict the evidence which could be given, by narrowing the issue; or it might simply be used to confuse or delay an opponent. The expression 'special pleading' became almost a synonym for the deployment of technicalities to perplex an adversary.[109] And some lawyers, notably Mr Serjeant Runnington (d. 1821), argued that the ends of justice would best be served by banning special pleas altogether.

Against this trend there came a reaction, headed by Mr Serjeant Stephen (d. 1864), in the early nineteenth century. Stephen considered the principles of pleading to be among the finest products of the legal intellect, and set out to demonstrate the thesis by writing the first reasoned treatise on them. He did not justify special pleading on antiquarian grounds, but on the practical requirements of the day as he saw them. The general issue failed to define the dispute before trial, and consequently added to expense by compelling litigants to come armed for all eventualities; and it failed to separate points of law and fact, so that points of law could crop up at nisi prius where there were no library facilities. Stephen wished the general issue to be abolished. And so the serjeants joined issue between themselves as to the purpose and utility of the science created by their predecessors five centuries earlier.

In 1830 the question was referred to the Committee on Courts of Common Law. Stephen was a member, and carried persuasion to his fellows. They acknowledged that special pleading still exhibited too many bad qualities, but thought the advantages were of superior weight.[110] Parliament thereupon empowered the judges to make rules of court implementing the spirit of the report, and soon afterwards the judges promulgated the New Pleading Rules of Hilary Term 1834. The 'Hilary Rules', which were said to have been the brainchild of Stephen's judicial ally Mr Baron Parke, drastically restricted the availability of the general issue. For instance, Not Guilty in trespass was limited to a denial of the breach of duty or act complained of, so that once again – as in the fourteenth century – justifications (such as self-defence) and titles had to be specially pleaded. Thus was special pleading forcibly resuscitated. But the consequences

[107] Cf. p. 88, ante. [108] See pp. 321–2, post.

[109] In recent lay usage it has come to mean an attempt to create a fallacious exception to a general rule, or applying double standards in argument. This bears no relation to special pleading in the legal sense.

[110] Parliamentary Papers 1830, XI, p. 45.

were less salutary than Stephen and Parke had envisaged. One loophole was that defendants, prevented from pleading generally, tried to obtain the same result by traversing specially every single allegation in the declaration.[111] Worse still, it resurrected all the old learning in the state in which it had long ago been abandoned, without modification of its purely formal technicalities. It proved to be a Baroque, if not a Gothic, revival. Pleaders scuttled back to the old black-letter books, and legal history for a while became a vocational subject. But it was imperfectly grasped history, misapplied to unworthy ends. Demurrers on points of form flourished; practising counsel were more concerned to trip up adversaries than to perfect Stephen's science in all its abstract purity. The judges must bear some of the blame for this turn of events. A generation later Lord Coleridge reminisced scathingly about their 'idolatry of Baron Parke', whose undoubted learning and intellect 'were devoted to heightening all the absurdities, and contracting to the very utmost the narrowness, of the system of special pleading', so that the merits of cases took second place to the forms of procedure.[112] The attitude of the early Victorian judges was summed up by the fictional Mr Baron Surrebutter (obviously based on Parke), who, having failed to explain the delightful intricacies of the replication *de injuria* to an uncomprehending litigant, loftily suppressed his complaints by saying, 'I do not conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant'.[113] They were not, however, behaving irresponsibly by the lights of their age. Imposing a rigorous formal discipline on the Bar has always been a strong judicial temptation, and the Victorian judges had inherited a tradition that the ethos of lawsuits was akin to that of sporting contests; an otherwise meritorious victor who had failed to observe the rules of the game could not in fairness be declared the winner. Punctiliousness with regard to pleading also had a more rational basis. If an imperfect issue was joined, then the jury had been asked the wrong question, and in consequence the court in banc had no relevant facts on which to give judgment. It was a consequence of the rigid demarcation between fact and law.

End of the Common-Law System

The experiment with special pleading went so badly wrong that within twenty years Parliament began, with judicial help, to rebuild the system from first principles. The Common Law Procedure Act 1852,[114] and the consequent Trinity Rules of 1853, retained much the same choice between the general issue and special pleading as before; but special traverses were abolished, and pleadings were to omit all immaterial statements, fictions, and legal or formal phrases (such as 'force and arms' and 'against the peace of our lady the queen'). No demurrers or motions in arrest of judgment were to be allowed for lack of form in pleading. It even became possible by mutual consent to proceed to trial without pleadings at all, either by stating a question of fact in the form of an 'issue' or by stating a question of law in a 'special case'. This possibility was used to good effect

[111] *Cooling v. Great Northern Rly Co* (1850) 15 Q.B. 486, per Lord Campbell CJ.

[112] 'The Law in 1847 and the Law in 1889' (1890) 57 *Contemporary Rev.* 797 at 799–801.

[113] G. Hayes, *Crogate's Case: A Dialogue in the Shades on Special Pleading Reform* (1854); reprinted in Holdsworth, *HEL*, IX, pp. 417–31. This lampoon, written by a serjeant, is still amusing reading.

[114] Stat. 15 & 16 Vict., c. 76.

when the Commercial Court was established in 1895.[115] Another major procedural reform of the 1850s concerned the admission of evidence. At common law (though not in equity) the testimony of the parties and interested persons had been excluded, on the grounds of bias, and this frequently made it impossible to prove a just cause of action or defence. Bentham scathingly attacked the rule as shutting out the evidence of the only people likely to know anything relevant, and it was ridiculed by Dickens.[116] The complaints were heard. In 1843 persons with an interest, and in 1851 the parties themselves, were enabled by statute to be competent witnesses.[117]

The Judicature Acts of 1873 and 1875, and the new rules of court appended in the schedule to the latter, carried the reforms further. The plaintiff was to begin with a 'statement of claim', stating briefly the facts on which he relied and what relief he claimed.[118] The defendant was then to make a brief statement of his defence (which could include a set-off or counterclaim), provided that he did not merely deny generally all the facts in the statement of claim. Beyond the defence, the parties could either plead new facts (by way of confession and avoidance) or join issue on the whole or part of the previous pleading. Each pleading was to contain, in numbered paragraphs, 'as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved'.[119] Prolixity was to be punished with costs. These provisions stifled the general issue,[120] and reduced special pleading to its most basic premises. The demurrer was swept away in 1883, and parties were enabled instead to raise points of law by pleading, or by applying to have a pleading struck out as disclosing no reasonable cause of action or answer.[121] An objection in point of law could be pleaded in addition to a denial of the facts; and points of law could be taken at the trial even if not pleaded. Moreover, the rules of court themselves were made subject to regular revision by the judges. The resulting system is essentially that still in use, subject to modifications made in the twentieth century. Pleading remains important, since it defines what is in dispute and therefore avoids wasted costs; moreover, without pleadings it would not be clear for future purposes what has been decided.[122] But it is now the substance of the pleading, never its form, which governs the outcome; and pleadings may even be amended in the course of proceedings. As an appellate judge observed

[115] This was not a new court but a separate listing of commercial cases in the Queen's Bench Division before a specialist judge. The streamlining of procedure was introduced by the first judge, Mathew J: E. Parry, *My Own Way* (1932), pp. 80–1; 60 LQR 324 at 325; 86 LQR 313 at 314. Much of the credit for the jurisdiction is due to Lawrance J: V. Veeder, 110 LQR 292.

[116] J. Bentham, *Rationale of Judicial Evidence* (1825); W. Twining, *Rethinking Evidence* (1990), p. 39. Cf. Lord Coleridge in 57 *Contemporary Rev.* at p. 798 ('Nonsuits were constant, not because there was no cause of action, but because the law refused the evidence of the only persons who could prove it'). The problem was brought to wider notice by the fictional trial in *Bardell v. Pickwick*: C. Dickens, *The Posthumous Papers of the Pickwick Club* (1837), ch. 33 (ch. 34 in later editions).

[117] Lord Denman's Act 1843 (6 & 7 Vict., c. 85); Lord Brougham's Evidence Act 1851 (14 & 15 Vict., c. 99).

[118] This was an amalgam of legal and equitable traditions. Common-law declarations had not included a 'claim'; the relief was determined by the form of action.

[119] Supreme Court of Judicature Act 1875 (38 & 39 Vict., c. 77), Sch. I, Ord. 19, r. 4.

[120] However, where the defendant pleaded a special traverse, it became common to add a general traverse to each and every allegation in the statement of claim: *The Supreme Court Practice 1997*, I, p. 321.

[121] R.S.C. 1883, Ord. 25.

[122] On the dangers of lax pleading see *Banbury v. Bank of Montreal* [1918] A.C. 626 at 709, per Lord Parker; *Farrell v. Sec. of State for Defence* [1980] 1 All E.R. 166 at 173, [1980] 1 WLR 172 at 180, per Lord Edmund Davies; *Prudential Assurance Co. v. I.R.C.* [2016] EWCA Civ 376.

with pride in 1887, 'law has ceased to be a scientific game that may be won or lost by playing some particular move'.[123]

Changing Role of the Court

Even more drastic in its effects than the abolition of the old system of pleading has been the virtual disappearance in England of the civil jury. The option of trying facts by judge alone was introduced by the Common Law Procedure Act 1854. There were at that date already many inferior courts in which juries were not used, not to mention courts of equity, and the experience suggested that judges were more likely to understand the factual issues than laymen, and were as competent to assess evidence. The 1854 Act therefore enabled parties, by consent, to leave issues of fact to a judge; and this was so often done that by the end of the century only half the civil trials in the High Court were by jury. The 1854 Act said that the 'verdict' of the judge was to have the same effect as the verdict of a jury, and the rules made under it show that the verdict was to be drawn up and entered in the same way. Yet, if judges had taken to finding general verdicts without directing themselves, it would have become difficult to raise questions of law and evidence in banc. Some judges were indeed bewildered by the dual role imposed on them,[124] and for some years it was possible to speak of a judge 'misdirecting himself' as to the law.

In the course of the twentieth century the civil jury more or less disappeared. Trial by judge alone necessarily became more common during the First World War, although shortly after the War Lord Atkin defended trial by jury in civil cases as 'an essential principle of our law'.[125] The existence of an option, however, made the decision to ask for a jury look suspicious: it suggested the hope of confusion in a weak case, or the expectation of exorbitant damages in a distressing or emotionally charged case. Lord Atkin's view did not prevail. After 1933 parties were allowed juries only with leave of the court, except in cases of libel and a few other matters; and by the 1960s the courts were openly unwilling to give such leave.[126]

As jury trial went into desuetude, so trial by judge alone became a process different in nature and result. English judges did not in the end adopt the practice of giving general verdicts, nor even – as in some American states – of making separate 'findings of fact'. Motions for new trials were simply not allowed in respect of trials without a jury. The notion of a verdict thus completely disappeared in civil trials. Instead, the English trial judge delivers a discursive 'judgment' in which findings of fact are intermingled with legal comment. What is now called the 'judgment' combines in one piece what had once been the trial judge's notes on the evidence, a 'direction' in law, a special verdict, and the court's reasoned decision, often adding for good measure the arguments of counsel as well. In a sense the trial judge is still stating a case for potential use on

[123] Sir Charles Bowen (later Lord Bowen), repr. in *Essays AALH*, I, at p. 541.

[124] J. A. Foote, *Pie-Powder* (1911), pp. 84–5, tells of a judge who was unsure whether he should find the facts as he himself saw them or as he thought a common jury would have found.

[125] *Ford v. Blurton* (1922) 38 T.L.R. 801 at 805.

[126] *Ward v. James* [1966] 1 Q.B. 273; *Williams v. Beesly* [1973] 3 All E.R. 144, [1973] 1 W.L.R. 1295. In 2013 the right to a jury in libel cases, without leave, was also removed: p. 477 n. 95, post.

appeal,[127] but he is now doing much more than was permissible under common-law procedure. The substitution of one person for twelve, and the surreptitious disappearance of the formulaic concept of a verdict, left judges free to publish their ruminations on the evidence in a way which the common law in its wisdom forbade to juries. The effects have gone far beyond procedure. We have seen how the emergence of the jury, by forcing a separation of fact and law, led to the refinement of substantive principles of law. So long as the questions of law arose upon pleadings intended to define an issue for a jury, or upon directions to the lay jurors by the judge, they could remain relatively clear and simple. Now that fact and law are no longer decided separately, it is sometimes unclear to what extent judgments turn more on the facts than the law. In theory every judgment now establishes some new point, however minutely specific, and thereby reduces the flexibility which once enabled jury verdicts to reflect changing lay assumptions. Equity, in the old sense of deciding every case on its own facts,[128] has begun to replace and not merely to supplement the law.

The judge also came to exert a greater control over litigation, returning to an emphasis on the pre-trial stage. Litigation at common law had rested on an adversarial system in which the parties themselves set the agenda and the pace of proceedings, culminating in a trial at which all the business was conducted orally, documents and legal authorities being read out in public. Cooperation was not expected, unless undertakings were given, and the parties did their utmost to hinder or ambush their opponents. Costs were unpredictable and often disproportionate to the matter in dispute. The Victorian reforms had done little to change this aspect of the system. Moreover, during the later twentieth century the pre-trial stage had grown in length and difficulty. Modern litigation, especially against corporations and other large organizations, often required access to documents hidden deep in private filing systems (and more recently in masses of electronic mail), perhaps in danger of politic loss or destruction. Assets might easily be removed from the jurisdiction. Increasing use was therefore made of discovery, pre-trial injunctions, freezing orders, and orders to preserve evidence.[129] Technical evidence was routinely being commissioned from experts on both sides. But these necessary devices could also be turned into a means of harassing opponents and adding unacceptably to delay and cost.

The evils of delay and disproportionate expense in High Court litigation were much debated in the second half of the twentieth century, and the best hope of ending them was seen to lie with the judge rather than with the parties.[130] The Evershed Committee in 1953 urged more intervention by the court, and a more robust approach to the 'summons for directions' before trial.[131] Little came of this, but in 1988 another committee set in train a more daring chain of reforms by proposing the modification of the

[127] For the replacement of the procedures in banc by appeals see p. 153, post.

[128] See pp. 109–12, post. The equity of the Chancery was administered by a judge sitting alone without a jury.

[129] For new developments see p. 216, post.

[130] This began at the level of County Courts, where since 1973 small claims have been disposed of under a highly informal procedure, counsel being rarely used and an actively interventionist role being taken by a 'district judge' (formerly known as a registrar).

[131] Final Report of the Committee on Supreme Court Practice and Procedure (1953) Cmd 8878.

adversarial system by a 'cards on the table' approach.[132] The chief immediate consequence was the introduction, in 1992, of the compulsory exchange of witness statements before trial. A Practice Direction of 1995 carried things a good deal further.[133] Judges were to assert greater control over the preparation for and conduct of hearings by limiting discovery, imposing time-limits on oral submissions and the examination of witnesses, defining more narrowly the issues to be addressed, and dispensing with the need to read aloud documents and authorities. Witness statements were to stand as evidence in chief unless otherwise ordered, so that oral evidence would begin with the cross-examination. Counsel were to supply the court with skeleton arguments,[134] and with bundles containing the pleadings and written evidence to be read in advance of trial. In heavy cases the court could require written submissions as well. The following year Sir Harry Woolf (later Lord Woolf) published the report of a committee which proposed still further reforms designed to simplify litigation and reduce its cost.[135] His recommendations were mostly adopted, and embodied in the new Civil Procedure Rules which came into effect in 1999.[136] These rules were meant as a completely new procedural code, replacing (with a few exceptions) the old Rules of the Supreme Court and rendering obsolete most of the learning with which they had become encrusted. The original writ was finally abolished,[137] and proceedings commenced by a 'claim form' – a document which nevertheless still behaves like a writ in that it has to be 'issued' by the court and served on the defendant.[138] Pleadings, now called 'statements of case', are to be accompanied by an averment of belief in their factual truth, under the sanction of punishment for contempt. Above all, the court is charged to give effect to the 'overriding objective' of dealing with cases justly. This includes ensuring that the parties are on an equal footing, and that cases are dealt with expeditiously and fairly, in ways which are proportionate to the amount of money at stake, the importance and complexity of the case, and the means of the parties. The court is required to further this objective by 'actively managing cases', with tight deadlines, and encouraging the parties to submit to alternative dispute resolution.

The procedural revolution of the 1990s aimed to replace the reactive judge of the past with a more proactive judge. That could be seen as a reversion to the medieval philosophy of tentative pleading, when the courts in banc devoted most of their time to supervising the definition of issues for trial, though the function is now exercised by a single judge or master, and legal questions can now be raised at the trial. On the other hand, there is more discovery (disclosure of documents) and reliance on depositions (now called witness statements), procedures long associated with delay and obfuscation in

[132] Report of the Review Body on Civil Justice (1988) Cm 394.

[133] Practice Direction [1995] 1 All E.R. 385.

[134] These had already been introduced in 1989 for the Court of Appeal.

[135] H. Woolf, *Access to Justice* (1996).

[136] Civil Procedure Rules 1998, made under the Civil Procedure Act 1997 (c. 12). For the additional r. 54 (judicial review), made in 2000, see p. 161 n. 112, post.

[137] For its virtual abolition in 1980 see p. 75, ante.

[138] The court 'issues' the form when it receives it from the claimant and stamps it. Service may now be electronic.

the unreformed Chancery and not without similar tendencies today.[139] Simplification is still a remote goal, since constant revision of the rules has made civil procedure as complex as it was before. And the reforms have significantly reduced the orality of proceedings, so that an observer sitting in court without access to the documents cannot expect to follow all that is happening in a civil trial. Posterity will have even less hope of understanding, since no permanent record of proceedings is now kept. Whether the right balance has been achieved between the quality of justice and its efficiency in terms of speed and cost is a question which no generation has conceded to be finally settled.

Further Reading

Pollock & Maitland, II, pp. 574–674

Milsom, *HFCL*, pp. 38–50, 70–81; 'Law and Fact in Legal Development' (1967) 17 *Univ. Toronto Law Jo.* 1–19 (repr. in *SHCL*, pp. 171–89); 'The Past and Future of Judge-Made Law' (1981) 8 *Monash Univ. Law Rev.* 1–14

P. Brand, 'Judges and Judging 1176–1307' (2012) in *Judges and Judging*, pp. 1–36, esp. pp. 11–12, 19–25

J. Baker, 'Judicial Positivism' and 'Legal Discussion in Court' [1483–1558] (2003) in *OHLE*, VI, pp. 48–52, 385–407

The Civil Jury

E. M. Morgan, 'A Brief History of Special Verdicts' (1923) 32 *Yale Law Jo.* 575–92

R. V. Turner, 'The Origins of the Medieval English Jury' (1968) 7 *Jo. British Studies* (pt ii) 1–10, repr. in *Judges, Administrators and the Common Law in Angevin England* (1994), ch. 3

M. S. Arnold, 'Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind' (1974) 18 AJLH 267–80; 'The Control of the Jury' (1985) 100 SS x–xxxi

J. Oldham, 'The Origins of the Special Jury' (1983) 50 *Univ. Chicago Law Rev.* 137–221; 'Special Juries in England: 19th Century Usage and Reform' (1987) 8 JLH 148–66; 'The Work of the Jury' and 'Questions of Procedure and Evidence' (2004) in *ECLM*, pp. 58–76

J. M. Mitnick, 'From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror' (1988) 32 AJLH 201–35

R. C. Van Caenegem, *The Birth of the English Common Law* (2nd edn, 1988), pp. 62–84

D. Millon, 'Positivism in the Historiography of the Common Law' (1989) 4 *Wisconsin Law Rev*. 669–714 (as to which see P. Brand, 'Judges and Juries in Civil Litigation in Later Medieval England: The Millon Thesis Revisited' (2016) 37 JLH 1–40)

'The Origins of the Jury: Forum' (1999) 17 LHR 535–607

J. Cairns and G. Macleod (ed.), *'The Dearest Birthright of the People of England': the Jury in the History of the Common Law* (2002) (11 essays)

J. Baker, 'Trial by Jury' [1483–1558] (2003) in *OHLE*, VI, pp. 351–73

K. Crosby, '*Bussell's Case* and the Juror's Soul' (2012) 33 JLH 251–90

Pleading

Holdsworth, *HEL*, III, pp. 627–56

H. J. Stephen, *A Treatise on the Principles of Pleading* (1826)

M. S. Arnold, 'The Medieval Rules of Pleading' (1985) 100 SS x–xx

J. Baker, 'Pleading' [1483–1558] (2003) in *OHLE*, VI, pp. 335–49

P. Brand, 'Pleading' [1286–89] (2007) 123 SS cxxi–clxi

[139] The use of witness statements as evidence in chief may have resulted in longer trials; they are prepared by solicitors and contain more detail than oral evidence, and therefore more to challenge in cross-examination. Full disclosure produces mountains of unsorted material.

Reforms

P. Polden, *OHLE*, XI, pp. 569–630

Holdsworth, *HEL*, IX, pp. 262–335

C. Glasser, 'Civil Procedure and the Lawyers: the Adversary System and the Decline of the Orality Principle' (1993) 56 MLR 307–24

L. Hoffmann, 'Changing Perspectives on Civil Litigation' (1993) 56 MLR 297–306

R. Jackson, *The Reform of Civil Litigation* (2016)

6

The Court of Chancery and Equity

The courts and procedures described in the preceding chapters embodied the regular 'course of the common law'. Although jurisdictions were adjusted, and the procedures were developed, distorted, or evaded in different periods, the essential premises and outward forms of the common-law system went almost unchanged between the thirteenth and the nineteenth centuries. It came to be thought an Englishman's birthright to be subject to this system rather than to any other, and a steady stream of medieval statutes from Magna Carta onwards guaranteed that no one should be deprived of life, liberty, or property save by 'due process of law'.[1] These statutes were intended as restraints on the power of the Crown to erect new jurisdictions and legal institutions, restraints on the very power which had earlier introduced the common law and its due process as an extra-ordinary alternative to regular local justice. And they were not just abstract theory. In 1368 the justices at Chelmsford held void a commission from the Chancery to seize a man and his goods without due process.[2] In 1406 Gascoigne CJ declared that 'the king has committed all his judicial powers to various courts',[3] and in the same year the King's Bench overturned a judgment given by a court of Oxford University – which by royal charter proceeded according to Roman Civil law – upon complaint that English subjects were entitled to be dealt with under the common law.[4] In 1483 the Common Pleas declared unlawful a municipal jurisdiction of supposedly immemorial antiquity to imprison suspected felons for three days in the town gaol, on the ground that this would be 'completely against common right and all reason' in that there was no provision for bail.[5] Expansion of prerogative conciliar jurisdiction under Henry VII led to actions for compensation, founded on the medieval legislation,[6] and under Elizabeth I and James I the due-process statutes were widely relied upon by the judges in seeking to curb interferences with the common law by prerogative courts.[7] The notion that the king had exhausted his judicative powers by creating the common-law courts was pressed to its limit by Coke CJ when in 1608 he told James I that he had no authority to participate in the judicial decisions of his own courts.[8] Coke also held

[1] Stat. 28 Edw. III, c. 3; 42 Edw. III, c. 3; p. 60, ante. For Magna Carta (1225), c. 29, see pp. 506–10, post.

[2] *Sir John atte Lee's Case* (1368) Lib. Ass. 42 Edw. III, pl. 5; Baker, *Magna Carta*, pp. 58–60, and passim. See also Co. Inst., IV, p. 163.

[3] *Chedder v. Savage* (1406) Y.B. Mich. 8 Hen. IV, fo. 13, pl. 13.

[4] *Peddington v. Otteworth* (1406) 88 SS 166 at 173; and see Baker, *Magna Carta*, p. 385. The action was brought by the assignee of a debt, whereas the common law did not allow assignment of choses in action. In 1388 it was held in Parliament that 'the realm of England never has been and never shall be ruled or governed by the Civil law': Rot. Parl., III, p. 236.

[5] Y.B. Hil. 22 Edw. IV, fo. 43, pl. 4.

[6] Baker, *Magna Carta*, pp. 97–9, 456–62. See also pp. 126, 506, post.

[7] Baker, *Magna Carta,* chs. 7–9.

[8] *Case of Prohibitions del Roy* (1608) 12 Co. Rep. 63; Baker, *Magna Carta*, pp. 366–8. James had been used to a different regime in Scotland and was very cross with Coke, offering to hit him.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

that no new court of equity could be established under the royal prerogative.[9] The objection was not to equity itself, but to the erection of new tribunals without parliamentary sanction. And in 1641 the same principle was invoked by Parliament in abolishing the Star Chamber.[10]

Parliament was provoked into passing the statutes of due process by a series of experiments with the judicial system. If litigation had become a game of skill, it was not fair to change the rules at random. Yet, despite their lofty phrases, it was difficult to see how the king could have lost his sovereignty by exercising it. He was sworn 'to do equal and right justice and discretion in mercy and truth',[11] and so if the regular procedures proved deficient it was his royal duty to furnish a remedy. The king was therefore understood in medieval times to retain an overriding residuary power to administer justice outside the regular system, but with the important limitation – enshrined in the due-process legislation – that it could be invoked only where the common law was deficient, and never in matters of life, limb, or property. By the end of the thirteenth century numerous petitions (or 'bills') were being presented to the king, asking for his grace to be shown in respect of some complaint. The usual royal answer was 'let him sue at common law', which in suitable cases could be achieved simply by forwarding the bill to justices in eyre or trailbaston. Sometimes a petitioner complained of misconduct by litigants or officials who were frustrating the common law. In the time of Edward III such bills were commonly passed on to the judges of the courts concerned, with a covering letter commanding them to do right.[12] However, in the exceptional cases where the king or the Council took some direct action, we can see the beginning of the newer jurisdictions in which suits were not only commenced by bill but did not follow the due process of the common law.

Already in the fourteenth century the petitioning of the king by bill, seeking a remedy as of grace, was so common that such business had to be referred to special sessions of the Council or Parliament. In hearing these petitions the king and his councillors were continuing one of the functions of the Anglo-Saxon *witan* and the Norman Curia Regis. By the middle of the century only petitions of special importance, such as those seeking a general and permanent change of law or procedure, were reserved for Parliament, where the bills (if assented to) became statutes. Private suits were more often dealt with by the Council, or delegated to individual councillors such as the chancellor, lord high admiral, or lord high constable, who had their own courts; once this became a matter of routine, petitioners took to addressing the appropriate individual or body directly. Out of the arrangements for dealing with these cases arose several distinct jurisdictions,[13] the foremost being that of the chancellor.

[9] *Perrot v. Chancellor of Oxford University* (1588) Co. Inst., IV, p. 97; Baker, *Magna Carta*, pp. 265–6, 379; *Andrews v. Webb* (1607) ibid. 380 n. 246.

[10] See pp. 126, 227, post. For earlier attempts to limit its jurisdiction see *Onslowe's Case* (1565) Dyer 242 (perjury); *A.-G. v. Brereton* (1614) Baker, *Magna Carta*, pp. 402–6 (power to enforce awards of damages).

[11] Coronation oath of Edward II, *Statutes of the Realm*, I, p. 168.

[12] The *Recorda* files of KB (KB 145) include a number of such bills and writs, in French. The use of informal letters probably began where the king's interests were involved: e.g. *R. v. Bishop of Lincoln* (1320) 104 SS 105 at 110–11.

[13] For those other than the Chancery see the next chapter.

The Chancery

The Chancery (*cancellaria*) began as the royal secretariat.[14] In origin it was not a court of law but a department of state, descended from the Anglo-Saxon scriptorium where royal writs and charters were drawn and sealed.[15] The head of the department, the chancellor, had the custody of the great seal of England, which was used to authenticate the documents which his clerks prepared. Royal grants of property, privilege, dignity, or office, and all writs and commissions in the king's name, had to 'pass the seal' in Chancery. The everyday original writs of the common law were no exception; they were prepared in the Chancery and required the touch of the great seal on a blob of wax. Through them the chancellor was associated with the ordinary administration of justice.

The chancellor has always been primarily an officer of state and a minister of the Crown, and the office was formerly one of great eminence. Most medieval chancellors were also bishops or archbishops. Some powerful chancellors, notably Cardinal Wolsey (1515–29) and Lord Clarendon (1658–67), were prime ministers in all but name. Appointments to the office are still made on political grounds, on the nomination of the prime minister, before whom the lord chancellor takes a nominal ceremonial precedence. Yet the majority of chancellors have been lawyers[16] and until 1875 spent much of their time sitting in court. The anomaly that a politician should hold the highest judicial office in the land was compounded by the undefined nature of the chancellor's jurisdiction. The chancellor received no patent or commission defining his authority, he held office at the king's pleasure, and he took no part in the ordinary administration of justice as an assize judge. His powers derived from his custody of the great seal and from his pre-eminent position in the King's Council.

The Great Seal

The great seal has since the eleventh century been the principal means of authenticating royal documents. The silver seal matrix, bearing the sovereign's effigy, was in later times carried by the chancellor on formal occasions in an embroidered purse and set before him in court. Whoever was given its custody possessed all the authority of the Chancery. Sometimes 'keepers of the seal' were chosen on a temporary basis, and in later times a lord keeper of the great seal might be appointed instead of a lord chancellor, with less status but with the same legal authority.[17] When the seal was placed temporarily in the keeping of commissioners of the great seal, they too had the same powers as a lord chancellor. After the union with Scotland in 1708, there was no longer

[14] The word *cancellaria* is Latin for a latticed or railed screen (cf. the chancel of a church), but there is no evidence of such an arrangement in the English Chancery; the name was imported from the Continent, probably in the 1060s.

[15] For the origins of this department, and the case for an Anglo-Saxon 'chancellor', see S. Keynes, *The Diplomas of King Aethelred 'the Unready'* (1980), pp. 134–53. For the case against cf. P. Chaplais, in *Studies in Medieval History presented to R.H.C. Davis* (1985), p. 41.

[16] This is true even of the medieval bishops, who were mostly graduates in Civil or Canon law and in many cases erstwhile practising advocates. The appointment of a LC without legal qualifications in 2016 led to considerable dissatisfaction.

[17] The last holder of the office was Sir Robert Henley (1757), who became Lord Henley C in 1761.

a great seal of England alone, and no lord chancellor of England (or Scotland); but the Court of Chancery, the court of the lord high chancellor of Great Britain, remained a purely English institution.[18]

The Chancery Clerks

The medieval chancellor had a large staff of clerks, who were reckoned as members of his own household and were therefore distinct from other branches of the Curia Regis. The first grade of clerks were the twelve *clerici ad robas*, so called because they received liveries of robes; they were known by Tudor times as the masters of the Chancery, and during that period were often doctors of law. They deputized for the chancellor in both administrative and judicial affairs. A late thirteenth-century writer describes them as hearing petitions and complaints, which they determined by issuing writs, though by that time the discretion to invent new remedies was severely restricted.[19] The foremost of these senior clerks was the clerk of the rolls, who kept the records of documents authenticated in Chancery – principally the patent rolls, close rolls, and treaty rolls – and appointed the lesser clerks. He was later called the master of the rolls. The second grade of clerks were known in medieval times as 'bougiers' and were also twelve in number. The chief officers in this grade were the clerk of the Crown in Chancery, who prepared patents and commissions under the great seal, and the clerks of the Petty Bag, who controlled much of the administrative and litigious business of the Chancery. The third grade were the cursitors (or *clerici de cursu*) who wrote out the standard-form original writs (writs 'of course', *de cursu*). The development of the chancellor's jurisdiction, shortly to be outlined, also gave judicial functions to the masters and led to the growth of many new offices, particularly the department of the six clerks. The six clerks were originally deputies to the master of the rolls and acted the part of attorneys; so much did their work expand that eventually they had their own deputies, the sixty clerks (or sworn clerks in court), who dealt directly with solicitor-clients.[20]

The Latin Side

The first signs of judicial activity in the Chancery began in connection with its specialized administrative work, particularly inquisitions relating to the Crown's property rights. For instance, on the death of a tenant in chief a writ of *diem clausit extremum* issued from the Chancery commanding a local official (the escheator) to hold an inquisition post mortem to discover exactly what lands he held, of whom, and on what day he died, and who and how old was his heir; this information would enable the recovery of whatever was due to the king as feudal lord. Such inquisitions were frequently

[18] *R. v. Hare and Mann* (1719) 1 Stra. 146. Scotland retained a separate seal after the union; it is now kept by the First Minister of Scotland. Ireland retained a separate great seal and LC after the union with Great Britain in 1801, but the office of LC was discontinued on partition in 1922; the great seal of Northern Ireland is kept by the secretary of state.

[19] *Fleta*, ii. 13 (72 SS 123); pp. 62–3, ante. Some common-law writs were attributed to named masters.

[20] They were called the 60 clerks because each six clerk was restricted to a maximum of ten under-clerks. The actual number was usually smaller. For the complicated history of these offices see *Ex parte The Six Clerks* (1798) 20 Ves. 589.

'traversed' by interested parties, thus raising legal questions to be heard in open court. The court also had a jurisdiction over personal actions involving Chancery staff, who were privileged from being sued elsewhere. All such proceedings were conducted on the Petty Bag side of the Chancery, called the 'Latin side' because the records were kept (as in the other central courts) in that language. The Court of Chancery was held 'before the king', and in this aspect of its jurisdiction bore a close resemblance to the medieval King's Bench, with which it worked in close co-operation; issues of fact were regularly sent to be tried in the King's Bench as if it were part of the same court.

Peculiar to the Chancery were petitions seeking redress against the Crown. The king could not be sued by his own writ in the other courts, and the determination of these 'petitions of right' was obviously a function of the king's residuary jurisdiction to do justice to his subjects, albeit the governing principles were those of the common law. In their procedural aspect only, petitions of right foreshadowed the growth of the new kind of bill procedure which brought the Court of Chancery into prominence. But the connection between the Latin and 'English' sides was minimal. The petition of right was brought to vindicate a legal property right and the judgment was of record. The bill procedure on the English side was the means of developing an equitable jurisdiction, in the exercise of which the Chancery was not tied to the forms or language of the common law and was not a court of record.

The English Side

The chancellor's 'English' jurisdiction, so called because the bills and pleadings were written in the vernacular tongue,[21] grew not from the departmental work of the Chancery but from the jurisdiction of the King's Council to deal with bills of complaint. We have seen that in the fourteenth century bills addressed to the 'king in council', complaining of interference with the common law, were passed on to the judges.[22] Later in the century bills of this kind could be addressed to the chancellor alone, whose function in such cases was still not to dispense justice himself but rather to facilitate its achievement in other courts, to serve as 'a convenient clearing-house for all kinds of business transacted elsewhere'.[23] The jurisdiction was that of the Council, and the chancellor was – by a kind of fiction – deemed to represent 'the king and his council in Chancery'.[24] By the time of Richard II a further development had occurred. Bills increasingly sought a specific remedy from the chancellor himself, irrespective of whether proceedings were pending at common law, and it is evident that the chancellor had begun to issue process and grant decrees in the Court of Chancery instead of redirecting petitions elsewhere. The Chancery may have been thought an appropriate place to furnish new remedies because of its traditional responsibility for the preparation of

[21] Some of the earliest were actually in French. The court itself used Latin until the 16th century for endorsements on documents, writs, and decrees; but the order books were from the 1550s almost wholly in English.

[22] This was still possible in the 1390s. For examples of petitions sent directly on to the assize judges see *Glanville v. Champernoun* (1393) 10 SS 11; *Palet and others v. Skipwith* (1397) ibid. 33.

[23] Sayles, 76 SS lxxi, lxxix. The first known bills addressed to the chancellor alone date from the 1340s.

[24] This style was used in the 1390s: 10 SS 33 ('coram nostro et concilio nostro in Cancellaria', referring to bills addressed to the chancellor alone), 36.

original writs.[25] A plaintiff applying for an original writ was in a sense making a petition in Chancery;[26] and in that context it became a common saying that no deserving plaintiff would be sent out of the Chancery without a remedy: *Nullus recedat a curia cancellariae sine remedio.*[27] Until the mid-thirteenth century one possible response to a petition had been to devise a new form of original writ, and when that power was curtailed the bill might be referred to Parliament for a legislative solution; but often redress was sought ad hoc, in the circumstances of a particular case, where it was more appropriate to make a decree which bound only the parties to the suit. Decrees were at first made in the name of the 'king in council', and then by the 'court', sometimes reciting the presence of judges, king's serjeants, councillors, and advisers. However, once the jurisdiction was firmly settled in the fifteenth century, the chancellors came to issue decrees on their own authority. In making such decrees, the late-medieval chancellors did not regard themselves as administering a system of law different from the law of England. They were reinforcing the law, by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. They came not to destroy the law, but to fulfil it.[28]

Mischiefs in the Law

The previous two chapters have shown why it became difficult to conceive of the common law without reference to the procedures through which it operated. In the King's Bench and Common Pleas its fulfilment was circumscribed by the writ system, the forms of pleading, the rules of evidence, the varying reliability of sheriffs, and the uncertainties of jury trial. The possibilities of technical failure were legion. And the growing strength of the substantive law could also work injustice, because the judges held that it was preferable to suffer hardship in individual cases than to make exceptions to clear rules.[29] The stock example was that of the debtor who gave his creditor a sealed bond, but did not ensure that it was cancelled when he paid up. The law regarded the bond as incontrovertible evidence of the debt, and so payment was no defence against it.[30] The debtor would suffer an obvious hardship if he was made to pay twice; but the mischief was a result of his own foolishness, and the law did not bend to protect fools. It was in the interests of certainty that deeds should prevail over mere words. Likewise, if a man made an oral contract where the common law required written evidence, he would find himself without remedy. Again, if someone granted land to others on trust to carry out his wishes, he would find that at law his trusted grantees were

[25] A proclamation of 1349 delegated to the chancellor 'matters concerning the common law' and those concerning the king's 'special favour', which the king was too busy to deal with. It is unclear whether this referred to the formulation of new writs or the exercise of jurisdiction, or both: see p. 69, ante; Palmer, *ELABD*, pp. 108–10, 130–1.

[26] *Fleta,* ii. 13 (72 SS 123).

[27] *Anon.* (1489) Y.B. Hil. 4 Hen. VII, fo. 5, pl. 8, per Moreton C, quoting the words of Stat. Westminster II (1285), c. 24, *in consimili casu* (p. 69, ante). Cf. Y.B. 21–22 Edw. I (RS), p. 323, per Bereford CJ ('no one should leave the Chancery in despair').

[28] F. W. Maitland, *Equity* (1909), p. 17. The allusion is to Christ's Sermon on the Mount in Matthew, v. 17 (King James version). Cf. Wycliffe's translation, *c.* 1380 ('undo the law').

[29] See p. 87, ante.

[30] See p. 346, post.

absolute owners who could not be compelled to obey him.[31] Now, it was not that the common law held that a debt was due twice, or that a promise or trust could be broken. Such propositions would have been dismissed as absurd. Those were merely the hard consequences of observing strict rules of evidence, rules which might well exclude the merits of a case from consideration by a court but which could not be relaxed generally without destroying certainty and condoning carelessness. For a creditor, promisee, or trustee to take unfair advantage of those strict rules was without question wrong; but it was a matter for their consciences rather than for the common law. It was 'better to suffer a mischief than an inconvenience'.[32]

The Chancery approached matters differently. In exercising his informal jurisdiction the chancellor was free from the rigid procedures under which inconveniences and injustices sheltered, because he was free to delve into the facts at large. His court was a court of conscience,[33] in which defendants could be coerced into doing whatever good conscience required, given all the circumstances of the case. Such a court obviously proceeded in a very different fashion from the Common Pleas.

Early Chancery Procedure

The early history of this side of the Court of Chancery is difficult to uncover for want of full documentation: the procedure was informal, and for the first century little has survived beyond some random files of bills. It seems probable that the English jurisdiction was established in its distinct form during the reign of Richard II, since already by 1393 there were complaints of its abuse. It was firmly settled while John of Waltham was master of the rolls (1381–86), a period when canon lawyers dominated the staff.[34] The procedure clearly owed something to the inquisitorial procedure of the canonists, and may have been modelled on the canonical *denunciatio evangelica,*[35] though some basic features of that procedure were absent. Significantly, the Chancery never became a court of canon law, and its practitioners were always members of the inns of court.

No original writ was necessary, and all actions were commenced by informal complaint, either by bill or by word of mouth.[36] The common first process, the writ of subpoena, was a simple summons to appear in Chancery or else forfeit a penalty.[37] There was only one form, and it did not tie the plaintiff to a cause of action. In practice – at any rate, in later practice – the penalty was never exacted, but a disobedient defendant

[31] See p. 269, post. [32] See p. 87, ante; p. 346, post.

[33] This term was in use by the early 15th century: 10 SS 121.

[34] See Stat. 17 Ric. II, c. 6 (authorizing the chancellor to award damages at his discretion for false suits in the council or Chancery by subpoena); Rot. Parl., IV, p. 84 (complaint in 1415 of canonical procedure introduced temp. Waltham MR).

[35] A suit brought to admonish a party to act conscionably, which could result in a remedy for the complainant: see H. Coing, 71 LQR 223; J. L. Barton, 'Equity in the Medieval Common Law' (p. 124, post). For doubts about the parallel see Dawson, *History of Lay Judges*, pp. 153, 158.

[36] The increase in the number of surviving bills during the 15th century could be due both to a decline in oral complaints and to better record-keeping.

[37] For a specimen see p. 588, post. The writ in its settled form has been dated to the early 1350s: W. M. Ormrod, 61 BIHR at 15–17.

was subject to proceedings for contempt.[38] Pleading was in English and, although common-law phraseology was adopted where convenient, it was free from undue technicality. There was no need for a single issue. And there was no jury; evidence was taken by written deposition and evaluated by the court. The Chancery was always open; it was not tied to the terms and return-days, though for convenience it observed them as far as possible. It could sit anywhere, even in the chancellor's private house, and issues of fact could be tried out of court by commissions of *dedimus potestatem* ('we have given power') to country gentlemen. These advantages enabled early chancellors to provide swift and inexpensive justice, especially to the poor and oppressed. Sheriffs and juries could be bypassed where undue pressure was feared, so that corruption could not prevent a fair hearing. The chancellor's eyes were not covered by the blinkers of due process, and he could go into all the facts, to the extent that the available evidence permitted. He could order parties not to enforce bonds and other writings if it would be unjust, and he could order the discovery of documents which were needed to enforce legal rights. He could order parol contracts to be performed, and fiduciary obligations discharged. He could ensure that unfair advantage was not taken of the weak and foolish. And defendants could not easily evade this new and powerful justice, since for contumacy they could be imprisoned or their property sequestered.[39] Decrees were also enforced by making the parties execute penal recognizances, payable to the chancellor or masters.[40]

By exercising this jurisdiction in conscience, the chancellor was not causing any of the 'inconvenience' which the law eschewed. In Chancery each case turned on its own facts, and the chancellor did not dispute or interfere with the general rules observed in courts of law.[41] The decrees operated *in personam*; they were binding on the parties in the cause, but they were not judgments of record binding anyone else and they did not alter or contradict the law.

Business of the Chancery 1400–1600

The difficulty of measuring business in the early Chancery accounts for inconsistencies between the various estimates of it.[42] It seems nevertheless to be generally agreed that it was increasing throughout the fifteenth century, and that it increased dramatically during the sixteenth until the court became so flooded with suits that it could scarcely cope. This expansion turned the Chancery into one of the major courts in Westminster Hall, and it was accompanied by a change in the general run of its business. In the

[38] First by attachment, and then by a 'commission of rebellion' empowering laymen to arrest the defendant and bring him to the Chancery.

[39] A commission of sequestration enabled property to be seized and the profits sequestered until compliance. This may not have been a medieval practice, but it was in use by the 1530s: Guy, *Career of More,* at pp. 58, 59.

[40] E.g. 94 SS 349. Cf. 102 SS 14.

[41] A reader of Gray's Inn *c*. 1529 explained that the chancellor could not decree that a bond was void, because if an action was brought on it at common law the decree could not be pleaded: Baker, *Magna Carta*, p. 103. The chancellor could only enjoin the party from bringing the action. See Y.B. Hil. 37 Hen. VI, fo. 13, pl. 3.

[42] M. E. Avery (p. 124, post) thought the main burst came during the chancellorship (1432–50) of John Stafford; N. Pronay (ibid.) put it in the 1470s.

decades around 1400, the typical petition still complained of weakness or poverty, or the abuse of position by an opponent. For example, a plaintiff might sue in Chancery for a common-law tort such as battery or negligence on the footing that the defendant was using his local influence to prevent a just remedy at common law.[43] During the same period there also developed an extensive appellate jurisdiction over inferior urban courts, including those of the City of London, which brought in commercial cases and occasionally tort. These suits were commonly commenced by parties in custody, using a *habeas corpus cum causa*, and the procedure may have become popular because of difficulties in obtaining bail in local courts.[44] In other cases the relief sought was ancillary to an action at law: a plaintiff at law might need discovery, a defendant at law might need the action stopped.

When the tide of business swelled, the greater part of it related to real property. Some of this was attributable to the growing practice of creating uses or trusts of land;[45] but there were many other ways of getting property cases into Chancery, and the work was by no means dominated by uses. Although the Chancery could not in theory interfere with the legal title, it could ensure that a successful party was put in possession. The enforcement procedure as settled in Tudor times was to issue a writ of execution, and if that was disobeyed a writ of attachment, an injunction to deliver possession, and a writ of assistance to the sheriff.[46] It could also make decrees to 'quiet' possession, either to protect the party in possession or to restore possession wrested by force until the merits were tried.[47] As the property jurisdiction waxed, the other aspects waned. The jurisdiction over municipal courts was largely given up. Tort cases disappeared. In the sphere of contract, the most important business came to be ordering the completion of conveyances, and relief from mortgages and penal bonds. One possible reason for this change we have already seen. The popularity of the Chancery in the later fifteenth century had been perceived as a challenge to the courts of law to change their ways, and it was one of the spurs which goaded the King's Bench into extensive reforms in the law of contract and tort, through actions on the case, and into adopting a bill procedure of its own.[48] Moreover, much of the other business with which it had started had gone elsewhere. The kind of unusual violence or abuse of power which the regular system was powerless to redress needed attention at the highest level; complaints of this nature were therefore heard by the full Council and became the foundation of the Star Chamber jurisdiction.[49] The Council also found new ways of dealing with poor men's causes.[50] By Elizabethan times the Chancery was far too busy to concern itself with petty matters,

[43] E.g. *Biere v. Mule* (1388) 10 SS 5 (trespass and detinue); *Rouseby v. Skipwith* (1397) ibid. 30 (sheriff put P in stocks and shackled his hands in 'pyrwykes'); *Fryday v. West* (undated) ibid. 123 (surgeon treated P negligently).

[44] An early example is *R. v. Sheriffs of London, ex parte Milner* (1388) 10 SS 9 (debt in the Sheriffs' Court, London). For later examples see *OHLE*, VI, p. 278.

[45] See pp. p. 270, post.

[46] It was also possible to put a plaintiff in possession by means of a commission: *Boles v. Walley* (1559) Cary 38. For the mid-16th century jurisdiction over title see E. Henderson, 26 AJLH 97.

[47] E.g. *Warnes v. Burwell* (1530) Guy, *Career of More,* p. 56; *Sapcote v. Newport* (1560) Cary 47. Likewise in Star Chamber: *Eland v. Savile* (1530) Guy, op. cit., p. 57.

[48] See pp. 48–52, ante.

[49] See pp. 127–8, post.

[50] For the Court of Requests see pp. 128–30, post.

and in 1579 sent away a plaintiff who claimed a right of entry to hang washing in his neighbour's yard.[51] The Chancery had ceased in reality to be an extra-ordinary court. Although it retained procedures which were extra-ordinary in the sense that they were outside the common law, it had become a court of constant resort.

Law and Equity

Despite these changes, it continued to be a trite saying that the Chancery was not a court of law but a court of conscience. Developments in the system of pleading and discussing cases in banc, and the effect of regular legal education in the inns of court, had by Tudor times fostered the modern conception of law as a body of rules applicable to given sets of facts.[52] The chancellor, by way of contrast, was less concerned with general rules than with individual cases. He combined the role of judge and jury, and in delving as deeply as conscience required into the particular circumstances before him he did not make such a definite distinction between fact and law. Chancery jurisprudence was therefore slow to develop. Indeed, the chancellors' approach to justice was not in origin perceived as a body of law at all: there was just a myriad of single instances in which good conscience required more of people than the law demanded. It was not taught in the inns of court[53] or mentioned in the textbooks of Littleton or Coke, even though it had a profound practical impact on the law of property which they described. Nevertheless, it prevailed over law, in that it could only function as a corrective to the common law if it had the last word. If, therefore, proceedings in other courts were brought unconscionably, the chancellor would enjoin the plaintiffs to surcease: this was called the 'common injunction'.

The chancellor's transcendant form of justice acquired in Tudor times the name 'equity'. The concept of equity was not, in its broadest sense, new. Aristotle had written of *aequitas* as a means of correcting general laws, which in their nature could not provide for every eventuality, and to him it meant interpreting written laws according to the intention rather than the letter.[54] This notion of equity was well known to medieval lawyers. *Glanvill* mentions it as a feature of the common law,[55] and throughout the year-book period and beyond it was applied to the interpretation of statutes.[56] What was new was its application to the extraordinary form of justice administered by the chancellor, for which it seemed a convenient term when it was distinguished from common law.[57] In a celebrated case of 1615, Lord Ellesmere C explained that the reason why there was

[51] *Hamby v. Northage* (1579) Cary 76. By this time there was also a rule of court forbidding claims for less than £10.

[52] See pp. 89–93, ante.

[53] An attempt, apparently unique, was made in Gray's Inn *c*. 1529: Baker, *Magna Carta*, pp. 101–3. Cf. the reader of Lincoln's Inn who dismissed the bill procedure as no part of the law of the land: ibid. 103 n. 177.

[54] Aristotle, *Ethica Nichomachea* (W. D. Ross ed., 1925), v. 10.

[55] *Glanvill*, prologue; ii. 7; vii. 1. The equity of the law is frequently mentioned in the earlier year books. There is also mention of *aequitas curiae* (the equity of the court) in 1285–86: 123 SS cxix. Cf. *Bracton*, II, p. 25 (where equity means equality, or uniformity).

[56] See p. 222, post.

[57] It had been applied to his common-law jurisdiction in *Anon.* (1328) Y.B. Hil. 2 Edw. III, fo. 20, pl. 5, per Hotham C (tr. 'this is a place of equity'). But it was rarely associated with the English side of the Chancery before St German: 10 SS xxx.

a Chancery was 'that men's actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances. The office of the chancellor is to correct men's consciences for frauds, breaches of trust, wrongs, and oppressions of what nature soever they be, and to soften and mollify the extremity of the law.'[58]

The shift from 'conscience' to 'equity' was more than a change of vocabulary. It is not certain how medieval chancellors arrived at their decisions, but the word 'conscience' has a fluid, subjective connotation.[59] Medieval chancellors were guided no doubt by their training in theology and canon law, and occasionally they referred to the law of nature, but they were also driven back onto their own consciences. What is clear is that they did not apply the technical learning of the canon law. If they had shown any inclination to do so, the doctors of law would have been brought in as practitioners before them. Early complaints about the jurisdiction were not that it was based on alien jurisprudence but that it obstructed the common law,[60] and that in doing so it seemed not to follow any law at all. Such complaints loudened under Cardinal Wolsey's chancellorship (1515–29). Wolsey had no legal training, and delighted in putting down lawyers; his arrogant confidence in his own untutored common sense, and his tendency to favour plaintiffs, gave an impression of arbitrariness. The chancellor's jurisdiction shared the failings of all human institutions, and the arbitrary decisions of an unlearned chancellor, sitting alone, offended at least the lawyers' sense of fairness. A strong reaction appeared in a treatise written by an anonymous 'serjeant at law' shortly after Wolsey's death. The writer 'marvelled' that the chancellor should presume to interfere by subpoena with the king's law, which was the inheritance of the subject. Conscience was a variable standard, for 'divers men, divers consciences'; and it was at odds with the rule of law. The 'serjeant' went so far as to assert that the chancellor's jurisdiction was founded on ignorance of the merits of the common law, and that it was contrary both to reason and the law of God.[61]

It could fairly be said in response that the 'serjeant' was equally ignorant of the true basis of Chancery jurisdiction. His argument may in fact have been couched in an intemperate and exaggerated manner as a literary trick.[62] However that may be, the rift which it reflected was largely closed by Wolsey's successor, Sir Thomas More (1529–33), a bencher of Lincoln's Inn and the first chancellor since the fourteenth century to have been educated in the common law. More had earlier written that to allow a judge, even a good judge, to follow his own whim would defeat the principle that justice must be

[58] *Earl of Oxford's Case* (1615) 1 Rep. Ch. 1 at 6.

[59] Even legal arguments were sometimes bolstered by asserting their consonance with conscience: e.g. *Savage v. Gisborne* (1382) Y.B. Trin. 6 Ric. II, p. 5, pl. 2, at pp. 7, 8; *Charles v. Antoigne* (1383) Y.B. Hil. 6 Ric. II, p. 145, pl. 2.

[60] E.g. Stat. 4 Hen. IV, c. 23 (forbidding interference after judgment at law); Rot. Parl., IV, p. 189 (unsuccessful petition of 1422, that no one should sue in Chancery unless a judge certified there was no remedy at law). But cf. Rot. Parl., IV, p. 84 (n 34, ante), for a complaint that the procedure was derived from Canon law.

[61] *Replication of a Serjeant at Law,* in Guy (ed.), *St German on Chancery and Subpoena*, pp. 99–105; extract in B. & M. 125.

[62] It has been suggested that the author was not a serjeant but Christopher St German, overstating the case which he himself opposed in *Doctor and Student* (p. 199, post). In the latter, St German linked conscience with sinderesis, a supposedly innate human capacity to distinguish right from wrong.

seen to be done.[63] He nevertheless accepted that the common law was too 'rigorous', and he not only exercised the equitable jurisdiction as fully as his clerical predecessors but continued the practice of inhibiting common-law actions by injunction. When the judges complained, he invited them to dinner and told them that it belonged to their own discretion to 'mitigate and reform the rigour of the law'; if they would do that, he promised he would issue no more common injunctions. The judges declined the offer, because – as More later told his biographer – 'they may by the verdict of the jury cast off all quarrels from themselves upon them, which they account their chief defence'.[64] The judges had no wish to become involved in decisions of fact, and therefore kept away from questions of conscience. In truth they were already introducing more flexibility into the common law by allowing a wider range of actions on the case, but their flat rejection of More's rhetorical proposition destined equity to develop in England as a system necessarily separate from the common law. Until More's time it could still be argued that equity or conscience operated in all courts, albeit to an extent which varied with the degree to which individual circumstances could properly be revealed. Even as late as 1550 it was said by the King's Bench that 'conscience is *aequum et bonum,* which is the basis of every law'.[65] Yet in 1566 a man was actually indicted for contempt in saying that the King's Bench was a court of conscience.[66] Equity had become the peculiar prerogative of the Court of Chancery, a special kind of justice not to be found elsewhere.[67]

Chancery and the Common-Law Courts

Before the distinction between law and equity hardened in this way, the Court of Chancery and the law courts enjoyed a harmonious collaborative relationship. Judges from the two benches frequently attended in Chancery to give legal advice, and had no difficulty in reconciling the different roles of the two jurisdictions.[68] In a Chancery case of 1452, Fortescue CJ countered a legal argument with the words, 'We are to argue conscience here, not the law'.[69] Nevertheless, the price of a one-man court was that harmony depended on the personality of the chancellor.

The harmony gave way occasionally to discord, especially when the chancellor was thought to have interfered improperly with common-law judgments,[70] or when he

[63] From *Responsio ad Lutherum*, as translated in *OHLE*, VI, p. 177. Cf. Audley's reading on uses (1526) B. & M. 118–19.

[64] W. Roper, *The Lyfe of Sir Thomas Moore* (E. V. Hitchcock ed., 1935), pp. 44–5; quoted in *OHLE*, VI, pp. 46, 47. The author, More's son-in-law, was chief clerk of KB.

[65] Bro. Abr., *Estates*, pl. 78. Cf. Bromley C's speech on swearing in Anderson CJCP (1582) Moo. K.B. 116 at 117 ('*aequum et bonum*, which are the life of the law').

[66] *R. v. Welsh* (1566) CUL MS. Dd.3.87, fo. 21.

[67] A parallel but smaller equitable jurisdiction developed in the 16th century in the Exchequer, with similar procedure: p. 55, ante. But the chancellor of the Exchequer was a finance minister, and equity cases were heard by the same barons who sat on the common-law side.

[68] Cf. *Re Fawsley* (1382) Y.B. Mich. 6 Ric. II, p. 105, pl. 20, where Belknap CJ overruled Waltham MR.

[69] Mich. 31 Hen. VI, Fitz. Abr., *Subpena*, pl. 23.

[70] A conflict occurred in 1482, when the chancellor granted an injunction to stop a party praying judgment in KB after a verdict in his favour. Huse CJKB said the KB was prepared to enter judgment, and that if the party was imprisoned the KB would release him by habeas corpus: *Russel's Case* (1482) Y.B. Mich. 22 Edw. IV, fo. 37, pl. 21.

treated with disdain the opinions of the common lawyers. Wolsey gave offence in both those respects, and prominent judges were among those who brought about his downfall. Another temporary eruption of discontent occurred during the chancellorship of Sir Thomas Wriothesley in 1546, when some common lawyers petitioned the Privy Council complaining of attempts to introduce Civil law into the Chancery. The petitioners' claim that this jeopardized their whole profession was a wild exaggeration, but Wriothesley was soon afterwards deposed for abuses 'to the great prejudice and utter decay of the common laws'.[71] The regular appointment thereafter of common-law trained chancellors[72] ended further fears of that nature; but there was an explosion of a different kind in 1616.

The trouble in 1616 was largely caused by a clash of strong personalities. Lord Ellesmere, the chancellor (1596–1617), was an able common lawyer by training, but as he grew older his political and personal prejudices gained the better of him, and he repeated Wolsey's error of antagonizing the judges. He particularly annoyed them by entertaining suits in Chancery after judgment had been given at common law, and also allowed a backlog of thousands of cases to pile up. Any criticism of himself he represented as an attack on the monarchy as established by God. The appointment of a doctor of Civil law, Sir Julius Caesar, as master of the rolls in 1614 had not eased relations.[73] In 1613 Sir Edward Coke was made chief justice of the King's Bench, and he joined battle with Ellesmere over the Chancery's claim to reopen cases after judgment at law. Coke had the law on his side; the procedure was contrary to statute and to a decision of all the judges in the Exchequer Chamber in 1597.[74] He began to release by habeas corpus prisoners who had been committed by Ellesmere for contempt,[75] and unwisely encouraged such prisoners to prosecute their opponents by *praemunire* for the crime of impeaching the judgments of the king's courts. Unfortunately for Coke, his hints were taken up by the unworthiest of litigants. After a misguided attempt by a crank to indict various officials, including Ellesmere himself, the dispute was referred to James I in 1616. Coke was by then in political disfavour for other reasons, and the weakness of his personal position at that moment enabled Ellesmere and Francis Bacon to gain the king's support for the Chancery. Sitting in state in the Star Chamber, the king issued a royal decree confirming the chancellor's authority to entertain suits after judgments at law.[76] Coke was dismissed from office a few months later.[77] But in 1617 Ellesmere died,

[71] *Acts of the Privy Council*, II, p. 48. The incident was politically motivated and the complaint disingenuous, but those wishing to be rid of Wriothesley were tapping into an existing stream of discontent: *OHLE*, VI, pp. 179–82.

[72] There were three more episcopal chancellors in the 1550s, but the only non-lawyers between then and 2016 were Sir Christopher Hatton (1587–91), Dr John Williams, bishop of Lincoln (1621–25), and Lord Shaftesbury (1672–73).

[73] Since the appointment of Sir Thomas Cromwell in 1534 all but one holder of the office had been common lawyers. The exception was Lord Bruce of Kinloss (1603–11), a Scottish judge and politician.

[74] Stat. 4 Hen. IV, c. 23; *Russel's Case* (1482) n. 70, ante; *Throckmorton v. Finch* (1597), discussed in Baker, *Magna Carta*, pp. 284–8.

[75] See p. 157, post.

[76] For strong contemporary reactions to this see Baker, *Magna Carta*, pp. 420–2. Timothy Tourneur of Gray's Inn complained privately that the king – with the support of Ellesmere – had raised his prerogative above the law of the realm, and that 'by consequence the liberty of the subjects of England will be taken away and no law practised upon them but prerogative'.

[77] See p. 178, post.

and Bacon on succeeding him took pains to restore good relations with the profession and with the judiciary. Once the dust had settled, the 1616 decree would be seen as illegal;[78] but never again did the relations with other courts become so strained that the division of functions led to any hostility. The lawyer chancellors from that time onwards concentrated on refining equity as a body of principles, and any remaining jurisdictional hardships resulted from the procedural inconvenience of having to seek equitable and legal remedies in separate courts.

Equity According to Rule

The essence of equity as a corrective to the rigour of laws was that it should not be tied to rules. If, on the other hand, no consistent principles whatever were observed, parties in like cases would not be treated alike; and equality was a basic requisite of equity. As John Selden quipped in the mid-seventeenth century, if the measure of equity was the chancellor's own conscience, one might as well make the standard measure of one foot the chancellor's foot.[79] The conundrum was an old one. St German, the anonymous 'serjeant', and Sir Thomas More, had all agreed that subjective equity had no place in a legal system. The chancellor, argued St German, must order his conscience after the common law. He could not attempt to enforce the finest dictates of conscience, for at some point litigation had to be final. Thus the Chancery would not always undo the results of deceit in lawsuits: it would not upset a false verdict in an attaint, or a wager of law tainted by perjury, or a legal fiction. In relation to uses, many of the rules applied by the Chancery had no moral content anyway; the trustee was bound by them in conscience merely because they were positive law. A case of 1522 showed that a trustee was not permitted to follow his personal conscience but was to obey his beneficiary; his conscience, like the chancellor's, was ordered by law.[80] Moreover, the acts of a supreme legislature could never be upset by recourse to conscience; statutes might be construed equitably, but they could not be disregarded in Chancery on the grounds that their effect would be unconscionable. In all these cases the only 'court of conscience' was the party's own soul.[81]

Another factor which compelled chancellors to regulate their supreme power was the sheer success of the equity jurisdiction in terms of the number of suitors which it attracted. Faced with thousands of petitions, they could not help but develop routine attitudes to commonly recurring cases. There had always been a procedural *cursus cancellariae,* a common 'course' of the court, and by the mid-sixteenth century the *cursus* was coming to embrace substantive doctrine as well.[82] In the 1590s lawyers were taking notes of what Egerton LK said in court, for future guidance, and Bacon LK in 1617 even appointed an official reporter

[78] *R. v. Standish* (1670) Treby Rep., II, pp. 458–61, 602–3; *CPELH*, III, p. 430. Cf. *Cole v. Forth* (1672) Treby Rep., II, p. 733, per Hale CJ (vexing a party in Chancery after judgment held contrary to Stat. 4 Hen. IV, c. 23).

[79] *Table Talk of John Selden* (F. Pollock ed., 1927), p. 43.

[80] *Gresley v. Saunders* (1522) Spelman Rep. 22.

[81] Cf. Y.B. Hil. 4 Hen. VII, fo. 5, pl. 8, per Fyneux sjt ('many things are to be sued here which are not remediable at common law, but some are in conscience between a man and his confessor').

[82] See *Bartie v. Herenden* (1560) B. & M. 142; p. 310, post.

to sit at his feet.[83] After 1660 Chancery cases were regularly reported. It is true that, as late as 1670, Vaughan CJ opined that precedents ought not to be cited in equity, 'For if there be equity in a case, that equity is an universal truth and there can be no precedent in it'.[84] But this was an idiosyncratic grumble. The effect of giving reasons for decisions, with a view to their being reported, was to complete the reduction of equity to a system of general principles. By 1676 a lord chancellor could repudiate the idea that equity had any dependence on his own inner conscience: 'the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures'.[85]

Thus equity hardened into a kind of law. Trusts and mortgages were governed by rules as clear as any rules of common law. In matters of contract and tort, the Chancery normally followed the law. There were few equitable torts,[86] and contracts would not be amended to make them less harsh: 'the Chancery mends no man's bargain'.[87] It could even be said in 1675, without a hint of paradox, that a contract without consideration was binding in conscience but not in equity.[88] It is true that equity remained, and still remains, more flexible than the common law, because it can take greater account of individual circumstances; for instance, remedies can be lost by delay, by the intervention of third-party interests, or by a lack of probity on the part of the plaintiff. Guidelines at first seemed more helpful than rigid rules. Some of the earliest Chancery reports had been merely collections of practice notes and dicta, and the first published book on equity was arranged around fourteen general principles of the broadest nature, such as 'Equality is Equity' and 'Equity prevents Mischief'.[89] But the preoccupation of the court with matters of property, the high intellectual capacities of many chancellors and leaders of the Chancery Bar, and the superior quality of the later reports, all combined to render equity as certain and scientific as law. Precedents were as persuasive in equity as at law, and now even the Chancery would sooner suffer a hardship than a departure from known rules.[90] The process may even have gone too far. *Rigor aequitatis* set in,[91] and equity almost lost the ability to discover new doctrines. 'Nothing would inflict on me greater pain in quitting this place,' said Lord Eldon C in 1818, 'than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot'.[92]

[83] See p. 194, post. Some of Ellesmere's dicta are now printed in 117 SS 277–338. No reports of Bacon's decisions have survived.

[84] *Fry v. Potter* (1670) 1 Mod. 300 at 307. Bridgman LK retorted, 'In them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded… It would be very strange and ill if we should distrust and set aside what has been the course for a long series of times and ages.'

[85] *Cook v. Fountain* (1676) 3 Swan. 585 at 600, per Lord Nottingham C. For Nottingham's influential chancellorship (1673–82) see Yale, 73 SS ix–cxxxi; Klinck, 28 LHR 711; *Conscience, Equity and the Court of Chancery*, ch. 8.

[86] An exception was equitable waste, for which damages were occasionally given: *Brown v. Lord Bridges* (1589) Tothill 51. The Chancery generally refused to award damages.

[87] *Maynard v. Moseley* (1667) 3 Swan. 655. An exception was the relief given against penalties: pp. 215, 346, post.

[88] *Honywood v. Bennett* (1675) Nottingham Rep. (73 SS) 214.

[89] R. Francis, *Maxims of Equity* (1727).

[90] *Galton v. Hancock* (1743) 2 Atk. 427 at 439, per Lord Hardwicke C. Cf. Bl. Comm., III, p. 440.

[91] Allen, *Law in the Making*, p. 416.

[92] *Gee v. Prichard* (1818) 2 Swan. 402 at 414.

Mischiefs of the Chancery

It is the height of irony that the court which originated to provide an escape from the 'mischiefs' of common-law procedure should in the longer term have developed procedural defects worse by far than those of the law. For two centuries before Charles Dickens wrote *Bleak House* (1852–53), the word 'Chancery' had become synonymous with expense, delay, and despair. That the court survived at all owed something to the vested interests of its officials but still more to the curious fact that expense and delay do not extinguish hope. Those landed families, if any there were, who escaped involvement with the Chancery were fortunate indeed.

The roots of the trouble were present from the beginning, since the court was not designed for the burdens it came to bear. The impossibility of trying all the factual issues in thousands of cases before a single judge, and the disfavour with which canonist chancellors had regarded oral procedure, had resulted in the gathering of evidence by officials or commissioners who examined witnesses upon interrogatories drawn by counsel. There was no opportunity for oral cross-examination, and so counsel were expected to foresee everything which might be relevant and include it in the written questions. Interrogatories consequently tended towards intricacy and prolixity. The uncertain perils of this procedure also led counsel to insert more and more evidence into the pleadings, which themselves became voluminous. The ultimate task of dealing with the mountains of parchment and paper fell on the shoulders of one man, and this was the principal cause of all the difficulties. Had the chancellor been a full-time judge, the strain would have been enormous; but the situation was worse, because he was also engaged on affairs of state, administrative matters, and presiding in the House of Lords. Not until 1885 was the heavy administrative burden eased by the creation of the Lord Chancellor's Department, headed by a principal secretary who also holds the ancient office of clerk of the Crown in Chancery.[93]

Much of the routine business was delegated to the masters, and some of the judicial business was transacted before the master of the rolls. However, as there was but one court, the master of the rolls could only sit when the chancellor was absent – often in the evening, by the light of candles. His decisions were, in any case, subject to review by the chancellor. In Tudor and Stuart times efforts were made to remove cases from the lists by referring them to lay commissioners to 'hear and end according to equity and good conscience', in effect a form of court-enforced arbitration; and from the mid-seventeenth century the court often directed issues of fact to be tried by jury at the assizes.[94] But even these devices made little impact on the ever increasing lists of unheard and part-heard cases. Chancellors were unwilling to give equitable relief until all the relevant facts were ascertained, especially since their decisions were usually final; and yet they never had the benefit of hearing a trial from beginning to end. If some fact was wanting, the only course was to adjourn; and perhaps when the cause came on

[93] See Lord Schuster, 10 CLJ 175. The department was subsequently reconstituted as the Ministry of Justice, responsible for prisons as well as the court system, and at the time of writing employs around 70,000 people.

[94] This was achieved by bringing a collusive action at law on a fictitious wager concerning the fact in dispute. See *Law's Two Bodies*, p. 52 n. 72.

again there would be more time wasted in reconstructing arguments, not to mention the possibility of new insights and doubts to cloud the issues. Throughout the seventeenth and eighteenth centuries the estimates of causes depending reached figures like 10,000 to 20,000, and the time taken to dispose of them could be as long as thirty years.[95]

The second main cause of the trouble was the dependency of the Chancery officials on the fee system. Most of the hordes of clerks were remunerated not by salaries but by fees, paid for each task they performed. Many of the fees were extortionate, if assessed objectively, and the standards of morality in taking them were somewhat flexible. Two distinguished chancellors (Francis Bacon and Lord Macclesfield) were dismissed for accepting 'presents', and yet for their subordinates gifts were almost respectable. Gold or silver could speed a litigant's passage through the Chancery morass, and by long usage many 'presents' became fees which could be demanded as of right with an untroubled conscience. The masterships had become so valuable that in the early 1700s they could be sold for as much as £5,000 each. The masters were not accountable for funds in court, and when the South Sea Bubble burst in 1725 it was found that over £10,000 was missing; it had been borrowed for investment by some of the masters. Since every step in litigation and every document attracted more fees, there was no incentive to expedition, let alone procedural reform. The six clerks received £2,000 a year for two months' work filing documents and signing copies, a labour which they delegated to under-clerks. Litigants were obliged to order, and pay for, copies they did not want and which were sometimes never made. One characteristic innovation was that which enabled masters' reports to be lengthened by reciting the whole of the previous proceedings verbatim, in a 'whereas' clause, before starting on the substance of the report. The sixty clerks charged by the page for drawing documents, and they developed such large handwriting, with such wide margins, that it was said a skilful clerk could spread six ordinary pages into forty. Attempts to reform these abuses were met with hostility and almost complete failure. Offices were freehold property, and reform was resisted as being tantamount to arbitrary confiscation.

On the other side, more than a few good words should be said of Chancery procedure, which came ultimately to prevail over 'due process of law'. The procedure of the present High Court is closer to that of the Chancery than to the more rigid system of the common law. Interlocutory proceedings before masters, the availability of discovery, the use of written testimony, trial by judge alone, most forms of relief other than damages, and the use of sequestration and receivership, all derive from Chancery procedure and were unavailable at common law. By the eighteenth century, however, the advantages were outweighed by the defects. Chancery pleadings had become verbose and complex, and the use of minutely drafted interrogatories served often to hinder rather than advance the progress of a suit. The documentation produced in many Chancery suits was elephantine, and by Lord Eldon's time the work seemed to be grinding to a halt. Eldon was lord chancellor from 1801 to 1827 and has borne much of the blame for the conditions over which he presided. He was so renowned for procrastination that his court was said to be a court of 'oyer sans terminer',

[95] The figures are skewed by the supervisory jurisdiction (e.g. administering family settlements during minorities), which by its nature was continuous.

and even he confessed on retirement that he had 'somewhat of the cunctative' in his character. The mess was by no means his creation, but his exacting judicial standards were incompatible with the load of work thrust upon him. He was against giving extempore judgments at the conclusion of arguments, because he thought that as Chancery litigation had increased counsel had become less well prepared, and therefore it fell to him to satisfy himself that nothing had been overlooked. He also disliked the semblance of dispatch which could be created by delegating issues to masters and juries; he felt this usually led to appeals and ultimately to more delay than a trial in Chancery.[96] But a one-man court could not possibly cope with all the business on that basis.[97] When, in 1824, Eldon was appointed to head a commission of inquiry into the causes of delay, the state of affairs could hardly have been worse. Even a simple matter could take five years to determine, and vast funds – £39 million, it appeared – mouldered in court, outside human dominion, the remains of undecided cases and wrecked fortunes. Appalling instances were mentioned to the commission. The case of *Morgan v. Lord Clarendon*, commenced in 1808, was still in its interlocutory stages; sixteen years had been spent on routine work, no counsel had been briefed, and yet the costs had already reached £3,719. Eldon was too resigned to the situation to perceive any obvious remedy; his report found little fault with the system, and attributed most of the delays to the carelessness or obstinacy of the parties.[98]

Reform and Abolition

Perhaps the most drastic of the nineteenth-century reforms of the judicial system, and certainly the most pressing, were those which tackled the practical evils in Chancery. The problem of judicial manpower was eased by appointing a vice-chancellor of England[99] in 1813 and two more in 1842, and by enlarging the jurisdiction of the master of the rolls. After 1833 the master of the rolls was empowered to sit concurrently with the lord chancellor in a separate Rolls Court. Still the chancellor had the final say, until in 1851 a Court of Appeal in Chancery was introduced, comprising in addition to the existing Chancery judges some additional 'justices of appeal in Chancery'. The deeper problems were addressed by the gradual abolition of most of the offices in the court. The six clerks went in 1842 and the masters in 1852, care being taken to buy out their vested interests using public funds. These officers gone, business in chambers could be streamlined, and after 1852 it was conducted – according to new rules – before the master of the rolls or the vice-chancellors and their 'chief clerks'.[100]

These measures encouraged talk of fusion between law and equity, and they prepared the way for still more fundamental reforms. Under the Common Law Procedure

[96] *Lord Eldon's Anecdote Book* (1960), pp. 130–6.

[97] For the difficulties encountered in obtaining a hearing even for a routine motion in Chancery at this period see *CPELH*, III, pp. 1498–504.

[98] A case which supports this is *Julia Caesar Forster v. Burrell*, in which the plaintiff drove her own legal advisers to the point of despair. Commenced in 1813, it was still not fully disposed of at the time of the plaintiff's death in 1850 and probably never was, most of the wrangling having been over costs: ibid. 1502–4.

[99] This title had been briefly used temp. Hen. VIII for the MR, previously known as the clerk of the rolls. The new office ranked below that of MR.

[100] The title 'master of the Supreme Court' was substituted for 'chief clerk' in 1896. Analogous officers in other divisions of the High Court were given the same title.

Act 1854 the Chancery was empowered to decide questions of law, to try issues of fact by jury, and to award damages; courts of law were empowered to compel discovery, to grant injunctions, and to a limited extent to allow equitable defences to be pleaded. The work of the various courts being thus to a greater extent assimilated, jurisdictional fusion was a relatively slight step. The step was taken in 1865 for the county courts and in 1875 for the superior courts.[101] But was fusion procedural or substantive? And, if there was to be no distinction between law and equity, should the resulting system be regarded as equity or law?

Procedural fusion was the object of the Victorian legislation. All judges of the Supreme Court of Judicature were empowered to administer law and equity, and both the Chancery and the old common-law courts were abolished. The lord chancellor ceased to sit as a judge of first instance.[102] The establishment of a Chancery Division of the High Court preserved the old name, but it merely reflected the convenience of specialization in certain fields of business, not the distinction between law and equity. The promoters of the legislation discussed fusion at a deeper level, but it was not in the event attempted. The only direct enactment was that 'in all matters . . . in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail'.[103] This was doubtless meant only to transpose the effect of a common injunction into substantive law, but its precise meaning proved elusive. Some lawyers at first thought the distinction between law and equity had been obliquely abolished, and that there was, for instance, no longer any distinction between legal and equitable estates in land. Sir George Jessel MR, the first judge to preside over the Court of Appeal, was inclined to incorporate equitable doctrines into the common law, and once suggested that damages could be given for innocent misrepresentation prior to a contract. His successor, Lord Esher MR, complained openly that Jessel 'had been sent to dragoon the Court of Appeal into substituting equity for Common Law, but that he (Esher) and his Common Law colleagues would not have it'.[104] However, it became plain, at any rate by 1897 when Lord Esher retired, that the effect of the section had been minimal. No new remedies or defences had been introduced, and equitable estates remained distinct (as they had to be) from legal estates. The truth is, as Maitland pointed out, that the wording of the subsection had been based on a complete misapprehension. Law and equity were never in 'conflict or variance', because equity was not a self-sufficient system. It was a gloss on the law. Without law there could be no equity; at every point equity presupposed the existence of common law.[105]

[101] Stat. 28 & 29 Vict., c. 99; Supreme Court of Judicature Act 1873 (36 & 37 Vict., c. 66). For an earlier example of procedural fusion see the statutes of 1696 and 1705 concerning penalties: p. 347, post.

[102] He was not formally barred from so sitting until 2005, when the previous office of vice-chancellor (abolished in 1875 but recreated in 1971) was renamed chancellor of the High Court and its holder became head of the Chancery Division: Constitutional Reform Act 2005 (c. 4), sch. 4, para. 118. There is still provision for a vice-chancellor, but no appointment has so far been made. The LC is at present concurrently secretary of state for justice, but has no judicial functions and need not be legally qualified.

[103] Judicature Act 1873, s. 25(11).

[104] A. Underhill, *Change and Decay* (1938), p. 87.

[105] F. W. Maitland, *Equity* (1909), pp. 16–17.

New attempts were made in the twentieth century, particularly by Lord Denning MR, to dissolve or blur the distinction between law and equity.[106] To the extent that they succeeded, equity took on a secondary meaning. In its technical sense it was no longer the preserve of a particular court, but in a broader sense it was an approach to justice which gave more weight than did the law to particular circumstances and hard cases. The abolition of the procedural distinction gave new emphasis to this broad view of equity. The survival of a distinct Chancery Bar, still largely domiciled in Lincoln's Inn, where the Chancery used to sit in vacation,[107] ensured the continuance of many of the specialist traditions of the Court of Chancery. But those traditions are no longer closely related to equity as distinct from law. And Chancery judges are the least likely to administer equity in the broader sense, because the type of work they do demands as much certainty as clear rules can provide. The Queen's Bench judges, in dealing with agreements and accidents, are more given to the equitable approach, having inherited it from the jury. Paradoxically, as the equity of the Chancery has hardened into law, so the law has been dissolving into something like informal equity.[108] Today, therefore, it may be said that the Chancery Division is not a court of conscience, and that 'it is the common lawyers who now do equity'.[109]

Further Reading

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[106] Sometimes illogically: *CPELH*, II, pp. 952–3.

[107] Lincoln's Inn sittings began in 1717 when the Rolls was being rebuilt, and after 1733 the LC himself regularly sat there in vacation. There is a vivid description of the court in Lincoln's Inn hall in the first chapter of *Bleak House*.

[108] See pp. 100–01, ante. See also S. F. C. Milsom, 'The Past and Future of Judge-Made Law' (1981) 8 *Monash Univ. Law Rev.* 1–14 (reprinted in *SHCL*, pp. 209–22).

[109] *Hill v. A. C. Parsons Ltd* [1971] 3 All E.R. 1345 at 1359, per Lord Denning MR. See also pp. 215–16, post.

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7

The Conciliar Courts

We have now seen how the common-law courts were derived from the early King's Council or Curia Regis, and how at a later stage the Court of Chancery separated from the Council as an extra-ordinary jurisdiction to be invoked where the ordinary course of law failed to provide justice. Even then there remained a residuary royal prerogative of justice. Petitions which were not thought appropriate for the chancellor alone to deal with were either retained in the Council, to be considered at its judicial sessions, or delegated to more appropriate officials or tribunals. In the mid-fourteenth century there was no sharp distinction between these jurisdictions, and even in the early Tudor period there was some fluidity in the relationship between them.

It was both the strength and the ultimate downfall of conciliar jurisdiction that it depended on a close connection with the king's chief ministers. A principal justification for its existence was that extraordinary action by the king himself and his magnates sometimes offered the only protection against the kind of undue influence which could corrupt sheriffs and juries. But the absolute power needed to check abuses in due process was itself open to abuse, and therefore to constitutional objection.[1] In 1510 a wave of reaction to Henry VII's avaricious ministers Empson and Dudley carried away one of the sub-conciliar jurisdictions which they had misused,[2] and a bill for total abolition of conciliar courts was rejected only at the new king's personal insistence.[3] In 1511 two plaintiffs recovered damages against opponents who had sued them before Empson, contrary to the fourteenth-century statutes of due process, and there was a flood of less successful actions in respect of conciliar jurisdiction in various forms.[4] By the end of the century the usual vehicles of attack were the prerogative writs of prohibition and habeas corpus, and these brought about further major clashes in the early seventeenth century. Nevertheless, when in 1641 conciliar jurisdiction in the old sense was swept away for ever, by statute,[5] it had been a regular feature of the English legal system for nearly three centuries.

[1] The objections began in the 14th century: e.g. Stat. 2 Edw. III, c. 8 (judges not to desist from doing justice by reason of royal letters); 25 Edw. III, stat. v, c. 4 (no one to be arrested on a petition to the Council except upon indictment or common-law process by writ); 42 Edw. III, c. 3 (similar).

[2] The Council Learned in the Law. Richard Empson and Edmund Dudley were eminent lawyers who became closely associated with oppressive new methods of raising revenue. In 1510 they were both executed for a more or less fictitious 'treason': *OHLE*, VI, pp. 582–4; Baker, *Magna Carta*, pp. 99–100.

[3] Parliament did, however, repeal a statute of 1495 which had introduced summary trial for misdemeanours: 1 Hen. VIII, c. 6.

[4] Baker, *Magna Carta*, pp. 97–100, 456–62.

[5] Stat. 16 Car. I, c. 10. Only the Privy Council was retained, for limited purposes: p. 151, post.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

The Court of Star Chamber

The best known of the conciliar courts was the Court of Star Chamber. It used to be thought that this court was established by the so-called Star Chamber Act of 1487, but that statute only set up a special tribunal to deal with particular problems of law and order; its jurisdiction was later absorbed into that of the Star Chamber, which was much older.[6] The starred chamber (*camera stellata*), so called from the gilded stars on the azure ceiling, was a room built within the palace of Westminster in 1347 and used for judicial sessions of the King's Council.[7] For over a century the 'council in the Star Chamber' was nothing other than the Council meeting in a particular place, and it dealt with state affairs (in the inner Star Chamber) as well as petitions for justice. During the chancellorship of Thomas Wolsey (1515–29) its civil jurisdiction increased dramatically, even to the extent of becoming a grievance; but it was not until 1540 that the Court of Star Chamber and the Privy Council were sufficiently distinct for separate records to be kept, and even after that the membership of the two bodies was almost identical.[8] The Privy Council which then split from the Star Chamber was a body which met in secret to discuss government policy and administration, including the enforcement of criminal law; but its only jurisdiction from the seventeenth century was of an appellate nature.[9]

The formal jurisdiction of the court was at first indistinguishable from that of the Chancery, and the procedure was closely similar. In Wolsey's time it was predominantly civil, in the sense that most proceedings were commenced by private parties; sittings were in term-time, presided over by the chancellor. Like the Chancery, the court was concerned mainly with real property, but petitioners usually added complaints of riot, unlawful assembly, forgery, forcible entry, or some other form of oppression, because it was this allegation of criminal misdemeanour which gave the court a justifiable interest in such business. Probably the allegations were often fictitious or overstated, and the court was being asked in reality to try title: a task it could not in theory undertake because of the statutes of due process.[10] A second large field of jurisdiction was the alleged perversion of justice by corruption, extortion, maintenance, champerty, perjury, subornation, embracery, and other abuses of legal procedure. There was also a general jurisdiction to punish 'errors creeping into the common wealth' which had not previously been recognized by positive law, errors as diverse as 'inveigling of young gentlemen and entangling of them in contracts of marriage to their utter ruin',[11] or drawing gullible inns of court students into murky investment schemes.[12] Although its

[6] Stat. 3 Hen. VII, c. 1; the marginal title *pro camera stellata* was an interpolation. Coke chided Francis Bacon for attributing the court to the statute, but in doing so seriously exaggerated its antiquity: Baker, *Magna Carta*, pp. 404–5; Co. Inst., IV, p. 62.

[7] A meeting there in 1366 for legal business is mentioned in *Calendar of Close Rolls 1364–68*, p. 237.

[8] The chief difference was that the chief justices of the two benches attended the Star Chamber but not the Privy Council.

[9] See p. 151, post. Its governmental function later passed to the Cabinet, a body with no legal jurisdiction or power.

[10] Stat. 25 Edw. III (sess. v), c. 4, prohibited the council from meddling with freeholds.

[11] *Lord Cavendish's Case* (undated), cited in Hudson, *Star Chamber* (1621), ed. Hargrave, p. 110.

[12] *A.-G. v. East and How* (1596) BL MS. Hargrave 26, fo. 60 (sentence of imprisonment, fine, whipping, and pillory).

procedure mirrored that of the Chancery, the Star Chamber did not develop an equity jurisprudence on the civil side, but was an extraordinary or supplementary court of law, particularly for cases with a criminal element. No clear distinction was drawn between civil and criminal procedure, save where a prosecution was brought by the attorney-general;[13] damages and a wide range of punishments could be given in the same action.[14]

The court could not try capital offences, but the law officers of the Crown found it a convenient forum for the prosecution of out-of-the-ordinary misdemeanours. The advantage to the Crown was that proceedings were begun by information and tried summarily, with no need to satisfy a grand jury and a trial jury. There was also an imaginative range of punishments to be imposed, including the slitting of noses and severing of ears. The Star Chamber therefore offered a convenient forum for prosecuting offenders who opposed unpopular policies, cases in which juries might be too sympathetic to defendants, and it was the association with political prosecutions and vindictive punishments in the time of Charles I which was its eventual undoing. But its true achievement lay in the previous century, when it often provided access to justice unavailable elsewhere. In its heyday it would punish persons in authority – even peers – for mistreating inferiors, and in 1588 imprisoned the sheriffs of London for causing two gentlewomen to be whipped as prostitutes without trial.[15] It also contributed to the development of the law of misdemeanours. Criminal libel, forgery, perjury, subornation of perjury, and attempts to commit crimes, were largely the creation of the Star Chamber. It is tempting to characterize this activity as criminal equity; but in this instance the court's 'equity' was an integral part of the common law, in that offences cultivated in the Star Chamber could be prosecuted on indictment in the regular courts.[16] The abolition of the court in 1641 did not, therefore, leave any gap in jurisprudence. Misdemeanours of a political character could still be prosecuted on information, but in the King's Bench, where they were triable by jury. And the King's Bench claimed to have inherited the function of developing the criminal law to meet new circumstances.[17] This quasi-equitable criminal jurisdiction was later supposed to have been abandoned, or rather surrendered to the legislature, in the interests of certainty.[18] The more extreme punishments were also given up, without explicit abolition.

The Court of Requests

The Council under the early Tudors found itself as over-pressed by suitors as the Chancery and relied similarly on delegation and reference. Indeed, conciliar proceedings

[13] By the mid-16th century he could commence a prosecution orally (*ore tenus*), without bill or indictment.

[14] See e.g. *Edwardes v. Woolton* (1607) B. & M. 708 (fine, damages, penance, imprisonment, and binding over, all in one suit). In *Egerton v. Brereton* (1614) there was a major dispute as to how an award of damages could be enforced: Baker, *Magna Carta*, pp. 403–6.

[15] Baker, *Magna Carta*, pp. 212, 266–9; p. 507, post. In 1594 the Star Chamber imprisoned the sheriff of Kent, and fined him 1,000 marks, for breaking into a house and seizing goods, and for accepting a bribe to return a 'reasonable' jury, and also fined a JP for granting bail to a notorious criminal: BL MS. Hargrave 26, fo. 44v.

[16] E.g. Popham CJ was reported in 1598 to be trying prisoners on circuit for attempted felonies: *Wilbraham's Diary* (4 Camden Soc., 3rd ser.), p. 20.

[17] E.g. *R. v. Edgerley* (1641) March N.R. 135 at 137 (damaging highway with large vehicles); *R. v. Sidley* (1663) 1 Sid. 168 (indecent exposure). For informations see pp. 546–7, post.

[18] Bl. Comm., I, p. 92; *Shaw v. D.P.P.* [1962] A.C. 220 at 268, 273; *Knuller v. D.P.P.* [1973] A.C. 435 at 471, 473.

often had the appearance of a compulsory arbitration process, in which parties were hauled before single councillors or referees, the adjudication being embodied in a conciliar decree. Sub-conciliar agencies of this kind were busy under Henry VII, but fell under the odium attaching to Empson and Dudley and were curtailed in the first years of Henry VIII.[19] Soon afterwards Wolsey C experimented with the revival of 'under courts' to relieve himself of minor causes when he grew weary of them; but they were not a lasting success.

The most enduring of the sub-conciliar tribunals was the Court of Requests. As a distinct department it comes to light with the promotion in 1483 of an official who had been dealing with the 'bills, requests, and supplications of poor persons' to be a 'clerk of the council of the said requests'.[20] Nevertheless there was not in the fifteenth century a court distinct from the Council, and the suits of the poor were regularly heard before the 'council attendant' which followed the king on his travels. In 1519 Wolsey established the 'king's council in the court of requests' as a stationary tribunal, meeting in the White Hall at Westminster and functioning independently of the full Council. Barristers were retained as stipendiary part-time judges to deal with the increased business. After the emergence of a separate and more select Privy Council in 1540, the Requests lost any direct connection with the Council, and the work was then dispatched by the appointment of two full-time masters of requests, augmented in 1562 by two 'extraordinary' masters of requests.

The court was originally the special responsibility of the king's almoner and dean of the chapel royal, reflecting its charitable nature, though its use of process under the privy seal led to the later supposition that it was the court of the lord keeper of the privy seal. It had in effect taken over from the Council that aspect of early Chancery jurisdiction which had given relief on grounds of poverty, and it emulated Chancery practice to the extent of becoming a court of equity with similar procedure. The court soon felt the effects of the surge in popularity of all the central jurisdictions in the Tudor period, and allegations of poverty became disingenuous as men of substance sought to take advantage of the bill procedure. But the Court of Requests had less constitutional foundation than the Chancery, especially when formal links with the Council were severed, and it was frequently complained of as an encroachment on the common law and an affront to due process. In 1595 an action was brought on Magna Carta for imprisoning a party in breach of a decree, but the Privy Council intervened to stop it.[21] After that date, despite a learned historical defence of the court by Sir Julius Caesar (then one of the masters of requests), prohibitions from the common-law courts were directed against it as a matter of course if the matter was justiciable at common law or if judgment had been given in the same case at law.[22] The court was not fatally damaged by the onslaught and even managed to survive the abolition of prerogative tribunals in

[19] See p. 126, ante.

[20] *Calendar of Patent Rolls 1476–85*, p. 413 (John Haryngton, a Cambridge law graduate). The office may have existed since the 14th century. A 'refrendarie' of the council is mentioned in 1387: Rot. Parl., III, p. 233.

[21] *Parsons v. Locke* (1595) Baker, *Magna Carta*, pp. 277–8, 484–7.

[22] The first case was *Stepneth v. Lloyd* (1598) Kiralfy, *Source Book*, p. 301; 12 SS xxxix; Baker, *Magna Carta*, p. 279. The *ratio decidendi* was narrower than Coke (Co. Inst., IV, p. 97) stated it to be.

1641;[23] but, though never abolished, it was stifled during the Civil War when the privy seal was withdrawn. Since it had developed no distinct equity jurisdiction of its own, nothing substantial was lost. The provision of small-claims courts was more sensibly tackled at a local level, since litigation at Westminster was inevitably more costly.[24]

Regional Conciliar and Equity Courts

In addition to the council which followed the king, there were in the early modern period two regional councils which exercised similar jurisdiction to the Star Chamber, Chancery, and Requests. The Council in the North Parts (meaning Yorkshire and the counties beyond[25]) originated in the time of Edward IV as the duke of Gloucester's council, but went into abeyance for some time before it was revived as the duke of Richmond's council in 1525. The Council in the Principality and Marches of Wales began as Prince Arthur's council in the time of Henry VII, and was confirmed by statute in 1542.[26] Each council met under a lord president and, by devolution from central government, transacted both judicial and administrative business. For a short time in 1539–40 there was also a Council in the West Parts (meaning the south-west).

The common-law courts kept a suspicious eye on these prerogative tribunals to ensure that they did not act *ultra vires* by meddling with the common law. The Council in the Marches was particularly troublesome during the presidency (1602–07) of Lord Zouche, whose high-handed conduct in disregarding writs of habeas corpus led Coke, while attorney-general in 1604, to write a tract on chapter 29 of Magna Carta.[27] The flow of prohibitions became a torrent during Coke's chief justiceship. Coke even denied the jurisdiction of an inferior court of equity to grant specific performance of contracts, on the ground that a defaulting party had a legal right to pay damages if he chose.[28] Both lords president complained of Coke's attempts to control them, though the Privy Council ruled that their councils 'should be within the survey of Westminster Hall'. Lord Treasurer Salisbury, according to Coke, said there was no reason why Yorkshire should be less free than, say, Cornwall; and yet there was the most miserable slavery when the law was vague or uncertain, and men's fortunes decided by discretion.[29] But the battle was not won. The councils continued to function until the Civil War, when they went into disuse. Only the Council in Wales was resurrected in 1660, by reason of its statutory foundation; but its second life was short, since in 1689 Parliament dissolved

[23] Records ceased in 1642, but the power to imprison was upheld in *Ex parte Howsden* (1645) HLS MS. 113, p. 229 (KB). Masters of requests were appointed at the Restoration, but they exercised no jurisdiction.

[24] For urban courts of requests see p. 131, ante.

[25] With the exception of Lancaster and Durham, which had their own courts (including chanceries) as counties palatine.

[26] Stat. 34 & 35 Hen. VIII, c. 26. Arthur (d. 1502), eldest son of Henry VII, became prince of Wales in 1489 at the age of 3; there was no prince of Wales between 1509 and 1610. Until 1604 the council exercised jurisdiction in Herefordshire, Worcestershire, Shropshire, and Gloucestershire, but it was then held that they were outside its bounds: *Farley v. Holder* (1604) Co. Inst., IV, p. 242; Baker, *Magna Carta*, pp. 305–7.

[27] Baker, *Magna Carta*, pp. 302–11, 500–10; *Whetherly v. Whetherly* (1605) ibid. 511–16.

[28] *Bromage v. Genning* (1616) 1 Rolle Rep. 368. The decision was overturned later in the century. For other conflicts temp. Coke CJ see Baker, *Magna Carta*, pp. 379–89.

[29] *Case of the Lords President of Wales and York* (*c*. 1608) 12 Co. Rep. 50.

it as being 'contrary to the Great Charter, the known laws of the land, and the birthright of the subject, and the means to introduce an arbitrary power and government'.[30]

Equity jurisdiction was also exercised in the three palatinates, where the equity courts were not connected with the central king's council but followed a similar course,[31] and in the Duchy Chamber of Lancaster.[32]

The Courts of the Admiral and Marshal

The courts of common law could not properly entertain causes of action arising outside the realm, because of the rule that an issue of fact had to be tried by a jury from the place where it was alleged to have occurred, and a jury could not be summoned from outside an English county. Ordinary justice ended where the power of the sheriff ended.[33] This gap in the system of justice was closed by the extraordinary jurisdiction of the Council. The Council needed no juries, its jurisdiction was *in personam*, and the speed of its process made it easier to deal with transient parties such as seamen or foreign merchants. By the middle of the fourteenth century it had allowed its extraterritorial jurisdiction to be exercised in all but the most difficult cases by the two sister courts of the admiral and of the constable and marshal.[34] These two specialized tribunals became courts of regular resort, both following Civil law procedure, and under the influence of the doctors of law they enjoyed a history wholly distinct from that of the other conciliar courts.[35] The jurisdiction was nevertheless not as exclusive in practice as the theory of venue dictated, because even in medieval times overseas actions were occasionally tried at common law by means of a fictitious supposition that the foreign place was in England. If the plaintiff said that a contract was made at Calais in Kent, it was not for a court to pronounce that there was no Calais in Kent, which was a question of fact; and it was not open to the Kentish jury to find that the contract, though made in Kent, was not made at Calais, because the place was in law immaterial. It was a different matter if other courts tried to encroach on the common law using analogous devices; they could be curbed by writs of prohibition.

The Court of the Constable and Marshal

The Court of the Lord High Constable and Earl Marshal of England came to prominence in the middle of the fourteenth century[36] as a court having jurisdiction over military

[30] Stat. 1 Will. & Mar. (sess. i), c. 27, s. 2. Cf. the Welsh Assembly created by the Wales Act 1978 (c. 52).

[31] The equity courts were: the Chancery of Durham, the Chancery of the County Palatine of Lancaster (presided over by the vice-chancellor), and the Exchequer of Chester (presided over by the chamberlain). The last was abolished in 1830; the other two flourished until 1971 (Courts Act 1971, c. 23, s. 41).

[32] The duchy was not a county palatine, but the Duchy Chamber (presided over by the chancellor of the duchy) came to exercise an equitable jurisdiction over duchy tenants.

[33] See p. 35, ante.

[34] From the 17th century relief was sometimes given in Chancery in respect of land outside the realm, since that was outside the jurisdictions of the admiral and marshal: e.g. *Arglasse v. Muschamp* (1682) 1 Vern. 75 (land in Ireland); *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444 (land in America).

[35] For the profession of doctors of law see pp. 180–1, post.

[36] It had antecedents in the military courts which followed the king's host on active service and held 'pleas of the army' (*placita exercitus*). For the later history of martial law within the realm see Baker, *Magna Carta*, pp. 430–1; *OHLE*, VI, pp. 216–19.

matters as diverse as treason, prisoners of war, ransom, contracts with sutlers, and disputed coats of arms. Its attempts to assert a wider common pleas jurisdiction were restrained by statutes of Richard II, after which it was confined to 'deeds of arms and war' and appeals of treason or felony committed overseas. Because of these strict limitations, and because for political reasons the high office of constable of England was suppressed in the sixteenth century, the court went into abeyance. In 1582 Elizabeth I refused to appoint a constable ad hoc so that an appeal of murder could be brought against the sea-captain Sir Francis Drake,[37] and the court rarely sat again.[38] The court has understandably been confused with that belonging to the earl marshal alone. This *Curia Marescalli*, or High Court of Chivalry, was revived by James I as a court of honour which not only tried the right to distinctions of honour, precedence, and coat armour, but also redressed affronts to honour such as slander. The slander jurisdiction was later denied,[39] leaving it with a jurisdiction confined to disputes over armorial bearings, determinable according to the law of arms. The court, which has sat only once since 1737, is the last English court to use the procedure of the Civil law.[40]

The High Court of Admiralty

The Court of the Lord High Admiral of England appeared at the same period as its terrestrial counterpart, to deal with matters arising on the high seas. Unlike the constable's court, it was not restricted to causes connected with warfare, and it was much resorted to by merchants. But it also encroached in its early days upon the common law and had to be restrained by statute from hearing matters arising within the realm, whether or not they concerned the sea.[41] The court was presided over by a judge of the Admiralty, usually a doctor of law, and proceeded according to the Civil law, under which process could issue against ships and goods as well as against persons. The law which it applied was based on the *jus gentium*, or universal law of the sea, which was partly derived from the ancient Rhodian sea law and the 'customs of Oleron'.[42]

The Admiralty was watched by the common-law judges with the jealousy and suspicion which they bestowed on all jurisdictions associated with Civil lawyers. In the fifteenth century actions were allowed in the two benches against adversaries who sued in Admiralty contrary to statute, and during the sixteenth century prohibitions rained on those who stepped over the boundary. In 1536 the criminal jurisdiction was by statute turned over to the common law, so that pirates and other marine criminals could be tried by jury under special commissions of oyer and terminer. By 1600 the admiral's

[37] *Doughty's Case* (1582) Coke's notebook, 135 SS, no. 33. Drake had ordered the execution of Thomas Doughty while at anchor in Argentina.

[38] A notorious exception was *Lord Rea v. Ramsey* (1631) 3 St. Tr. 483, an appeal of treason in which battle was waged but not fought.

[39] *Chambers v. Jennings* (1703) 7 Mod. Rep. 125.

[40] *Manchester Corporation v. Manchester Palace of Varieties Ltd* [1955] P. 133. Lord Goddard LCJ sat as surrogate of the earl marshal.

[41] Stat. 13 Ric. II, sess. i, c. 5; 2 Hen. IV, c. 11.

[42] These were sea-laws codified in the name of Eleanor of Aquitaine, queen of Henry II, and later copied into the Black Book of the Admiralty. Oléron is an island in the gulf of Gascony, then part of the duchy of Aquitaine.

civil jurisdiction was at a low ebb. According to the Elizabethan judges, the Admiralty could not try maritime causes arising on land in England or beyond the seas, but only causes arising on the sea.[43] This restrictive view excluded charterparties, marine insurance, and other maritime contracts, which the common law had taken over. The court was left to deal with seamen's wages, which were earned at sea, collision, salvage, and prize.[44] The Civilians retaliated with fiction, allowing allegations that maritime contracts were made upon the high seas when in truth they were not. In 1633 the Privy Council directed a settlement of the dispute, under which the Admiralty was to be allowed actions for freight and actions to enforce charterparties relating to overseas voyages or maritime contracts made on foreign soil.[45] This settlement did not last, however, and by the end of the century the common law had succeeded in depressing the Court of Admiralty to an even worse condition than in Tudor times.

The court revived somewhat during the Napoleonic wars, when the prize jurisdiction benefited from British naval successes. A number of statutes after 1840 extended the Admiralty's competence so that it could entertain all maritime matters except charterparties, and the value of such a specialized tribunal was recognized in 1875 when it was incorporated into the Probate, Divorce and Admiralty Division of the High Court. The president of that division used to sit with the silver oar of the Admiralty before him when trying maritime cases. But Coke's final victory came in 1970, when the division was abolished and all admiralty business transferred to the Queen's Bench Division.[46]

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[43] This was exclusive of the foreshore above low tide: *R. v. Lacy* (1583) 2 Co. Rep. 93 (murder on Scarborough Sands); *Constable's Case* (1601) 5 Co. Rep. 106 (wreck); p. 35, ante.

[44] Prize, from the past participle of the French verb *prendre*, is the right to a share in the proceeds of enemy ships and cargoes seized at sea.

[45] *Memorandum* (1633) Cro. Car. 216.

[46] Administration of Justice Act 1970 (c. 31). The silver oar is still displayed during Admiralty sittings.

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P. Polden, 'The Court of Admiralty' [1820–1914] (2010) in *OHLE*, XI, pp. 714–32

8

The Ecclesiastical Courts

At much the same time as the common law of England was being fashioned through the centralization of royal justice, the universal law of the Church was developing as a parallel but wider system of jurisprudence through the centralization of ecclesiastical authority in Rome. Already by the twelfth century there was a mass of rules and pronouncements made by the Church and circulating in collections of 'canons', but no clear distinction was made between theology, jurisprudence, governance, and discipline. Canon law became a system of thought distinct from theology chiefly through the work of the Bolognese law-teacher Gratian, under the influence of ancient Roman law. Gratian's *Decretum*, or *Concordance of Discordant Canons* (*c*. 1140),[1] set out to systematize the canons and their underlying principles in accordance with a hierarchical scheme of authority, with the bishop of Rome (the pope) as the spiritual counterpart of the emperor at the earthly summit. The pope was the supreme legislator and judge. Whatever he decreed was to be obeyed, however intolerable or wrong; if he erred, the divine punishment would be his, and the obedient would have to rely on posthumous forgiveness. The study of this new system of law became all the rage in medieval European universities, and a network of courts developed to cope with the litigation which its study fuelled. Numerous questions found their way up to the popes for decision, and the papal answers to these forensic questions, contained in letters called 'decretals', provided additional material for study. Decretals were in a sense case-law, giving reasoned answers to real-life questions,[2] but since they emanated from the supreme declaratory authority they had the force of legislation. By the fourteenth century there was a substantial corpus of them, comprising the Decretals of Pope Gregory IX (1234),[3] the Sext (1298), and the Clementine Decretals (1305–14); to these were later added the *Extravagantes* of Pope John XXII (1316–34) and the *Extravagantes Communes* (*c*. 1300–1480).[4] These five collections, together with Gratian, constituted the body of canon law (the *Corpus Juris Canonici*).[5] Additional legislation was enacted in England by provincial councils summoned by the archbishops of Canterbury, and this English

[1] There were at least two redactions, the last perhaps in the 1150s, in which more Roman law was introduced and a greater deference to papal authority: see A. Winroth, *The Making of Gratian's Decretum* (2004).

[2] They were not judicial decisions which disposed of a case but authoritative solutions to guide the bishop who sent up the question. This distinction proved material in *Anstey c. Francheville* (1158–63) 107 SS 387 at 396–7; p. 530 n. 85, post.

[3] This retrospective collection contained some English cases from the 12th century, including an important case concerning marriage: see p. 517, post.

[4] Unofficial collections wandering outside (*extra vagantes*) the official editions. There was no standard text until they were printed in the early 16th century.

[5] The Roman Church made substantial alterations to the *Corpus Juris Canonici* at the Council of Trent in the mid-16th century, and abandoned it altogether in 1918. The medieval *Corpus Juris Canonici* still has a theoretical residuary authority in the Church of England, though little of it is still applicable.

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supplement to the canon law was sufficiently consequential to acquire its own academic commentaries.[6]

As far as England was concerned, there had been a time (before the twelfth century) when bishops wielded their spiritual authority without the aid of a distinct system of courts, through the shires and hundreds. The bishop attended the shire court, alongside the sheriff, in order to deal with any ecclesiastical business.[7] William I ordered in the 1070s that pleas of bishops and archdeacons should not be heard in the hundred courts, but that the power of the king and the sheriff should be available to compel appearance before the bishop himself. This was intended to prevent the corrective jurisdiction of the Church from passing with the hundreds into lay hands. The separation of ecclesiastical and lay pleas at county level was not completed until the next century. As with the royal courts of the same period, there is no distinct event to record. Bishops exercised their authority in different ways, and one intermediate stage between the county and the settled courts of later times was the synod.[8]

By the end of the twelfth century, however, under papal dominance, the Church and its legal administrators had constructed a transnational hierarchy of tribunals with the Roman Curia at its apex. The courts of the English Church were accommodated within this system. At the lowest level, archdeacons had criminal courts for the correction of moral and disciplinary offences; appeal lay from archidiaconal courts to episcopal 'courts of audience'. The bishops also had their 'consistory courts', presided over by chancellors learned in canon law,[9] which heard lawsuits such as matrimonial, probate, and defamation cases. From bishops appeal lay to the courts of the archbishops: in the province of Canterbury to the Court of Arches,[10] and in its northern counterpart to the Chancery Court of York. From these provincial courts appeal lay either to papal delegates or to the papal audience court, usually known from the fourteenth century as the Rota.[11] The audience court was reconstituted under Pope John XXII in 1331, at which time it was composed of doctors of law selected from all over Europe, sitting in the palace at Avignon. A prominent papal auditor in the formative years was William Bateman, bishop of Norwich and founder of a law college at Cambridge; either he or his Cambridge protégés began the tradition of reporting cases at Avignon, and these reports (*decisiones rotae*) added to the conciliar legislation, the decretals, and the doctrinal literature of the academic decretists, a body of judicial case-law.[12]

[6] Principally John of Ayton's gloss, written in Cambridge *c*. 1330, and William Lyndewode's *Provinciale*, written by another Cambridge professor *c*. 1440.

[7] It was reported that Wulfstan (d. 1095), bishop of Worcester, used to doze off when secular business was being discussed: *Gesta Pontificum Anglorum* (M. Winterbottom ed., 2007), I, p. 429.

[8] See C. Morris, 82 EHR 449.

[9] The judge of the consistory court is properly called the bishop's 'official principal', but 'chancellor' became the more common title. See 2 Eccl. L.J. 383.

[10] So called because it sat in the church of St Mary-le-Bow, in London, which is built over arches.

[11] So called from the wheel-shaped arrangement of the auditors' benches in the great hall of justice at Avignon.

[12] The earliest *decisiones rotae* in print are those of Dr Thomas Fastolf, taken in 1336–37, published in 1475: *CPELH*, II, pp. 569–82. The reporter was a brother of Nicholas Fastolf, serjeant at law.

Canon Law and Common Law

The canon law of the Western Church was taken to apply to all Christians in all places, and nearly all people in England were (or were deemed to be) Christians;[13] but its enforcement in the terrestrial world depended on the co-operation of temporal authorities, and the degree of co-operation varied from one country to another. No English king, or royal judge, would have dreamed of disputing the spiritual authority of the Church. Papal administrative authority and ecclesiastical jurisdiction were also acknowledged, but they were more difficult to accept absolutely, especially since some popes claimed temporal as well as spiritual power, and there was considerable room for argument as to what matters were spiritual and what temporal. There was therefore a potential conflict of laws, caused by the existence of two legal systems with different sovereigns operating within the same geographical territory.

The first major clash arose in the 1160s over the immunity claimed by the clergy from secular criminal jurisdiction. After stormy debates, the king's council at Clarendon in 1164 agreed to a compromise. Clerks in orders accused of serious secular crimes would be arraigned before the temporal court; if they proved their clerical status, they would be handed over for trial to the bishop; if convicted, they would be deprived of their clerical orders and returned to the lay court for punishment as laymen. This sensible settlement, which was consistent with statements in Gratian and with English custom, and accepted by most of the bishops, fell foul of a personal dispute between King Henry II and Thomas Becket, the troublesome archbishop of Canterbury. Becket produced two theological objections. One was that the clergy were completely immune from all temporal authority; but this was disposed of by the proposal to withdraw clerical status, in accordance with canon law, from felons convicted by the Church. The other was that the scheme would involve an improper double punishment. For this Becket cited a biblical prophecy, 'God will not adjudge twice on the same matter'.[14] But this ancient Middle Eastern text had nothing to do with human justice, or double jeopardy, let alone double punishment, since it was about the finality of God's judgments. And Becket's argument rested on the questionable assumption that a deprivation of status could not properly be combined with punishment for crime.[15] That the Church should have sought such a privilege for priests who were murderers, rapists, and thieves now seems self-serving and shameful, but Becket's assassination in 1170 by a covert military operation earned him a martyr's crown and the Church succeeded in making him England's most prominent saint. The papal view on clerical immunity hardened after this episode, and the clergy secured their privilege in English law, though it was later to be secularized (with episcopal support) by extension to laymen and eventually women.[16]

[13] The only exceptions of significance in medieval England were the Jews, until they were expelled in 1290. They were readmitted under an Order in Council of 1654.

[14] Nahum, i. 9 (translated from the Latin version of the Septuagint). The obscure prophet was warning of God's supposed jealousy: slow to anger, his retribution against non-believers would be so final and destructive as to leave no room for reprieve.

[15] No one suggested in the case of laymen that corruption of the blood and forfeiture of property for felony, which were additional to the loss of life, were invalid as double punishment. Nor did the Church have qualms about the degradation and burning to death of heretical clergy.

[16] For its bizarre secular role in the history of English criminal law see pp. 554–7, post.

On the other hand, Becket's posthumous victory was limited to the protection of criminous clergy. He did not secure the exemption from civil justice which the clerical class enjoyed in other parts of Europe,[17] or the exclusive jurisdiction which he had sought in other areas of dispute.[18]

Further direct conflict was generally avoided, and jurisdictional disputes were fought out instead between private litigants in particular cases. The means was the royal writ of prohibition, whereby a party could seek to prevent litigation in an ecclesiastical court by the threat of fine or imprisonment for contempt. The party's opponent might retaliate by setting in motion the process of excommunication. But these weapons were wielded by subjects, not by Church and State; and among the keenest seekers of prohibitions in the early days were the clergy themselves.

The issue of writs of prohibition as a matter of course, on a bare application being made, was much complained of by bishops in the thirteenth century. The wrangle ended in a compromise when King Edward I conceded a procedure (called 'consultation') by which a prohibition could be withdrawn if the adverse party satisfied the king's judges that the cause was spiritual. The decision as to what matters were spiritual was still reserved to the king and his judges. Written clarification of the boundaries, in the writ *Circumspecte agatis* (1286)[19] and the *Articuli cleri* (1315), gave the Church courts an unassailable jurisdiction over heresy, marriage and bastardy,[20] testate and intestate succession to personal property,[21] and punishment of mortal sins, such as fornication, adultery, or gluttony. Heresy – the rejection of theological orthodoxy – was punished with death by burning, the sentence of the Church being carried out by the sheriff.[22] The more serious worldly crimes, such as murder and theft, were reserved for the royal courts as pleas of the Crown (subject to benefit of clergy). Church land was only excluded from temporal jurisdiction if it had been given 'in free, pure, and perpetual alms', without any form of feudal service to the lord; if the status of land was in dispute, it was tried before royal justices by the assize *utrum*.[23] The appointment of clergy to benefices was for the bishop; but patronage, the right to nominate a clerk for such appointment, was a temporal property right (an 'advowson') justiciable in the royal courts.[24] Questions as to tithes, the principal income of benefices,[25] were subject to a

[17] In the 1370s the Rota proclaimed that the English 'custom' of subjecting clergy to the law of the land was illegal: W. Ullmann, 13 *Studia Gratiana* 453. This was not for the Church to decide, and the decision was ignored in England.

[18] E.g. disputes about advowsons remained (and still are) within the jurisdiction of the secular courts: Constitutions of Clarendon, cl. 1; p. 253, post.

[19] Regarded later as a 'statute', this was merely a letter of guidance to some of the judges, advising them to 'tread warily' when investigating ecclesiastical jurisdiction.

[20] See pp. 510–11, 517, 528, post.

[21] See pp. 411–12, post.

[22] See p. 510, post. The authority to burn people was not clear in England until 1401.

[23] This was introduced by the council at Clarendon in 1164. For *utrum* see S. E. Thorne, 33 *Columbia Law Rev*. 428; E. G. Kimball, 43 EHR 341; A. W. Douglas, 53 *Speculum* 26. For free alms see Douglas, 24 AJLH 95.

[24] The bishop could not lawfully fill a vacancy except upon the nomination of the patron. For the patron's remedies see p. 65, ante; p. 253 n. 55, post.

[25] A rector was entitled to one tenth of the annually renewing produce (e.g. crops) in his parish. Many rectories (with the tithes) were appropriated by monasteries, who appointed vicars to perform the duties. After the Dissolution of the Monasteries in the 1530s the appropriated rectories, with the tithes, passed into lay hands as 'lay rectories'.

troublesome division of authority; but the common law (and from Tudor times the equity side of the Exchequer) increasingly took them over.[26] Contracts and debts were for the temporal law; but 'breach of faith' was a sin which could be corrected by penance in the spiritual courts.[27] Two torts were allowed to the Church courts: laying violent hands on a clerk,[28] which was concurrently a breach of the king's peace, and defamation, which was not actionable at common law until the sixteenth century.[29] In each case the remedy was penance, not civil compensation; but in practice a civil remedy could be achieved by allowing commutation of the penance on terms.

This settlement gave the Church a pervasive jurisdiction over the lives of most ordinary people: over family matters, wills, sexual misbehaviour, and defamation. The king's courts retained exclusive control over temporal property, including advowsons and much of the land owned by Church institutions, and were resorted to extensively by bishops, monasteries, and other ecclesiastical bodies, when pursuing their considerable temporal rights. In case of conflict, the king's law prevailed. Parliament legislated in the 1350s against papal interference with advowsons,[30] stating that 'the Holy Church of England' had been endowed with benefices by kings and nobles within the realm, and that these were protected by the law of the land against meddling by the bishop of Rome. Further legislation, reinforced by the Statute of Winchester (1393), prescribed severe penalties for drawing out of the realm any plea belonging to the king's court, and this was held to extend to actions brought in Church courts within England for temporal matters, since these were similarly in derogation of the Crown.[31] The courts also explored difficulties over the status of the pope: he was recognized as having supreme authority to expound the canon law, but not as a bishop to whom the court could send writs. A papal excommunication was for that reason treated by the English royal courts as invalid.[32]

The two systems of temporal and spiritual law were not hermetically sealed off from each other, but direct influence of Church lawyers on the common law was minimal. The medieval common lawyers were aware of some basic principles of canon law, for instance in relation to marriage, and they could see in academic legal writing the model of a coherent body of jurisprudence, heavily influenced by Roman law. They had enough contact with canonists in the early days to borrow some of their terminology,

[26] When tithes when 'separated from the nine parts' the rector could bring trespass for taking them. After a statute of 1549 (2 & 3 Edw. VI, c. 13) the rector could bring debt for failing to set them out. The manner of tithing (*modus decimandi*) could be varied by local custom or by agreement (a 'real composition'), and disputes as to such a custom or contract also fell within the common-law jurisdiction.

[27] R. H. Helmholz, 91 LQR 406. It was not an extensive jurisdiction.

[28] R. H. Helmholz, 8 *Monumenta Iuris Canonici* (Series C: Subsidia) 425.

[29] See ch. 25. The ecclesiastical jurisdiction here was peculiar to England, and was based on a constitution of the Council of Oxford 1222.

[30] Statute of Provisors (1351), 25 Edw. III, stat. iv. The pope had been taking over church livings to use as rewards, often for absentee foreigners; this was called 'provision'.

[31] 27 Edw. III, stat. i; Stat. Winchester (1393), 16 Ric. II, c. 5, as interpreted in the 15th century (Y.B. Mich. 5 Edw. IV, fo. 6, pl. 7). Parliament also authorized a prohibition for tithes of timber, even though such tithes were allowed under the canon law: Stat. *De Silva Caedua* (1371), 45 Edw. III, c. 3.

[32] *Seton v. Cokeside* (1358) Y.B. 30 Edw. III, Lib. Ass., pl. 19 (misdated); *Anon.* (1413) Hil. 14 Hen. IV, fo. 14, pl. 4; *Sondes v. Pekham* (1484) Mich. 2 Ric. III, fo. 4, pl. 8. The inability to correspond with the pope by writ would deprive the party of a regular means of absolution.

such as 'equity' and perhaps even 'common law' itself,[33] and they liked to cite Latin maxims derived from canon law (and from Roman law) where they captured a universal principle; but the few borrowings were adapted for their own purposes, without the appendant doctrine. Canon law was taught only in the universities, not in the law schools of the common law. To judges, serjeants, and barristers it was 'their law' (*lour ley*), not ours [34] – a clerical preserve, remote from the secular world of Westminster Hall. When the courts were required to take notice of the other law for judicial purposes,[35] they would hear argument at the bar from doctors of law; it was 'no part of our learning'.[36]

Effect of the Break with Rome

By the end of the fifteenth century the uneasy peace between the two jurisdictions was under strain. The King's Bench was receiving a stream of actions brought on the Statute of Winchester against parties who had sued in ecclesiastical courts concerning matters which overlapped the jurisdictional boundary.[37] There were frequent complaints of avarice and extortion by Church officials, of uncertainties and delays, and of the unfairness of the inquisitorial procedure in heresy cases. The affair of Dr Standish in 1515, and the murder of Richard Hunne in the bishop of London's prison the same year, drove anti-clericalism to a new height, especially among lawyers in the House of Commons and inns of court.[38] When the archbishops sought to defend the allowing of clerical privilege to laymen for murder, Henry VIII warned them, ominously, that the kings of England had no superior but God and that he would see his temporal jurisdiction maintained.[39] Pamphleteers such as St German argued that the king's law tolerated the ecclesiastical jurisdiction only on trust, and that if the trust was abused the liberty was forfeitable like any other. In 1529 the most powerful prelate in England, Thomas Wolsey, lord chancellor, archbishop of York, cardinal of St Cecilia trans Tiberim, and papal legate *a latere*, was condemned by the King's Bench on his own confession for improperly using his legatine authority contrary to English law. The precedent enabled the king's advisers to bring the rest of the clergy to heel, and prepared the way for the legal revolution effected by Parliament. A separate issue of state had occasioned the ultimate crisis;[40] but the issue was argued in legal terms, and the manner of its resolution was a culmination of earlier legal developments.

[33] See p. 33 n. 99, ante (*jus commune*).

[34] For a reference to 'lour ley' in 1308 see 17 SS 36, pl. 5. For contrasts between 'lour ley' and 'nostre ley' see e.g. Y.B. Hil. 14 Hen. IV, fo. 14, pl. 4, per Hankford J (1414); Pas. 34 Hen. VI, fo. 39, pl. 9, per Danby J (1456).

[35] If it was in issue, the judges had to take judicial notice of it because there was no formal means of certifying to them what it was: *Bohun v. Broughton* (1456) Y.B. Pas. 34 Hen. VI, fo. 39, pl. 9, per Moyle J. See also *OHLE*, VI, pp. 238–9.

[36] Y.B. Trin. 12 Hen. VIII (119 SS), p. 23, pl. 4, per Newdegate sjt.

[37] *OHLE*, VI, pp. 241–4.

[38] Standish was prosecuted for heresy after questioning the abuse of benefit of clergy by laymen. Hunne was prosecuted (and burned posthumously) for heresy after challenging the right of a parish priest to seize his deceased son's winding-sheet as a mortuary present.

[39] *Dr Standish's Case* (1515) 116 SS 683 at 691. This was almost 20 years before the break with Rome.

[40] For the king's divorce see pp. 532–3, post.

From January 1534 the Church of England was severed from Roman authority, appeals to the pope's courts were forbidden, and the king was declared the 'supreme head' on earth of the Church.[41] This did not mean that the Church of England was a breakaway church. It was still the ancient *Ecclesia Anglicana* whose liberties were guaranteed by Magna Carta, a part of the 'one holy catholic and apostolic Church' mentioned in the creed,[42] but freed from the dominance of 'the see of Rome or any other foreign courts or potentates of the world'. Some common lawyers advocated abolition of the Church courts at the same time, but that would have required a fusion of canon law and common law. Some kind of fusion was seriously contemplated. The king was empowered by statute to appoint a law commission to edit and abridge the ecclesiastical laws as they applied in England, and to recommend the abrogation of those which should no longer be followed. In the meantime the old canon law was to continue in operation, except where it was contrary to common or statute law or the king's prerogative. Since the codification never materialized,[43] the transitional provision slipped into permanence and is still in force.

Henry VIII suppressed the study of canon law at Oxford and Cambridge, so that the judges and advocates in the ecclesiastical courts would thereafter be doctors of Civil law and laymen. Nevertheless, the doctors preserved the cosmopolitan learning of the canonists, and the long survival of the wider jurisdiction of the Church is partly attributable to the existence of this small but persistent profession.[44] The Civilian advocates continued to keep abreast of current continental literature, even though produced by authors adhering to the pope.[45] But the English ecclesiastical courts, with their staple business of family and probate law, were well distanced from the theological debates attending the Reformation and the rise of Protestantism, and generally escaped alteration. The chief effect of the break with Rome in the juridical sphere was the introduction of two new courts to replace the extraterritorial papal courts. The regular appellate court was to be the Court of Delegates, which took over the jurisdiction of papal legates; the statutory delegates were a mixture of temporal judges and doctors of law, appointed by ad hoc by commissions from the Chancery.[46]

Papal supremacy was briefly restored under Mary I (r. 1553–58), but in 1559 all ecclesiastical jurisdiction was 'for ever united and annexed to the imperial crown of this realm' by Parliament, and Elizabeth I was authorized to issue commissions to exercise it with special reference to heresy, schism, and 'enormities'.[47] The original purpose of the commissions was not to replace the ordinary episcopal courts but to weed out the

[41] Stat. 24 Hen. VIII, c. 12; 25 Hen. VIII, c. 19. The legislation proclaimed that 'this realm of England is an empire…governed by one supreme head and king', in ecclesiastical as well as temporal affairs. This was regarded as merely declaratory, since kings had always exercised a temporal authority over the Church in England: see Baker, *Magna Carta*, pp. 220–1. But the controversial title 'supreme head', in relation to the Church, was changed to 'supreme governor' by Elizabeth I.

[42] As to the apostolic succession of the Anglican bishops after 1558 see 109 SS lxviii.

[43] A commission was finally appointed, under new statutory powers, in 1551; but its report was shelved.

[44] See pp. 180–1, post.

[45] E.g. English procedural writers frequently cited the procedural manual of the Inquisition (1595): Helmholz, *Roman Canon Law in Reformation England*, p. 146. The treatise on matrimony by the Spanish Jesuit Tómas Sánchez (1602) was also received as a standard work in England.

[46] For the court's history see G. I. O. Duncan, *The High Court of Delegates* (1971).

[47] Stat. 1 Eliz. I, c. 1.

bishops and clergy who had adhered to Rome in the time of Mary I, without resorting to the death penalty for heresy which they had promoted with fearsome savagery.[48] But the 'High Commission' became a permanent institution, a wide-ranging spiritual Star Chamber exercising jurisdiction in all manner of cases over the laity as well as the clergy. Some thought its jurisdiction derived entirely from the statute of 1559, others that it rested also on the royal prerogative. On either view, its enlarged role was controversial. It put defendants to undue expense by not sitting locally, and locked them up if they did not cooperate. There was no appeal from its decisions. And it was much hated for its use of the oath *ex officio*, whereby people could be driven to incriminate themselves under expert questioning. All this seemed too reminiscent of the tyrannical ways of the past, and the fierce disputes over its jurisdiction were largely responsible for the revival of interest in Magna Carta in the 1580s and 1590s.[49]

The Church courts, like all others, experienced a boom in the sixteenth and seventeenth centuries, and there was a corresponding boom in writs of prohibition to keep them in check.[50] More troubled times, however, brought some reform. In 1641 the Long Parliament abolished the High Commission and the criminal jurisdiction of the other ecclesiastical courts.[51] The High Commission was never revived, and the punishment of minor offences by archdeacons' courts (though revived in 1661) passed de facto in the eighteenth century to the justices of the peace. The staple business of the consistory courts continued to be probate and family law, together with defamation.

Nineteenth-Century Reforms

By the nineteenth century what still remained of the Church's jurisdiction was becoming indefensible. It was absurd in a plural society that Jews and Dissenters, or Roman Catholics, should have to use the court of a Church of England bishop if they wanted a legally recognized divorce or probate of a will. Moreover, there was widespread dissatisfaction with the workings of the Church courts and their antiquated procedures. An Ecclesiastical Courts Commission was appointed in 1830 to look into the matter. Its first recommendation was the abolition of the Delegates. The procedure for issuing commissions to delegates had proved dilatory and expensive, and they were commonly issued to less experienced advocates so that their seniors could earn the fees for arguing the cases. Parliament responded immediately by transferring the final appellate jurisdiction in English ecclesiastical law to the Privy Council, where it has remained ever since. This had the odd consequence that some controversial questions in the 1850s and 1860s about ritual, ornament, and even doctrine, fell to be decided by a largely lay

[48] Heresy was not abolished, but it was much restricted and the judges were unwilling to see it revived. No Roman Catholic was executed for heresy after the break with Rome. See p. 511, post.

[49] Baker, *Magna Carta*, pp. 133–43, 159–61, 258–60, 270–5. The pioneering study by R. G. Usher, *The Rise and Fall of the High Commission* (1913), contains useful information but largely ignores the legal sources.

[50] For tussles temp. Coke CJ, especially in relation to the oath *ex officio*, see Baker, *Magna Carta*, pp. 289–98, 353–75, 429–30.

[51] For the abolition of powers of punishment see further p. 511, post. Some of the matrimonial jurisdiction was transferred during the 1650s to lay magistrates: p. 520, post.

body.[52] At the other end of the judicial system, the Commission drew attention to the problems arising from the existence of local 'peculiar' jurisdictions, which were inadequately staffed with either judges or counsel. The Commission favoured the consolidation of all ecclesiastical courts, the introduction of jury trial, the extension of rights of audience to barristers, and the abolition of the remaining criminal and defamation jurisdiction. On the other hand, it urged the retention of the probate and matrimonial jurisdiction, the former in particular because its removal would ruin the proctors and clerks without any corresponding public benefit.[53] The commissioners omitted to address the difficulties faced by members of other faiths and denominations. Yet even their restrained proposals, which had bipartisan support, failed to pass when they were introduced in Parliament in 1835, and the ecclesiastical courts continued in their unreformed state for another twenty years. The inevitable final solution began with abolition of the Church's defamation jurisdiction in 1855, and in 1857 the family law and probate business was transferred to statutory secular courts.[54] Since that time the jurisdiction of the ecclesiastical courts has been confined to Church matters properly so called, such as the granting of faculties to alter or sell consecrated property and disciplinary proceedings against clergy.

Further Reading

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R. M. Fraher, 'The Becket Dispute and the Two Decretist Traditions' (1978) 4 *Jo. Medieval Hist.* 347–68

[52] E.g. in 1863 the Privy Council held it lawful for a clergyman to believe that God might reprieve the wicked from eternal damnation: *Fendall v. Wilson* (1863) 2 Moo. P.C. (N.S.) 375. Some complained that it had abolished Hell.

[53] In 1833, however, the Real Property Commissioners recommended its transfer to the Chancery.

[54] Stat. 18 & 19 Vict., c. 41; 20 & 21 Vict., c. 77 and c. 85; p. 536, post. The jurisdiction was further transferred in 1875 to the High Court, but until 1970 its distinctiveness was preserved by allocation to the Probate, Divorce and Admiralty Division.

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9

Judicial Review of Decisions

Most modern judicial systems recognize that judges and juries may make mistakes, providing for redress by way of appeal to a higher court. People have come to regard the right to appeal as a basic requirement of natural justice or a fundamental right. This idea was promoted in the early seventeenth century by Coke CJ,[1] and in 1723 it was said to be 'the glory and happiness of our excellent constitution, that to prevent injustice no man is concluded by the first judgment; but that if he apprehends himself to be aggrieved he has another court to which he can resort for relief'.[2] It was not always so. The machinery of appeals was not built into the common law at the outset, and when the central courts began to subject each other and inferior tribunals to judicial review the means were at first limited in scope.

It is easy to understand why the earliest legal systems had no appeal process. There was no second-guessing of absolute discretion, and no possibility of human error in a judgment supported by divine intervention. Even the establishment of juries, and the consequent separation of findings of fact from rulings on law, did not call for the introduction of appeals. An appeal from the king was as unthinkable as an action against the king, and so a judgment in the king's court, if validly given, was final. The only conceivable outside forum would have been the Church, in matters which concerned it; but we have seen that when papal intervention appeared to threaten the authority of royal jurisdiction, Parliament legislated to stop 'appeals' from the king's courts to any others.[3] Neither was there any obvious logic in allowing the decisions of the king's judges to be reopened before different royal judges. A first-instance decision of the King's Bench or Common Pleas was a decision of the whole bench, not of the trial judge, and provided such a court kept within its bounds and did not commit formal errors it would have produced unnecessary uncertainty to permit another court to say that its decisions were mistaken. Obviously trial judges in the country could not give the same detailed attention to legal arguments as could the central judicial bodies, and one of the advantages which would now be claimed for an appeal is that it enables greater legal concentration to be brought to bear on a problem once the facts have been ascertained. The trial judge is now regarded as the court of first instance, and a review of his decision by a panel of judges must therefore be by way of appeal. Under the nisi prius system, however, the trial judge was not a 'court' capable of giving judgment; his task ended when the verdict was given, and the verdict was then returned to the full court for the final stage.

[1] It was a ground for attacking the High Commission and inferior courts of equity: Baker, *Magna Carta*, pp. 136, 377–8, 388.

[2] *R. v. Cambridge University, ex parte Bentley* (1723) 1 Stra. 557 at 565, per Pratt CJ.

[3] See p. 141, ante.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

The finality of the judgment in banc, once entered on the record, accounts for the reluctance of the medieval judges to reach a decision at all if a division of opinion occurred on the bench.[4] In case of doubt, proceedings would be adjourned as often as necessary to enable the doubts to be fully explored and for the judges to deliver their 'arguments' (in effect tentative judgments), which could be reviewed on successive occasions until a consensus of judicial opinion was found. Delays which might now seem intolerable were regarded as acceptable, indeed as essential to the deliberative process. There was therefore little need for an appeal.

The rise of the jury raised different problems, and procedures were provided by the common law for dealing with them both before and after the trial.[5] Corruption and misconduct by jurors were unacceptable obstacles to justice. An action called 'attaint' could be brought against jurors for giving a false verdict, and if it was successful the verdict would be quashed. But attaint did not permit judicial review of decisions of fact by way of appeal, to determine their substantial correctness, or of directions in law given by the trial judge. The only question was whether the jurors had perjured themselves, and the only evidence which could be considered in the attaint was that laid before the trial jury.[6] Though not abolished until 1825, the procedure was rarely used even in medieval times, and by Tudor times was almost obsolete, because the punishment prescribed for perjured trial jurors was so severe that attaint juries would seldom find against them.[7] Misconduct by juries was more easily raised by motion;[8] or, in serious cases, by complaint in the Star Chamber. Of more utility, but still not providing an appeal in the later sense, were proceedings in error.

The Writ of Error

Although proceedings in error superficially resembled an appeal, they were not. They were predicated entirely on the record, or plea roll, which contained a formal minute of all the stages in the action down to judgment. It was both exclusive and conclusive. Judges could take no account judicially of anything which was not on the record, however well they might know it from personal experience.[9] And it was invested with such a sacred finality that it was accepted as indisputable evidence of what it contained, unalterable even by the judges themselves.[10] But this irrefutability did not extend to legal mistakes apparent on its face. A writ of error ordered judges to send the record of their proceedings in a particular case to a superior court for inspection. Its original basis was a suggestion that the judges below had misbehaved, but by 1300 the finality of the record as to matters

[4] See p. 86, ante.

[5] Before trial, a party could challenge individual jurors or upset the whole panel for bias in the sheriff, or for a family relationship between the sheriff and the other party. If the sheriff was disqualified, process went to the coroners.

[6] *Rolfe v. Hampden* (1542) Dyer 53; *R. v. Ingersall* (1593) Cro. Eliz. 309 at 310. Trial in an attaint was by jury of 24.

[7] See *OHLE*, VI, pp. 371–3. [8] See pp. 82, 92, ante.

[9] In 1329 Scrope CJ refused to take account, as justice in eyre, of facts he had learned as CJKB: *Eyre of Northamptonshire*, I (97 SS), p. 238. This is the concept later called 'judicial notice', as distinct from actual knowledge.

[10] This principle is mentioned in the 12th century: *Dialogue of the Exchequer*, ii. 2 (p. 117). Scribal errors could be corrected until the end of term. Only additions could be made afterwards, by way of extension as the case proceeded.

of fact had come to rule this out, and focus had shifted to the language of the roll itself. The court of error could concern itself only with 'manifest error' revealed by the written words (as where an essential procedural step was missing), or with new facts (such as the death of a party) which were not inconsistent with the record but required proof by the plaintiff in error. If the plaintiff in error assigned points worth argument, the other party was summoned to hear the alleged errors and dispute them, and after argument the court could either affirm or reverse the judgment of the lower court.

The inability of the court of error to go behind the record made it difficult in medieval times to raise questions of substantive law by this means. The formulaic character of pleadings kept crucial facts off the record, the mode of entering the verdict kept evidence off the record, and the reasoning behind any judgment (though occasionally recorded in the thirteenth century) came also to be excluded. So long as the proceedings were in common form, and correctly entered, there could be no challenge on the grounds that the judges or the jury had erred in law, because no error by them would ever appear on the face of the record. Before the sixteenth century most writs of error were indeed brought on technical grounds. However, the rise of actions on the case, and the revival of special verdicts, placed more detail on the record and enabled new points of substance – such as the sufficiency of the consideration for a promise – to be raised by writ of error. Error could be brought whenever a motion in arrest of judgment was appropriate,[11] and so it began belatedly in the Tudor period to make a parallel contribution to legal development.

Courts of Error

Every court of record was subject to the surveillance of some other tribunal to ensure that in giving judgment it had not erred on the face of its record.[12] From local courts of record, such as borough and franchise courts, from the counties palatine, and from the Common Pleas, error went to the King's Bench. From the King's Bench and the Exchequer of Pleas, both deemed to be held *coram rege*, error lay in medieval times to the king in Parliament. The latter jurisdiction came to be exercised by the House of Lords alone. It was not often invoked, because parliaments only met intermittently, and were frenetically busy when they did meet. In 1347 the Commons prayed that judgments in the Exchequer might be reviewed by the King's Bench, but the king replied that they should instead be referred to a committee consisting of the chancellor, treasurer, and two justices. Ten years later a statutory tribunal, the Council Chamber (subsequently known as the Exchequer Chamber), was established to hear writs of error from the Exchequer. In the case of the King's Bench a like remedy was delayed until 1585, when another statutory court – also called the Exchequer Chamber – was set up because of the same difficulties of securing hearings in Parliament.[13] This court consisted of the justices of the Common Pleas and barons of the Exchequer. Error still lay

[11] For motions in arrest, likewise tied to the record, see p. 91, ante; p. 149, post.

[12] From courts not of record, such as local and seignorial courts, there was an analogous procedure (called 'false judgment') whereby those courts were ordered to make up an ad hoc record of a case for review by the CP.

[13] Rot. Parl., II, p. 168; Stat. 31 Edw. III, sess. i, c. 12; 27 Eliz. I, c. 8. The Exchequer Chamber, off Westminster Hall, was a convenient room for a large meeting.

from this court, and from the King's Bench as a court of error,[14] to the House of Lords. Such cases became more frequent in later times, and the unsuitability of the Lords for such purposes remained a problem; the shortage of legal expertise was remedied by summoning the judges to attend, but the judges' opinions could in theory be disregarded by lay peers voting against law.[15]

The use of writs of error to question points of substantive law in actions on the case in Elizabethan times coincided with some deep disagreements between the central courts and produced some strange results. In 1592 a litigant complained that, in error from the Exchequer, five could outvote six, and in 1602 a law student noted with dismay that if the King's Bench overturned a unanimous Common Pleas by three votes to one, three judges would prevail over five.[16] Worse still, as Coke CJ complained in 1611, it only took one-third of the entire judiciary to defeat the majority if the Exchequer Chamber reversed the five King's Bench judges by four to three.[17] Judgment without consensus was a new and unsettling phenomenon, especially when all the judges concerned were equal in rank and experience, and when they were tempted to bury endless wrangles by giving judgment without reasons.[18]

Two major reforms preceded abolition of this procedure in the nineteenth century. In 1830 the separate error jurisdictions of the King's Bench, Council Chamber, and Exchequer Chamber were combined in a new Court of Exchequer Chamber, comprising the judges of all three superior common-law courts; error from any one court was heard by the judges of the other two. Then, in 1852, the writ of error was abolished, and proceedings in error became a 'step in the cause' rather than a separate action. Finally, in 1875, proceedings in error were themselves abolished.[19] They had been rendered otiose by the introduction of a more comprehensive appellate procedure.

Development of the Appeal

The nisi prius system enabled jury verdicts to be taken by assize judges on circuit, and in the absence of any objection judgment would normally be entered in the office as a matter of course the next term. But the full court which met in banc at Westminster could stay the entry of judgment if cause were shown. The procedure in banc allowed

[14] Or in cases commenced by original writ: p. 54, ante.

[15] An instance of this is *Bishop of London v. Ffytche* (1783) 1 Bro. P.C. 211, 17 LQR 367, where the bishops voted in their own interest against the judges. But it was decided in *O'Connell v. Reginam* (1844) 11 Cl. & F. 155 that only legally qualified peers should vote.

[16] BL MS. Lansdowne 38, fo. 14 (1592), referring to *Finch v. Throgmorton*; *The Diary of John Manningham* (R. P. Sorlien ed., 1976), p. 149.

[17] *Maine v. Peacher* (1610) B. & M. 490. Cf. *Fossett v. Carter* (1623) Palm. 329; Cro. Jac. 662, where the *quorum* of six in the 1585 Act was construed by Tanfield CB as prescribing a majority of at least six. That construction had been suggested in 1599 but rejected: *Anon.* (1599) CUL MS. Dd.8.48, fo. 87.

[18] A litigant of 1592 (n. 16, ante) begged that judges in the Exchequer Chamber should 'deliver their reasons in open court, as in other courts is accustomed and is most consonant with justice'. In Serjeants' Inn cases, also, counsel sometimes had to press the judges to divulge their reasoning: e.g. *Shelley's Case* (1581) B. & M. 163 at 168; p. 306, post; *Earl of Pembroke v. Berkeley* (1595) BL MS. Hargrave 356, fo. 131; *Slade's Case* (1602) B. & M. 460 at 474.

[19] Stat. 11 Geo. IV & 1 Will. IV, c. 70; Common Law Procedure Act 1852 (15 & 16 Vict., c. 76), s. 48; Judicature Act 1873 (36 & 37 Vict., c. 66), Sch. I, Ord. 58, r. 1. For 'error on the face of the record' in *certiorari* see p. 160, post.

one of the parties to make an *ex parte* motion for a 'rule *nisi*', which was an order for the opposing party to show cause against what was sought; if the opponent was successful the rule was discharged, but otherwise it was made absolute. If a verdict had been given for the plaintiff, the defendant's counsel could move either in arrest of judgment or for a new trial.[20] The motion in arrest of judgment involved showing cause against the plaintiff's rule *nisi* for judgment; it was subject to the same limitations as error, being confined to matter intrinsic to the record. The motion for a new trial could be used from the late seventeenth century to raise matters extrinsic to the record,[21] and therefore gave the court in banc wider powers to consider questions arising from the trial. But all these powers were exercised before judgment, and not by a court of appeal. Once the court in banc had given judgment, the only redress was of the limited kind provided by the writ of error.

Judicial Consultations on Points of Law

It was common in medieval times for petty assizes to be adjourned 'for difficulty' into the Common Pleas for argument in banc before judgment was given,[22] the reason being that assizes did not begin in the central courts and therefore did not routinely return there for consideration by a full court. By the sixteenth century assize commissioners were also, and for the same reason, reserving difficult questions arising at gaol delivery for discussion in term-time at Serjeants' Inn or in the Exchequer Chamber.[23] The assembled judges had no jurisdiction to decide such cases. They were not hearing an appeal but merely advising the judge who sought their opinion.

In criminal cases it was possible to take a verdict and respite sentence or execution until the reserved point of law was resolved,[24] and if necessary a pardon would be obtained in accordance with the decision of the twelve judges. From a wholly informal beginning, this procedure became increasingly regularized, the judge stating a written case and counsel being heard; but the twelve judges were not a court of law, did not keep a formal record, and did not normally even give reasons. A bill of 1844 would have given convicted defendants the same rights to move for new trials as parties in civil cases, but that seemed too radical. The judges thought it was unnecessary, and that it would be inhumane to delay executions until appeals could be heard.[25] The statute as passed in 1848 instead set up the Court for Crown Cases Reserved as a court of record, which would now sit in public and give reasons for its decisions.[26] But the reservation of cases was still at the discretion of the trial judge, and the court did not have the same powers as the court in banc in civil cases. Despite continuous pleas for reform, the

[20] See pp. 91–3, ante. [21] See p. 93, ante.

[22] This was provided for by Magna Carta (1217), c. 13 (1225, c. 12), which said that the assize should then be determined in the Bench.

[23] E.g. some questions referred from Newgate in 1488 (Caryll Rep. 6–8); and some questions referred by the assize judges in 1557 (Dyer's notebook, 110 SS 411).

[24] See further p. 564, post.

[25] The implicit assumption, which lasted until well into the 20th century, was that criminal appeals would rarely succeed.

[26] Stat. 11 & 12 Vict., c. 78. At first all 12 judges sat, but the number was reduced to five in 1875.

defendant in a criminal case did not acquire a right of appeal until the introduction of the Court of Criminal Appeal in 1907.[27]

A comparable civil procedure, which has already been noticed, developed within the nisi prius system in the seventeenth century.[28] With the agreement of the trial judge, points of law could be reserved for consideration by the court in banc upon motion. When this procedure first began, a decision in banc to set aside the verdict resulted in a new trial;[29] but an eighteenth-century refinement made the decision of the full court final, so that the plaintiff was nonsuited if the point was decided against him. This second change made the option more attractive than motions for new trials, which were more sparingly granted and involved the expense of a retrial.[30] Unlike reserved criminal cases, however, the procedure did not involve the judges of the other courts. And the informality of the procedure effectively prevented any further review by a court of error.[31]

The practice of withholding judgment until points of law could be discussed more widely was not confined to trial judges. It was not uncommon in the early Tudor period for the judges of one bench to send one of their number across Westminster Hall to state a case to the judges of the other.[32] The year books of the fifteenth century also mention meetings of all the judges in the Exchequer Chamber,[33] or occasionally in a London church, to debate difficult cases or matters of public importance amongst themselves. Similar discussions occurred less formally after dinner in the Serjeants' Inns,[34] and opinions there were occasionally reported in early Tudor times. At first the Serjeants' Inn meetings were merely post-prandial discussions by members of each particular inn, and such interchanges between judges must have been coeval with the inns themselves. But during the sixteenth century they were sometimes held in public, with all the judges present, and then they were functionally indistinguishable from the gatherings in the Exchequer Chamber.[35] The Serjeants' Inns were a more convenient venue when the judges were not at Westminster, and may have been considered less formal.[36] Here again the judges were not acting as a court of record which could give judgment, but merely as an advisory assembly. Nevertheless, their pronouncements

[27] The Court of Criminal Appeal consisted of the LCJ and the judges of the King's Bench Division, with a quorum of three; it was reconstituted in 1966 as the Criminal Division of the Court of Appeal.

[28] See p. 92, ante.

[29] *Noell v. Wells* (1668) 1 Sid. 359; 2 Keb. 337; 1 Lev. 235.

[30] *Cox v. Kitchin* (1798) 1 Bos. & P. 338 at 339, per Buller J.

[31] *Lord Eldon's Anecdote Book* (1960), pp. 159–62. Eldon was mistaken in attributing the procedure to Mansfield.

[32] *OHLE*, VI, p. 411 n. 6.

[33] E.g. *Doige's Case* (1442) B. & M. 434 (KB); p. 358, post. Chancery cases (from the Latin side) could be referred in the same way: e.g. *Re Lord Dacre* (1535) B. & M. 127 at 131.

[34] The earliest reported reference to this is in 1486, when Hussey CJ put questions to two judges 'a son hostel puis manger': Y.B. Hil. 1 Hen. VII, fo. 10, pl. 12. See also *OHLE*, VI, pp. 412–13. Dinner was then a midday meal, and the courts at Westminster did not sit in the afternoon.

[35] For Serjeants' Inn cases adjourned from the Exchequer Chamber see *A.-G. v. Donatt* (1560) 109 SS 49–50; *Cantrell v. Churche* (1601) B. & M. 649 at 651. In *Shelley's Case* (1581) ibid. 163 at 168, the judges were convened first at the lord chancellor's house and then at Serjeants' Inn, Fleet Street. *Slade's Case* was argued in the Exchequer Chamber in 1597 and then at Serjeants' Inn (but still in public) in 1598 and 1602: B. & M. 460, 467, 470.

[36] Note Walmsley J's retrospective comments on *Slade's Case* (1602) B. & M. 479–80.

were keenly reported and were doubtless a better guide to common opinion than the decisions of single courts.

These procedures all enabled the discussion of points of law by a bench of judges after trial, but they were still not appeals. The notion of an appeal began outside the common law.[37]

The Privy Council

The royal prerogative power to entertain applications for redress in respect of the overseas jurisdictions of the Crown was virtually the last judicial prerogative to be retained by the king and not delegated to a regular court. After the abolition of the Star Chamber in 1641, this appellate function was the only jurisdiction exercised by the Council in suits of an adversary nature. The jurisdiction of the Council over the Channel Islands had been established since at least 1495,[38] and in the seventeenth and eighteenth centuries it was extended to all the plantations and colonies. Such appeals were usually referred to a standing committee on which legal and colonial expertise was represented, and in 1832–33 the committee was placed on a statutory footing as the Judicial Committee of the Privy Council, with a defined membership and a slightly extended jurisdiction. In addition to hearing appeals from overseas, the Judicial Committee was also to be the final court of appeal for ecclesiastical cases, replacing the Court of Delegates, and for admiralty cases.[39] The committee was not a court of error, and appeals were allowed on the substantial merits of the case. The Privy Council, then, furnished one model for a court of appeal in the 1830s; but its judicial work was limited in scope.

Review in Chancery

Chancery provided another model. Error lay from the Latin side of the Chancery to the king in Parliament. But error was not appropriate for the English side, because there was no record. At first the only way of reviewing a decision in equity was by reopening the matter before the chancellor himself, or his successor, or by obtaining a commission of review.[40] However, after a great deal of argument in the seventeenth century, it was finally decided by the House of Lords in 1675 that it had jurisdiction to review decisions on the English side.[41] A review in equity enabled all the available evidence to be taken into consideration – an appeal in the widest sense. In 1851 a Court of Appeal in Chancery

[37] It was also an established feature of canonical procedure, and as such would have been familiar to English lawyers.

[38] See p. 36, ante.

[39] Stat. 2 & 3 Will. IV, c. 92; 3 & 4 Will. IV, c. 41. The Privy Council also advised the Crown on legal and constitutional questions. The precedence of king's counsel before serjeants was so settled: p. 176, post.

[40] The availability of this latter procedure was confirmed by all the judges in *Earl of Worcester v. Finch* (1600), but it was seldom used: Baker, *Magna Carta*, pp. 288–9.

[41] *Shirley v. Fagg* (1675) 6 State Tr. 1121. The House of Commons opposed the decision and there was a brief constitutional crisis. But the appellate jurisdiction remained. An important early example of its use is *Howard v. Duke of Norfolk* (1685) B. & M. 194 (restoring a decision of Lord Nottingham C which had been reversed by North LK).

was erected for hearing Chancery appeals, with power to reverse the lord chancellor, and full-time appellate judges were appointed for the purpose.[42] A final appeal still lay to the Lords.

The Court of Appeal and House of Lords

The appeal, having thus become fully established in respect of admiralty, ecclesiastical, and colonial courts, and courts of equity, made a late debut in the common-law system in 1854. Legislation of that year provided for an 'appeal' to a court of error from a court in banc against a decision to award or refuse a nonsuit (on a reserved point) or a new trial. Parliament expressly referred to the court of error as a 'court of appeal' for this purpose, since it involved matters off the record. When the Exchequer Chamber, and proceedings in error, came to an end in 1875, it was this Court of Appeal (now formally so styled) which passed into the new scheme of things. It absorbed the jurisdiction of the Court of Appeal in Chancery, and acquired full-time lords justices of appeal. The system envisaged by the Judicature Commission for common-law cases was that motions 'in banc' would be made to the Divisional Court of the appropriate division of the High Court, as if at first instance; and from thence an appeal would lie to the Court of Appeal.

There had been considerable discussion between the commissioners as to whether the appellate jurisdiction of the House of Lords should be retained, or transferred to the Judicial Committee of the Privy Council, but by 1872 the decision had been taken to abolish the second appeal altogether.[43] Under the Judicature Acts as passed, the jurisdiction was indeed taken away; but, before the new legislation came into force, opposition from members of Disraeli's incoming government forced a reconsideration of the role of the House of Lords. At the last moment the original scheme was changed, the Lords were given a statutory appellate jurisdiction akin but superior to that of the Court of Appeal, and yet another judicial rank was brought in, the lord of appeal in ordinary.[44] Ironically, the court introduced by the 1873 Act retained its new title as the *Supreme* Court of Judicature, though its supremacy had been snatched from it before birth.[45] The judicial House of Lords which in truth occupied the supreme position was no longer the same as the upper chamber of Parliament, but a court composed of professionally qualified judges sitting in committee independently of the parliamentary sittings of the House. Lord Derby expressed surprise that this solution had satisfied the Conservative peers, since there was little more than a nominal connection between the House of Lords and this new appellate court, and the ordinary peers 'have no more to do with it than with the Court of Chancery'. But the compromise ended several years of sometimes acrimonious debate, and also ended the absurdities of the former

[42] They were known as justices of appeal in Chancery.

[43] Lord Cairns and some other judicial peers planned to oppose the bill on this ground in April 1872, but were dissuaded by Lord Derby: *Derby Diaries* (J. Vincent ed., 1994), p. 105.

[44] Appellate Jurisdiction Act 1876 (39 & 40 Vict., c. 59). Lords of appeal were the first statutory life peers. Lords justices of appeal (in the Court of Appeal) were not peers.

[45] The expression 'supreme courts at Westminster' had, however, been used generically for the common-law courts before 1875: e.g. 20 & 21 Vict., c. 43, s. 1. See also p. 58, ante.

situation.[46] The creation of lords of appeal – albeit at first in very small numbers[47] – not only rendered unnecessary the cumbrous practice of summoning the judges to give advice[48] but justified ending any participation by lay peers in appeals.

The rescue of the judicial House of Lords led to a more fundamental change than might have been expected from an otherwise conservative saving measure. Since the addition of a further appellate tier might have taken a case before three successive panels of judges after trial, it was decided to remove the first tier by doing away with motions in banc to the divisional courts. The motion in banc before judgment was thereby replaced by an appeal after judgment, and the post-trial work of the divisional courts in High Court actions (as successors to the old courts in banc sitting at first instance) was transferred to the Court of Appeal. Some would have abolished the divisional courts altogether at that point, but it was decided to keep them to protect the Court of Appeal from hearing cases stated by magistrates' courts.[49]

In 2009 the appellate jurisdiction of the House of Lords was transferred to a new Supreme Court.[50]

The Prerogative Writs

The effect of the Victorian legislation was that the judgments of courts of law could be reopened on appeal in the same way as the decrees of courts of equity – that is, by way of review on the merits or even rehearing. This removed the need for proceedings in error. But the notion of judicial review represented by error, though restricted to formal and apparent errors, could be applied to a broader range of decisions than those covered by proceedings in error or appeals. The wider principle was that the king's courts should keep all lesser authorities within the procedural and jurisdictional bounds set by the law, and provide the subject with a remedy if tribunals or officials exceeded their legal authority or gave orders which were patently contrary to law. The function of controlling authority was regarded as a royal prerogative, and until the sixteenth century it had been primarily the responsibility of the Council. In Tudor and early Stuart times the justices of the peace, as local authorities, were supervised directly by the assize judges acting on the Council's instructions;[51] but from the middle of the seventeenth century political control passed to the lords lieutenant of counties, and legal control to the central courts. The assize judges were still consulted informally on quarter sessions questions in the eighteenth century, but became reluctant to give advice which the

[46] *Derby Diaries*, p. 282. The credit was due to Lord Cairns LC. For the acrimony see ibid. 197.

[47] There were originally only two, one from the English bench (Lord Blackburn, by birth and title Scottish) and one from Scotland (Lord Gordon); in 1882 a third was appointed, from Ireland (Lord Fitzgerald). The number of English law lords was increased to two in 1891.

[48] The practice was not abolished but was last used in *Allen v. Flood* [1898] A.C. 1; p. 496, post.

[49] The Judicature Act 1875 dealt with motions in arrest of judgment and *non obstante veredicto*. Motions for new trials were transferred to the Court of Appeal by Sir Robert Finlay's Act, i.e. the Judicature Act 1890 (53 & 54 Vict., c. 44), s. 1. For cases stated by magistrates see p. 160, post. Under the 1876 scheme, cases were stated to the Queen's Bench Divisional Court, with appeal direct to the HL.

[50] Constitutional Reform Act 2005 (c. 4), s. 23. This came into effect on 1 Oct. 2009. The purpose was to make manifest the separation of powers.

[51] This was achieved by the assize judges' domination of the commission of the peace as representatives of central government. The assizes were given a general superintendence over JPs by Stat. 4 Hen. VII, c. 12. See Cockburn, *History of the Assizes*, pp. 153–87; *CPELH*, III, pp. 956–8.

justices were free to ignore; the proper course, they said, was to state cases formally for the King's Bench.[52]

The supervisory role of the King's Bench became firmly established during the reigns of Elizabeth I and James I. The principle now known as the 'rule of law' treats all exercise of authority as falling under the control of the regular courts of law, so that the subject is furnished with a legal remedy when any official, however mighty, exceeds the power which the law gives him. This was the principle enshrined in chapter 29 of Magna Carta, though the means of giving effect to it were not developed until the sixteenth and seventeenth centuries. It was accepted by 1600 that only the absolute prerogatives of the Crown, such as summoning parliaments, entering into treaties, and declaring war, were beyond the purview of the courts. The ordinary prerogatives were justiciable, and they could never prevail against Magna Carta.[53] Not only was no ordinary power outside the law, but any lawful power over the lives, liberty, or property of others had to be exercised in accordance with certain minimum standards of fairness. According to Coke, even a discretionary authority was within this principle: 'although the words of [a commission] give authority to the commissioners to act according to their discretion, their proceedings ought nevertheless to be limited and bound within the rule of reason and law, for discretion is a science … and they are not to act according to their wills and private affections'.[54] The proper place for conducting this oversight was the court which, in contemplation of law, was held before the king himself.

Coke CJ claimed for the King's Bench a general jurisdiction to correct 'errors and misdemeanours extrajudicial, tending to the breach of the peace, or oppression of the subjects … or any other manner of misgovernment'.[55] This was achieved by adapting the operation of certain judicial writs so as to extend judicial review to all bodies which exercised quasi-judicial authority. These writs had been designed for purely routine procedural functions. In relation to their newfound role, however, the court had 'a great latitude and discretion … not bound by such strict rules as in cases of private rights'.[56] The jurisdiction was, in other words, equitable. But, being exercised by a court of common law,[57] it was more fitting to attribute it to the royal prerogative, and the remedies chosen were known as 'prerogative writs'.[58] The name was studiously chosen, because in the early stages of their expansion the writs were mainly used to curb the unwarranted exercise of power by royal councillors and 'prerogative' courts and bring them under the rule of law. It was

[52] In 1724, at Hereford assizes, Lord Raymond CJ 'did not care to give his opinion where they might choose whether they would stand by it or not, but if they would bring it into the King's Bench he would there give his opinion and make them stand by it': 11 *Law Magazine & Rev.* (3rd ser.) at 274.

[53] For the distinction between the absolute and ordinary prerogatives, as expounded by Coke, see Baker, *Magna Carta*, pp. 144–7, 322–3, 420–5; and cf. Bacon at pp. 305–7. The difficulty was in drawing the line between them.

[54] *Rooke v. Withers* (1598) 5 Co. Rep. 99 at 100. See also *Keighley's Case* (1609) 10 Co. Rep. 139 at 140. Both cases concerned taxes imposed by commissioners of sewers.

[55] 11 Co. Rep. 98; Co. Inst., IV, p. 71. He had developed this theory while he was attorney-general (1596–1606). See further Baker, *Magna Carta*, pp. 302, 308–11, 386–7, 504.

[56] *Lord Montague v. Dudman* (1751) 2 Ves. 396, per Lord Hardwicke C, in ruling that the Chancery could not restrain mandamus by injunction.

[57] The jurisdiction was chiefly exercised in KB. The CP used habeas corpus (and occasionally prohibition) to protect its own officers and litigants, though under Coke CJ it came to use both writs more widely: Baker, *Magna Carta*, pp. 157, 354, 378–9, 384, 507.

[58] See e.g. the words of Mountagu CJ in 1619, p. 157, post.

politic under James I to attribute this form of control to the king's supreme authority, delegated to his judges, rather than to pit the judges against the king's government by challenging the prerogative directly. Lord Ellesmere C was unconvinced by this, and strongly objected to Coke CJ's usurpation of the conciliar supervisory function: 'in giving excess of authority to the King's Bench he doth as much as insinuate that this court is all sufficient in itself to manage the state . . . as if the King's Bench had a superintendency over the government itself'.[59] Ellesmere did not acknowledge a distinction between the conduct of government and the judicial oversight of governmental actions. But he foresaw well enough the rebalancing of power which Coke's theory would bring about, and did his best to stop it. Subsequent developments made this a greater dispute between law and prerogative than that which Coke lost to Ellesmere in 1616;[60] for, in the context of judicial review, Coke's common-law brand of equity prevailed, and in the long term it has proved as vital as the equitable creations of the Chancery.

Prohibition

The oldest member of the 'prerogative' class of writs was the writ of prohibition, which was developed in the thirteenth century as a means of restraining ecclesiastical courts from meddling with temporal causes.[61] During the sixteenth and seventeenth centuries its use was extended to all other kinds of judicial tribunal: to the palatinates, to conciliar courts, to courts of Civil law (such as the Court of Admiralty, Court of Chivalry, and university courts), and to inferior jurisdictions. By virtue of this procedure the boundaries of jurisdictions, and the interpretation of any charters or statutes which affected them, fell exclusively to the judges of the two benches. Coke CJ claimed that prohibitions might even be sent to the Chancery,[62] but that was never tested; the dispute between Coke and Ellesmere had to be resolved by James I in person.[63] But Coke CJ and his brethren did issue prohibitions against the High Commission and the provincial councils, which were high prerogative courts. After the mid-seventeenth century prohibition was less frequently used than the other prerogative writs, because the Crown was unable after 1641 to erect new types of court without parliamentary sanction, and the restraint of non-judicial powers could be achieved in other ways. It was, nevertheless, fully settled in the nineteenth century that prohibition would where necessary lie to statutory bodies and central government departments.[64]

Quo Warranto

Whereas prohibition enabled a private party to stop specific legal proceedings against him, a general challenge to the existence of a jurisdiction or franchise could be made by a writ summoning the claimant to show by what authority (*quo warranto*) he exercised it. Extensive use of this procedure was made by Edward I in what was intended to be a

[59] 'Observations on Coke's Reports', printed in L. A. Knafla, *Law and Politics in Jacobean England* (1977), pp. 307–8 (spelling modernized).
[60] See p. 117, ante. [61] See p. 138, ante. [62] Baker, *Magna Carta*, pp. 376–7, 412.
[63] See p. 117, ante.
[64] In 2000 the remedy was renamed a 'prohibiting order': Civil Procedure Rules, r. 54.1(c).

comprehensive survey of inferior jurisdictions and liberties. Although the investigation proved over-ambitious, one lasting outcome was a statute which fixed 1189 as the time from which prescriptive claims had to be made.[65] The statute also provided that writs of *quo warranto* should be returnable before justices in eyre. This was intended to save costs, but it had the unintended consequence that *quo warranto* disappeared with the eyre system itself. There was a revival under Henry VIII, when three or four special eyres were commissioned for the purpose.[66] But a less cumbrous procedure was devised at the same time, in the form of informations laid in the King's Bench by the attorney-general. The 'information in the nature of a *quo warranto*' thereafter completely supplanted the procedure by writ. The Tudor revival looks superficially like a new government campaign to suppress private authority, but it now seems that most of the informations were brought on the relation of private suitors, and by the seventeenth century there was a recognized procedure for subjects to promote such informations in the name of the master of the Crown Office. The last major political use of *quo warranto* occurred when Charles II sought to remodel municipal corporations by forcing new charters upon them. The City of London fought this reform to the bitter end, having been called upon by information to show 'by what warrant' it claimed its privileges; and in 1683 the King's Bench delivered the shattering judgment against the City that its liberty of being a corporation be seized into the king's hands.[67] The following year, by an equally dramatic use of the analogous procedure of *scire facias,* the charter of the province of Massachusetts was rescinded for an encroachment on the royal prerogative in founding Harvard College. After this period, the steady suppression of private and irregular jurisdictions by Act of Parliament reduced the need for *quo warranto*; but its scope was extended to cover all usurpations of public functions of importance, even if they were not judicial.[68] The information in *quo warranto* was abolished in 1938, but the same remedy could still be given by injunction.[69]

Habeas Corpus

The writ of habeas corpus has become the principal safeguard of personal liberty. It is ironic, therefore, that its original purpose was not to release people from prison but to produce them in custody. The words 'habeas corpus' (have the body) occurred in the common judicial writs of *capias* and *latitat*, in the Chancery subpoena, and in the *habeas corpora juratorum* to compel the attendance of jurors. Another use was in cases of privilege; an officer of a central court, or a litigant there, could be transferred from imprisonment in another court by writ of privilege in habeas corpus form, to prevent

[65] Stat. *Quo Warranto* (1290). For 'time immemorial' see also p. 32 n. 91, ante.

[66] For one held at Lynn in 1522 see Spelman Rep. 199. It so reduced the rights of the bishop of Norwich that the town's name was changed from Bishop's Lynn to King's Lynn.

[67] *R. v. City of London* (1682–83) 8 State Tr. 1039. See J. Levin, *The Charter Controversy in the City of London 1660–88* (1969).

[68] *Darley v. Reginam* (1846) 12 Cl. & Fin. 520, reviewing earlier cases.

[69] Note also Supreme Court Act 1981 (c. 54), s. 31 (injunction to restrain someone from acting improperly in an office).

his being drawn away from attendance.[70] The Court of Chancery at the same time developed the *corpus cum causa* for reviewing any cause of imprisonment by an inferior tribunal, and this became a common remedy against the misuse of borough jurisdiction in the fifteenth century.[71] Both procedures suggested a means of challenging the causes of any imprisonment. The King's Bench developed the more general writ of *habeas corpus ad subjiciendum* in the sixteenth century, and besides its more mundane uses it enabled subjects to challenge unconstitutional imprisonment by privy councillors and officers of state; it ordered the person detaining the prisoner to have his body before the court together with the reason for his detention.[72] After reviewing the reason so returned, the court could release, bail, or remand the prisoner as appropriate. The procedure was resisted by some of Elizabeth I's ministers but was firmly established after the judges submitted a memorial to the queen, complaining of interference with due process, in 1591.[73] From around 1565, under Catlyn CJ,[74] it was also used to challenge committals by prerogative tribunals such as the High Commission, the provincial councils, and the Court of Requests, and even by the Chancery.[75] It was reinforced by an unhistorical but potent linkage with Magna Carta,[76] and Coke hailed it as the principal means of enforcing chapter 29.[77] His successor Mountagu CJ, though less inclined to challenge prerogative power, adopted Coke's reasoning that it was itself 'a prerogative writ, which concerns the king's justice to be administered to his subjects; for the king ought to have an account why any of his subjects are imprisoned'.[78] Only after fierce wrangles in the time of Charles I did the general principle triumph.[79]

The Habeas Corpus Act 1679[80] improved the procedure in criminal cases, so that prisoners had to be produced within three days, and any prisoner not tried within two terms was to be given bail. But the remedy was not confined to persons on criminal charges, for the writ could be addressed to anyone believed to be keeping a subject in improper confinement, to produce the body together with the 'cause' for scrutiny. Habeas corpus replaced earlier civil actions[81] as the most effective means of challenging a deprivation of liberty, and therefore of challenging all powers of taxation or regulation

[70] E.g. *Kayser's Case* (1465) cited in Dyer's reports, 109 SS 108; Co. Inst., II, p. 55; Co. Inst., III, p. 42; Baker, *Magna Carta*, pp. 120–1. Landmark cases a century later (all temp. Dyer CJCP) were *Scrogges' Case* (1559–60) Dyer 175; 109 SS 34, 54; *Lee's Case* (1568) 109 SS 143 (privilege against self-incrimination); and *Hynde's Case* (1576) 110 SS 355 (rejecting a general return). For these see Baker, *Magna Carta*, pp. 156–62.

[71] See p. 113, ante. It also had wider applications: e.g. *Ex parte Cornewe* (1475) C244/120/58 (arrest returned 'by special command of the king himself').

[72] For a specimen writ see p. 590, post.

[73] See pp. 507–8, post.

[74] Catlyn CJ said of the KB, 'this is the queen's highest court, whatever those of the Chancery might say; and it is of such dignity that, in whatever prison a man may be, we may command the officer to bring him here': Baker, *Magna Carta*, p. 159.

[75] Ibid. 160–2, 209.

[76] The link was made by Edmund Anderson, arguing at the bar in 1572: ibid. 250.

[77] See his treatise on c. 29, written in 1604 when he was A.-G.: 132 SS 394–402; Baker, *Magna Carta*, pp. 346–7, 500–10; p. 130, ante. For the controversy arising 10 years later from Coke CJ's use of habeas corpus to release prisoners committed by Lord Ellesmere C see ibid. 155–63, 297–311, 412–18.

[78] *R. v. Lord Warden of the Cinque Ports, ex parte Bourn* (1619) Cro. Jac. 543.

[79] See pp. 508–9, post.

[80] Stat. 31 Car. II, c. 2.

[81] The writs *de homine replegiando* (p. 505, post), *de odio et atia*, and mainprise, enabled release in certain cases. Most disputes about imprisonment before 1600 were tried in actions of false imprisonment; but these lay only to recover damages after the event.

which depended on fines or imprisonment.[82] It enabled the King's Bench to affirm and protect a wide range of fundamental personal liberties: for instance, by denying the power of Parliament to imprison people beyond the period of one session,[83] of courts to coerce jurors by imprisonment after verdict, or of husbands to detain their wives in order to exact their conjugal rights.[84] It enabled persons committed to madhouses to secure a proper medical review of their condition.[85] It brought questions as to the custody of children before the courts.[86] And it enabled a slave, once landed in England, to resist being sent back into slavery.[87] In recent times its chief use has been to question orders of extradition and deportation, the writ being available to all persons except enemy aliens who are present within the jurisdiction. Even in its widest application, however, it does not enable an appeal on the merits of a decision to imprison. Its function is to question the lawfulness, not the inherent correctness, of an imprisonment. But courts have in modern times developed general principles for the judicial review of discretionary powers which may also be deployed in habeas corpus cases.

Mandamus

A good many writs, including the writ of error, contained the word *mandamus* ('we command'); but the species which came to be particularly distinguished by that word was developed at the beginning of the seventeenth century as a means of controlling borough and city authorities. There were rare precedents back to the fourteenth century;[88] but it was from the time of Coke's chief justiceship that the King's Bench asserted a general jurisdiction to order a local authority to do something or else return a cause showing why it did not need to do so. The warrant for this remedy was, once again, found anachronistically in Magna Carta.[89] At first mandamus was used only as a 'writ of restitution'[90] for those deprived of public offices, such as alderman, constable, recorder, or churchwarden,[91] and those who were disfranchised from (or barred from admission to) the freedom of a borough; it could secure a review of local elections when corruption was alleged, and require the removal of mayors and aldermen clinging to office unconstitutionally. Until the nineteenth century, the commonest purpose of mandamus was the protection of some office or status which could not be recovered by an assize.[92] Wider

[82] The payment of fines was enforced by the sanction of imprisonment.

[83] During a parliamentary session, however, the KB would not interfere with a committal by either house. See pp. 509–10, post.

[84] *Streater's Case* (1653) 5 State Tr. 365; *Bushell's Case* (1670) Vaugh. 135; 1 Freem. 1; *R. v. Lister, ex parte Rawlinson* (1721) 8 Mod. Rep. 22; 1 Stra. 478; *R. v. Jackson* [1891] 1 Q.B. 671.

[85] *R. v. Turlington, ex parte D'Vebre* (1761) 2 Burr. 1115.

[86] E.g. *R. v. Johnson* (1723) 1 Stra. 579 (young child delivered to guardian); *R. v. Delaval* (1763) 3 Burr. 1434 (older child to decide for herself).

[87] See p. 514, post.

[88] Baker, *Magna Carta*, pp. 203–6. The only reported precedent was *Middleton v. Osborne* (1574) 3 Dyer 332.

[89] *R. v. Mayor of Plymouth, ex parte Bagg* (1615) 11 Co. Rep. 93; 1 Rolle Rep. 224; Baker, *Magna Carta*, pp. 396–8.

[90] For this term see *R. v. Corporation of Lincoln, ex parte Shuttleworth* (1613) 2 Buls. 122; *R. v. Mayor of Gloucester* (1616) 3 Buls. 189 (both for aldermen).

[91] In *Bishop v. Newman* (1619) 2 Rolle Rep. 106, it was held that it lay not only for a wrongful eviction from office but also for declining to swear in an elected churchwarden.

[92] For the limitations of the assize for an office see pp. 460–1, post.

uses were considered in the seventeenth century,[93] and in the eighteenth century it was extended to ecclesiastical benefices such as prebends, and to university degrees.[94] In 1763, when mandamus was awarded to restore a Presbyterian minister, Lord Mansfield CJ observed that it was a prerogative writ which 'ought to be used upon all occasions where the law has established no specific remedy'.[95] It would not, nevertheless, protect a private employment, for there the remedy was to sue for breach of contract;[96] and it could not properly be used to establish rights of fellowship or privileges in colleges or inns of court, because those are domestic bodies under the control of their 'visitors'.[97]

Reforms in local government in the nineteenth century, which transferred administrative functions to elected councils,[98] greatly reduced the need for mandamus in the context of local office-holding, while the widening of the parliamentary franchise removed the need for it in the context of freemen; but in the twentieth century it was turned to the wider use of compelling local and central public authorities or officials to carry out their statutory duties, including the proper exercise of discretionary powers.[99]

Certiorari

The writ of certiorari was originally a means of supplying information to a superior court by way of certification, especially from another court of record.[100] For instance, it might be necessary during proceedings in error from the Common Pleas for the King's Bench to inspect the original writ, and in that case a certiorari went to the custos brevium of the Common Pleas commanding him to search his files and certify the writ to the King's Bench. A different form of the writ was used to remove records into the King's Bench, so that proceedings could be taken over by the superior court. Until the seventeenth century it was only used for indictments, which could be brought into the King's Bench to be tried there, or quashed, or sent back for trial in the country. This gave the King's Bench before 1500 a limited power to review criminal jurisdiction; but review was limited to the wording of the indictment, and most judgments to quash were made on purely technical grounds.[101]

In the reigns of James I and Charles I the procedure was extended to administrative bodies with coercive powers,[102] such as commissioners of sewers and justices of the peace,

[93] E.g. *Case of All Souls College, ex parte Heron* (1655) BL MS. Hargrave 4, ff. 44, 61v (mandamus for a fellow-elect of a college). Cf. the visitatorial jurisdiction over colleges: n. 97, post.

[94] *R. v. Cambridge University, ex parte Bentley* (1723) 1 Stra. 557.

[95] *R. v. Barker, ex parte Mends* (1763) 3 Burr. 1265 at 1267.

[96] E.g. *Lord Protector v. Caius College* (1655) Style 457 (headmaster of the Perse School, Cambridge).

[97] E.g. *R. v. Patrick* (1667) 2 Keb. 65, 164 (presidency of Queens' College, Cambridge); *R. v. All Souls College, ex parte Ayloffe* (1680) T. Jones 174. For the judges' visitatorial jurisdiction over the inns of court and chancery see *CPELH*, I, p. 238.

[98] After the Municipal Corporations Act 1835 (5 & 6 Will. IV, c. 76) borough councils, elected by ratepayers, were separated from the borough sessions of the peace.

[99] *Padfield v. Min. Agriculture, Fisheries and Food* [1968] A.C. 997; *Sec. State for Education v. Tameside M.B.C.* [1977] A.C. 1014. Since 2000 the prerogative order of mandamus has been replaced by a 'mandatory order': Civil Procedure Rules, r. 54.1(b).

[100] The key words were '*certiorari volumus*' (we wish to be certainly informed). For a specimen see p. 588, post.

[101] See p. 562, post.

[102] When the history was reviewed in *R. v. Wagstaffe* (1665) BL MS. Hargrave 62, fo. 7 (fine imposed on jurors), the following stages in the extension of the remedy were noted: a fine by a court of sewers (1617); a fine

first as a way of removing recognizances to enforce fines and orders, and then to remove the orders themselves for scrutiny. By the end of the seventeenth century the King's Bench was regularly resorted to as a court of review for both summary convictions and orders of quarter sessions relating to such matters as public works, licensing, and the settlement of the poor. The essential features of the jurisdiction were clarified by Holt CJ around 1700: certiorari would lie to any body created by statute which acted judicially, even if it was not a court of common law; statutes creating powers outside the common law were to be strictly construed; and before conviction a man was entitled to be summoned so that he had an opportunity to present his case.[103] Certiorari could not, however, be used to question purely 'ministerial' or administrative decisions. And, as with error, the superior court was limited to an examination of the record to ensure that no order or conviction was *ultra vires*. It could not conduct a new trial or act as a court of appeal.[104]

In the nineteenth century the situations which had occasioned the remedy changed. Summary convictions after 1848 were entered in a form which rendered review of the record unfruitful, and from 1857 doubts in law could be raised instead by stating a case to one of the superior courts.[105] In 1888 county administration was taken from the justices of the peace and transferred to elected councils which were not regarded as judicial bodies.[106] And in the twentieth century the growth of the welfare state resulted in more and more powers being conferred on administrative bodies, with no statutory appeal to the courts. By the end of the century there were over fifty categories of administrative tribunal in England. Although Parliament did not usually specify any means for tribunal decisions to be challenged, the judges extended the old remedy of certiorari for this purpose. The feat was achieved by relaxing the notion of a 'record', so that the courts could correct errors in law in the certified decisions of any public body which interfered with the rights or obligations of subjects.[107] Even in relation to courts, the notion of a record was transformed for this purpose; it was no longer confined to the bare minute, setting down the procedural essentials in standard form, but included the judge's stated reasons.[108] The new procedures for judicial review which were brought in at the end of the twentieth century went further by rendering obsolete the underlying concept of removing a record, with the consequence that disputed decisions can be reviewed at large.[109]

by a forest eyre (1633); a fine by a mayor's court (1634); and a recognizance given to a clerk of the peace (1649). Its availability to review summary convictions was confirmed in *Berrie's Case* (1637) Rolle Abr., I, p. 743.

[103] See *Groenvelt v. Burwell* (1700) 1 Ld Raym. 454; *R. v. Chandler* (1702) 1 Ld Raym. 581; *R. v. Dyer* (1703) 6 Mod. Rep. 41; Holt 157.

[104] *R. v. Bolton* (1841) 1 Q.B. 66 at 76, per Lord Denman CJ ('We must not constitute ourselves into a court of appeal').

[105] Stat. 20 & 21 Vict., c. 43, ss. 2, 6.

[106] Local Government Act 1888 (51 & 52 Vict., c. 41), s. 3 (administrative functions of quarter sessions transferred to county councils).

[107] See *R. v. Local Government Board* (1882) 10 Q.B.D. 309; *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338.

[108] *R. v. Knightsbridge Crown Court, ex parte International Sporting Club (London) Ltd* [1981] 3 All E.R. 417.

[109] The Latin name certiorari was dispensed with in 2000, and improper decisions are now reversed by a 'quashing order': Civil Procedure Rules, r. 54.1(d). Courts of record had already ceased to keep a record in the traditional sense of the term.

Declarations and Applications

A modern remedy which went further than any of these prerogative remedies was the action seeking a declaration of right from the court, rather than specific relief. This started as an equitable procedure, of which a medieval prototype was the petition of right against the Crown, but until 1883 a declaration in private proceedings could only be granted where some specific relief was also available. After 1883 the action for a declaration became a remedy in its own right, regularly given by the High Court whether or not other relief was claimed.[110] Although a declaration when given was not directly enforceable, it was unlawful to act against it; and it could be combined with an injunction or damages. From the 1950s the courts encouraged its use in the sphere of 'public law', because its freedom from technical restrictions enabled gaps in the prerogative remedies to be filled; it could be used, for example, against the Crown,[111] or a professional body, and even to question subordinate legislation; it could be prospective without being retrospective; and the rules as to *locus standi* were more relaxed than in other actions.

Until 1977 a declaration could not be combined with a prerogative remedy, and the prerogative remedies could not be combined with each other. On the recommendation of the Law Commission, this difficulty was overcome by the simple expedient of a new rule of court introducing an 'application for judicial review'.[112] This enabled an application for mandamus, prohibition, certiorari, declaration, or injunction, separately or in combination, to be made in a summary way, subject to a strict time limit and safeguards to prevent abuse by cranks and busybodies. The jurisdiction was at the same time transferred from the Divisional Court to the High Court, so that cases could be heard by a single judge. Following the model of the Commercial Court, these cases were listed separately – in a Crown Office List – so that they could receive specialist attention in London; and this side of the Queen's Bench Division was in 2000 renamed the Administrative Court. As a result of these reforms, and of the evident receptiveness of the judiciary to such applications, the period since 1981 has seen an explosion of judicial review cases.[113] Further possibilities for judicial review were opened up by the provision for proceedings against public bodies under the Human Rights Act 1998.

Administrative Law

The history of the prerogative remedies affords an illustration of the way in which the common law could adapt to new circumstances in order to protect long established notions of justice. The forms of 'oppression and misgovernment' which Coke CJ sought to control sprang chiefly from bodies erected under the royal prerogative to administer

[110] It was introduced in this form by R.S.C. 1883, Ord. 25, r. 5.

[111] E.g. *Dyson v. A.-G.* [1911] 1 K.B. 410 (tax form sent to millions of taxpayers declared illegal).

[112] R.S.C. 1977, Ord. 53; subsequently embodied in the Supreme Court Act 1981 (c. 54), s. 31. In 2000 this in turn was replaced by Civil Procedure Rules, r. 54: S.I. 2000/2092, Sch. Applications are now made by way of a 'claim form'.

[113] By 1999 there were nearly 5,000 a year, half of them immigration cases. By 2013 there were over 15,000, two-thirds of them related to immigration or asylum. In that year most of this work was diverted to a new Immigration and Asylum Chamber.

policy or 'equity' outside the safe framework of the common law. The principal concern in Coke's time was with prerogative courts, and with commissions issued under the prerogative.[114] Once the Crown had been painfully brought under the law, it was Parliament which brought about a different kind of discretionary authority. Countless statutory bodies were set up in the nineteenth and twentieth centuries, many of them with sweeping powers to restrict freedom and confiscate private property and money, or to allocate public funds to claimants. In 1978 it was discovered that administrative tribunals dealt with six times as many cases as the High Court and county courts together. These new powers had been conferred on tribunals by the democratic consent of the governed, but that did not remove the need for fairness in their dealings with the individual. The power to take away a person's home or livelihood is a far greater power than that of imposing a small fine, and it would have made no sense if the latter had been susceptible to judicial review and not the former. Many of the new administrative functions were assigned to non-judicial bodies for the very reason that government departments wished to control their membership, and the policy which they administered, in a way which would not be tolerated in the case of a court.[115] The powers conferred on commissions, boards, tribunals, ministers, and officials, were therefore often expressed in absolute terms: their decision was to be final, it was not to be questioned in any court, or it was to be as valid as if embodied in legislation. There is an apparent conflict between the letter of such statutes and the spirit behind the rule of law; but, so far, Coke's approach has prevailed. The legislation cannot itself be set aside;[116] but much can be done by way of interpretation, using the presumption in favour of procedural fairness. Coke had insisted that discretion, even absolute discretion, was a science controlled by law and not an arbitrary power.[117] In the time of Lord Mansfield CJ, when Parliament purported to give magistrates powers which could not be reviewed, it was held that Parliament could not have intended the magistrates' decisions to be regarded as properly made, and therefore beyond review, unless they were made in strict accordance with the legislation and with the principles of natural justice.[118] This approach was still remembered in the nineteenth century.[119] In the earlier part of the twentieth century, however, the courts felt that their armoury was insufficient to cope with what they saw as the alarmingly absolute discretion conferred by modern legislation on administrative bodies. In place of law there was policy, administered not by judges but by employees controlled by civil servants and their masters. In 1929 the lord chief justice

[114] E.g. the commissioners of sewers, who could levy taxes under a statute of 1531 (23 Hen. VIII, c. 5). The commission system was also used for other kinds of taxes, for enclosures, and later still (1836) for tithe redemption. In some of these cases, lay commissioners were empowered to hear and determine appeals. For 19th-century efforts to keep the imposition of taxation within the rule of law see C. Stebbings, *The Victorian Taxpayer and the Law* (2009).

[115] This tendency was attacked with some vehemence in J. Toulmin Smith, *Government by Commissions Illegal and Pernicious* (1849). Somewhat inconsistently, he believed everyone should own a copy of Domesday Book, and in 1861 promoted a new facsimile edition.

[116] Coke's hint that it could was not pursued in England: pp. 223–4, post.

[117] See p. 154, ante.

[118] *R. v. Moreley* (1760) 2 Burr. 1040.

[119] E.g. *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180 (a seemingly arbitrary power held subject to an implied right to be heard).

of the day thought the rule of law had been buried, and the only remedy was to raise the alarm through the press.[120]

The tide turned after the Second World War to such an extent that 'administrative law' has become one of the most creative and beneficial areas of modern judicial activity. Parliament, though responsible for the spread of tribunals and delegated powers, has generally acquiesced in the judges' approach and facilitated it. Since 1947 the Crown – the government – has been made liable to actions in contract and tort. And in 1958 measures were passed to place tribunals more clearly under the rule of law: chairmen were to be appointed by the lord chancellor, and were to give reasons for their decisions, so that certiorari would lie to correct errors, and in some cases an appeal to the High Court was provided.[121] In more recent times tribunals were assembled into a coherent structure, with an Upper Tribunal consisting of four separate chambers, and an appellate body (the 'First Tier') to hear appeals from miscellaneous agencies and authorities.[122]

In the 1960s the judges returned to the attack on legislative language purporting to confer absolute power,[123] and began to blur the distinction between administrative and judicial bodies. From the old cases on summary convictions and churchwardens, and the like, emerged certain broad principles of 'natural justice' to which all decision-making bodies are in some degree subject: those who make decisions affecting others must be free from bias, must be properly informed, must apply the law correctly, must not take account of irrelevancies, and must allow those likely to be affected to put their case. The substantive principles of law may be traced back in a direct line to Sir Edward Coke, and even in the late twentieth century many of the procedures through which they were implemented were still those of Coke's day. The prerogative writs were the one group of forms of action left untouched by the procedural reforms of the nineteenth century,[124] but it was necessary to choose the correct form at one's peril. There were hopes in 1977 that the application for judicial review would solve that problem. Yet an awkward side-effect of the reform was a new distinction between public law remedies (sought by application) and private law remedies (sought by action). Since the House of Lords decided in 1983 that an action was no longer the appropriate way of seeking a public law remedy,[125] there appeared for a time to be a new formulary system under which a plaintiff might lose merely because he had chosen the wrong form of

[120] See the pessimistic reflections of Lord Hewart LCJ in *The New Despotism* (1929). His main grievance was the misnamed 'Henry VIII clause': p. 226, post.

[121] Crown Proceedings Act 1947 (10 & 11 Geo. VI, c. 44); Tribunals and Inquiries Act 1958 (6 & 7 Eliz. II, c. 66).

[122] These were set up under the Tribunals, Courts and Enforcement Act 2007 (c. 15). At the time of writing there are over 260 salaried tribunal judges, all with the title 'Judge' (which was previously confined to County Court and Circuit judges).

[123] *Anisminic Ltd v. Foreign Compensation Commission* [1969] A.C. 147 (where a statutory provision that a determination 'shall not be called in question in any court of law' did not oust the jurisdiction to decide whether it was *intra vires*).

[124] In 1938 the remedies of mandamus, prohibition, and certiorari ceased to be available in the form of writs, and became orders obtained on application by notice of motion: Administration of Justice (Miscellaneous Provisions) Act 1938 (1 & 2 Geo. VI, c. 63). Some confusion was caused after 1854 by the introduction of an *action* for mandamus, now obsolete; but that was really a species of injunction.

[125] *O'Reilly v. Mackman* [1983] 2 A.C. 237.

action.[126] The choice was not always straightforward, since 'public law' was a new and elusive concept and did not mean merely that the suit was brought against an arm of the executive. Over the subsequent decades, however, the distinction proved to be less rigid than was originally feared, and a litigant may sometimes have an election between remedies, provided that the course chosen does not amount to an abuse of process.

Further Reading

Milsom, *HFCL*, pp. 55–9
R. Stevens, 'The Final Appeal: Reform of the House of Lords and Privy Council 1867–76' (1964) 80 LQR 343–69
P. A. Howell, *The Judicial Committee of the Privy Council* (1979)
J. S. Hart, *Justice upon Petition: the House of Lords and the Reformation of Justice 1621–1675* (1991)
R. Pattenden, *English Criminal Appeals 1844–1994* (1996), ch. 1
J. Baker, 'Attaint' and 'Error' [1483–1558] (2003) in *OHLE*, VI, pp. 371–3, 403–7; 'Reserved Cases', ibid. 526–8
J. Oldham, 'Informal Lawmaking in England by the Twelve Judges in the Late 18th and Early 19th Centuries' (2011) 29 LHR 181–220 (and see the three further articles on the same topic, ibid. at 221–88)

Prohibition
See pp. 143–4, ante

Quo Warranto
D. W. Sutherland, *Quo Warranto Proceedings during the Reign of Edward I* (1963)
H. G. Goodyear, 'The Tudor Revival of Quo Warranto' (1977) in *Laws and Customs*, pp. 231–95
P. Brand, 'Quo Warranto Law in the Reign of Edward I' (1979) 14 IJ 124–72 (repr. in *MCL*, pp. 393–441)
J. H. Baker (ed.), *John Spelman's Reading on Quo Warranto delivered in Gray's Inn (1519)* (113 SS, 1997)

Habeas Corpus
P. Halliday, *Habeas Corpus: From England to Empire* (2010)
J. Baker, 'Imprisonment and Habeas Corpus' (2017) in *Magna Carta*, pp. 155–70, 496–9

Later Administrative Law
S. A. de Smith, 'The Prerogative Writs' (1951) 11 CLJ 40–56
L. L. Jaffe and E. G. Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345–64
E. G. Henderson, *Foundations of English Administrative Law* (1963)
J. M. Jacob, 'The Debates behind an Act: Crown Proceedings Reform 1920–1947' [1992] *Public Law* 452–84
P. Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 CLJ 63–90
C. Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (2006)
S. Anderson, *OHLE*, XI, pp. 342–84, 423–522
K. Costello, 'The Writ of Certiorari and the Review of Criminal Convictions 1660–1848' (2012) 128 LQR 443–65
S. Sedley, *Lions under the Throne: Essays on the History of English Public Law* (2015), esp. part II

[126] See J. A. Jolowicz, [1983] CLJ 15; W. Wade, 101 LQR at 187, 188.

10

The Legal Profession

There is a close relationship between any system of law and the experts who operate it: the judges who declare and explain it, the advocates who decide how to present cases to them, the practitioners who advise clients as to their legal position, and those who expound its principles by writing and teaching. At the time of the Norman Conquest, although there were men who understood legal proceedings and documents, these specialist categories were not yet in evidence. The story of the legal profession begins in the twelfth century, and it begins with the judiciary.

Origins of a Professional Bench and Bar

We have seen in previous chapters how the common law emerged from the practices adopted by the twelfth-century *justiciarii*, the members of the Curia Regis who toured the country on eyre or sat in the great hall of pleas at Westminster. Had they understood the meaning of our terms, these early *justiciarii* might have considered themselves civil servants rather than lawyers. Getting through the workload in an orderly manner was more important than fine learning, and therefore a university degree in law was not essential. Some of them were clergy, while some of the most prominent (like Lucy and Glanvill) were knights; but by their uniform administration of royal justice they elevated the judicial role into a distinct and technical profession. Henry II's leading justices devoted much of their working lives to the system they were helping to establish, and continuity was facilitated over the next few generations by the practice of appointing to the bench some of the men who had served as judges' clerks. The appearance in the early thirteenth century of a body of professional advocates and attorneys to mediate between the judges and private litigants added another class of legal expert, a class which soon outnumbered the judiciary. It became obvious that judges needed to be comparable in background and forensic skill with those who appeared before them, and by the end of the thirteenth century it had become a general rule that judges of the two benches should be appointed only from the professional Bar.[1] As a result, England possessed from an early date a Bench and Bar united by their membership of a common profession. This peculiarly English professional structure was wholly independent of the Church and of the university law faculties, where only canon law and Roman Civil law were taught, and was rooted in the practice of the law of the land. This factor more than any other ensured the autonomous character of English law and its isolation from the influence of Continental jurisprudence.

How far litigants would have had access to expert assistance before the thirteenth century is unclear. The clergy were not allowed by canon law to practise in lay courts

[1] The last exceptions were mostly temporary: see Brand, *MCL*, p. 135.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

for gain, though it is possible that – as a widely literate class – they provided some assistance to people with legal problems before a profession came into being. Amateur assistance, however, belonged with an earlier way of doing things. The need for a regular, centralized profession must have been irresistibly compelling once the royal courts were in regular session. The wise men of old who had passed on the customs of the shire were of little use there. Litigation in royal courts required management by experts who could follow the king's court wherever it might be, who understood its procedures, and who could offer technical advice. Moreover, the precision required in oral pleading made expert advocacy indispensable. Not only did it have to follow the established forms, it had to be conducted in French, since the variety of dialects made English an unsuitable language for use in a central court; French was the language of courtly speech and of international discourse, and it could be translated exactly into the Latin of the record.[2] From the start, the two functions of advocacy and representation were conceived of as being distinct. The 'forespeaker' (*prolocutor* or *advocatus*) who stood beside a litigant and spoke for him, subject to correction, had a different role from the representative (*responsalis*,[3] *procurator* or *attornatus*) who stood in another's shoes and acted on his behalf so as to bind him in his absence. There was no fission of a single legal profession into two branches; the division of functions preceded the appearance of professional lawyers to perform them.

We cannot properly speak of a legal 'profession' until such time as men were following the law for a living, and subject to some control and oversight in so doing. The first element was present as early as 1200, when the names of a few attorneys and essoiners[4] are found to recur in the rolls of the Curia Regis. They were habitual practitioners but did not yet act to the exclusion of others, nor were their functions mutually exclusive. A profession of substantial size came into being in the second quarter of the thirteenth century, and later in the century an element of regulation was felt necessary. In 1275 it was enacted that no one should deceive the king's courts, and that if a lawyer did so he should be imprisoned for a year and barred from pleading again.[5] More detailed regulations were made in 1280 by the City of London for practitioners in the mayor's court, requiring an oath from those newly admitted, and a separation between pleaders, attorneys, and essoiners.[6] It is likely that some closely analogous regulation was made for the Common Bench at about the same period, for as soon as there is clear evidence of such matters it is found that the pleaders in the Bench were selected by the judges there, made to take an oath, and then expected to abstain from inferior forms of practice. A study of the names of pleaders in the records and year books of Edward I's reign shows that by the 1280s, at the latest, the Bar was dominated by a small group of highly skilled advocates. At the same time, the attorneys in the royal courts became a distinct, though

[2] For legal French as used in England (with a glossary) see J. H. Baker, *A Manual of Law French* (2nd edn, 1990). For the early development of idiomatic phraseology see Brand, 123 SS xxxii–xxxviii.

[3] *Glanvill* used this term, but it was replaced early in the next century by *attornatus* (attorney). The primary sense of 'attorney' lives on in the power of attorney, which may be granted to someone who is not a lawyer. The *procurator* (proctor) came to be exclusive to the ecclesiastical and admiralty courts.

[4] An essoiner was employed to make formal excuses for non-appearance in court. In the 13th and 14th centuries the function waned with the real actions and was absorbed into that of the attorney.

[5] Stat. Westminster I (1275), c. 29 (referring to 'serjeant counters' and 'others').

[6] For their limited effect see P. Tucker, 121 EHR 361.

much larger, group. Their role was to represent clients in the formal aspects of litigation, managing suits for absent clients, collecting evidence, taking out writs, and instructing counsel. They became officers of the court, selected by the judges and sworn to do their duty, which was enforced by the bench. The separation of pleaders and attorneys was a natural separation of function and also of different skills, between quick-witted and learned court-room lawyers and managerial men of affairs.[7] The same distinction between specialists and general practitioners was reproduced in later centuries by barristers and solicitors.

Serjeants at Law

The pleaders in the Common Bench were already an identifiable class in 1230, when Matthew Paris referred to them as 'the forespeakers of the Bench (*prolocutores banci*), whom we commonly call counters (*narratores*)'.[8] Their principal employment was to recite the plaintiff's count (*narratio*) and engage in any argument which ensued. Once the year books begin, the names of these counters are much in evidence; they were the leaders of the profession from whom the judges were chosen, and whose arguments at the bar were worth noting down for future learning.

During the fourteenth century the counters in the Common Bench were organized into a guild-like fraternity known as the order of serjeants at law. Admission to this body took place every few years, so that (after 1329 at the latest[9]) new serjeants were 'called' in batches of about six to nine at a time. The act of admission became an elaborate degree ceremony, or 'creation', conducted by the judges of the Common Pleas, and initiated by the issue of a royal writ of subpoena to each graduand ordering him to make himself ready to assume 'the estate and degree of a serjeant at law'.[10] This degree was not merely a professional qualification, but a public honour which would in time compete for status with knighthood and the doctorate. New serjeants took an oath to serve the king's people, gave a sumptuous feast which the king sometimes attended, distributed gold rings as largesse,[11] and were invested with their hoods and coifs. The coif, originally a white head-covering of fine linen tied under the chin, was the badge of the serjeants until the end of their order.[12] But the central point of all the ceremonies was the admission at the bar of the Common Pleas, when each new serjeant was led up in his robes and coif by two senior serjeants and heard to count for the first time. It was this count which made him a serjeant. The serjeants necessarily had a monopoly of

[7] Coke said it was a distinction between *officium ingenii* and *officium laboris*: Co. Inst., II, p. 514.

[8] *Chronica Majora* (H. R. Luard ed., RS, 1872–83), III, p. 619. For 'counting' see p. 83, ante.

[9] Nine new serjeants were admitted in 1329: Baker, *Serjeants at Law*, p. 155. There was a similar call in 1309, and perhaps in the 1290s, but until 1329 some serjeants still made their debut singly.

[10] This form was used by 1382: Baker, *Serjeants at Law*, pp. 28–9; cf. ibid. 254 (privy seal writ). The possible reasons for compulsion are there discussed.

[11] Giving gold is mentioned in 1329: BL MS. Add. 41160, fo. 40v; cf. 97 SS 13, 14 (in eyre the same year). Late-medieval rings have the motto v*ivat rex et lex.* From *c.* 1510 a different motto was used at each call. Rings of various sizes were given to the king, the judges and old serjeants, and numerous officials, besides friends and clients. See *CPELH*, II, pp. 832–7.

[12] In Tudor times it was almost covered by a black skull-cap, leaving the white edge visible, and by Victorian times this had shrunk into a circular black patch with a crimped lawn edging, attached to the crown of the wig.

audience in the Common Pleas, because pleading at the bar there was their raison d'être. They enjoyed their greatest fortunes in the year-book period, when the bulk of civil litigation in the royal courts passed through that court, and Sir John Fortescue wrote in the fifteenth century that they were the richest advocates in the whole world. So elite was the 'order of the coif' that, in over six centuries, it numbered under one thousand members, fewer than the number of queen's counsel practising at the present day.

Apprentices at Law

The emergence of specialists in the thirteenth century necessitated an educational system to prepare them. By the middle of the century such a law school had come into being, though it is known about only from surviving texts of its lectures and disputations, and by the 1280s its students were known as the 'apprentices of the Bench'. These apprentices were learners attached to the court itself, where they attended to the proceedings from a raised platform, or railed parclose, called the 'crib' (in fifteenth-century parlance, the 'pecunes' or 'pekennes').[13] Not all apprentices could hope to become serjeants, and so, since there was at first no intermediate degree, the designation 'apprentice' continued to attach to them after they entered practice. The fully-fledged apprentices then constituted a junior branch of the profession, and there was plenty for them to do. They might practise as counsel available to the public,[14] or as private advisers to great landowners, as attorneys, clerks, and officials. As advocates they could appear in the King's Bench, Chancery, Exchequer, and lesser courts, and assist with trials on circuit. In the fourteenth century we hear of greater and lesser apprentices; two centuries later the term 'apprentice of the law' no longer denoted a mere student, but a lawyer of the highest seniority below the serjeants.[15]

The Lawyers' Inns

By the fourteenth century the western suburbs of London were home to a number of town houses or inns (*hospicia*) accommodating the statesmen, civil servants, and lawyers whose work brought them to the metropolis when Parliament and the courts were in session. Of these only the inns of court, and the inn or palace of the archbishop of Canterbury at Lambeth, have retained their original character and identity. The judges and serjeants mostly had houses to themselves before Tudor times, but the apprentices and clerks found it more economical to live in shared accommodation, sometimes in the inn of a magnate who did not need it, occasionally in the household of a judge or senior official. About twenty inns are known to have been used by apprentices of the law, most of them in the parishes of St Andrew Holborn and St Clement Danes. Some were occupied only briefly, while others came to house permanent societies. In no case

[13] 'The Pecunes', 98 LQR 204–9 (revised in *CPELH*, I, pp. 308–14).

[14] Before the establishment of the chambers system, lawyers could be consulted in the morning in Westminster Hall and in the afternoon in St Paul's (in the centre of the City of London).

[15] It came to be equated with a readership (or even a double readership) in an inn of court: *OHLE*, VI, p. 427; *CPELH*, I, pp. 33–5; *The Men of Court*, I, p. 15. A double reader was a bencher who had read twice.

was there a 'foundation' or incorporation, as with the colleges at Oxford and Cambridge; they were creatures of expediency. By the middle of the fourteenth century, however, the inns had taken over from the shadowy thirteenth-century law school attached to the Bench the sole responsibility for educating lawyers. Lectures and disputations were held in their halls, and a domestic discipline was enforced, mirroring that of the universities.[16] In this connection four of the inns achieved a predominant position and were known by the 1420s as the 'inns of court', meaning the inns of the men of court.[17]

The origins of the inns of court are not precisely recorded. The New Temple had been the *hospicium* or London residence of the knights Templar until their dissolution, and the Inner Temple hall stands on the site of the refectory of the military order, still linked by cloisters to the round church. The site was granted to the knights hospitaller of St John of Jerusalem in 1324, and by them let to lawyers around 1340. By 1388 at the latest, and in all likelihood from the outset, the lawyer tenants formed the two societies of the Inner Temple and Middle Temple.[18] Gray's Inn had been the town house of the Lords Grey of Wilton before it was let to apprentices at about the same period. No mention has been found of Lincoln's Inn as a legal society before 1417; it probably began as Strange's Inn in Shoe Lane, a house formerly belonging to Henry de Lacy (d. 1311), earl of Lincoln, and around 1417 migrated to the bishop of Chichester's Inn in Chancery Lane (adopting the old name of Lincoln) when Lord Strange resumed possession of his London mansion. The earliest records of any of the inns are the Black Books of Lincoln's Inn, which begin in 1422 and show that already by that time there was an educational and social routine, expressed in a distinctive terminology. By that date, too, the serjeants were drawn almost exclusively from the four inns of court.

The other inns were of lesser status, and by the middle of the fifteenth century were used chiefly by the attorneys and clerks who could not gain admission to one of the greater houses, and by younger students coming to learn the rudiments of procedure. The life of the students was governed by written statutes, some of which survive, and these reveal a similar (but less advanced) routine to that of the major inns, with a similar in-house vocabulary. The number of lesser inns fluctuated, but by 1500 had settled at nine, known compendiously as the 'inns of chancery'.[19] The implication that they had a common origin in association with the Chancery is misleading; but a few of them had been the houses of Chancery clerks who taught the elements of the writ system, and throughout the fifteenth century they were under the surveillance of the lord chancellor. In Tudor times they came under the wing of 'parent' inns of court, which sent members to lecture there and in some cases acted as landlords. Besides attending lectures, the students were required to participate in elementary exercises in oral pleading (moots) and other exercises based on writs. When the educational functions declined

[16] Colleges were being founded in the universities in the same period and for the same purpose.

[17] The English expression is found *c.* 1425 in *Arnold's Chronicle* (1811 edn), p. 291. Fuller Latin forms were *hospicia hominum curiae* and *hospicia jurisconsultorum*.

[18] There were two halls in the Temple before the lawyers took up residence, and both inns are mentioned in 1388: *CPELH*, I, pp. 173–80. In 1418 there is mention of the 'Nether Inn' and 'Further Inn' of the Temple, but the latter was probably the Outer Temple: Baker, *The Inns of Chancery*, p. 49.

[19] The nine were: Barnard's Inn, Clement's Inn, Clifford's Inn, Davies (later Thavies) Inn, Furnival's Inn, Lyons Inn, New Inn, Staple Inn, and Strand Inn. Fortescue in the 15th century said there were 10, the other one probably being the Utter (or Outer) Temple: Baker, 124 LQR 384 (repr. in *CPELH*, I, pp. 181–4).

in the seventeenth century, and students went straight to the inns of court, the inns of chancery lingered on to provide accommodation and social facilities for attorneys. Most of them survived until they were sold, and the societies wound up, in Victorian times. Only one of the medieval buildings survives, the hall of Barnard's Inn;[20] but Staple Inn, carefully rebuilt after war damage, still evokes the atmosphere of these forgotten little colleges of law.

The fifteenth-century inns of court and chancery together formed a populous law school not much smaller in size than the entire University of Cambridge at that time. It would be referred to informally in Tudor times as the Third University of England, and with good reason, for it played a full part in the education of laymen destined for temporal office and positions of local authority. A considerable part of the gentry attended the inns, even when they had no intention of practising law, but the serious student might expect to spend up to ten years before graduation. After his grounding in an inn of chancery, the student who aspired to the Bar would seek admission to one of the inns of court as a student, or 'inner barrister'. Seven years or so would then be spent visiting the courts, reading and copying books, performing in more advanced moots, attending lectures, and keeping commons with his fellows.[21] He might then expect to be called to the bar as an 'utter barrister'. The term 'barrister', found in the Black Books in the middle of the fifteenth century, indicated the status of a member at moots. The hall of an inn was arranged after the mid-day dinner to resemble a court; the inner barristers sat within the bar, like clerks of the court, and the utter barristers stood outside it, like serjeants. Graduation as a barrister occurred by performing a pleading exercise at the bar of an inn, just as a serjeant's graduation took effect by counting at the bar of the Common Pleas, and university graduation by responding in a disputation.[22] Twice a year, in the Lent and summer vacations, a barrister of at least ten years standing was elected to deliver a course of lectures (called a 'reading') upon a selected statute. After performing this duty he became a bencher, so called because he sat on the bench at moots, taking the part of a judge. In addition to their educational role, the benchers assumed the task of governing their inns, including the selection of candidates for call to the bar, a function which they have retained to the present.

A medieval lecture, whatever the subject, was not an abstract dissertation but an exposition of a written text, which was read out (*lectio*). Readings in the inns were therefore not given on the common law, as such, but on the texts of statutes. The opportunity was nevertheless taken to expound the common law piecemeal, as the readers reached appropriate trigger words in the legislation. The glossing of texts in this way had a scholastic outward appearance, and yet this was no ivory tower. Lecturing was an essential qualification for the coif and the bench. All the judges and serjeants had taught in the inns, and used to return to their former inns for the readings, which played a central role in the

[20] Clifford's Inn hall was demolished in 1934. It is said to have been dismantled and taken to America, but no one can find it.

[21] A student was usually admitted to clerks' commons, and progressed after a few years to masters' commons. The significance of this division seems to have been more gastronomic than academic.

[22] A degree, whether academical or legal, was not 'conferred' in the modern sense. What was conferred was permission to move up a step oneself by performing the necessary exercise. The word degree is from the French for *gradus* (a step).

development of English law as a coherent science. The lecturers established over time, subject to moderation by the judges in their audience, a tradition as to what was accepted as law ('common learning') and what was still unsettled. In some fields, such as criminal law, they may even have developed doctrine in advance of the courts.[23] But their main function was to preserve and elaborate the learning concerning real actions and real property. It was in that sense that (in Maitland's famous phrase) the law schools made tough law.[24] As Maitland's remark assumes, law can be 'made' not only by acts of legislation and judgment, but also by shaping and refining the common thinking of the profession which will produce the legislators and judges of the future.

In the sixteenth and seventeenth centuries the readings declined in authority. Whereas the medieval course had been perfected from one reader to the next, each adding refinements to a core of inherited wisdom,[25] the later readings were individual performances of varying quality, the statutes selected at the reader's whim, the commentary more a display of ingenuity than a real attempt to instruct. Coke complained that they had become more like riddles than lectures, mainly aimed at finding 'nice evasions out of the statute'.[26] By the time that the educational system of the inns was fatally disrupted by civil war in 1642, the task of refining and declaring the common law had already passed to the courts.[27] Readings were only briefly revived in the Restoration period, and the moots thereafter declined into elementary performances of little more than ceremonial value. Many of the readers in the 1660s and 1670s, who were still being chosen according to seniority – a seniority which had been accruing for two decades – resented the revival and preferred to pay the fine for not reading. The inns, for their part, soon realized that the fines were of more value to them than perfunctory lectures, and so the old system petered out. Not only was the opportunity to reform legal education lost, but it ceased altogether for over a century.

The New Profession

When litigation was concentrated in the Common Pleas, the serjeants and attorneys there were engaged in the bulk of the important contentious work of the nation. Their pre-eminent position was assured by their exclusive rights of audience and representation respectively. But neither of those old branches of the profession had any monopoly on the new work which flooded into the King's Bench, Chancery, and conciliar courts in the sixteenth century, or on other aspects of legal practice. Subject to the law of maintenance – the crime and tort of meddling in someone else's litigation without cause – this work could be done by anyone with the necessary professional attainments.[28] The year books show that the senior apprentices were busy in all proceedings

[23] See p. 563, post. For 'common learning' see p. 209, post.

[24] F. W. Maitland, *English Law and the Renaissance* (1901), p. 25.

[25] See 71 SS lx–lxviii; 113 SS xvii–xx; 132 SS lvi–lx. There may originally have been a cycle, going from Magna Carta (1225) to *Quia Emptores* (1290), chapter by chapter, and then starting again.

[26] Co. Litt. 280. Cf. William Fleetwood's similar complaints 50 years earlier: Baker, *Magna Carta*, pp. 237–8.

[27] See *CPELH*, I, pp. 342–51.

[28] In 1354 it was a sufficient justification that one was a 'man of law': *CPELH*, I, p. 73. A century later, membership of an inn was usually pleaded: ibid. 58–9.

outside the Common Pleas, and it was evidently possible to earn a living from the law without becoming a serjeant or an attorney. Indeed, there was enough demand for legal services to cause the other 'men of court' to grow into a new branch of the profession.

In the sixteenth century attempts were made, both by the judges and by the Privy Council, to impose some control on this new branch. Audience had been freely granted in the superior courts to benchers of the inns of court, but with the explosion of litigation in the Tudor period the benchers were not sufficiently numerous to take all the cases, and so much of the work went to utter barristers. This gave rise to the first regulations, which were intended to ensure that only barristers of a certain standing should appear in the superior courts.[29] It was already axiomatic that call to the bar of an inn was a sine qua non for practice at the bar of the central courts; no other appropriate qualification existed. The domestic rank of utter barrister thus became a public degree, and to reflect this change it became generally known from this period as the degree of 'barrister at law'.[30]

Contemporaneous with this process of definition was the appearance of another kind of legal practice, that of the 'solicitor'. Solicitors are mentioned in the fifteenth century, and were so called from the function of 'soliciting causes', a broad concept which included helping clients through the jurisdictional jungle, giving general advice, and instructing attorneys and counsel in different courts. Since the name described the function rather than a specific class of lawyer, solicitors were not at first a category distinct from barristers or attorneys. Young barristers were expected to gain experience by soliciting causes, while an attorney of the Common Pleas was said to act as a 'solicitor' when pursuing cases in other courts. Indeed, there was a widespread view that it was only barristers and attorneys who could lawfully act as general solicitors; without such a qualification, assisting in litigation was maintenance. There was no objection to a client's servant or permanent adviser soliciting his causes, and some of the earliest solicitors were 'in-house' lawyers to religious houses and large landowners.[31] But it was improper for an unqualified person to hold himself out to the public as available to solicit causes generally, and the judges – supported by the Star Chamber – waged a fierce campaign between 1590 and 1630 against 'mere' solicitors. In 1596 Egerton LK denounced them in the Star Chamber as 'caterpillars of the common wealth' and promised to 'abolish and extirpate all solicitors'. And in the parliament of 1601, in the queen's presence, he declared the queen's wish that a law be made against 'pettifoggers and vipers of the common wealth, prowling and common solicitors that set dissension between man and man'.[32] Solicitors nevertheless proved immune to extermination and became in the seventeenth century a separate branch of the profession. Opposition to

[29] *Tudor Royal Proclamations* (P. L. Hughes and J. F. Larkin ed.), I, p. 408, no. 294 (call to the bar, and 8 years' standing from admission, required in 1547). Note also *Broughton v. Prince* (1589) *CPELH*, I, pp. 79–86, 118–19.

[30] The title also distinguished those with rights of audience from 'inner barristers' (students) and from barristers in the inns of chancery, terms which disappeared in the 17th century. The suffix 'at law' was dropped *c.* 1970 as surplusage.

[31] The pre-eminent example was the king's solicitor-general (first appointed formally in 1461). He was always a barrister.

[32] J. Hawarde, *Cases in Camera Stellata* (Baildon ed., 1894), pp. 45–6; *Proceedings in the Parliaments of Elizabeth I*, III, p. 305.

them had proceeded partly on the basis that soliciting was best done by young barristers, but the Bar had become so busy with appearances in court, giving opinions, and settling pleadings, that they had no wish to be solicitors as well. Barristers found it more convenient to leave preliminary dealings with clients, and the preparation of briefs, to attorneys and solicitors, seeing themselves as specialists to whom cases were referred by the latter. Solicitors thus became indispensable, and the only sensible course was to legitimize them. In the seventeenth century the decision was taken to admit them as officers of the Court of Chancery and thereby subject them to professional regulation.

The new callings of barrister and solicitor mirrored the older division between serjeant and attorney. The barristers as specialist advocates and counsel were aligned with the serjeants, assuming a similar professional and social superiority over ministerial practitioners and clerks who did not share the cachet of being 'learned in the law'. The Bar represented itself as a liberal profession, in the Roman sense, followed not for private lucre but for the furtherance of the public good. Out of this sentiment were born the rules of etiquette that barristers could not sue for their fees,[33] which were regarded as *honoraria*, that barristers should not court the company of attorneys, and that barristers should not undertake the routine work of soliciting causes or attending directly to the everyday affairs of clients. Steps were also taken to exclude attorneys and solicitors from the inns of court. The segregation of barristers suited solicitors perfectly well, because it extended their own range of opportunities. By the eighteenth century prominent country solicitors were at the centre of local affairs, not only as private practitioners but as clerks of the peace, under-sheriffs, election agents, land agents, trust managers, investment brokers, moneylenders, and bankers. As their local business increased, they were no longer able to spend term-time in London and instead employed London attorneys and solicitors as agents for their contentious and conveyancing work, authorizing them to engage counsel as necessary.[34] Counsel's opinions were considered by attorneys and solicitors to insure them against blame if anything went wrong, and they were taken not only on every step in litigation but also on the preparation of documents. It was deemed unwise to purchase land or lend on mortgage without taking an opinion both on the abstract of title and on the proposed instruments of conveyance, or to issue any process or deliver any pleading without consulting counsel. All this was managed by London agents.

In 1729 attorneys and solicitors were subjected to closer professional regulation, to exclude undesirables, and at about the same time they formed a 'Society of Gentlemen Practisers in the Courts of Law and Equity'. As a result of the control imposed by this society, and its descendant the Law Society (incorporated in 1826), the profession of solicitor[35] was by the nineteenth century as respectable as that of barrister. In the twentieth century the large City of London firms were able to develop a collective knowledge which put them on at least an equal footing with barristers as experts in certain finan-

[33] This involved no risk in an age when fees were always paid in advance.

[34] For London agents see J. Baker in *Law and Legal Process*, pp. 246–62.

[35] From 1 November 1875 all existing attorneys were renamed solicitors: Judicature Act 1873 (36 & 37 Vict., c. 66), s. 87. In the United States the older title lives on as a generic term, applied to all legal practitioners, although the Supreme Court ordered in 1790 that attorneys should not practise as counsellors.

cial and commercial fields. At the same time, the social and educational distinctions between the two classes withered away so completely that the professional differences are now in function and expertise rather than in education or ability.

Decline of the Serjeants

Throughout the medieval period the serjeants had been the leaders of the Bar, but their titular distinction outlived their importance, and it was their destiny to decline and ultimately vanish with the court to which they belonged. Although they had audience in the King's Bench and other courts, it was shared with the barristers. Furthermore, when written pleadings replaced oral pleading at the bar, and contentious proceedings effectively began with the trial at nisi prius,[36] the pre-eminence of the serjeants was undermined even in their own court. Serjeants retained a monopoly of motions in banc, and of signing special pleas, in Common Pleas cases; but for all other business they had to compete with the lower branch of the Bar. The growth of a junior Bar also caused the loss of the serjeants' exclusive right to judicial appointments, because from the sixteenth century it became common to appoint judges from outside the order of coif by the expedient of putting new judges through a formal creation ceremony for qualifying purposes only. The first documented instance of this occurred in 1519, when John Ernle, the attorney-general, was made chief justice of the Common Pleas; and the precedent was followed in 1545 when Sir Richard Lyster, chief baron of the Exchequer, became chief justice of the King's Bench. The practice thereafter became ever more common, so that many eminent judges – Coke, Mansfield, and Blackstone among them – were men who had achieved their eminence without ever practising as serjeants in the Common Pleas. The exclusive character of the order was destroyed in the seventeenth century when ministers sold the coif for bribes, and by 1700 there were ten times as many serjeants as there had been in 1500 but with less for them to do. Even the precedence which serjeants enjoyed over the rest of the Bar was lost in the seventeenth century to the growing number of king's counsel.[37] Any remaining attractions of the coif waned once it was found to pin men beneath their juniors who achieved this newer rank.

The end of the serjeants was finally settled in 1846 when, by a statute passed hurriedly in the long vacation, the Common Pleas was opened to the whole Bar.[38] The order of the coif was never abolished, but the last non-judicial serjeants were created in 1868. When the High Court was set up in 1875, its judges were not required to take the coif, and the last judge to be made a serjeant was Lindley J (later Lord Lindley MR), appointed to the old Common Pleas in May 1875. Although Lord Cairns LC informed the House of Lords – mistakenly[39] – that the power to create serjeants remained, it was well known that it would not be used. The serjeants therefore sold Serjeants' Inn in

[36] See pp. 89–90, ante. [37] See pp. 175–6, post.

[38] Stat. 9 & 10 Vict., c. 54. For an unlawful attempt by Lord Brougham to achieve this by royal warrant see *The Serjeants' Case* (1839–40) 6 Bing. N.C. 235; J. Manning, *Serviens ad Legem* (1840).

[39] The prerogative was limited to nomination. In the absence of legislation a serjeant could only be created by admission in the CP, which ceased to exist in 1875.

1877, and watched their order die away. Lord Lindley, who turned out to be the last serjeant, died in 1921.[40]

King's (or Queen's) Counsel

The only *degrees* in the common law were those of bencher and barrister at law, conferred by the inns of court, and that of serjeant at law, conferred by the judges upon the nomination of the Crown. But there have been, and still are, various *offices* which members of the Bar might fill in the course of their profession. The highest offices appropriated to the Bar were judicial, as were some of the lowest – for instance, stewardships of manors. For practising advocates the most rewarding were those relating to the litigation of the Crown. The king retained his own counsel and attorneys, most prominently the king's serjeants and attorney in the Common Pleas, and the king's serjeants and attorneys in the palatinates and in Ireland. From 1382 a king's attorney was appointed to prosecute and defend all the king's business in the Common Pleas 'and elsewhere',[41] and in 1452 the title was changed to the king's attorney-general. The redesignation of the attorney-general in 1452 was followed in 1461 by the appointment of the first king's solicitor-general.[42] Despite their titles, these offices were held by barristers. The king's serjeants were serjeants holding patents as counsel to the king. Usually between two and four in number, their rank originally gave them precedence over the rest of the English Bar. But in 1623, on the occasion of a large call of new serjeants, the attorney-general and solicitor-general were by royal warrant given precedence over all but the two most senior king's serjeants;[43] and by another warrant in 1813 they were given their present pre-eminence over the entire Bar.[44] The standing of these two offices had been increasing steadily since the fifteenth century, when they were already a stepping-stone to judicial office. In Tudor times two serjeants were willing to give up the coif to undertake them, technically a loss of status, because the position was more influential and lucrative. By the seventeenth century the attorney-general could earn, besides his modest salary of £81, as much as £10,000 a year in fees.[45]

The attorney-general, solicitor-general, and king's serjeants constituted the king's counsel in ordinary. The first king's counsel 'extra-ordinary' to be granted that office was Francis Bacon. He had been informally appointed in 1594 as Queen Elizabeth I's 'learned counsel extraordinary, without patent or fee', and in 1604 James I granted him

[40] Serjeant Sullivan (d. 1959), often called 'the last serjeant', was not a member of the English order but the last king's serjeant in Ireland. This rank had no connection with the order of the coif: cf. the surviving office of queen's serjeant in the county palatine of Lancaster.

[41] He was no common attorney. The 1382 patent was for William de Hornby, who became a serjeant in 1396.

[42] The first holder, Richard Fowler, was appointed as 'our solicitor in all matters . . . touching us within our realm of England'; he was concurrently chancellor of the Exchequer. From 1485 the title 'solicitor-general' was invariably used.

[43] These two were then called the king's first (or 'prime') and second serjeants.

[44] For the reasons see Baker, *Serjeants at Law*, pp. 58–61, 112. For the names see J. Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (1987).

[45] It has been estimated that Sir Robert Heath A.-G. was earning that much in the 1620s: P. E. Kopperman, *Sir Robert Heath 1575–1649* (1989), pp. 249–50. Heath was also given the entire province of Carolina, together with the Bahamas, as a reward for exceptional services in 1628–29. Sir Francis Bacon A.-G. estimated his annual income in 1616 to be £6,000 (nearly £1M today).

a patent as 'one of our counsel learned in the law', with 'place and precedence in our courts or elsewhere and preaudience', and a fee of £40 per annum.[46] Only one other king's counsel was appointed by James I, but Charles I appointed nine and Charles II thirty-one. In theory the king's counsel were supernumerary law officers who, in return for a small annuity (probably not paid), held permanent retainers which prevented them from appearing against the Crown. Prevention rather than advancement had been the motive for Bacon's appointment, and until 1920 it remained necessary for king's counsel to obtain a licence to appear for the defence in a criminal case. But by the nineteenth century that was a mere formality. The title had become a public mark of recognition, a stepping stone to the bench, and the right of preaudience was highly valuable to the recipient. It therefore had to be bestowed fairly. In modern times it has been granted to all applicants deemed suitable, so that around one in ten practising members of the Bar at any time are queen's counsel.[47]

The institution of the new rank proved to be the principal death blow against the order of serjeants. It was uncertain until 1670 whether serjeants took professional precedence of king's counsel extraordinary, but in that year King Charles II in the Privy Council personally delivered the damaging decision that they did not.[48] Thereafter the most junior king's counsel preceded even the most senior serjeant (not being a king's serjeant), and the prospect of continuous demotion deterred able lawyers from applying for the coif. A serjeant could, of course, apply to become a king's serjeant; but this would carry him in one leap over the heads of many of his seniors, and in all but a few cases this would have been professionally dangerous. By the nineteenth century nearly all barristers with high aspirations chose the silk gown[49] in preference to the coif of a serjeant, and this tendency contributed more than anything else to the decline and gradual extinction of the order of the coif.

The Judiciary

Although the emergence of an expert judiciary preceded the formation of a profession of private practitioners, as soon as such a profession came into existence its foremost members became prime candidates for judicial appointments. The first practising lawyer to become a royal judge was perhaps Roger Huscarl (d. *c.* 1230), who started practice as an attorney in the 1190s and was a justice of the Curia Regis from 1210. By the end of the thirteenth century nearly all the superior judges had practised at the bar of the Common Pleas, and before the middle of the fourteenth century it was a firm rule that only serjeants at law could be appointed to judgeships in the King's Bench and Common Pleas or to commissions of assize. In the Court of Exchequer, the chief baron was often

[46] Sainty, *English Law Officers*, p. 294 (1604 patent). He was described in 1594 as one of the queen's counsel at large: BL MS. Harley 6745, fo. 59. Another report that year says he 'came within the bar' to argue a case.

[47] At the time of writing there are around 16,000 practising barristers and 1,600 QCs. Almost all High Court judges in modern times were either QCs or Treasury juniors prior to appointment.

[48] The proceedings are printed in Baker, *Serjeants at Law*, pp. 488–90. The decree did not apply to CP, where KCs had no right of audience before 1846.

[49] Around 1700 KCs began to wear distinctive black silk gowns, which account for the colloquial name 'silks'. Junior barristers wear stuff gowns, with a diminutive mourning hood hanging on the left shoulder, assumed in mourning for Charles II in 1685.

a serjeant, but it was not until the last decade of the sixteenth century that the coif became an invariable qualification for all the barons.[50] These judges received salaries and robes from the Crown,[51] but also received income from court fees, and the chiefs had valuable clerical offices in their gift. Permanent judgeships, unlike recorderships and inferior judicial offices, prevented the holders from continuing in private practice at the Bar or as king's counsel; but in medieval times judges were allowed to give private advice, and habitually acted as arbitrators, in which capacity they accepted fees and alimentary gifts from the public. The judiciary were thus removed from the profession of the Bar only by office, and in the two Serjeants' Inns[52] the judges lodged and dined alongside their brethren of the coif. If a judge lost his office, he could return to practice as a serjeant; and this was not an infrequent occurrence in the troubled years of the seventeenth century.

The independence of the judiciary from political control is now regarded as one of the pillars of the constitution, but it was built on an unsure foundation. The judges were servants of the king, appointed and paid by the king, and in theory removable at the pleasure of the king. On the face of things they were no more secure in office than a government minister. And in reality kings and their advisers sometimes expected subservience from their judges in matters affecting the Crown. Fourteenth-century courts routinely received direct instructions from royal ministers by writs of privy seal requiring favour. But they were forbidden by Parliament to obey them if they would prevent a party from receiving justice.[53] In 1344 a clause was inserted in the judges' oath, 'You shall deny no man common right by the king's letters . . . and in case any letters come to you contrary to law, you shall do nothing by such letters, but shall certify the king thereof and go on to do the law'.[54] Judges were only rarely removed from office, even though the year books show the judges sometimes deciding against the Crown, and a general independence of spirit is assumed. It was the professional training of the judiciary, and the notion of a constitutional monarchy as expounded by Sir John Fortescue,[55] which transformed the personal loyalty which judges owed the king into a more objective form of loyalty to an impersonal Crown and to the law. This enabled the late-medieval judges to develop the important principle that 'the king can do no wrong', and the subsidiary principle that any grant or command by the Crown must be in writing, capable of judicial scrutiny. They could reject anything done in the king's name which it was not lawful for him to do, on the footing that he could not legally have done it.[56] The prerogative writs rested on the same foundation, enabling governmental power to be scrutinized by the judges in the king's name.[57]

[50] The cursitor baron excepted. See pp. 56–7, ante.

[51] The salary of a puisne judge was £100 in 1400 (about £60,000 in today's money), but from 1660 it was £1,000 and by 1830 had risen to £5,000 (equivalent to £340,000 today).

[52] One was in Fleet Street, and the other in Chancery Lane. In 1730 the former was given up and the two societies merged.

[53] Stat. 2 Edw. III, c. 8; 14 Edw. III, stat. i, c. 14. For a striking example of an offending letter see 104 SS 110.

[54] 18 Edw. III, stat. iv.

[55] J. Fortescue, *The Governance of England* (C. Plummer ed., 1885); *De Laudibus Legum Angliae* (S. B. Chrimes ed., 1942). Fortescue had been CJKB (1442–61).

[56] Baker, *Magna Carta*, pp. 45–6, 61–2, 106, 150, 328. The statute of 1344 (n. 54, ante) assumed the king himself would not write letters contrary to law.

[57] See pp. 153–5, ante.

The independent stance of particular chief justices may have helped to establish a general principle of independence. The famous story that Gascoigne CJ had committed Prince Henry (later King Henry V) for contempt in trying to browbeat the court, whether true or not, was a popular tale in Henry VIII's time.[58] Huse CJ provided another instance at the beginning of the Tudor age; when, in 1485, the new king desired the judges to give preliminary opinions in a treason case, the chief justice declined, saying that 'it would come before the King's Bench judicially, and then they would do what by right they ought to do'.[59] Under Henry VIII there was a notable contrary instance of judges conforming their opinions to the king's wishes,[60] albeit in order to restore the earlier common law, but it was an unusually tense period and the incident was notable chiefly because it *was* unusual. The fact that there were few removals from judicial office before the seventeenth century is as consistent with judicial subservience as with independence. But probably the Crown rarely applied, or needed to apply, extreme pressure on the judges; when it did so, the reaction depended on the quality of the men in office and the extent of their personal agreement with royal policy.

In the seventeenth century the judiciary came into head-on collision with the Crown on several occasions. James I frequently argued with the judges, and permitted the law officers to wrangle with them in the Privy Council. A dramatic instance occurred in 1616, when the judges were summoned before the Council to say whether they would stay a suit if the king so ordered. All the judges submitted except Coke CJ, who answered – doubtless remembering the example of Huse CJ – that 'when that case should be, he would do that should be fit for a judge to do'.[61] A few months later – through the machinations of Francis Bacon – Coke was summarily dismissed, by a writ giving no reasons, despite his reputation as the greatest lawyer of the age.[62] The legal world saw it as an outrage, but it was a sign of things to come. Royal interference continued under Charles I. In 1626 Crewe CJ was dismissed for opposing a forced loan, and over the next fifteen years Charles I removed several more judges who refused to comply with government policies. Judicial office became less secure than it had ever been, and those judges who survived in office were in consequence distrusted by the public. The decision of a majority of the judges in favour of the imposition of ship-money in 1638 brought their reputation to its lowest ebb,[63] and in 1641 several of the ship-money judges were impeached by the House of Commons.

Contemporaries saw the best solution to be life tenure for judges. The appropriate words of limitation in a patent granting office for life were *quamdiu se bene gesserit* ('so long as he should behave well'), but – except for the barons of the Exchequer – judges had usually been appointed during the king's pleasure. Bryan CJCP had (perhaps

[58] *OHLE*, VI, p. 419.

[59] *R. v. Stafford* (1486) Y.B. Trin. 1 Hen. VII, fo. 26, pl. 1. Huse's descendants spelt the name as Hussey and it was presumably so pronounced.

[60] *Lord Dacre's Case* (1535) B. & M. 127 at 132; p. 274, post. Another example the same year was *Melton's Case*, B. & M. 87; 55 CLJ 249 (repr. in *CPELH*, III, pp. 1380–97); p. 296, post.

[61] *Acts of the Privy Council 1615–1616* (1925), p. 607; Baker, *Magna Carta*, pp. 422–6. Cf. the judges' answers to Charles I concerning the Petition of Right (1628) and Sir John Elliot (1629): pp. 508–9 nn. 64–7, post.

[62] Baker, *Magna Carta*, pp. 435–41.

[63] See pp. 227, 509, post.

uniquely) been appointed during good behaviour in 1472,[64] and in 1642 Charles I was pressured into reviving this practice. The practice was continued under Charles II by Lord Clarendon C, but from 1668 there was a return to grants during pleasure. Even judges who had life tenure were insecure, because they could be suspended from sitting; a suspended judge remained technically in office, and received his salary, but could take no further part in decisions.[65] Charles II also began the practice of forced retirement. It had been rare for judges to retire, since there was no right to a pension; usually they served until they died. But there were precedents for permitting judges to retire with a pension on grounds of old age or ill health, by issuing a 'writ of allowance'.[66] In 1678 the same writ was used peremptorily to remove Rainsford CJ to make way for a court favourite (Scroggs CJ), and in 1679 to remove several judges for political reasons. These scandals were exceeded by James II, who dismissed twelve judges in four years, without pensions, mostly for refusing to recognize his claim to dispense with statutes. The lesson was learned. William III was advised to appoint all his judges during good behaviour, and from 1701 tenure during good behaviour was guaranteed by the Act of Settlement (1700).[67] Yet even tenure during good behaviour ended on the demise of the Crown. Upon the king's death all judicial proceedings ceased until judges could be appointed. One of the first royal acts of a new king was to deliver the great seal to a chancellor, who could then seal the patents of appointment. This gave a new sovereign the opportunity to dismiss judges and officers of state by not renewing their patents. This had rarely happened over the centuries, though Queen Anne discontinued some judges in this way in 1702. From 1707, however, all judicial patents were continued for six months after the demise of the Crown, and since 1760 continuity in office has been secured by statute.

Once judges received security of tenure, the principal form of political influence lay in the choice of new judges, which was a matter for the king on the advice of the lord chancellor. It was an influence which ended on appointment, but since the selection itself was an act of absolute royal prerogative it might be used by the government to reward supporters. Until 1946, when Lord Goddard LCJ was appointed, it had been the usual practice for four centuries to offer chief justiceships when vacant to government law officers.[68] Politics sometimes played a part in the appointment of puisne justices as well. Convention normally prevented abuse, but Lord Halsbury LC in the Edwardian period made some nominations which were widely condemned as showing party bias. In 2006, when the position of lord chancellor was diminished, it was thought more seemly to transfer the responsibility for making nominations from the lord chancellor

[64] His predecessor (Danby CJ) was dismissed by royal mandate, presumably for supporting the readeption of Henry VI, in 1471: IND 17180, fo. 4.

[65] *Re Justice Archer* (1672) T. Raym. 217; Lincoln's Inn MS. Misc. 500, fo. 206v.

[66] E.g. Kingsmill JCP (1605), Hale CJKB (1676), and Twisden JKB (1678). Hale had scrupulously advised against the grant of his own pension as a potential threat to judicial independence.

[67] Stat. 12 & 13 Will. III, c. 2; and see D. A. Rubini, 83 LQR 343; Supreme Court Act 1981 (c. 54), s. 11(3). The statutory procedure for removing a superior judge for misconduct has never been used in England, but it does not apply to all judges: p. 180, post. There is now a compulsory retiring age (originally 75, now 70) and a procedure for removal in case of permanent infirmity: Judicial Pensions Act 1959 (8 & 9 Eliz. II, c. 9), s. 2; Administration of Justice Act 1973 (c. 15), s. 12.

[68] With two exceptions (Lord Tenterden CJKB and Erle CJCP) all 19th-century chief justices had served as law officers. Tenterden had been Treasury counsel.

to a statutory Judicial Appointments Commission.[69] As for political activity, Lord Ellenborough CJ was (in 1806) the last chief justice to serve in the Cabinet, and his association with the administration was controversial at the time;[70] thereafter, with the anomalous exception of the lord chancellor, judges remained studiously aloof from party politics.

The tenure secured with such a struggle for judges of the superior courts was not given to other judges. Until 1972–73 justices of assize and justices of the peace were appointed by commissions which were issued ad hoc from time to time, and there was no guarantee that any person would be continued from one commission to the next. Circuit judges are now appointed by royal warrant, justices of the peace by an instrument signed by the lord chancellor; but these documents confer little more security of tenure than commissions. The majority of judges are to this day removable at the behest of the lord chancellor, who remains an active member of the government. However, following the reduction in status of the lord chancellor in 2003, the approval of the lord chief justice is now required for the removal of a circuit judge.[71]

Civilian Advocates

The practitioners and judges in the English ecclesiastical and admiralty courts were until 1857 wholly separate from the common-law profession just described. There was a parallel division of function between advocates (corresponding to serjeants) and proctors (corresponding to attorneys), but their training was remote from that provided in the inns of court. The proctors were bred up in the routine of their courts, by a kind of apprenticeship. The advocates were doctors of law from the universities of Oxford and Cambridge who had been admitted to practise by the ecclesiastical authorities.[72] In medieval times practising advocates were necessarily canonists; but after Henry VIII's reign, when the schools of canon law were closed, they were doctors of Civil law (usually abbreviated D.C.L. at Oxford, LL.D. at Cambridge). From the advocates were appointed the judges in those courts, and the king's advocate, who acted as law officer there. Most of them belonged to a society called Doctors' Commons, with a house in London not far from St Paul's where they kept a common table and built up a precious library of foreign law books. This society was first formed by the 'doctors of the Arches' in the fifteenth century, for reasons of social convenience, and never possessed educational functions like those of the inns of court, or the power to grant qualifications. It was incorporated in 1768 as 'the College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts', to enable the society to purchase the freehold of their premises. The doctors' high status and scarlet robes matched those of the

[69] Constitutional Reform Act 2005 (c. 4), s. 61. This took effect in April 2006. There is a different procedure for selecting justices of the Supreme Court.

[70] The government answered the critics haughtily, 'we take not our principles of the English constitution from the theories of Montesquieu and Blackstone', and that it was idle to talk of the separation of powers: *Ann. Reg. 1806*, pp. 27–33. See also S. Jay, 38 AJLH 118; R. Melikan, 18 *Parliamentary History* 131.

[71] Courts Act 1971 (c. 23), s. 17(4) (LC alone), as amended by the Constitutional Reform Act 2005 (c. 4), sch. 4, cl. 68.

[72] Usually by the dean of Arches upon receipt of a mandate from the archbishop of Canterbury. A doctorate in law was mandatory for practice in the Court of Arches, but not for advocates in the province of York.

serjeants, but they acquired a similar reputation by the nineteenth century for being a 'cosey, dosey, old-fashioned, time-forgotten, sleepy-headed little family party'.[73] Many of the Victorian advocates were men of learning and distinction, but the institutions they served were out of tune with the times. Upon the establishment of secular divorce and probate courts in 1857 the doctors were deprived of their monopoly of audience in those important spheres, and two years later they lost their monopoly in the Court of Admiralty. The profession was thereby doomed to extinction. Doctors' Commons sold its library in 1861 and its premises in 1865. The last practising advocate, Dr T. H. Tristram, died in 1912.

Legal Education in the Universities

The universities had law schools by the early thirteenth century, but they taught Roman Civil and canon law to the exclusion of the law of the land, disdaining to recognize subjects which were not universal in application or expressible in Latin. The majority of their law graduates before Victorian times became country parsons; a few chose administrative positions in the Church, and only a tiny proportion became advocates in Doctors' Commons. The common lawyers, with equal exclusiveness, disclaimed any special knowledge of Roman law or its method.[74] In truth the medieval inns of court owed a good deal to the university model, but the lectures (being on statutes) did not provide a comprehensive course of instruction, and the exercises were chiefly designed to produce advocates who knew their way around the labyrinthine procedures of the common law. At its height, the professional law school was tough and effective; but, as we have seen, it came to an end in the mid-seventeenth century, leaving self-help as the principal method of legal education. A law student could attend Westminster Hall in term-time, with pen and notebook, to learn by watching and listening; and he could try to obtain a clerkship or pupillage in order to study the routine of pleading and conveyancing at first hand.[75] His law would be gathered from such books as he could afford to buy or borrow, and the most useful of these owed more to the alphabet than to schematic analysis.

By a strange turn, the universities were destined to succeed where the inns of court eventually failed. England was perhaps the last European country to admit the study of the municipal law into its academic curriculum,[76] but the process began in earnest when Dr William Blackstone began to lecture on English law at Oxford in 1753. In 1758 the Oxford lectures were endowed by the foundation of the Vinerian professorship,[77] and within the next fifty years similar chairs were founded at Trinity College Dublin and at Cambridge.[78] Blackstone's lectures were not aimed at professional law students

[73] C. Dickens, *David Copperfield* (1850), ch. 23.

[74] See Baker, 55 *Current Legal Problems* 123 (repr. in *CPELH*, I, pp. 367–93); p. 140, ante.

[75] Pupillage in barristers' chambers probably began in the early 18th century. Previously young barristers or bar students might find a seat in the office of an attorney or court official. See *CPELH*, I, pp. 282–8.

[76] F. Sullivan, *Principles of Feudal Law* (1772), p. 10.

[77] See D. J. Ibbetson in *Learning the Law*, pp. 315–28.

[78] The Downing professorship at Cambridge was on the foundation of Downing College, incorporated in 1800 after decades of Chancery litigation over the will of Sir George Downing (d. 1749). But the first holder, Edward Christian, had begun to lecture in 1788.

but at country gentlemen and clergymen, and his modest aim enabled him to take a broad view of the subject. They were the first attempt since *Bracton* to expound the whole of the law in a rational and elegant, albeit elementary, method. But the publication of the lectures in 1765–69 as the *Commentaries on the Laws of England* provided law students also with a primer. And it rendered further lectures for the time being less attractive; it was cheaper to buy the book. Blackstone's immediate successors did not attract large audiences; nor did the earlier Downing professors at Cambridge. Indeed, at times the lectures in English law ceased altogether for want of hearers. But the example had been set.

A new impetus for legal education came from the efforts of Andrew Amos, a practising barrister who accepted the first chair of English Law in the new University of London in 1828. He gave evening classes and lectures in Gower Street for Bar students and articled clerks who had spent the day in an office, and his avowed intention was to combine practical observation with academic discussion. His classes were a notable success, and in 1839 London University awarded the first academic degrees in the common law.[79] Again, however, it was a one-man success, and it seems to have owed more to Amos's personality and quirky methods than to coherent scholarship. In the 1840s legal education returned to the doldrums. There were insufficient endowments to attract professors of distinction, and students preferred to learn their law in the rival professional law schools which were springing up at that time. It is a reflection on the low status of legal education in those days that most distinguished English lawyers between about 1850 and 1950 were either not university graduates at all or, more usually, had read subjects other than law. The need to improve legal education was constantly debated. In 1846, and again in 1971, it was recommended by committees of enquiry that universities should teach the elements of legal science and that professional law schools should teach the practice, both being necessary for every lawyer. The profession responded by establishing the Council of Legal Education in 1852 to serve the inns of court;[80] but lectures were voluntary and came to be virtually superseded by the services of crammers, while examinations for the Bar were not made compulsory until 1872.[81] In 1849–50 Cambridge and Oxford both experimented with B.A. courses in jurisprudence coupled with other humane subjects, and in 1858 Cambridge introduced a separate law tripos.[82] Experiments in extending legal education to the provinces began in the same period with the foundation of a law department at Queen's College, Birmingham, in 1850.[83] These measures initially had more impact on the education of prospective solicitors than barristers, because of the engrained notion that the latter, as members of a liberal profession, ought to read classics or mathematics rather than law. Towards the end of the century, however, the academical study of law revived

[79] See [1977] *Current Legal Problems* 1; *CPELH*, I, pp. 292–6. Amos went to Cambridge in 1849 as Downing Professor, but his teaching was less successful there.

[80] The school established in 1852 became the Inns of Court School of Law in 1967.

[81] The Law Society, which had provided lecture courses since the 1830s, acquired an established School of Law in 1903.

[82] This led to a B.A. in law. The LL.B. (B.C.L. at Oxford) was retained as a postgraduate degree. In other English universities the LL.B. was the first degree in law. The Cambridge LL.B. has now been renamed the LL.M.

[83] See W. W. Pue, 33 AJLH 241. Law departments were founded in 1880 at Owens College (later Manchester University) and in 1892 at University College, Liverpool (later Liverpool University).

in the two older law faculties under the influence of professors such as Maitland, Dicey, Anson, and Pollock, whose writing raised legal scholarship to a new level.[84]

By 1933 there were over 2,500 students reading law at sixteen English universities.[85] The study of law at university is now recognized as a liberal education in its own right, and it has also become the normal preliminary to the vocational training and examination which is now required for both branches of the profession.[86] Women were excluded from both branches of the profession until 1919, though a number had already been reading law at university.[87] The number of women law students only became significant after the Second World War, but by the end of the twentieth century they were outnumbering men.

Further Reading

Holdsworth, *HEL*, XII, pp. 4–101 (on the 18th century)
E. W. Ives, *The Common Lawyers of pre-Reformation England* (1983)
R. Cocks, *Foundations of the Modern Bar* (1983)
D. Duman, 'The Late Victorian Bar' (1983) in *Law, Litigants and the Legal Profession*, pp. 140–54
J. H. Baker, *The Order of Serjeants at Law* (5 SS Supp. Ser., 1984); 'The Legal Profession' in *CPELH*, I, pp. 19–139; 'The Bar' and 'Attorneys and Clerks' [1483–1558] (2003) in *OHLE*, VI, pp. 421–44; *The Men of Court 1440–1550* (18 SS Supp. Ser., 2012)
N. L. Ramsay, 'Retained Legal Counsel, *c.* 1275–*c.* 1475' (1985) 35 TRHS (5th ser.) 95–112; 'What was the Legal Profession?' in *Profit, Piety and the Professions in late Medieval England* (M. Hicks ed., 1990), pp. 62–71
W. R. Prest, *The Rise of the Barristers* (1986); (ed.) *Lawyers in Early Modern Europe and America* (1981)
D. Lemmings, *Gentlemen and Barristers: the Inns of Court and the English Bar 1680–1730* (1990); *Professors of the Law: Barristers and English Legal Culture in the 18th Century* (2000)
P. Brand, *The Origins of the English Legal Profession* (1992)
C. W. Brooks, 'The Decline and Rise of the English Legal Profession 1700–1850' (1998) in *Lawyers, Litigants and English Society*, pp. 129–47
P. Polden, 'The Legal Professions' [1820–1914] (2010) in *OHLE*, XI, pp. 1017–201 (and the further reading listed on pp. 1239–42)

Inns of Court and Chancery

W. R. Prest, *The Inns of Court 1590–1640* (1972)
J. H. Baker, 'The Inns of Court and Chancery' (8 papers) in *CPELH*, I, pp. 141–252; 'The Origin and Early Character of Lincoln's Inn' in *A Lincoln's Inn Commonplace Book* (G. S. Brown ed., 2016), pp. 36–49; *The Inns of Chancery 1340–1640* (19 SS Supp. Ser., 2017)
W. C. Richardson, *A History of the Inns of Court* (1978)
R. O. Havery ed., *History of the Middle Temple* (2011)

[84] See p. 203, post. [85] 51 LQR 179.

[86] Articled clerkship for solicitors (now called traineeship) has been compulsory since the 17th century. Pupillage for barristers, though almost universal, was not compulsory until 1958. In the later 20th century attendance at a vocational law school was made compulsory for both branches.

[87] The exclusion was ended by the Sex Disqualification (Removal) Act 1919 (9 & 10 Geo. V, c. 71). The first woman barrister (Dr Ivy Williams of the Inner Temple) was called in 1922 and became a law lecturer. The first woman solicitor (Carrie Morrison), was admitted in the same year. The first women KCs (Helena Normanton and Rose Heilbron) were appointed in 1949, and the first woman High Court judge (Dame Elizabeth Lane) in 1965.

Legal Education

S. E. Thorne, *Readings and Moots in the Inns of Court, I: Readings* (71 SS, 1952)

H. G. Hanbury, *The Vinerian Chair and Legal Education* (1958)

J. H. Baker, 'Legal Education' (9 papers) in *CPELH*, I, pp. 255–410; *Readings and Moots in the Inns of Court,* II: Moots (105 SS, 1989); *Readers and Readings in the Inns of Court and Chancery* (13 SS Supp. Ser., 2001); 'The Education of Lawyers' [1483–1558] (2003) in *OHLE*, VI, pp. 445–72; 'Magna Carta in the Inns of Court 1340–1540' (2017) in *Magna Carta*, pp. 69–109; 'The Exercises of Learning' in *The Inns of Chancery 1340–1640* (2017), pp. 75–87

P. Brand, 'Courtroom and Schoolroom: the Education of English Lawyers prior to 1400' (1987) 60 BIHR 147–65 (repr. in *MCL*, ch. 3); 'Legal Education in England before the Inns of Court' (1999) in *Learning the Law*, pp. 51–84

T. W. Evans, 'Study at the Restoration Inns of Court' (1999) in *Learning the Law*, pp. 287–313

M. McGlynn, 'Readings on Statutes in the Inns of Court' (2017) in *English Law and Literature*, pp. 41–60

Attorneys and Solicitors

R. Robson, *The Attorney in 18th Century England* (1959)

M. Birks, *Gentlemen of the Law* (1960)

C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: the 'Lower Branch' of the Legal Profession in Early Modern England* (1983); 'Apprenticeship and Legal Training in England 1700–1850' (1998) in *Lawyers, Litigation and English Society*, pp. 149–78

A. J. Schmidt, 'The Country Attorney in Late 18th Century England' (1990) 8 LHR 237–71

Civilian Advocates

B. P. Levack, *The Civil Lawyers in England 1603–41* (1973); 'The English Civilians 1500–1750' in *Lawyers in Early Modern Europe* (W. Prest ed., 1981), pp. 87–109

G. D. Squibb, *Doctors' Commons* (1977)

C. T. Allmand, 'The Civil Lawyers' in *Profession, Vocation and Culture in Later Medieval England* (C. H. Clough ed., 1982), pp. 155–80

The Judiciary

A. F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II' (1950) 66 LQR 62–78, 229–52; 'James II and the Twelve Men in Scarlet' (1953) 69 LQR 522–46

W. J. Jones, *Politics and the Bench: The Judges and the Origins of the English Civil War* (1971)

S. F. Black, 'Coram Protectore: the Judges of Westminster Hall under the Protectorate of Oliver Cromwell' (1976) 20 AJLH 32–64; 'The Courts and Judges of Westminster Hall during the Great Rebellion' (1986) 7 JLH 23–52

D. Duman, *The Judicial Bench in England 1727–1875* (1982)

R. V. Turner, *The English Judiciary in the Age of Glanvill and Bracton* (1985)

P. Brand, 'Edward I and the Transformation of the English Judiciary' (1992) in *MCL*, pp. 135–68; 'Edward I and the Judges: the "State Trials" of 1289–93' in *Thirteenth Century England* (P. R. Coss and S. D. Lloyd ed., 1986), pp. 31–40 (repr. in *MCL*, pp. 103–12); 'Ethical Standards for Royal Justices in England *c.* 1175–1307' (2001) 8 *Univ. Chicago Round Table* 239–79

D. Lemmings, 'The Independence of the Judiciary in Eighteenth Century England' (1993) in *Life of the Law*, pp. 125–49

R. B. Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (1993)

J. H. Baker, 'The Judiciary' [1483–1558] (2003) in *OHLE*, VI, pp. 411–20

P. Polden, 'The Judiciary' [1820–1914] (2010) in *OHLE*, XI, pp. 959–1016

11

Legal Literature

It is possible for courts and administrative systems to function without books, but it is impossible for a body of law to develop very far without the interposition of writing. The ways in which English law came to be written down, or written about, were various. Legislation was always important, but it presupposed an existing and more comprehensive body of unwritten law, and until the sixteenth century it came without reasoning or explanation; it does not count as legal literature so much as a supplementary source of law, interspersed with a good deal of ephemeral regulation.[1] Professional literature began in connection with the workings of royal justice. The forms and procedures followed by the courts called for formularies, first of writs and then of pleadings; and formularies attracted notes of explanation and commentaries, to help the beginner understand as well as learn the forms. The dynamics of litigation, looking beyond the forms, could be learned by watching the interchanges between the judges and serjeants in court, and it was sensible for someone to make notes of them for future reference. And when the inns of court organized readings and disputations, in which accepted doctrine was tried and tested in the presence of judges and benchers, it was again sensible for those present to keep notes. All these kinds of material circulated in manuscript. The more assiduous medieval lawyer had to spend many hours writing out his own library, or spend money on copies. Even a century after the introduction of the printing press, the copying, abstracting, and annotating of legal texts by hand remained a feature of legal self-education. Books were the repositories of legal learning, and lawyers were ever hungry for books. The more eminent the lawyer, the larger his library,[2] and by the seventeenth century there were over a hundred legal volumes in print. The publication of law books subsequently grew with such rapidity that by 1800 the printed literature of English law extended to over 1,500 separate titles.

Glanvill and *Bracton*

The common law of the king's courts was from the outset inseparable from their practical operation. Anyone wishing to use those courts needed to know whether an action was available, and if so how to commence and manage it. The Latin records of the courts were a formal source of answers, but most people would not have had ready access to them, and (for reasons already given) they were opaque.[3] Instruction had to come from insiders. The treatise called *Glanvill* was written in about 1187–89, probably

[1] For legislation see the next chapter, pp. 216–25.

[2] Hence Chaucer's humorous depiction (*c.* 1390) of a serjeant at law equipped with law reports stretching back (impossibly) to the Conquest. For libraries of the common law before 1640 see *Libraries in Britain and Ireland*, I (E. Leedham-Green and T. Webber ed., 2006), pp. 448–60.

[3] See pp. 86–7, 146–7, ante.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

by one of the royal justices if not by Glanvill himself. We have already noticed its significance in concentrating on the work of the king's central courts.[4] The decision of the author to focus on writs and procedure rather than on legislative decrees was equally significant. English law was already seen as rooted in the remedies given by the royal courts in particular cases, and only by explaining such things could any underlying principles be uncovered.

The active life of *Glanvill* was short, because it was completely overtaken both by legal developments and by a huge treatise with the same title, *De Legibus et Consuetudinibus Angliae* ('On the Laws and Customs of England'), which appeared in the thirteenth century.[5] The latter bears in some versions the name of Henry de Bracton (d. 1268),[6] one of the judges *coram rege* in the 1240s and 1250s, and is generally known as *Bracton*. It was once supposed that it was written in the 1250s, using plea rolls of the previous generation which had first been collected into a notebook. Recent scholarship suggests that it was mostly written in the 1220s and 1230s, using current plea rolls, and then mangled by editors trying to bring it up to date in the middle of the century. Bracton was doubtless one of these later redactors, but his work was never finished; there are, throughout the text, inconsistencies and broken promises to continue topics later. The treatment is still heavily based on the writ system, but filled out with evidence of judicial practice selected from the plea rolls and also with speculative learning derived from Roman and canon law. The number of surviving manuscripts (over fifty) shows that it circulated widely in the later thirteenth and early fourteenth centuries; but it failed to have a deep and lasting impact because it was written too soon. The compiler was able to survey the whole of the common law with confidence only because it had not yet become clogged with sophisticated detail; special pleading had barely begun, there were no law reports, and there was as yet no law school for intending practitioners. The book was aimed at intending judges and their clerks rather than pleaders,[7] though there is some doubt whether it represented the law as it ever really was.[8]

Had the common law developed in the academical manner, *Bracton* might have been heavily glossed and then replaced by still more comprehensive Latin treatises in the same genre. However, despite the attempts to correct and update the text before circulation, and the appearance of Latin epitomes or *summae*,[9] this kind of book was generally defunct by the end of the century. For background reading, the law student of Edward I's time preferred books in French, such as *Britton* (*c.* 1290);[10] while, for practical initiation,

[4] See p. 17, ante. The best edition is by G. D. G. Hall (1965). Glanvill's claim to authorship was questioned by Maitland, who favoured Hubert Walter. Lady Stenton suggested Geoffrey FitzPeter, and more recently R. V. Turner proposed the academically trained justiciar Godfrey de Lucy: 8 LHR 97.

[5] *Bracton De Legibus et Consuetudinibus Angliae* (G. E. Woodbine and S. E. Thorne ed., 1968–77). It was first printed in 1569.

[6] The name occurs in the preface as 'ego Henricus de Bracton', though in some versions the author is just 'ego talis'. The name is derived from Bratton in Devon.

[7] The preface (II, pp. 19–20) said that the laws were often misapplied by ignorant judges who ascended the judgment seat before learning them, and that the treatise would enable those who studied it to sit in the royal court and to make orderly enrolments of cases.

[8] See Milsom, introduction to Pollock & Maitland, I, pp. lxxii–lxxiii. All the judges agreed in 1457 that it was 'never held to be an authority in our law': *CPELH*, I, p. 368.

[9] The most widely circulated were those attributed to Hengham CJ: *Radulphi de Hengham Summae* (W. H. Dunham ed., 1932); Brand, *MCL*, p. 369. For Gilbert de Thornton's *Summa* see Thorne, *EELH*, p. 111.

[10] This was a shortened and rearranged version of *Bracton*. The best text is the edition by F. M. Nichols (1865; repr. 1983). In 1294 Mettingham CJ told a serjeant, 'Go to your "Bruton" and he will teach you': Brand, *MCL*, p. 73.

he attended the lectures given for apprentices of the Bench[11] and studied the oral pleading of the serjeants in open court. The obsolescence of *Bracton* not only left the common law without systematic exposition for the next 500 years; its failure was a sign that the law was developing too quickly to be captured reliably in a grand theoretical treatise. The common law was destined to be tied more closely to the life of courtroom practice than to exposition by jurists.

Formularies

The need for guidance in the practice of the king's courts explains why compilations of the forms of writs are among the most plentiful of early English legal manuscripts. *Glanvill* and *Bracton* had provided the wording of the most important formulae, but the corpus of available writs was increasing beyond the capacity of treatises to accommodate them. What was most needed was a comprehensive working formulary of the writs themselves. A bare collection of writ formulae was called a 'register'. Whether there was ever one authoritative Chancery register is unknown, but some of the early manuscripts were owned by Chancery clerks and it seems probable that each master made his own collection, using earlier versions which came to hand. The earliest belong to the first quarter of the thirteenth century, and revised versions were produced over the next 300 years.[12] All registers contain texts of writs, in Latin, but they differ in scope and arrangement. As their content increased steadily during the thirteenth and fourteenth centuries, they attracted glosses in the form of notes and 'rules', seemingly derived from lectures. But they reached their final form when the older writs ceased development. The classical register was that printed in 1531, from a fifteenth-century exemplar, as the *Registrum Omnium Brevium*. It contained only a few early specimens of actions on the case, and no serious attempt was made to update it when those actions transformed the common law in the sixteenth century.[13] That role fell to another type of formulary, the collection of precedents of pleading.

The progenitor of this second type appeared within a generation of the first registers, and was evidently for the use of counters. Books of specimen counts in French, called *Novae narrationes* (in English, 'the New Tales'), with occasional interspersed instructions for their use, reached the peak of their development in the fourteenth century. They contained a wide selection of counts but relatively few defences.[14] Such books went out of use, except for educational purposes in the inns of court and chancery, when attention shifted from the count to tentative special pleading.[15] The full art of tentative pleading could only be learned by observation, or by the study of verbatim reports of interchanges in open court,[16] since it was a dynamic process and could not be captured in set formulae. In any case, the formal medium of special pleading was not the French spoken in court but the Latin formulation entered on the roll; it was the Latin entry which settled what was in issue, which provided the focus for any proceedings

[11] See pp. 170–1, ante; pp. 197–8, post.
[12] *Early Registers of Writs* (E. de Haas and G. D. G. Hall ed., 87 SS, 1970).
[13] Cursitors must have needed precedents of these, and at least one formulary exists from around 1550: *OHLE*, VI, p. 888. But the drafting was probably left to counsel.
[14] See *Novae Narrationes* (E. Shanks and S. F. C. Milsom ed., 80 SS, 1963).
[15] See pp. 83–4, ante. [16] See pp. 188–9, post.

subsequent to the trial, and which served as a precedent for the future. When paper pleadings were circulated to assist the court they were presumably in Latin, and so (reversing earlier practice) the oral plea became merely a French paraphrase of a draft Latin entry. The prime need for access to Latin precedents was that of the clerks responsible for the entries on the rolls, and it was the prothonotaries and clerks of the Common Pleas who first compiled 'books of entries' in the fifteenth century from the records in their custody. By the sixteenth century there was a growing demand for such books, to assist not only the clerks but also attorneys and counsel (who did not have ready access to the plea rolls) in framing pleas themselves.[17] The first to be printed was the *Intrationum Excellentissimus Liber* (1510), the authorship of which is unknown. The best were compiled by judges: William Rastell's *Colleccion of Entrees* (1566), based on at least three earlier collections, and Sir Edward Coke's *New Booke of Entries* (1614). Rastell and Coke both included a good selection of actions on the case, and in later books of entries these came to predominate. The later collections of precedents of actions on the case effectively combined the functions of both registers and *narrationes*, and for this reason they continued to be produced from ever more modern precedents until the nineteenth century. The genre survives as Bullen and Leake's *Precedents of Pleading* (1st edn, 1860; 18th edn, 2015).

Reports of Cases

The writs were the first subject of legal study, but a lawyer practising in the king's courts, or a student intending to practise, needed to know much more than the bare formulae. He needed to know the interrelationship between procedures, the opportunities for manoeuvring, the practicalities of proof, and how the judges responded to exceptions and demurrers. As early as the 1220s lawyers were extracting interesting cases from the plea rolls as illustrations of the law in action, and many such cases were used by the author of the treatise called *Bracton*. The rolls continued to be the most authoritative source of precedents into later times, and it was common for counsel to 'vouch the record' when citing a previous case. But they were of limited use. After some initial experimentation in the thirteenth century, the record came to be highly formulaic, using stereotyped Latin phrases and omitting the evidence, the arguments of counsel, and the reasons for judgments. There was a purpose to this formalization. Established formulae had clear meanings, and they were best kept short. Reasoning was less amenable to precise statement than simple outcomes, and its inclusion in the record might render the judgment less secure.[18] It was therefore excluded. The debates between the serjeants and judges, the tentative pleading and judicial rulings which obliquely revealed the assumptions of the common law,[19] took place off the record, and only the formal end-result went down on parchment. For those seeking to understand the law, these ephemeral forensic exchanges in court were of great importance, and long attendance

[17] See J. Baker, 41 IJ 1 (repr. in *CPELH*, II, 670–90). The earliest identifiable compiler of entries, Simon Elryngton, was a filazer of CP 1442–75. But there are earlier examples.

[18] It laid it open to challenge by a writ of error: e.g. *Barry v. Pierrpont* (1287) 112 SS 271; *Windsor v. Membury* (1293) 57 SS 160.

[19] See pp. 85–7, ante.

in Westminster Hall was an indispensable part of a common lawyer's education. The natural store for such learning was the human mind. Royal judges of the twelfth and thirteenth centuries must have relied heavily on memory and experience, prompted by the rolls. But memory is frail and unsafe, and if continuity was to be preserved from one generation to another, and if legal discussions in the Bench were to reach a wider audience than those who happened to hear them in court, then some additional kind of record was required.

The Year Books

The first surviving reports of arguments or remarks attributed to named judges are from the 1250s. They are little more than collections of dicta, perhaps mediated through the classroom. Some were intended to illustrate accounts of procedure, and these are sometimes found in collections arranged by forms of action. More detailed narrative accounts of proceedings in court, from the 1280s onwards, preserved instructive or memorable interchanges in particular terms at Westminster or at eyre sessions in the country. The chronological format was the one that prevailed. Eyres were becoming infrequent, though the last sessions were reported in full.[20] For the Common Bench, a continuous stream of reported arguments began in 1291.[21] The reports were written in the Anglo-French dialect spoken in court. The arguments were rendered in abridged form, often almost impenetrably brief, but with the names of the speakers and occasional asides from the reporter. Their authorship is unknown, and they are referred to by the generic name 'year books'.[22] Contemporaries called them 'books of terms', since the only headings in the manuscripts are those of the law terms (and years) to which the reports relate.

The first year books were the creature of the new legal profession which developed in the reigns of Henry III and Edward I, but opinion is divided as to whether they were produced primarily for established practitioners such as serjeants, or for court officials, or for young apprentices. A long-standing tradition, first recorded by Plowden in the mid-sixteenth century, attributed the year books to official reporters, conjecturally identified by some as the prothonotaries of the Common Bench. But the thesis that they had an official purpose is no longer accepted; there are no records of the appointment or payment of reporters, no year books were preserved with the records of the courts, and some of the early reports are not only informal but inaccurate in matters of fact. The purpose of the reports cannot have been to supplement the record for official purposes, since they frequently omitted details – such as the names of the parties – which would be needed to trace the corresponding entries in the plea rolls. The object must rather have been to record the intellectual aspect of proceedings in court: to circulate and preserve for the information of students and their practising elders the

[20] Kent (1314–15), London (1321), Bedfordshire, Northamptonshire, and Nottinghamshire (1329–30), Derbyshire (1330).

[21] The date corresponds with a rearrangement of the court to accommodate more student observers: Brand, *Observing and Recording the Medieval Bar and Bench at Work*, pp. 15–18.

[22] Cases were cited by year and folio, once the foliation was standardized by the printers. They may also be cited by term and *placitum* (the case-number within the term).

possible moves in the recondite games of legal chess played out by the pleaders at the bar. If we have to account for their beginning, the most likely explanation is that they arose from a case-method of instruction in the law school which served the apprentices of the Bench. This would help to explain the anonymity of the texts, and the fact that the earlier cases are in a different order in almost every manuscript; they were not an individual lawyer's journals, but a product of the communal interchange of notes generated by the teaching process. For the same reason, the contemporary value of the early reports lay not in their historical authenticity as precedents but in the ideas and suggestions which they contained. If one report is materially different from another, we should not rush to blame it on carelessness, for we may be seeing the consequences of a teacher teasing out the points in a case by varying the facts, or different teachers working from the same case. If that is so, it mattered little at the time who wrote the manuscripts. They were not authoritative repositories of historical fact but of legal reasoning. Any sense they made was self-evident, and any nonsense could be freely corrected or ignored by the reader.

The Later Year Books

The mystery and anonymity surrounding the year books of Edward I is almost as deep two centuries later with respect to those of Henry VII and Henry VIII. It does not follow that they were still being produced in the same way, or for the same purposes. Once the age of experiment was over, the fourteenth-century reports settled into a more uniform and at times apparently single series. Although some have been tempted to associate this continuity with the establishment of the inns of court and chancery, no direct link has yet been discovered and it seems certain that the later year books were not produced under their superintendence. Law reporting was a matter of private enterprise, and the uniformity is to some extent an illusion produced by the Tudor printers, who made no attempt to distinguish the work of different hands.[23] Yet at any one time there were apparently only a few reporters, who supplied the rest of the profession. In the fifteenth century a few of them can be identified. The earliest so far discovered was a Wiltshire apprentice (John Bryt), some of whose work is in the printed year books of Henry IV, but who also reported cases on the western circuit. The first of whom anything much is known was Roger Townshend, admitted to Lincoln's Inn in 1454, created serjeant in 1478, and a justice of the Common Pleas from 1485 to 1493. Since his reports extended from the 1450s to the later 1480s, it is evident that reporting was not confined to a particular class of lawyer but was the life-long occupation of certain individuals. And this holds true of most of the Tudor reporters whose identities can be ascertained. For instance, John Caryll's reports extend from his student days in the Inner Temple in the 1480s through his time as a prothonotary of the Common Pleas (1493–1510) and then throughout his career as a serjeant (1510–23).[24] Some year-book reports of the

[23] One exception was the *Long Quinto* (printed in 1552), a much longer version of the year 5 Edw. IV (1465–66) than that printed as the vulgate text. Some of the printed year books of the 1450s are similar 'long' reports, though printing perversely made them the vulgate text and the standard versions were never printed.

[24] About half of Caryll's reports were published in 1602 as 'Keilwey', and some others were printed anonymously in the year books of Hen. VII. All the identifiable texts were printed, with translation, in *Reports of Cases by John Caryll* (115–16 SS, 1999–2000).

1480s and 1490s were the work of an unidentified member of Gray's Inn; and John Spelman of that inn was reporting from about 1502, when he was a student, until the 1530s, when he was a judge.[25] If these examples stood alone, it might be a reasonable speculation that there was one acknowledged reporter in each inn of court; but this does not hold true in the sixteenth century, and a manuscript discovered in 1979 contains reports written over a thirty-year period by John Port, a near contemporary of Caryll at the Inner Temple in the 1490s.[26]

In early Tudor times the character of the reports began to change. This was not the result of any breakdown in organization, but simply a consequence of the transformation which the legal system was undergoing. There was an increase in the amount of law reporting, and more reports were made of cases in the King's Bench, where the most interesting innovations were being initiated. With the decline of oral pleading, the reports concentrated more and more on motions in banc raising questions of law after trial, especially if they resulted in judicial decisions. The direct discussion of substantive law which they contain, and the reasoned judgments, places them more readily within the reach of a modern reader than the inconclusive tentative pleading of the classical year books.[27] Despite these differences, however, there was no break in continuity between the year books and their successors. The year books did not end at any fixed date. What has usually been taken as their end was the result of two concurrent factors unrelated to their content: the advent of printing, and the practice of identifying reports by the name of the author.

The Advent of Printing

Within ten years of the introduction of printing into England in the 1470s, the London printers found a limited but ready market in the legal profession. The first printed English law book was Littleton's *Tenures* (*c*. 1482),[28] and in Henry VII's reign a number of older year books were printed and offered for sale in yearly units at a few pence each. By 1558 the canon of printed year books was arbitrarily deemed by the printers to be complete, though many more survived and could have been added. They were reprinted numerous times, still as single years, by the Elizabethan law printer Richard Tottell, and then between 1590 and 1610 other printers collected them into eight thick composite volumes together with the *Liber Assisarum* (assizes and circuit cases of Edward III) and the *Long Quinto* (5 Edward IV). The first attempt to print the whole at once was not made until 1679–80, when what was destined also to be the last edition was produced in ten tall folio volumes;[29] several thousand sets were printed, at a pre-publication price of £7. The effect of printing the year books was that the manuscripts were soon ousted

[25] *The Reports of Sir John Spelman* (93 SS, 1977). The cases were arranged under alphabetical headings, though the principal remaining manuscript has them rearranged chronologically.

[26] *The Notebook of Sir John Port* (102 SS, 1986). This was completely unknown before it appeared at auction in 1979. Only one case is in the same words as a report in Caryll.

[27] Year books were described formally in 1553 not as reports of decisions, but as books of arguments and opinions: CP 40/1156, m. 525 ('libri de argumentis et opinionibus legis peritorum').

[28] See p. 198, post.

[29] The reprint of 1679–80 has been wrongly associated with the name of Mr Serjeant Maynard (d. 1690), who promoted the first publication of Y.B. Edw. II (1678). A useful electronic index to the printed year

from practitioners' libraries. The printed version, for all its defects and omissions, had the practical appeal of appearing to be a complete set of reports of accepted authenticity, with a standard method of citation.

Unfortunately for the historian, the magic of the printed word has tended to obscure the textual traditions underlying these year books. Many interesting reports which survive in manuscript, including all of those from the reigns of Edward I, Edward II, and Richard II, and more than ten years of Edward III, were omitted altogether.[30] For the fifteenth and early sixteenth centuries a variety of texts was confused into a deceptively uniform series. Our suspicions are aroused when we find judges speaking after they were dead, and similar chronological impossibilities; moreover, careful investigation sometimes reveals that what are printed as different but related cases, or as successive arguments in the same case, are in fact reports of the selfsame argument by different hands. The last printed year book of all, ending with Michaelmas term 1535, was once taken to represent some definitive line between old and new, and the cessation of the series was believed by Maitland to be an ominous event which marked the decline of the common law at the zenith of Henry VIII's despotism. In fact law reporting was by then busier than before; it was simply that the printing press failed to keep up publication. The only surviving manuscript year book of 1535 continues into the 1540s without any change of style.[31] Indeed, many of the reports of the mid-Tudor period are in general indistinguishable from the 'last' year books. It is a convenient convention now to confine the term 'year books' to the anonymous pre-1535 reports, but necessary to remember that this is bibliographical shorthand and conveys nothing of historical significance. Even the title 'year book' does not appear in any printed edition before the nineteenth century.

Named Reports

The personalization of law reports during the Tudor period may have been occasioned by the proliferation of manuscripts of variable quality and authority, and a consequent interest in distinguishing the work of different hands. A number of these survive as distinct texts. John Caryll (d. 1523) produced reports in the year-book tradition, and some of his work found its way into the printed years of Henry VII. The other known reporters of the early sixteenth century, such as Sir John Port (d. 1540), Sir John Spelman (d. 1546), and Sir James Dyer (d. 1582), kept reports of the same kind. Like Townshend before them, they all began reporting in their student days – just within the year-book period – and continued during their careers as serjeants and judges.[32] *Dyer* was published posthumously, but with omissions, in 1585/86.[33] *Spelman* did not reach the press

books, with paraphrased texts, and links to images of the 1679–80 edition, has been compiled by Professor D. Seipp and is accessible through the Boston University website.

[30] Some reports from these years were summarized in the abridgments (p. 196, post).

[31] Library of Congress Law MS. 15 (resuming in 1541). Dyer's reports begin in earnest (ff. 6–31) with a full report of the year 1536–37.

[32] Port's notes of cases in KB from 1529 to 1534 (printed in 102 SS 55–76) are the earliest surviving autograph reports by an English judge.

[33] The omissions, so far as they can be reconstructed from copies, were published in *Reports from the Lost Notebooks of Sir James Dyer* (109–10 SS, 1994).

until 1977, followed by *Port* in 1986. Others from the reign of Henry VIII were printed in 2004.[34]

Only a minority of the Tudor and Stuart reports were ever printed, and those usually long after they were written. The profession was accustomed to using manuscript reports of current cases, and until the 1640s several standard series could be obtained in mass-produced scribal copies from law stationers. Even in the eighteenth century it was not uncommon for manuscripts to be cited in court. This tradition explains why some reporters, for instance William Dalison (d. 1559),[35] William Bendlowes (d. 1584), Sir Edmund Anderson (d. 1605), and Sir Francis Moore (d. 1621), were well known and frequently cited long before their work appeared in print. Much of the printing was carried out in the second half of the seventeenth century, when controls on the press were eased, and editing was of a low standard. Some reports chosen for the press were merely notes, and of poor quality, whereas the better manuscripts were for reasons of length or unavailability passed by. Unscrupulous publishers placed on title-pages the names of distinguished lawyers of the past, even if the texts were in reality as anonymous as the year books. The *English Reports*[36] before 1660 therefore present considerable textual problems. Perhaps as many as half of them are wrongly attributed. *Keilwey,* so named after an owner, is really a part of Caryll's year books bound up with Inner Temple moots (no doubt reported by Caryll) and fourteenth-century *quo warranto* cases. Parts of *Dalison*, *New Benloes*, *Owen*, *Noy*, *Popham*, and *Winch* are demonstrably spurious in their attribution because they all contain cases decided after the alleged reporters' deaths; on page 125 of *Winch* we even find a memorandum of Winch's own death.[37] A glance at *Dalison*, *Old Benloes,* and the earlier pages of *Anderson* will reveal a substantial number of identical texts, albeit in a different sequence in each collection: it was a common practice to collect together cases from borrowed manuscripts without acknowledgment. One case occurs three times, in identical words, in different parts of the collection called *Leonard*.[38]

Most of the early-modern reports in print were casual gleanings from dead men's studies which got into the hands of law printers. Of the reports written before 1660, only three series were seen through the press by their authors. The first was Plowden's *Commentaries* (1572, extended in 1579). Edmund Plowden (d. 1585), bencher of the Middle Temple, reported cases from the 1550s to the 1570s, taking great pains to check details with the counsel and judges, and to procure a transcript of the record, which he printed in Latin before each case. He selected for publication only those cases in which questions of law were raised for solemn argument upon demurrer, special

[34] *Reports in the Time of King Henry VIII* (120–1 SS, 2004) includes those of Roger Yorke (d. 1536), serjeant at law, Richard Pollard (d. 1542), bencher of the Middle Temple, John Caryll junior (d. 1566), bencher of the Inner Temple, and a few others.

[35] The reports printed under his name in 1689, as an appendix to Bendlowes, are mostly from a period after his death. The true reports were printed as *The Reports of William Dalison 1552–58* (124 SS, 2007).

[36] This name was given to the standard reprint of 1900–32, containing the principal pre-1865 reports in 178 volumes.

[37] *Reports of that Reverend and Learned Judge, Sir Humphry Winch* (1657), p. 125. The reports have been attributed, but without any certainty, to Richard Allestree (d. 1655) of Gray's Inn.

[38] *Anon.* (1566) 3 Leon. 13, 4 Leon. 167 and 224; identifiable as *Yevance v. Holcomb*, B. & M. 648. William Leonard was an unsuccessful barrister of Gray's Inn (called 1585). Even the publisher did not pretend that these reports were *by* Leonard, and some of them date from before his time.

verdict, or motion in banc, and edited them meticulously, adding references and commentary. Plowden's conception of a law report as a reasoned exposition of the law, with learned gloss, was taken further by Sir Edward Coke (d. 1634), chief justice of the King's Bench. Coke edited eleven slim volumes of reports between 1600 and 1616, and left further reports in manuscript from which two posthumous parts were printed in 1658 and 1659.[39] He added more of his own comment than Plowden had done, often working into one report his notes of earlier related cases, and not always distinguishing (as Plowden had) his own views from those he was reporting. Coke's intentions were not disingenuous, because like Plowden he still held the medieval view that the correctness of the doctrine reported was more important than the historical precision of the report. His reports were conceived as instructional law books built around actual cases. Coke's personal authority was enough to justify this method, despite strong criticism from contemporaries (such as Lord Ellesmere) who disapproved of his opinions on constitutional questions. The volumes have the distinction of being cited simply as *The Reports*, and they have been perhaps the single most influential series of named reports. A year after Coke's retirement in 1616, Bacon LK sought to fill the void by appointing salaried reporters, but the scheme came to nothing.[40] The third printed series worthy of mention was that of Edward Bulstrode (d. 1659), a Welsh judge, who in the last three years of his life edited three copious volumes of King's Bench reports taken under James I and Charles I. These reports were not so elaborate as those of Plowden or Coke, but they continued the tradition of careful and detailed reporting into a period better known for books which should never have been printed. Bulstrode's were also the first reports published by their author in English.[41]

The printed reports of the period 1650–1750 were mostly of an inferior nature, consisting of short notes and scattered arguments intended for private use rather than publication. Some of them were so bad that judges forbade their citation, or resorted to manuscripts to supply their deficiencies: a discipline which the student of legal history must necessarily emulate. For long periods there are no printed reports of what was happening in the Common Pleas. This century did, nevertheless, witness the beginning of continuous if irregular reporting in the Chancery and Exchequer. After 1750 the quality of reporting generally began to improve. Lord Mansfield's tenure of the office of lord chief justice of England (1756–88) made its impact on the law partly through attracting King's Bench reporters of high calibre, the foremost of whom was Sir James Burrow (d. 1782), master of the Crown Office in that court. Burrow's reports (1756–72) were followed by those of Henry Cowper (1774–78) and Sylvester Douglas (1778–84), both written with a view to publication. The appearance of professional reporters[42] such as Cowper and Douglas brought to an end the haphazard phase of law reporting.

[39] Much remains unpublished. The Selden Society has undertaken an edition of the cases in the autograph notebooks, and the first instalment (1572–96) will appear soon (134–6 SS).

[40] 26 SS xxii; *CPELH,* III, pp. 1449–50; M. Macnair in *Law Reporting in England*, pp. 123–33; W. H. Bryson, 117 SS xv–xvii. One of the official reporters was Thomas Hetley or Headley of Gray's Inn, though the printed *Hetley's Reports* were not his. A meagre collection of his true reports is in the Suffolk Record Office, HA 93/8/116.

[41] All printed reports were in French until 1650, when law books were required by statute to be printed in English. Bulstrode's reports were printed in 1657–58. After 1660 a few further reports were printed in French, but by 1700 English was invariably used.

[42] Reporting was not a permanent profession but could be a means of support for young barristers; Cowper was only 25 when his reports were published.

By the end of the century periodical series were being commissioned for publication in respect of all four superior courts, a venture which – once the profession accepted the high price of the volumes – ensured a continuous succession of reliable versions of recent decisions. The first of these were Durnford and East's *Term Reports* (King's Bench, 1785–1800), *Henry Blackstone* (Common Pleas, 1788–96), *Vesey Junior* (Chancery, 1789–1817), and *Anstruther* (Exchequer, 1792–97).[43] Thereafter a number of professional law reporters maintained these and parallel series until 1865, when the Council of Law Reporting was set up to produce the *Law Reports.* With the introduction of shorthand, and the submission of texts to the judges for correction, the identities of reporters became less important and their reports, though not anonymous, were (like the year books) cited as if they were; even the most learned lawyer would not know (or think it useful to know) who reported, say, *Donoghue v. Stevenson*.[44] But the coverage is necessarily selective, and the semi-official character of the *Law Reports* has not inhibited the publication of parallel and specialist series, which continue to proliferate; the courts will allow any report to be cited if it is vouched for by a barrister. Moreover, the electronic era has made it possible, and increasingly common, for copies of judgments in the higher courts to be made generally available even when they have not been selected for printing. Whereas the old reporters necessarily summarized the pleadings, and the arguments of counsel, before reproducing the judgment, modern judgments are designed for instant publication and tend to include everything: a summary of the pleadings and evidence, the findings of fact, and the arguments of counsel, in addition to the judge's opinions on the law.[45] In consequence, the distinction between report and record has become meaningless.

Abridgments

By the middle of the fifteenth century the bulk of the year books was so large that lawyers were finding it necessary to compile commonplace books or abridgments to help them recover material when they needed it. In a commonplace, points encountered in reading were jotted down under pre-ordained titles for future reference. The reports of Port and Spelman, mentioned above, were added into books organized in this way, and so were Coke's earliest notes of cases. The abridgment was a more systematic and comprehensive product of the same method, perhaps in some cases designed for circulation. A blank volume would be divided into alphabetical titles – say, from *Abatement* to *Withernam* – and the compiler would work through the year books, inserting under the appropriate headings a precis or abridged text of useful propositions of law and practice.

Three abridgments of year books were printed. The first was published in Rouen in about 1490 and has no title-page; the latest cases in it are from the 1450s.[46] A tradition stretching back almost to the date of publication attributed it to Nicholas Statham (d. 1472), a bencher of Lincoln's Inn. *Statham* was of the same type as other manuscript abridgments of the same period, some of which have almost identical contents: printing,

[43] For nisi prius reports see p. 439, post.
[44] [1932] A.C. 562. It was Harry Baird Hemming of Lincoln's Inn, reporter in HL 1911–33.
[45] See pp. 100–01, ante. [46] E.g. B. & M. 106, 218.

therefore, merely increased the availability of a genre already circulating in manuscript. In the sixteenth century came the larger and more widely used 'grand' abridgments of Fitzherbert and Brooke. Anthony Fitzherbert (d. 1538), who became a Common Pleas judge, owned a large collection of old manuscripts, including many year books now lost. His *Graunde Abridgement*, first published without title in 1514–16 when he was still a serjeant, was the prime example of this kind of book and had a considerable influence on techniques of research and citation.[47] It is said to contain 13,845 entries, almost four times as many as *Statham*. The *Graunde Abridgement* of Sir Robert Brooke (d. 1558), printed posthumously in 1573, was in some ways an improvement on Fitzherbert's. It contained even more items (over 20,000), with helpful marginal summaries, but the abridging was more drastic. These two great abridgments relieved less industrious lawyers from having to make their own, or even from referring to the year books themselves, though this was not their object.[48] Besides serving as a guide to the printed reports, the larger abridgments also contained many unique reports: both those taken from manuscript year books not included in the vulgate (such as those of Edward II and Richard II) and contemporary cases reported by the compilers themselves.[49]

In the seventeenth century the same treatment was applied to post-medieval reports. Epitomes of Plowden, Dyer, and Coke were published as little pocket volumes; and three much larger abridgments were also printed. William Sheppard's *Epitome* (1656), later enlarged into a *Grand Abridgment* (1675) in four volumes, may have resulted from an attempt to survey the law as a preliminary to codification; but it was a muddle, superficially analyzed and inaccurate. Hardly any better were William Hughes's *Grand Abridgement of the Law* (1660–63) and Henry Rolle's *Abridgment des Plusieurs Cases* (1668). The latter, published posthumously, had a bad reception. Its publication was delayed by a lawsuit over copyright, and when it finally appeared it was castigated as a mere student's commonplace book. Vaughan CJ said he wished it had never been printed, since it contained so many conflicting opinions that it made the law ridiculous.[50] Although the contents did little credit to the memory of a distinguished judge,[51] Rolle's *Abridgment* did at least introduce the improvement of subdivisions, which enabled some degree of analysis, and it included numerous cases not otherwise in print. Rolle's material was incorporated in the later abridgments of Comyns and Viner.

Comyns' *Digest*, not printed until the 1760s, was the work of Sir John Comyns (d. 1740), chief baron of the Exchequer, and in its original state was the last English law book written in French. The most extensive of all the abridgments was the monumental *General Abridgment of Law and Equity* produced in twenty-three volumes between 1741 and 1753 by Charles Viner. It contained nearly all the substantive points of law to be found in the earlier abridgments and later reports, under subdivided titles, with marginal annotations

[47] See F. L. Boersma, *An Introduction to Fitzherbert's Abridgment* (1981); p. 199, post.

[48] Coke urged lawyers to read the original reports, and in 1606 he inveighed against 'abridgment men that never read the books at large': J. Hawarde, *Reportes in Camera Stellata* (W. Baildon ed., 1894), p. 301. There is a modern analogy with reliance on internet digests rather than original sources.

[49] The contemporary matter in Brooke (1530s to 1550s) was extracted and printed as Bro. N.C. (1578). A report of 1499 by Fitzherbert is in B. & M. 442.

[50] *CPELH,* II, p. 651. For the copyright suit see Carter 89.

[51] Rolle (d. 1656) was CJ Upper Bench 1648–55 and perhaps the most influential Interregnum judge. His reports of KB cases (1614–25) were printed in 1675 after enjoying a wide circulation in MS.

and cross-references. More juristic in its approach, though less comprehensive, was Matthew Bacon's five-volume *New Abridgment of the Law* (1736–66), which contained some connected commentary, including extracts from the unpublished writings of Sir Jeffray Gilbert (d. 1726). It shared with Comyns a high reputation well into the nineteenth century, and both passed through several editions in England and the United States of America.[52] Gilbert doubtless also influenced Blackstone.[53] Although the abridgments were not of the same intellectual order as reports or textbooks, they began to bridge the gap between the two by sorting the confused mass of ideas in the reports and bringing together for comparison the authorities on particular areas of the law.

Treatises

The eclipse of the Latin treatise by the more practical literature described above explains in part why treatises did not occupy the prominent position in English law that they did in most other European legal systems. Nevertheless, the apparent absence of systematic exposition of the law after *Bracton* does require further explanation. How could students understand what they watched in court if they did not know the underlying premises? It would be worse than trying to understand a chess match without knowing the rules of the game or its objective; and just such an effort may indeed be required of the historian peeping into the same court through the year books. The solution to the mystery lies in the tradition of oral instruction.

Thirteenth-century manuscripts reveal a profusion of short tracts, mostly in French, on the choice of writs, on the manner of composing writs, on pleading in abatement of writs, on essoins, and on the elements of pleading.[54] The most enduring of these was the *Old Natura Brevium*, a primer on original writs. It seems likely that all of these derived from lectures given to apprentices of the Bench on common-law procedure. In addition to the course on civil procedure, there was another on criminal procedure,[55] and an introduction to land law which circulated in writing as the *Old Tenures*.[56] The law school which produced this literature preceded the foundation of the inns of court and was overtaken by them in the fourteenth century. The newer system of education, described in the previous chapter, involved readings on statute law, and pleading exercises requiring a considerable level of technical expertise, but it did not provide a coherent induction into the common law. The explanation is that the elementary instruction was entrusted in the first instance to the inns of chancery, where the *Natura Brevium* and *Old Tenures* (often bound together) served as textbooks into Tudor times,[57] and then disappeared.

The readings to some extent supplied the place of a doctrinal literature of English law. Many of them were taken down in writing and circulated, and it seems possible that the

[52] An edition of Bacon was printed in Philadelphia as late as 1876. [53] See p. 201, post.

[54] Collections of these have been printed: e.g. *Four 13th Century Law Tracts* (G. E. Woodbine ed., 1910); *Brevia Placitata* (G. J. Turner ed., 66 SS, 1947); *Casus Placitorum* (W. H. Dunham ed., 69 SS, 1950). See also the essays by Beckerman, Brand, Seipp, and Philbin in *Learning the Law*, chs 3, 4, 5 and 7.

[55] If we may so interpret *Placita Corone* (J. M. Kaye ed., 4 SS Supp. Ser., 1966).

[56] The edition of *c.* 1515 was reprinted in 1974 with an introduction by M. S. Arnold. It is half way between a glossary of terms and a legal treatise.

[57] The first printed edition of the former (1494) was issued at the instance of Strand Inn. Both had been rewritten in the 14th century.

bulk of manuscript readings was once as great as that of the year books. The earliest surviving texts seem to date from the 1420s, though some of the content is earlier still, and a series of *quaestiones* on the statutes, with the names of speakers who flourished in the 1340s, hints at the existence of similar lectures in the middle of Edward III's reign. Medieval readings were nearly all given on the legislation of the thirteenth century, and by discussing them readers were able to embark on minute accounts of the intricacies of the land law. Later readings ranged more widely, and were sometimes given on recent legislation. If historians have given them less weight than the year books, that is a reflection of modern assumptions rather than of the surviving evidence.[58] The absence of treatises is thus to some extent an illusion. The readings could be regarded as dictated treatises, and they certainly influenced the style and content of the books which eventually displaced them. But they were tied to the wording of the statutory texts, and were often badly mangled by the students who noted them down. The majority, moreover, were not preserved by succeeding generations which valued only case-law.

An important book which began life as a written text was the *New Tenures* (*c*. 1450–60) by Sir Thomas Littleton (d. 1481), a Common Pleas judge under Edward IV.[59] The author claimed to have written it for a son, doubtless Richard Littleton (d. 1518), who later became a bencher of the Inner Temple. It was cast in more elementary form than the readings and seems to have been intended to supply the need for a rudimentary explanation of the land law after oral teaching had ceased. But it was more elegant and much longer than the *Old Tenures* which it replaced. Perhaps Richard turned it to profit in a way his father had not intended; but it is likely that copies were already circulating in manuscript before the author's death and that the private purpose was expressed out of professional modesty. At any rate, from the date of its first publication in print (around 1482) it was seized upon by the whole profession as a faithful introduction to the complex law of real property. Littleton wrote at a time when the common-law scheme of tenures and estates had reached a settled stage of development, and he chose to ignore the complications brought about by uses. But the precision of his elemental statements, and the economic clarity of his style, was to give his every word an authority enjoyed by no other legal author before or since. Already by 1550 *Littleton* had been reprinted more often than the English translation of the Bible, and by 1600 it was 'not now the name of a lawyer, but of the law itself'.[60] Sir Roger Owen, writing around 1615, even suggested that the author should have his own holy day.[61] Copies were sold with extra wide margins, or interleaved with blank paper, so that students could cram them with annotations. It was set reading for all law students until the mid-nineteenth century.

The Renaissance Period

No other writer applied Littleton's pedagogic technique with the same clarity to other branches of the law,[62] but the printing press did stimulate the production of more treatises

[58] See pp. 170–1, ante.
[59] See the entry in *ODNB*. The most recent edition is by E. Wambaugh (1903).
[60] W. Fulbecke, *Direction or Preparative* (1600), fo. 27v.
[61] Lincoln's Inn MS. Misc. 207, ch. 3, fo. 1v.
[62] The *Profitable Book* (1st edn, 1528) by John Perkins of the Inner Temple was a kind of supplement to Littleton and imitated its style. It was also a best-seller.

in the sixteenth century to fill the literary void. The old *Natura Brevium* was rewritten by Sir Anthony Fitzherbert, whose *Novel Natura Brevium* (1534) was a collection of Latin writ formulae with a commentary which took account of recent developments and contained references to his own *Graunde Abridgement*. Sir William Staunford (d. 1558), another Common Pleas judge, used the same abridgment extensively in compiling his two books on Crown law: *Les Plees del Coron* (1557) on the criminal law, and *An Exposition of the Kinges Prerogative* (dated 1548, printed in 1567). These works were significantly different in style from Littleton, reflecting a shift of emphasis in legal science from common learning to authoritative case-law. No longer, it seems, could an English jurist – even a judge – write on his own authority about first principles, and so reasoning and clarity were sacrificed to a profusion of citations. Staunford expressed the hope that other learned men would digest the whole of the common law, following the titles of Fitzherbert's *Abridgement* but introducing sufficient subdivision to lay bare the principles, so as 'to help the students of their long journey'.[63] Even to the best legal minds, therefore, digesting and arranging authorities had come to seem more worthwhile than expounding the principles themselves. It was better than nothing. But it was perhaps the worst consequence of the abridgments.

If settled law fared badly, the developing law fared worse. It is only in an advanced state of legal scholarship – and of legal publishing – that nascent ideas find their way into print, and this accounts for the absence of any books about the emerging law of contract and tort, or of uses and trusts. Those subjects were also largely absent from the inns of court exercises. Christopher St German's *Doctor and Student* (1528–31)[64] was for that reason alone a remarkable enterprise. Cast in the form of a dialogue between a doctor of divinity and a student of the common law about the relationship between law and conscience, a debate relevant at that time both to the controversy over the chancellor's jurisdiction[65] and to the status of ecclesiastical jurisdiction before the break with Rome, it was not intended as a law book so much as a lawyer's view of moral philosophy, written partly for lay consumption. But it remained popular for its legal content, and the frequency of editions shows that it was second only to Littleton as an introductory textbook until the eighteenth century.

The increased printing activity of the seventeenth century brought a torrent of new law books, many of them badly written and of little value, though flowing into new areas such as contract and tort. The best attempt at analysis, at the beginning of the century, was Sir Henry Finch's *Nomotechnia* (1613), a bold and original essay in methodizing the common law through the use of dialectical techniques learned at Cambridge. Finch's scheme influenced later writers, though his book, written in law French and thin in its treatment of individual topics, did not become a standard textbook and was not translated until 1759.[66] Books about the personal actions, for instance William Sheppard's *Marrow of the Law* (1651), *Action upon the Case for Slander* (1662), and *Actions upon the Case for Deeds* (1663), were inferior jumbles of cases and barely an improvement on the

[63] *The Kinges Prerogative* (1567), preface.

[64] The first edition of Part I is dated 1528. Part II came out in 1530, with further additions in 1531. The best edition is now *St German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton ed., 91 SS, 1974).

[65] See pp. 115–16, ante.

[66] Finch's *Law or a Discourse thereof* (1627), published posthumously in English, was more successful; but it was based on an earlier version of Finch's scheme. For these books see Prest, [1977] CLJ 326.

abridgments.[67] The two greatest legal writers of the seventeenth century, as in the two preceding centuries, were judges.

Sir Edward Coke

When Coke was dismissed from the office of chief justice in 1616, and thereby effectively prevented from continuing his *Reports*,[68] he channelled his literary energy into writing his *Institutes of the Laws of England.* Already 64 years of age, and with a fraught parliamentary career still ahead of him, Coke did not attempt to survey the whole of the law;[69] but the four parts which he wrote are a lasting monument to his industry. The first part, published in 1628 when Coke was 73, and the only volume he saw in print, was his *Commentary on Littleton*. Coke 'shovelled out his enormous learning in vast disorderly heaps',[70] piled around Littleton's *Tenures* to form a phrase by phrase gloss on the text. By constantly wandering off at tangents he was able to touch on many aspects of the common law which Littleton's text never hinted at. Coke seems to have been oblivious to the disorder, writing like a helpful old wizard anxious to pass on all his wisdom before he died, but not quite sure where to begin or end. The comment on the first section of *Littleton* provides an extreme example. The text itself is a definition of 'fee simple'; but the commentary wanders through such disparate topics as etymology, alien status, misnomer in grants, interest rates and usury, the precedence of earth over the other elements, the correct Latin words for ponds, marshes, rushes, willows, elders, and boileries of salt, the Domesday Book, the eight parts of a deed, the styles and titles of the kings of England, the ownership of the Isle of Man, and the legal status of monsters and hermaphrodites. However difficult it was to read and digest, *Coke on Littleton* was the principal textbook on property law until Victorian times; the nineteenth edition, encrusted with notes by Hale, Nottingham, Hargrave, and Butler, is still valued. The remaining three institutes, which are much easier to follow, comprised a commentary on most of the older statutes, a treatise on criminal law, and an account of the courts. The manuscripts of these three parts were suppressed by the government on Coke's death in 1634, for fear of any politically dangerous opinions they might contain, but they were printed in the 1640s.

Sir Matthew Hale

A distinct advance in the quality of English legal literature was made by Sir Matthew Hale (d. 1676), who likewise rose to be chief justice of the King's Bench. Regarded, like Coke, as an oracle in his own time, Hale has had an equally lasting influence and his views on criminal law and public law are occasionally still cited. His are the first English law books to possess a coherence and style with which the modern reader can feel at ease. Yet Hale's influence was delayed, because of his singular attitude to publication. Whereas he was prepared to unwrap his scientific speculations to the public gaze, he

[67] See Simpson, *LTLH*, pp. 278–9. [68] See pp. 117, 178, ante.

[69] He did not tackle contract and tort, or uses, and there is no evidence that he ever intended to write more than four parts.

[70] F. W. Maitland, *Collected Papers* (1911), II, p. 484.

consistently refused to publish what he had written on the subject he knew best,[71] and even forbade publication by his descendants. The legal works were therefore posthumous publications, from his *History of the Common Law* (1713),[72] and the influential *History of the Pleas of the Crown* (1736),[73] to the more recently printed *Prerogatives of the King* (1976), *Jurisdiction of the Admiralty* (1993), and *The Law of Nature* (2017).[74] Hale made considerable use of history, and was familiar with the scientific concept of evolution,[75] but he was no more a historian than Coke. The old records which he used were, when properly understood, a guide to the present. His principal achievement was that he was able to organize historical as well as recent material into thoughtful and analytical treatises marked by their clarity.[76]

Sir William Blackstone

The magnum opus of the following century was Sir William Blackstone's *Commentaries on the Laws of England* (1765–69), based on the lectures he gave as Vinerian Professor of English Law at Oxford.[77] Though Blackstone's writing stands in a direct line of succession from Finch and Hale, the succession was broken and imperceptible at the time. The generality of law books in the first half of the eighteenth century were slight in character, and the period was more distinguished by abridgments than textbooks; indeed, by a pleasing irony, the endowment for Blackstone's chair was derived from the profits of Viner's alphabetical abridgment. The only prolific institutional writer was Sir Jeffray Gilbert (d. 1726), who wrote clear elementary accounts of most branches of the law while serving as a judge in Ireland in the first decade of the century. He was influenced by Hale, and may have intended ultimate publication, but he left his various drafts unfinished and – like Hale – left instructions that none of it should be published. Some of his work was in fact printed posthumously, but it was never edited into the single encyclopaedia of English law which he may have envisaged.[78] Blackstone had few other printed examples to follow. As with Littleton and St German before him, his success was attributable in large part to the discipline of trying to explain the law in simplified terms to educated laymen. This Blackstone achieved in his lectures with such

[71] His only legal publication during his life was his preface to Rolle's *Abridgment* (1668). In his *Difficiles Nugae* (1674), criticizing the Torricellian experiment, he denied the possibility of a vacuum; see also n. 75, post.

[72] It was published with his *Analysis of the Laws of England.* There is a reprint with an introduction by C. M. Gray (1971). The autograph MS. is in the Clark Library, Los Angeles, but has not received modern attention.

[73] The title is misleading. It is a treatise on the criminal law of Hale's own time.

[74] *Hale's Prerogatives of the King* (D. E. C. Yale ed., 92 SS, 1976); *Hale and Fleetwood on Admiralty Jurisdiction* (M. J. Prichard and D. E. C. Yale ed., 108 SS, 1993), part 1; *On the Law of Nature, Reason, and Common Law: Selected Jurisprudential Writings* (G. J. Postema ed., 2017).

[75] He anticipated some of Darwin's evolutionary theory in *The Primitive Origination of Mankind* (1677), prompted by speculation about species discovered in America and the study of fossils.

[76] More perceptive as works of legal history were the writings of John Selden (d. 1654), but these were not law books for professional purposes. See *CPELH*, II, pp. 755–67.

[77] See p. 181, ante. The first edition was reprinted in facsimile in 1979, with new introductions. A new edition, with variant readings from the successive editions, and new introductions, was published in 2016 under the general editorship of Professor W. Prest.

[78] See Macnair, 15 JLH 252. There are numerous Gilbert MSS in the BL, Columbia Law School, and King's Inns, Dublin. His tracts on personal property and contract are being edited by Professor M. Lobban.

effect that, before long, lecture-notes were being passed round by students; and (so he claimed) it was the circulation of corrupt copies which finally induced him to commit the lectures to the press. Blackstone has been accused of blind complacency about the state of the law, and of superficiality in his interpretation of history; but no amount of criticism can destroy the fact that the *Commentaries* were the first connected and reasonably comprehensive survey of English law since *Bracton,* and among the most stylish and readable contributions ever made to English legal literature. Just as Littleton had embalmed the logic of medieval land law on the eve of its eclipse, so Blackstone conveyed to a wide readership on both sides of the Atlantic Ocean the essential beauty and logic – and occasional absurdity – of a system of law and constitutional theory about to be submerged by waves of reform. His account was both a final survey of the old common law and the first textbook of a new legal era.

From Blackstone to Maitland

After Blackstone, the older kind of cut-and-paste law book was doomed; but professorial and professional writers alike proved capable of rising to the standards which he set. The years immediately following the *Commentaries* saw a number of works of high quality, mostly written outside the universities,[79] but scholarly and reflective rather than narrowly vocational. It is enough to mention the historical and comparative *Observations on the More Ancient Statutes* by Daines Barrington (1766); William Eden's *Principles of Penal Law* (1771); and the recondite 'essays' by Charles Fearne on *Contingent Remainders* (1772) and by Sir William Jones on *Bailments* (1781). Lord Mansfield's creative tenure of the chief justiceship of the King's Bench enabled the first textbooks of commercial law to be written in the 1780s and 1790s. Even in 1800, however, the student learned most of his law from the law reports and by attending court, without much reference to treatises.[80]

Two distinct schools of legal writer may be identified in the nineteenth century.[81] The first was the young or disappointed barrister producing a standard work of reference. Writing treatises had become a legitimate form of professional self-advertisement, and of earning a living when fees were sparse; for such writers a full methodical analysis and statement of all the case-law, without too much abstract comment, was the principal end. Some of the practitioners' works of the late Georgian period which stood the test of time, albeit with complete rewriting by successive editors, are *Woodfall's Landlord and Tenant* (1802; 28th edn, 1978, but still updated in loose-leaf form), *Archbold's Pleading, Evidence and Practice in Criminal Cases* (1822; 67th edn, 2018), *Chitty on Contracts* (1826; 32nd edn, 2015), *Byles on Bills of Exchange* (1829; 29th edn, 2013), and *Williams on Executors and Administrators* (1832; 21st edn, 2018). The second school of

[79] Blackstone's immediate successors did produce works of some merit, e.g. R. Chambers, *A Course of Lectures on the English Law 1767–1773* (T. M. Curley ed., 1983), which Chambers composed with the help of Samuel Johnson. But professors were not expected to write books.

[80] Pollock CB (d. 1870) so learned the law *c.* 1806: recollection cited in F. Pollock, *A First Book of Jurisprudence* (3rd edn, 1911), p. 314 n. 2 ('I myself read no treatises: I referred to them as collecting the authorities').

[81] The literature generated by the reform movement mostly took the form of polemical pamphlets rather than books. For Stephen's treatise on pleading see pp. 97, 103, ante. Note also the codification movement, p. 234, post.

legal writing blossomed in the revitalized university law schools of the later Victorian period, where some classic monographs – for instance, those of Westlake,[82] Maine,[83] Pollock,[84] Anson,[85] Dicey,[86] and Maitland[87] – were, like Blackstone's *Commentaries*, being born in the lecture rooms.[88]

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[82] J. Westlake, *Private International Law* (1858); *International Law* (1904). Westlake was Whewell Professor of International Law, Cambridge, 1888–1908.

[83] H. Maine, *Ancient Law* (1861); *Early History of Institutions* (1875); *Early Law and Custom* (1883); *International Law* (1887). Sir Henry Maine was Regius Professor of Civil Law, Cambridge, 1847–54; Corpus Professor of Jurisprudence, Oxford, 1869–77; Whewell Professor of International Law, Cambridge, 1887–88. See R. Cocks, *Sir Henry Maine* (1988); A. Diamond (ed.), *The Victorian Achievement of Sir Henry Maine* (2006).

[84] F. Pollock, *Contract* (1876); *Partnership* (1877); *Possession* (with R. S. Wright, 1880); *Jurisprudence* (1882); *Land Laws* (1883); *Torts* (1887); and others. Sir Frederick Pollock, 3rd Bt, was Corpus Professor Jurisprudence, Oxford, 1883–1903, but wrote some of these books in Lincoln's Inn. For his influence see N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (2004).

[85] W. Anson, *Contract* (1879); *Law and Custom of the Constitution* (1886–92). Sir William Anson was Warden of All Souls College, Oxford, 1881–1914.

[86] A. V. Dicey, *Introduction to the Law of the Constitution* (1885; new edn, with introduction, by J. W. F. Allison, 2013); *Conflict of Laws* (1895). Dicey was Vinerian Professor of English Law, Oxford, 1882–1909.

[87] F. W. Maitland, *History of English Law before the time of Edward I* (with F. Pollock, 1895); *Constitutional History of England* (1887, printed 1908); *Equity* (1888, printed 1909). Maitland was Downing Professor of the Laws of England, Cambridge, 1888–1907.

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12

Law Making

Common lawyers before the nineteenth century liked to think of their law as an unchanging body of common sense and reasoning which was part of the heritage of the English people. If human reason does not change, the law cannot change; it is only the application of old ideas to new situations which creates the appearance of change. The function of judges was not to change the law: 'their office is *jus dicere*, and not *jus dare*'.[1] Judicial decisions, on this view, did not make law but merely declared what it was. The progress of legal history was seen as a slow revelation and refinement of essentially immutable ideas, or the adaptation of timeless basic principles to altered social circumstances. Change could only be imposed from without, by the legislature. And to the extent that legislative changes did not simply restore or reinforce the common law, they were, as a corollary, at odds with natural reason. Sir Edward Coke wrote that it was 'a maxim of policy, and a trial by experience,' that the alteration of any fundamental point of the common law was dangerous, 'for that which hath been refined and perfected by the wisest men in former succession of ages, and proved and approved by continual experience to be good and profitable for the common wealth, cannot without great hazard and danger be altered or changed'.[2] Sir John Davies, in the same vein, wrote that 'the customary law of England . . . doth far excel our written laws, namely our statutes or acts of Parliament; which is manifest in this, that when our Parliament have altered or changed any fundamental points of the common law, those alterations have been found by experience to be so inconvenient for the common wealth as that the common law hath in effect been restored again'.[3] Sir Matthew Hale, looking back over the preceding centuries, was not convinced that there had been any fundamental changes at all, because 'the mutations hath not been so much in the law as in the subject matter of it'.[4]

The supposition that common-law principles exist before anyone has said what they are is a philosophical abstraction rather than a historical fact. And the notion that apparent changes in the law are merely rediscoveries of eternal truths is tantamount to fiction. At no time has the common law stood still. Changes in the law have sometimes come about through barely perceptible modifications and clarifications from case to case; at other times they have occurred swiftly and deliberately, through bold judicial decisions or reforming legislation. But never has the law been exempt from the ceaseless alteration to which all human creations are subject. Even the distinction between

[1] F. Bacon, *The Essayes* (1625), p. 316.

[2] *Le Quart Part des Reportes* (1604), sig. B2v. Cf. Co. Litt. 379: 'Commonly a new invention doth offend against many rules and reasons of the common law, and the ancient judges and sages of the law have ever . . . suppressed innovation and novelties in the beginning.'

[3] *Le Primer Report des Cases en Ireland* (1615), preface.

[4] Preface to Rolle's *Abridgement* (1668), repr. in Hale, *Selected Writings*, p. 159 at 161. See also Baker, *Magna Carta*, pp. 85–6, 220–4, 349–50, 444–6.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

judicial and legislative change has not always been as fundamental as modern theory supposes. It is true that courts can only make new law within the framework of common-law reasoning, whereas a sovereign legislature may choose to legislate irrationally or unreasonably. Yet few legislative acts before the nineteenth century could be regarded as radical departures from the common-law tradition, and some lawyers even regarded the acts of the High Court of Parliament as the decisions of a supreme court of law,[5] a court untrammelled by forms and precedents but operating within the same legal system. Moreover, whatever statutes may say, their effect in reality depends on how they are interpreted by judges trained in the common law.

The Common Law

In considering the techniques of law-making, it may be convenient first to dispose of the thesis put forward by Sir Henry Maine in his treatise *Ancient Law* (1861). Referring to earlier societies in general, Maine advanced what he called a 'general proposition of some value' regarding the agencies by which law could be brought into harmony with the current needs of a changing society: 'These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation… Their historical order is that in which I have placed them. I know of no instance in which the order of their appearance has been changed or inverted.'[6] His thesis supposed a process of legal evolution, a natural progression from making changes while pretending not to (fictions), through making exceptions in particular cases (equity), to direct change by virtue of authority or power (legislation). Those are certainly distinct mechanisms, but in so far as Maine imposed an historical sequence on the harmonizing influences it is difficult to square his generalization with the English experience. The explanation seems to be that he gave the terms 'fiction' and 'equity' different meanings from those used by English lawyers. But, in focusing on English law, we shall be less liable to confusion if we separate fictions in the technical legal sense from the development of concepts and terminology,[7] and if we separate the equity of the Court of Chancery from the equitable spirit which inheres in the common law itself. We should begin with the common law.

Case-Law and Precedent

The common law is both a body of accumulated wisdom and a system of thought, but even unwritten law can only be understood through words, and there was never a time when the common law was not in some sense 'case-law', the outcome of solutions found in real cases. In the twelfth-century dialogue on the Exchequer, a student cites the Roman maxim that one should follow reasons rather than precedents; but this elicits the response from his master that, where the reasons for things are obscure, it is enough to follow precedent.[8] *Glanvill*, it is true, only once refers to a specific case; but the writs and procedures on which it was largely based were probably devised in specific cases, following

[5] See pp. 220–1, post. [6] *Ancient Law* (1861), pp. 24–5.

[7] For the distinction between verbal fictions and shifts in the legal meaning of words see Baker, *The Law's Two Bodies*, pp. 42–7.

[8] *Dialogue of the Exchequer*, i. 11 (p. 91).

deliberations in the Curia Regis. By the time of *Bracton* (*c*. 1220–50), the influence of judicial practice is clear on the face of the text. The author of the preface states that he has written the book in order to prevent the newer generation of judges straying from the right course marked out by their wise predecessors. The law made by those predecessors was embodied in their enrolled judgments, many of which were cited in the treatise. Not long afterwards, the very words of judges and pleaders were being taken down in writing,[9] and the year books of the 1280s show counsel and judges referring to earlier cases, with or without names.[10] When a judge of Edward II's time remarked, 'one may safely put that in one's book for law',[11] he was presumably addressing the reporters. The year books sometimes quote judges openly admitting that their decisions would be taken as precedents in future ages, and in 1454 it was urged that a clear line of precedents should be followed even if the reason was not immediately apparent, lest the students should lose faith in their law reports.[12]

The present notion that cases are a source of law might seem, from such evidence, to have been always the first principle of English jurisprudence. In truth, however, the medieval attitude towards precedent was different from that which developed later. The strict meaning of 'precedent' was a judgment entered on the roll, and a proper citation in court would require voucher of the record.[13] But the formal entry of judgment gave no reasons, and in the majority of cases no law was made on the record by a judgment.[14] Moreover, records were not always what they seemed; at worst they were bedevilled by fictions, and at best one could not be sure what points had actually been considered, or whether there had been any legal argument at all.[15] The plea rolls contain mostly common-form entries, with the occasional interesting question raised by a new form of pleading. Where a novel point was explicitly raised by demurrer, the medieval judges were notoriously reluctant to enter judgment if there was any disagreement among themselves; even if they agreed, neither the demurrer nor the judgment gave reasons. When parties went to issue without demurring in law, the record did not reveal whether the court had considered and approved the pleadings after a discussion, whether there had been an arguable point but a serjeant had decided not to risk staking the case on it,[16] or whether no one had seen a point worth arguing. The revelation of legal principles in court could therefore only be observed at the evanescent oral stage which attracted the

[9] See p. 189, ante.

[10] E.g. *Hoo v. De la More* (1281) 111 SS 113 at 114, per Bereford sjt; *Abbot of Newnham v. Aunger* (1282) ibid. 116 at 117, per Brompton J ('this I have seen adjudged'); *Anon*. (before 1290) 123 SS 520, per Lisle sjt (named case); Brand, ibid. xxx–xxxi.

[11] *Midhope v. Prior of Kirkham* (1313) 36 SS 178, per Stanton J.

[12] *Wyndham v. Felbrigge* (1454) Y.B. Mich. 33 Hen. VI, fo. 38, pl. 17, at fo. 41, per Prysot CJ (tr. 'It would be a bad example to the young apprentices who are studying terms [year books], for they would never give credence to their books if such a judgment as has been so often adjudged in their books should now be adjudged the contrary').

[13] In *Kaynes v. Kaynes* (1285) 112 SS 185 at 186, a case of 1270 was even cited in the plea roll (with the 1270 roll reference) in support of the judgment. But this did not become the practice.

[14] See p. 87, ante.

[15] Note *Anon.* (1319) 81 SS 131, per Denom sjt (tr. 'Cite law and not precedents, for it may be the party wanted to plead and lose'). See further *The Law's Two Bodies*, chs. 1–2.

[16] A demurrer in law required an admission of all the facts alleged by the other party. For the danger in demurring see p. 86 n. 43, ante.

reporters. Yet we have already noticed that in the medieval period much of the reported debate at that stage was tentative, extempore, and inconclusive.[17]

Any law which emerged in the course of tentative pleading was not law formally laid down by way of an enrolled judgment, but the accepted learning within the profession: 'common learning', as it is called in the year books.[18] No single precedent could be taken as common learning. Long usage was more sacrosanct, and the courts were unwilling to depart from settled lines of precedent. The authority of accepted doctrine was therefore different from, and more powerful than, a mere judicial decision. Although the judges were the chief repositories of common learning, their collective declarations were received as law not merely because of their judicial office but because they represented the established wisdom in the little intellectual world of Westminster Hall and the inns of court. The common opinion of all the judges and serjeants in the Exchequer Chamber was the highest authority there could be.[19] But such unanimity was seldom arrived at in cases of difficulty. And, if the judges could not agree, the point under discussion was evidently beyond solution by recourse to common learning – a majority decision could hardly turn doubts into certainties – and so judgment was withheld. This explains the seeming paradox that counsel's decision to withdraw a point from argument, by reframing his plea, sometimes indicated the state of the law more clearly than the pressing of doubtful points on the court by demurrer. And the opacity of the record explains why a court could not be bound by a previous decision. To that extent, it was correct to assert that judges did not make law. Their opinions were not sources of law, but simply evidence as to what the law was commonly thought to be. They were not even exclusive evidence. The current of received opinion in the inns of court, as handed down in the readings and moots, was a coequal source of common learning and reasoning. The law transcended single instances.

Increased emphasis on the single decision came in early Tudor times, as a result of the Renaissance emphasis on judicial positivism. New procedures for raising questions of law were developed in that period because lawyers and their clients wanted more definitive rulings from the bench.[20] Then, as more law came to be settled by decisions upon demurrers, special verdicts, or motions after trial, the courts began to look at old precedents in a new way and to disparage the authority of dicta in cases where no considered decision was reached. Moreover, the publication of abridgments, coupled with the printing of the year books, made the corpus of reported decisions the common property of the whole profession and facilitated the use of specific citations in argument. Fitzherbert, in his *Novel Natura Brevium* (1534), was the first published writer to make a practice of discussing earlier cases critically.[21] Precedents had to be evaluated: a case could now be dismissed as out of date, or as an aberration, or as a mere exchange of opinions; and the record of a reported case could be searched for to see whether the report had stated the point in issue accurately. The result of these changes was that the reasoned judgment was becoming a distinct source of law, to be distinguished from the passing opinion or obiter dictum. By Plowden's time, the distinction was fully

[17] See pp. 85–7, ante.
[18] For common learning see *The Law's Two Bodies*, pp. 61–70, 81–2, 161–9.
[19] See pp. 149, 150–1, ante. [20] See pp. 89–93, ante.
[21] See also p. 199, ante. This was not a new technique: cases had previously been discussed in the readings.

recognized. Earlier reports, he said, had mostly been based on 'the sudden speech of the judges upon motion of cases of the serjeants and counsellors at the bar', whereas his reports were of judgments settling points of law raised by demurrer or special verdict, 'of which the judges had copies, studied them, and in most of them argued, and after great deliberation have given judgment. And so (as I think) there is most firmness and surety of law in this report.'[22] By 1600 even a majority decision would have this effect of settling the law,[23] albeit that a prevailing majority in the statutory Exchequer Chamber might be a minority of the whole judiciary.[24]

Notwithstanding this fundamental change of attitude, the doctrine of the binding force of a single precedent did not appear for centuries. Hale CJKB popularized the expression *stare decisis* in the 1670s,[25] and yet it was not meant as an absolute fetter on the courts. Hale's contemporary Vaughan CJCP explained that, since judges sometimes made mistakes, precedents might be wrong. And, although error in a particular case could only be corrected vis-à-vis the parties by a court of error, judges were not bound to repeat the error in similar cases. If a judge considered a previous decision to be wrong, being sworn to do justice according to law he ought not in conscience to follow it: 'for that were to wrong every man having a like cause, because another was wronged before'.[26] The desire for certainty was the chief restraining factor; but it could not be assured by rigidity. A strict adherence to precedent can actually increase uncertainty, because it encourages over-subtle distinctions between cases essentially alike.[27]

It is sometimes suggested that the tide turned in the early nineteenth century, and that the principle of *stare decisis* was then elevated into inflexible dogma by conservative judges such as Lord Kenyon CJ and Parke B (later Lord Wensleydale). The *locus classicus* of the new thinking is said to be the latter's opinion in 1833 that rules derived from precedents ought to be applied for the sake of uniformity and consistency even when they were 'not as convenient and reasonable as we ourselves could have devised'.[28] But Parke B only said that precedents were to be followed 'when they are not plainly unreasonable and inconvenient'. Pollock CB later recalled that 'even Parke, Lord Wensleydale (the greatest legal pedant that I believe ever existed), did not always follow even the House of Lords; he did not over-rule . . . but he did not act upon cases which were nonsense'.[29] In any case, there was nothing new in the sentiment that long-accepted principles ought to outweigh individual opinions; it had often been said in the year books. The truth is that, from the earliest period, there have been on the bench

[22] *Les Comentaries* (1571), prologue. See further *OHLE*, VI, pp. 388–9.

[23] *Slade v. Morley* (1602) is a good example: p. 366, post. In *Throckmorton v. Finch* (1594) the Exchequer Chamber gave judgment by a majority of one, despite having achieved a previous majority the other way before 3 judges died: Baker, *Magna Carta*, p. 285.

[24] See p. 148, ante; *CPELH*, I, pp. 428–31. Most appellate decisions today are made by a small minority of the court giving judgment (2 out of 40 suffices in the present Court of Appeal, since normally only 3 sit on any case).

[25] *Hanslap v. Cater* (1673) 1 Vent. 243 ('he said it was his rule, *stare decisis*'); *Kirkbright v. Curwin* (1676) 3 Keb. 611; *The Law's Two Bodies*, p. 85.

[26] *Bole v. Horton* (1673) Vaugh. 360 at 383. Lord Denning MR was fond of saying that justice was mentioned in the oath before law.

[27] *Darley v. Reginam* (1846) 12 Cl. & Fin. 520 at 544, per Lord Brougham.

[28] *Mirehouse v. Rennell* (1833) 1 Cl. & Fin. 527 at 546.

[29] Lord Hanworth, *Lord Chief Baron Pollock* (1929), p. 198 (citing a letter of 1868).

both 'timid souls' and 'bold spirits',[30] and that to seek a uniformity of judicial philosophy at different periods may be to seek what never existed. There has also been a constant tendency for judges to treat rules of property law as standing in greater need of certainty than matters of contract and tort. Coke CJ, who spoke frequently of the need for certainty in the land law and strove to banish all the new-found conceptions which had crept in since the Statute of Uses (1536), promoted with equal vigour new developments in the law of contract and in the prerogative remedies of the subject against administrative bodies.[31] Lord Mansfield CJ, one of the boldest of judicial spirits, often acted on the principle that 'as the usages of society alter, the law must adapt itself to the various situations of mankind'.[32] Yet in property matters he accepted the need for fixed rules, and in that context, 'if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned'.[33] In 1834 a barrister called James Ram published a large collection of conflicting judicial pronouncements on the subject of precedent. His enigmatic conclusion was that a court *could* be bound by a previous decision, but only if it was 'wholly unimpeachable' or if the objection to it was insufficient to shake its authority.[34] Thus the approach to precedent in the 1830s, far from being inflexible, could only be summarized by drawing a vicious circle.

The duty of repeating errors is a modern innovation, and one which many came to regret within a generation or two of its introduction. It was occasioned by the establishment of a hierarchical system of appellate courts in the Victorian period, since it was obviously a sensible discipline to require lower courts to abide by the rules laid down by courts dedicated to hearing appeals. Nevertheless, the hierarchical logic did not require any court to be bound by its own decisions, or by those of courts of comparable authority. This was especially important for the House of Lords before the appointment of professional lords of appeal in 1876. But the doctrine broke loose in 1898, when – following a period of disagreement[35] – the House of Lords decided that it was bound by its own decisions. The Court of Appeal followed suit in 1944. The theory apparently also requires the Court of Appeal to follow decisions of the Exchequer Chamber and Court of Appeal in Chancery, since those were courts of co-ordinate authority.[36] But courts cannot logically bind themselves to be bound. When the House of Lords freed itself from the self-imposed fetter in 1966,[37] only the Court of Appeal (Civil Division), and in some situations the divisional courts, were left subject to such restraint. There was some controversy in the 1960s as to whether the Court of Appeal should not emulate the House of Lords and declare itself once more free; but since 1969 there has been a

[30] *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164 at 174, per Denning LJ.

[31] See pp. 154–5, 161–2, ante; pp. 306–7, 367–8, post.

[32] *Johnson v. Spiller* (1784) 3 Doug. 371 at 373. The remark prompted Lord Kenyon CJ to respond, 'I confess I do not think that the courts ought to change the law so as to adapt it to the fashions of the times': *Ellah v. Leigh* (1794) 5 Term Rep. 679 at 682.

[33] *Hodgson v. Ambrose* (1780) 1 Doug. 337 at 341.

[34] J. Ram, *Treatise on Legal Judgment* (1834).

[35] E.g. in *Bright v. Hutton* (1852) 3 H.L.C. 341 at 391, Lord Campbell said a decision of the HL could only be altered by Parliament; but Lord St Leonards (p. 388) said every court had an inherent jurisdiction to correct its previous errors.

[36] *Drive Yourself Hire Co. (London) Ltd v. Strutt* [1954] 1 Q.B. 250 at 272, 274; *Beswick v. Beswick* [1966] Ch. 538 at 552; *Tiverton Estates v. Wearwell Ltd* [1975] Ch. 146.

[37] *Practice Note* [1966] 3 All E.R. 77. The Supreme Court follows the 1966 convention.

procedure for by-passing the Court of Appeal where the House of Lords is to be invited to overturn a decision binding on the trial judge.[38]

After 1972 all English courts were required by statute to follow decisions of the European Court of Justice – since 2009, the Court of Justice of the European Union – as to the meaning or effect of any treaty or instrument concerning the European Community (later the European Union); but that court does not regard itself as bound by its own decisions, and an English court with doubts could reopen a point by making a 'reference'.[39] Decisions of the European Court of Human Rights, which is independent of the European Union, are on a different footing. English courts are obliged by statute to 'take into account' its decisions when interpreting the European Convention on Human Rights,[40] and this is understood to mean that they will usually follow any clear principles to be found in them but that they are not bound by them. These enactments of 1969, 1972, and 1998 were the first to encroach on the unwritten conventions of judicial decision-making by giving statutory force to previous decisions, whether as binding on other courts or only persuasive.

Fictions

Maine used the term Legal Fiction in its widest sense, 'to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified'.[41] The reason for resorting to pretence for this purpose is that it satisfied the desire for improvement without offending what Maine called 'the superstitious disrelish for change'. An example of a fiction in Maine's wide sense was the extension of benefit of clergy to enable courts to avoid imposing the death penalty, first by treating as a 'clerk' anyone who could read, and then by allowing clergy to persons who could not read, or were disqualified from being clergymen, or were not even men.[42] Another was the fictitious certification of bastardy to free a person from villeinage.[43] These were fictitious decisions, defying factual truth in order to achieve beneficial results which eventually became the norm. However, the more usual sense of the term is that of the Roman *fictio,* a false averment of fact by a party which could not be traversed and so could not be shown to be false by trial. We have seen how several English courts in the fifteenth and sixteenth centuries acquired enlarged jurisdictions by means of fictitious allegations.[44] Fictions were also used to extend substantive remedies, the most familiar examples being the deceit commonly laid in *assumpsit* and other actions on the case,[45] the loss and finding in trover,[46] the lease and ouster in ejectment,[47] the title in a collusive common recovery,[48] and the

[38] Administration of Justice Act 1969 (c. 58), ss. 12–16.
[39] European Communities Act 1972 (c. 68), s. 3(1); *Bulmer Ltd v. Bollinger S.A.* [1974] Ch. 401 at 419–20, per Lord Denning MR.
[40] Human Rights Act 1998 (c. 42), s. 2(1). [41] *Ancient Law* (1861), p. 26.
[42] See pp. 554–7, post. [43] See p. 505, post.
[44] See pp. 49–50 (bill of Middlesex and *latitat*), 56 (*quominus*), 127, 129 (conciliar courts), 131 (places overseas), 133 (maritime matters), ante.
[45] See pp. 358, 365, 381, 468, post. [46] See pp. 419, 424, post. [47] See pp. 321–2, post.
[48] See p. 301, post.

implied promise in *indebitatus assumpsit* for quasi-contractual claims.[49] In all these cases the pretence was of a fact which, if true, would have led to the desired result under pre-existing forms of action. If the untrue assertion was not substantially material to the cause of action, but merely satisfied some jurisdictional or procedural requirement which was not essential to achieving justice, then the pretence might be regarded as adjectival rather than substantive. But some fictions went further than that by implying facts which do seem to be material – such as the implied promise in *indebitatus assumpsit* for money had and received – in order to achieve a wholly new remedy. These had a more lasting effect on legal thought, since the implication of a material fact is tantamount to a conclusion of law. The line between fiction and implication is still blurred in the law of contractual terms.[50]

Another kind of fiction was verbal rather than factual, as where facts were deemed to relate back to earlier events for legal purposes. 'Relation' was really a way of modifying the law rather than falsifying facts.[51] Another example of a verbal 'fiction' was the use of ordinary words in a specialist or abstract sense, as when *ecclesia* (church) was used in early grants and statutes to signify variously an advowson, a bishop, or clerics in general, rather than the Church or a church building. This was simply a metaphor used as shorthand, to avoid circumlocution. It was in this artificial lawyers' usage that husband and wife were one person,[52] that monks were dead in law,[53] and that 'the crown' could own property.[54]

One of the most fruitful fictions of this verbal kind was the corporation.[55] Kings, wives, monks, and bishops could all possess attributes which they did not have in their own persons,[56] and in the case of kings and bishops the special capacities were perpetual and outlived the natural beings. Monasteries were even more peculiar in that all their members were legally dead, and yet they owned property and made contracts through their human agencies. As *Bracton* observed, a monastery was an artificial body or *corpus* which continued in being when the head was changed, and the property continued by automatic succession rather than by inheritance on a head's death.[57] This superhuman capacity of being immortal was recognized in the thirteenth-century mortmain legislation.[58] Treating groups of living secular people in the same way raised conundrums which led to further thinking in the fifteenth century about corporate

[49] See p. 393, post; and also P. Birks, 'Fictions Ancient and Modern' in *The Legal Mind* (P. Birks and N. MacCormick ed., 1986), pp. 83–101.

[50] For fiction, implication, and metaphor see Baker, *The Law's Two Bodies*, pp. 42–7.

[51] E.g. a person invited onto premises who misbehaved could be deemed a trespasser *ab initio*: *The Six Carpenters' Case* (1610) 8 Co. Rep. 146. For other examples of 'relation' see *Butler v. Baker* (1591) 3 Co. Rep. 25 at 28; H. Finch, *Nomotechnia* (1613), ff. 17–18v; *Viner Abr.*, Relation.

[52] See p. 522 post. [53] See p. 501 post.

[54] For 'the crown' as metaphor see *R. v. Latimer* (1321) *Abbreviatio Placitorum*, p. 339 (tr. 'the king's crown is always *quasi* under age').

[55] Incorporation means to constitute a group of people into one 'body' (*corpus* in Latin).

[56] E.g. monks, infants, and married women were capable of suing and being sued as executors, even though they could not sue or be sued in their own capacities.

[57] *Bracton*, IV, p. 175. He drew the analogy with a flock of sheep, which remains the same flock even though all the sheep die and are replaced by their offspring.

[58] See p. 262 post.

personality.[59] It was not something which people could confer on themselves, but was seen as a status which could only be derived from a royal grant or acquired by immemorial prescription. Around the same time the year books show lawyers distinguishing the legal position of such bodies from that of their individual members, and referring to the corporation as a 'body politic', a mystical body which (like the Church) contained the dead and the unborn as well as the living.[60] The same terminology could then be applied to bishops and the like; they were 'corporations sole' distinct from the mortal persons. Kings could even be given two bodies – a natural body and a 'body politic' which did not die[61] – or treated as heads of a body, with their subjects as limbs.[62] Treating corporations as artificial bodies or persons with heads and limbs was in one sense a fiction; but it was really just a convenient metaphor, like the Crown. The use of metonymy enabled the common law to capture and describe, with economy of language, what had formerly been an elusive basic concept.

Fictions of whatever kind were not intended to mislead anyone.[63] While it is doubtless wrong to lie, false allegations of fact in legal proceedings were allowed if their effect was desirable in the eyes of the court. Real deception was both wrong and punishable; but the procedural fictions could be rationalized as creatures of equity, enabling the law to be modified equitably: *In fictione juris semper est aequitas*.[64] Even so, the daily use of pleading fictions added unnecessary mystery if not absurdity to the law. Later writers urged procedural reforms which would render them otiose, and one of the legal achievements of the nineteenth century was to end fictions in the classical sense of the term. Such fictions belonged to the formulary stage of a legal system. Once emphasis was shifted from the forms to the facts, it was no longer permissible to make a false assertion in pleading, whatever the purpose. But fictions in litigation are by no means defunct,[65] and in the wider linguistic sense they are frequently encountered in the form of conclusive presumptions, 'deeming' provisions, constructive obligations, and terms implied into contracts by law.

Equity and Legal Change

The equity of the Court of Chancery, like the fictions used in the common-law courts, proceeded from the premise that the course of the common law was immutable. But in Chancery the equitable result was arrived at, not by distorting facts to fit old procedures,

[59] See further *OHLE*, VI, pp. 622–7; D. Seipp in *Judges and Judging*, pp. 37–50; T. Powell, 'Body Politic and Body Corporate in the 15th Century' in *Political Society in Late Medieval England* (B. Thompson and J. Watts ed., 2015), pp. 166–80.

[60] Y.B. Mich. 21 Edw. IV, fo. 38, pl. 3, per Fairfax J. The theologian Thomas Aquinas (d. 1274) characterized the Church as a *corpus mysticum*. But the Church itself never became a corporation in English law; it did not own anything or make contracts.

[61] *Willion v. Lord Berkeley* (1562) Plowd. 223v at 234.

[62] Ibid.; and cf. John Spelman's reading (1519) 113 SS 76; *R. v. Duke of Buckingham* (1521) Port 124 at 125, per Fyneux CJ (tr. 'The king and the whole realm are a body politic'). This metaphor did not prove fruitful. For the Crown as a corporation sole see J. G. Allen, 77 CLJ 298.

[63] Cf. Milsom, 74 LQR at 223: 'The aim of fictions is not deception; it is to keep records straight.'

[64] 11 Co. Rep. 51; Co. Litt. 150; Baker, *The Law's Two Bodies*, p. 55 n. 83. Cf. *Treatise concerning Estates Tayle* (1641), p. 19 (of common recoveries): *Lex fingit ubi subsistit aequitas.*

[65] E.g. the fictitious allegation of adultery still commonly made in divorce petitions: p. 538, post.

but by developing new procedures which enabled the court to take account of more of the real facts. So long as chancellors were seen as providing ad hoc remedies in individual cases, there was no question of their jurisdiction bringing about legal change or making law. However, when equity was regularized and reduced to known principles and rules, the overall content of English law was unquestionably augmented. The use and the trust, the equity of redemption, the principles of relief against forfeitures, penalties, fraud, and mistake, and the equitable remedies of discovery, injunction, rescission, rectification, and specific performance, were permanent additions to the law which survived the abolition of the court.

Equity also affected the law independently of the Chancery. Through the aid of fictions, it played a role in certain branches of the common law,[66] such as the action for money had and received;[67] this was openly acknowledged under Lord Mansfield CJ, who 'never liked common law so much as when it was like equity'.[68] And some equitable doctrines were in the longer term received into the law as a result of legislation. The trust, for instance, which began as a mere trusting of someone, with no prospect of legal protection, came first to be upheld by the Chancery in individual cases, then recognized by the common-law judges as a result of a statute of 1484, then treated as a regular species of property, and finally (under the property legislation of 1925) the sole means of creating future interests in land.[69] Another example is the will, which was not allowed under the feudal land law. Leaving land by will was made possible by means of the use, an arrangement recognized only in equity; but then, after the equitable arrangement had been prevented, the legal power to devise land was introduced by statute in 1540.[70] The equitable doctrine of relief against penalties was received into the law in the seventeenth century by the use of a mandatory imparlance.[71] Married women were given the capacity to own separate property in equity centuries before they were given legal capacity by statute in 1882.[72] Other new kinds of property, such as copyright and trademarks, were recognized in equity before Parliament took them over.[73] Then again, in the nineteenth century, equity was moving towards the recognition of joint-stock companies with limited liability before the statutory foundations of modern company law were laid in 1844 and 1856.[74]

After the abolition of the Court of Chancery in 1875 there was some talk that equity was past the age of childbearing,[75] but in fact it continued to bear offspring in the twentieth century. One of its progeny, the deserted wife's interest in the matrimonial home,

[66] For the equity of the law in a broader sense see p. 114, ante. [67] See pp. 395–400, post.

[68] *Lord Eldon's Anecdote Book* (1960), p. 162. Eldon added that this attitude was reversed under Lord Kenyon CJ (Mansfield's immediate successor).

[69] See pp. 269–71, 309–11, 328–30, post. [70] See pp. 268–9, 276, post.

[71] See p. 347, post. An imparlance was an adjournment to take counsel before pleading. By ordering a perpetual imparlance, the court would never have to give judgment on the legal right. There are earlier examples of courts of law withholding judgment in order to achieve equity: e.g. *Botye v. Brewster* (1595) BL MS. Harley 6745, fo. 105v; and the enforced remission of damages, ante, p. 92.

[72] See pp. 524, 526–7, post. [73] See pp. 485, 488, post.

[74] C. A. Cooke, *Corporation, Trust and Company* (1950), pp. 86–8; J. Getzler and M. Macnair, 'The Firm as an Entity before the Companies Acts' (2005) in *Adventures of the Law*, pp. 267–88. For the history of modern company law see B. C. Hunt, *The Development of the Business Corporation in England 1800–1867* (1926); M. Lobban, 'Joint Stock Companies' (2010) in *OHLE*, XII, pp. 613–73.

[75] Harman J said in 1951 that 'Equity is not to be presumed to be of an age past childbearing': R. E. Megarry, *A Second Miscellany at Law* (1973), p. 293.

was judicially exterminated; but its demise led to a statutory change in the law.[76] Other examples were procedural. In the 1970s the courts extended the scope of interlocutory injunctions and orders, first to restrain the removal of assets outside the jurisdiction in order to frustrate litigation in England (the 'Mareva injunction'),[77] and secondly to preserve documentary evidence in danger of removal or destruction before trial (the 'Anton Piller order').[78] It is true that neither development was attributed to equity as now understood: Mareva injunctions were fathered on a statutory power to grant injunctions when it appeared 'just or convenient',[79] Anton Piller orders on the 'inherent jurisdiction of the court'. But the devices were equitable in the original sense of the term; they depended on an injunctive power, and they were devised by judicial discretion to make the regular law function more effectively. Both were later subsumed in procedural legislation.[80]

Legislation

Maine regarded legislation as working in a completely different way from fictions and equity, because it changed law directly as an exercise of authority, whereas the other two means of adjustment rested on the assumption that the law did not or could not change. Even this proposition is not straightforward. It is doubtless correct to regard all forms of royal legislation as an exercise of sovereign power, and yet it would be going too far to suppose that early legislation was primarily intended to alter the substance or the course of the law. The Anglo-Saxon codes, as we have seen, were intended to declare and perhaps unify what had previously been uncertain or variable customs; they were not generally intended to replace old rules with new, except in minor respects. The Normans and Angevins did not issue codes of that kind, but they produced a good deal of legislation, variously known as assizes, constitutions, charters, or even *statuta*.[81] Decisive written legislation on specific matters was a significant step in legal history. There was a conservative view, expressed by the Empress Matilda in 1164, that in cases of difficulty it was better not to use writing.[82] Written laws removed flexibility, and writing was not seen as adding any authority to laws.[83] Almost uniquely in the world, this view prevailed with respect to the British constitution. It was also the strength of the common law. But Henry II, taking his lead from the Church, and inspired also by the Coronation Edict of Henry I (1100), clearly believed that the certainty of the written word was in some cases the lesser evil.

[76] *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175; Matrimonial Homes Act 1967 (c. 75).
[77] *Mareva Compania Naviera S.A. v. International Bulk Carriers* [1975] 2 Lloyd's Rep. 509.
[78] *Anton Piller K.G. v. Manufacturing Processes Ltd* [1976] Ch. 55.
[79] Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. V, c. 49), s. 45.
[80] Supreme Court Act 1981 (c. 54), s. 37(3) (injunction to restrain removal of assets); Civil Procedure Act 1997 (c. 12), s. 7 (search and preservation orders); Civil Procedure Rules 1998, r. 25.1(1) (freezing orders).
[81] For a *statutum decretum* of Henry I which settled the doctrine of coparcenary, see p. 287, post.
[82] She was displeased that the Constitutions of Clarendon had been put into writing: *The Correspondence of Thomas Becket 1162–70* (A. J. Duggan ed., 2000), I, pp. 166–7.
[83] *Glanvill*, prologue (p. 2). In 1194 the chief justiciar, Hubert Walter, said that what the king commanded orally was more potent than what he commanded in writing: *Rotuli Curiae Regis* (1835), I, p. 47.

The twelfth-century enactments, many of which have doubtless been lost, were omitted from the later canon of statute-law as dating from before the time of legal memory. *Glanvill* referred in numerous places to the effects of Henry II's 'constitutions' and 'assizes' but did not treat them as specific texts to be quoted or even dated.[84] Their long-term effects, in helping to create the common law, may well have exceeded their pragmatic purposes. Courts and Parliament alike had their origins in the same royal council which advised the early kings and whose consent may have been thought necessary for permanent changes in the law.[85] Their functions were still not wholly distinct. Even when the courts began to separate from central government, the judges could reserve cases of difficulty for the king to decide in person or in council, and conversely the king in council could issue general or specific directions to the judges. Sometimes a controversial case could lead to a written statute.[86] The presence of today's judges sitting on woolsacks before the throne, at a state opening of Parliament, hearken back to a distant age when the king's justices were part of an undivided royal council.

This ambivalence clouds the concept of 'the statute-book'. Although it was no more a single historical entity than 'the register of writs', it was commonly held in late medieval times that there was a canon of English statute law beginning with the Magna Carta of 1225. King John's more famous charter of 1215 was a royal concession under duress, repudiated by the king soon after it was made,[87] and never took effect as law; it was usually called the Charter of Runnymede rather than the 'Great' Charter. But the revised version of 1225 was issued by the infant King Henry III at an assembly representing the 'bishops, abbots, priors, barons, knights, freeholders, and everyone of our realm', and that could readily be seen as an early parliament. There was formerly a doubt, partly because the king was a minor, whether even this was a 'statute' before it was confirmed by the parliament held at Marlborough in 1267.[88] It was finally settled in Coke's time that, for legal purposes, it was.[89] The line was, however, arbitrary. Many medieval statutes, later accepted as such, were not in the same form as later Acts of Parliament. Indeed, it is difficult in the thirteenth century to distinguish between parliaments and councils. What Magna Carta did make clear was that the king could not alter the law on his own; but what manner of supporting advice he needed was for some time indeterminate.[90] A comparison of the enacting words found in legislation during the first century after 1225 shows no consistency. The charters of liberties were framed as grants in

[84] Hall (ed.), *Glanvill*, pp. xxxiv–xxxvi. For many, no text has been found.

[85] In *Archbishop of Canterbury v. Abbot of Battle* (1140) 106 SS 255, it was asserted that the king could not change the law beyond his own lifetime unless he obtained the consent of his barons.

[86] E.g. *De Donis* (1285): p. 293, post. For other medieval examples see Brand, *MCL*, pp. 244, 290, 318.

[87] Pope Innocent III helpfully threatened John with eternal damnation if he should observe it. To a pope it seemed shameful and demeaning for a king to give up his absolute power by giving rights to his people.

[88] See e.g. *Re Sir John Skrene* (1475) Y.B. Mich. 15 Edw. IV, fo. 13, pl. 17, per Littleton J; Hervy's reading on Magna Carta (*c.* 1485) 129 SS 87. But the 1225 charter (as confirmed in 1297) was the first item in all the statute-books. The confirmation of 1297 was later taken to be the statutory version, but this was a misunderstanding: Baker, *Magna Carta*, pp. 9–12.

[89] *The Prince's Case* (1606) 8 Co. Rep. 1 at 19; *Bulthorpe v. Ladbrook* (1607) in Baker, *Magna Carta*, pp. 8–9, 531–3; Co. Litt. 43.

[90] Magna Carta (1215), cl. 12, provided that no taxation should be imposed except by the common council of the realm. By cl. 14 this council was to be summoned to a particular place and was to include all tenants in chief. All this was dropped in 1225. There is a case for putting the origins of Parliament in the first half of Henry III's reign: J. R. Maddicott, *The Origins of the English Parliament* (SS Lecture, 2013).

the name of the king alone; the Provisions of Merton (1236) were made 'in curia regis', and were once thought not to be a parliamentary statute for want of any mention of the commons;[91] on the other hand, the Statute of Marlborough (1267) mentions the presence and agreement of 'men of higher and lower estate'. The Statute of Westminster I (1275) provided a model for the future by reciting the consent of the lords and 'the commonalty of the realm', these latter being knights of the shires, citizens, and burgesses who had been summoned to attend but did not as yet constitute a distinct 'house'. It was nearly a century before this became the common form, and some undoubted parliaments were summoned without the commonalty being mentioned at all. The Statute of Westminster II (1285) mentions a 'parliament', but the legislation is attributed on its face to the king, without any reference to consent, and the same is true of the Statute of Winchester (1285); the statute *Quia emptores* (1290) is attributed to the king in Parliament 'at the instance of the great men of the realm', omitting to mention the commons. Yet these were all received thereafter as Acts of Parliament.

In the reign of Edward III the commonalty began to meet as a separate house, both to initiate and to scrutinize proposals for legislation, and to assert a constitutional role. In 1340 the king conceded the principle that no taxation should be imposed without their separate consent;[92] in 1348 it was asserted in Parliament that laws were made by the king with the assent of the peers and commons;[93] and in 1366 Parliament rejected the purported submission of the realm to the pope by King John, with the advice of his barons, because it was not made with the consent of Parliament.[94] In 1382 the commons successfully petitioned Richard II to revoke a recent 'statute' against Lollards because they had not agreed to it.[95] But the need for consent by the House of Commons to all legislation was not fully established until 1414, in that it remained possible until then for the lords to introduce variations when assenting to commons' petitions.[96] In 1407 Henry IV recognized that the proper legislative procedure was for the lords and commons to debate propositions as separate houses, and only when they were both agreed should the matter be submitted to the king for his assent.[97] From then until the present, parliamentary legislation has required the separate consent of king, lords, and commons.[98]

The tripartite division of Parliament inevitably led to an increased concentration on the text of bills, as containing the propositions to which each house in turn was asked to give its assent. In the fifteenth century the practice arose of inserting in a bill the exact wording of the proposed legislation, and since Tudor times this has been the universal practice. It is not certain that earlier legislation was produced in the same way, with debates by the lawmakers upon the wording of written drafts.[99] Bills were at first

[91] Baker, *Magna Carta*, pp. 7, 478.
[92] Stat. 14 Edw. III, sess. ii, c. 1.
[93] *Hadelow v. Regem* (1348) Y.B. Hil. 22 Edw. III, fo. 3, pl. 25.
[94] Co. Inst., IV, pp. 13–14.
[95] 12 Co. Rep. 57; Baker, *Magna Carta*, p. 116.
[96] Rot. Parl., IV, p. 22, no. 10. See also *Pilkington's Case* (1455) Y.B. Pas. 33 Hen. VI, fo. 17, pl. 8; Morgan Kidwelly's reading (1483) 132 SS 100–02. The last instance of a king making amendments unilaterally (albeit minor) was in 1504.
[97] Rot. Parl., III, p. 611.
[98] Although this remains the basic principle, the Parliament Acts 1911 (1 & 2 Geo. V, c. 13) and 1949 (12, 13 & 14 Geo. VI, c. 103) empower the Commons to override the Lords if agreement cannot be reached in two years. The Lords therefore have a delaying power, not a veto. The royal assent was last refused in 1708.
[99] The Provisions of Westminster 1259 may have been an exception, since 4 drafts have been found: Brand, *MCL*, p. 325. The context was unusual.

petitions seeking the redress of a grievance, expressed generally, and drafting the resulting statutes may have been referred to the clerks and judges after assent had been given in principle. A statute then represented the terms of a general decision upon a generally worded complaint or petition; a decision of the highest authority in the land, but not different in kind from decisions by inferior branches of the Curia Regis, which were likewise entered up in writing by the clerks. This accounts both for the freedom with which the older statutes were interpreted and for the otherwise inexplicable lack of contemporary definitive texts.

There was at first no procedure for enrolling parliamentary statutes, but from 1299 an official (though incomplete) roll was kept in the Chancery. Statutes were also registered in the Red Book of the Exchequer. Parliament's own rolls, beginning in 1290, contained only some of the legislation together with non-legislative 'acts', such as decisions in litigation. The medieval courts therefore had no authentic texts available to them, and yet it seemed not to matter. Argument in court rarely turned on the precise wording of a statute, and even in the inns of court the readers glossed whatever texts they had to hand.[100] The public and their legal advisers, and even those in positions of government, had to rely on private collections of statutes. Although hundreds of these manuscript statute-books survive, the earliest dating from the thirteenth century, hardly any two of them have the same content. They were never wholly complete, because there was no definitive guide to what should be included, and the occasional statute may have escaped notice altogether.[101] They often contained writs, ordinances, procedural directives, and even passages from *Glanvill* and *Bracton*, masquerading as statutes. By professional usage, some of these spurious texts were actually treated as statutes for practical purposes, and were later printed as such, although – in so far as it mattered – they were properly to be regarded as evidence of the common law rather than as legislation.[102] The old statutes were printed in the 1480s, and with later continuations were frequently re-edited in successive centuries as the *Statutes at Large*.[103] Not until 1810–22 was an official edition of the old statutes (up to 1713) published, in the impressive elephant-folio volumes of the *Statutes of the Realm*; but even these were acknowledged to be incomplete and to contain apocrypha.

By Tudor times the character of parliamentary legislation had undergone major changes. The reason was partly procedural, for the result of the new bill procedure was that legislation was 'no longer the Government's vague reply to vaguely worded complaints, but rather the deliberate adoption of specific proposals embodied in specific texts'.[104] And it was partly a result of printing. From 1484 Acts of Parliament were printed as soon as they were passed, after 1508 under the authoritative imprint of the king's printer. Printing killed off the manuscript statute-books, which were less reliable than the printed versions. But the changes were also political, in that Parliament was

[100] E.g. in 1512 Baldwin Malet, without apology or explanation, lectured on a clause of the 1215 Magna Carta which was omitted in 1225: 132 SS 210.

[101] E.g. the Royal Marriages Act (1428), rediscovered in 1977: R. A. Griffiths, 93 LQR 248; G. O. Sayles, 94 LQR 188.

[102] *Re Sir John Skrene* (1475) Y.B. Mich. 15 Edw. IV, fo. 13, pl. 17, per Littleton J; *Swaffer v. Mulcahy* [1934] 1 K.B. 608.

[103] These collections omitted statutes which were spent or repealed.

[104] Plucknett, 60 LQR at 248.

deliberately extending its sphere of perceived competence. The Tudors exalted Parliament, and expected somewhat in return. King Henry VIII's parliaments were prodigiously industrious, passing some 677 statutes which occupy almost as much space as all the preceding legislation from Magna Carta onwards. Many of these statutes were of immense political significance. The achievements of the so-called Reformation Parliament in spiritual matters established the legislative supremacy of Parliament against its only remaining rival, the Roman Church. And in the temporal sphere Parliament ventured to the limits of legal possibility: entailing of the Crown, fictional livery of seisin,[105] new treasons of appalling width, even boiling in oil as a punishment. Attempts were made to control the environment and the economy by legislation. The innovations wrought by Parliament in the Tudor period were the work of humanist legislators confident in their ability to improve things by the right use of power. With this new concept of legislation came an even greater reverence for the written text. Legislative drafting was now carried out by Crown lawyers, and the legislative purpose was set out in extensive and explicit preambles intended to restrain the judges from the kind of creative exegesis they had bestowed on the more open-textured medieval statutes. There would always thereafter be a sharp division between legislature and judicature, with long-term implications for the future of judge-made law.

Acts of Parliament as Judgments

These changes in the character of legislation were disguised by constitutional theory. In the thirteenth century, Parliament had been nothing other than a grand meeting of the king's court; and even if by 'court' we mean a judicial body, the term was entirely appropriate on account of the volume of contentious business.[106] Long after most of the litigation had been directed elsewhere, Parliament continued to be regarded as a 'high court', distinguished from other superior courts chiefly in that its acts were not tied to the course of the common law and were not reversible for error. Sir Henry Finch wrote of Parliament as having 'absolute power in all cases, as in making laws, adjudicating upon matters in law, trying capital cases, and reversing errors in the King's Bench, and especially is this the proper court where there is some common mischief which the ordinary course of the law has no means to remedy. And all things that they do are like judgments.'[107] Its judgments bound everyone, on the medieval principle (or fiction) that, since all the estates of the realm were represented in Parliament, every person was 'privy' to its acts. By Finch's time, however, there were obvious procedural differences between the legislative side of Parliament and the judicial side. Half a century later, Sir Matthew Hale pointed out the ambiguity of the phrase 'High Court of Parliament', which had borne different senses in different periods. Most of the judicial work had long been appropriated to the House of Lords: 'although in truth the king and both houses of parliament make the entire supreme court of this kingdom; yet very often, in

[105] For the Statute of Uses (1536) see p. 275, post.

[106] Cf. *Fleta* (*c.* 1290) ii. 2 (72 SS 109, tr.): 'The king has his court in his council in his parliaments . . . where doubts concerning judgments are determined, new remedies devised for wrongs newly brought to light, and justice dispensed.'

[107] *Nomotechnia* (1613), ff. 21v–22 (translated). Finch had been a MP since 1593.

parliamentary records of writs, *curia nostra in parliamento,* and *curia parliamenti*, is applicable to the lords' house'. Hale therefore found it necessary to distinguish the legislative or 'deliberative' function of Parliament from the contentious or 'judicative'. The former looked to the future, the latter to things already done. Even so, Hale treated the functions as being of like nature. The House of Lords, he argued, could not be the supreme court of final appeal because, if it were, 'then is the legislative power virtually and consequentially there also'. The test was whether the house could give judgment against an Act of Parliament. Since it could not, it was not supreme. The argument now seems academic; but it shows that, as late as the seventeenth century, analytical legal writers saw no fundamental difference between judicial and parliamentary law-making. For Hale, the supreme power of making laws and the supreme power of deciding cases had to reside in the same body.[108] *Jus dicere* was *jus dare*.

Statute Law and the Courts

From the time of Edward I, English lawyers never doubted the authority of Parliament to make new law – 'special law' (in medieval parlance) as opposed to common law – and in so doing to bind all courts, with the exception only of future parliaments. Thus in 1334 Herle CJ said that, although the judges would not change a particular rule which was law before they were born, the party if he wished could 'sue in Parliament to make a new law'.[109] A century later, Fortescue CJ declared that 'this high court of Parliament is so high and so mighty in its nature that it may make law, and that that is law it may make no law'.[110] There was therefore nothing particularly new in Sir Thomas Smith's assertion in 1565 that 'the most high and absolute power of the realm of England consisteth in the Parliament', as a body representing every Englishman; 'the Parliament abrogateth old laws, maketh new, [and] giveth order for things past and for things hereafter to be followed'.[111] In short, as Thomas Egerton said in 1591, Parliament can do anything.[112] Coke CJ was likewise merely paraphrasing these older views when he wrote, in the time of Charles I, that the power of Parliament in making statutes 'is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds'.[113] The theory was clear enough. Nevertheless, when power is exercisable only through the written word, it is always constrained by the need for interpretation.

In applying and interpreting the legislative output of the supreme court of Parliament, medieval judges enjoyed the like freedom as they had in applying and interpreting the common law of their own courts. This was because, as we have seen, the texts had no special authority in themselves. In the early days when judges helped to draw statutes in Parliament, and were therefore closely acquainted with underlying policy, it is not surprising to find them following that policy rather than the letter of the text. Hengham

[108] M. Hale, *The Jurisdiction of the Lords House, or Parliament* (F. Hargrave ed., 1796), esp. pp. 17, 85, 205–7; *Selected Writings*, pp. 244–5; *The Prerogatives of the King* (D. E. C. Yale ed., 92 SS, 1976), p. 181.

[109] Y.B. Mich. 8 Edw. III, fo. 69, pl. 35. A statutory change is referred to as 'novel ley' in 1304: Y.B. Trin. 32 Edw. I (RS), p. 259.

[110] *Re Thomas Thorp, speaker-elect* (1453) Rot. Parl., V, p. 239.

[111] *De Republica Anglorum* (1583), pp. 34–5 (written in 1565).

[112] *Sir Francis Englefield's Case* (1591) 4 Leo. 135 at 141 ('Parliamentum omnia potest').

[113] Co. Inst., IV, p. 36.

CJ once cut short a serjeant who was attempting to expound a statute of 1285 with the remark, 'Do not gloss the statute, for we understand it better than you; we made it'.[114] Even judges who had not been personally involved might lay claim to a knowledge of the makers' intention, albeit that it was not reflected in the wording: for instance, in 1312 Bereford CJ interpreted a statute of 1285 by reading in words which were not there, on the footing that the draftsman had omitted to express what was meant.[115] It was thus possible to enlarge a statute by the 'equity': as where a statute providing a remedy against the warden of the Fleet Prison for the escape of debtors was interpreted to apply to all gaolers.[116] Equity in this sense was the Aristotelian concept of interpretation according to the legislative intention, on the footing that written words were necessarily deficient to cover every case.[117] It became a principle of the common law that beneficial legislation should be interpreted according to the meaning, not the letter,[118] and in 1574 Plowden explained: 'It is not the words of the law but the internal sense of it that are the law; for our law, like all other laws, has two parts, the body and the soul: the letter of the law is the body of the law, but the sense and reason of the law is its soul…and often when you know the letter you do not know the sense, for sometimes the sense is not as large as the letter and sometimes it is larger.' The test which Plowden advanced for making an equitable construction of a statute was this: 'Whenever you read the letter of statutes, imagine that the lawmaker is present, and that you have asked him about the equity; then give yourself that answer which you imagine the lawmaker would have given if he had been present.'[119] Tudor draftsmen took advantage of this way of thinking by elaborating the explanatory preambles in statutes so as to frustrate any assertion of a legislative intent contrary to that expressly declared.[120]

Some medieval lawyers took the equitable approach to the extreme of believing that an unreasonable or absurd statute could be disregarded entirely. There are a few signs of this happening in the early year-book period,[121] but little in the way of theoretical justification. One possible approach was to treat the offending statute as vitiated by mistake, since the lawmaker would hardly have wished the statute to be put into effect had the full consequences been apparent to him.[122] Another approach – suggested by a fifteenth-century reader – was that, if it could hardly be supposed that Parliament intended what the words said, maybe it had not said them; the clerk of the parliaments could then be presumed to have made a mistake in recording them.[123] It was also

[114] *Aumeye's Case* (1305) Y.B. 33–35 Edw. I (RS), p. 82; Plucknett, *Statutes and their Interpretation*, pp. 183–4 (and see pp. 49–50, for further examples).

[115] *Belyng v. Anon.* (1312) B. & M. 57 at 58; p. 299, post. Bereford became JCP in 1292.

[116] Stat. I Ric. II, c. 12; Port 115, pl. 62; *Plat v. Sheriffs of London* (1550) Plowd. 35 (following earlier cases).

[117] See p. 114, ante.

[118] Statutes which restricted common-law rights, or were seen as contrary to common-law principles, were to be construed strictly: *OHLE*, VI, p. 77 n. 169. There was thus further flexibility in deciding whether statutes were beneficial or restrictive.

[119] Commentary to *Eyston v. Studde* (1574) Plowd. 459 at 465, 467.

[120] It was said *c.* 1495 that a statute could not be construed contrary to its recited intention: Port 115, pl. 59. But the preamble was not always conclusive as to the mischief: [Fleetwood], *Discourse upon Statutes* (Thorne edn), pp. 114–17.

[121] Plucknett, *Statutes and their Interpretation*, pp. 66–71.

[122] See *Tregor v. Vaghan* (1334) Y.B. Pas. 8 Edw. III, fo. 30, pl. 26, per Herle J (tr. 'Some statutes are made which even he who made them would not wish to put into effect').

[123] 94 SS *44* n. 10. This was no solution, since a court could not question the record of Parliament for error.

common in the fifteenth and early sixteenth centuries to treat some old statutes as 'void' when they did not conform with current understanding, or were inconsistent with other statutes, or simply did not make sense.[124] None of these approaches could survive the tightening of bill procedure, with its greater emphasis on the written formulation. St German in the 1520s put into the mouth of his Doctor a third theory, that a statute against natural law (or the law of reason) was not law at all, and therefore void.[125] But such abstract statements bore little or no fruit in the practice of the courts.

A bold but forlorn attempt to revive the medieval approach was made by Sir Edward Coke in his report of *Bonham's Case* in 1610: 'it appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.' There is no doubt that this was Coke's considered opinion at the time, for the passage has been found written out twice in his own autograph.[126] There is some doubt, however, whether anything to that effect was said in court or whether his brethren agreed. It seems better to view it more as an overstatement than as a statement of orthodox doctrine. Parliament could not indeed work the impossible; but in so far as Coke's remarks suggested other limitations on the supremacy of Parliament they were immediately challenged. Lord Ellesmere C reacted sharply, saying it was more fitting that 'acts of Parliament should be corrected by the same pen that drew them than to be dashed in pieces by the opinion of a few judges'.[127] In his speech to Coke's successor as chief justice, Ellesmere remonstrated against the view that judges 'have power to judge statutes and Acts of Parliament to be void if they conceive them to be against common right and reason', which was for the king and Parliament alone to judge.[128] The context of Coke's remark was a statute which infringed a principle of natural justice, and at least one contemporary (Hobart CJCP) shared Coke's view that 'an Act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself, for *jura naturae sunt immutabilia*'.[129] Being a judge in one's own cause was arguably a case of impossibility rather than unfairness: innate bias, or the appearance of it, cannot be removed by legislative magic. It nevertheless seems from Coke's *Fourth Institute* that, after further consideration, Coke modified his opinion even in respect to natural justice. He recounted a story that Henry VIII had asked his judges whether an attainder in Parliament could be called in question if the person attainted had been denied an opportunity to defend himself; they had replied that they hoped Parliament would never do such a thing, but if it did the Act could not be questioned.

[124] Baker, *Magna Carta*, pp. 88–90. Note the debate in Gray's Inn *c.* 1529 whether a statute would be void if it was irreconcilable with fundamental legal principles: ibid. 90–1, 104; *CPELH*, II, pp. 942–4.

[125] *Doctor and Student*, 91 SS at p. 15. A similar view was advanced by Fortescue in the 15th century: Doe, *Fundamental Authority*, pp. 75–8.

[126] *Dr Bonham's Case* (1610) CUL MS. Ii.5.21, fo. 93v (original report, printed in 8 Co. Rep. 114); Yale Law School MS. G.R24.1, fo. 157v (note).

[127] L. A. Knafla, *Law and Politics in Jacobean England* (1977), p. 307.

[128] *Speech to Sir Henry Montague* (1616) Moo. K.B. 826 at 828. He added, 'I speak not of impossibilities or direct repugnancies'.

[129] *Day v. Savadge* (1614) Hob. 85 at 87 (quoting St German). Holt CJ took the same view: *City of London v. Wood* (1702) 12 Mod. 669 at 687. For other followers see Baker, *Magna Carta*, p. 90 n. 104.

Coke then listed some oppressive statutes, and drew a lesson which was less legal than moral; they were 'a good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law, and not to the incertain and crooked cord of discretion'.[130] Little more was heard in England after 1610 of judicial review of statutes,[131] and Coke's doctrine was diluted into a presumption to be applied where a statute was ambiguous or in need of qualification by necessary implication.[132] The two propositions as to morality and feasibility have remained intact. Parliament cannot make bad good, nor can it make possible the impossible. But it has the power to make bad law, to deem the impossible to have occurred, or to prescribe a punishment for those who fail to do the bad or impossible.

Blackstone said that to permit judicial review of unreasonable legislation 'were to set the judicial power above that of the legislature, which would be subversive of all government'.[133] The principle of not reviewing legislation has since been carried so far in England as to eliminate the equitable approach to construction almost completely. It gained added weight in and after the 1830s, when reforming legislation was often based on detailed factual enquiries formally unavailable to the courts, and frequently involved a deliberate decision of policy to depart from common-law reasoning.[134] When in 1950 Denning LJ tried to resurrect the medieval equitable approach by seeking the intention of Parliament in a particular statute and giving effect to it by filling in gaps in the wording, Lord Simonds rebuked him for 'a naked usurpation of the legislative function under the thin guise of interpretation'.[135] The last remnant of the equity of a statute is the 'mischief rule', also formulated by Coke, which permits ambiguous legislation to be interpreted in such a way as to suppress the mischief which it was designed to eliminate.[136] This may sometimes justify taking account of the legislative history of an enactment.[137]

This settlement between the judiciary and the legislature did not prevent new problems arising in the twenty-first century. Government ministers have come to gauge their success in office by the quantity of new legislation for which they can claim responsibility. The consequent tendency to rush unclear and inconsistent legislation through Parliament – sometimes for want of time[138] but sometimes, perhaps, because clarifying the meaning might only facilitate opposition – leaves the courts to grapple with the shortcomings later. The result is that blame for the defects is frequently directed at the judges by an uncomprehending press and public. Yet Parliament has at the same time given the courts their widest powers to question its enactments. The Human Rights Act

[130] Co. Inst., IV, pp. 37, 41. The story probably referred to the attainder of Thomas Cromwell, earl of Essex, in 1540: *OHLE*, VI, p. 68.

[131] Coke's opinion may have had some influence on the establishing of judicial review in America: Plucknett, 40 HLR at 61–8.

[132] Bl. Comm., I, p. 91. Necessary implication can, perhaps, achieve all that Coke intended: see p. 162, ante.

[133] Bl. Comm., I, p. 90.

[134] See P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p. 384.

[135] *Magor and St Mellons R.D.C.* v. *Newport B.C.* [1952] A.C. 189 at 191.

[136] *Heydon's Case* (1584) 3 Co. Rep. 7; 133 SS, no. 128; Bl. Comm., I, p. 87. Coke attributed the principle to Manwood CB.

[137] E.g. *Smith v. Bull* [1995] Q.B. 88 ('prostitute' held not to include a male prostitute, because the statute in question resulted from an inquiry into female prostitution).

[138] This explains the substantial increase in 'Henry VIII' clauses: p. 226, post.

1998, while not authorizing the courts to strike down statutes as invalid, because that would overturn the parliamentary constitution, does give them the power to review legislation and to make declarations that particular Acts of Parliament are incompatible with the human rights which Parliament has spelt out. Since these rights were expressed in words of considerable generality, adopted from the European Convention on Human Rights (1950)[139] and intended to be understood in divergent jurisdictions, the courts seemingly acquired a power to make law independently of statute or common law. Most of the principles declared in the convention were, however, derived from the common-law rights of the English as guaranteed by Magna Carta and expounded by Coke.[140] It was therefore expected that the courts would exercise their newfound power with due regard to the intellectual origins of human rights and without approaching the broad definitions in the Act *de novo*. That was, indeed, one of the motives for embodying the convention in English law.[141] But courts prefer following precedents to being overturned, and a perceived tendency to follow European decisions without demur has given rise to a popular notion that human rights are a foreign invention frustrating parliamentary democracy.

Subordinate Legislation

Parliament was not the only source of legislation. At the other end of the legal hierarchy, bodies such as municipal corporations, courts leet, and guilds, were able in medieval times to make bye-laws, either by immemorial custom or by royal grant; but they could not legislate in a way which would contradict the common law by infringing the liberty of the subject. As a result of internecine conflicts in towns, the Elizabethan judges were frequently asked to review municipal bye-laws, basing their jurisdiction on chapter 29 of Magna Carta.[142] But a weightier legal issue was whether the same restraints could be applied to the central government. Ministers of the Crown might well think it efficient to legislate without troubling Parliament, but any such power would be at odds with Magna Carta if it touched liberty or property. The law of the land allowed the king to issue proclamations in the exercise of his prerogative,[143] but not to alter the law itself. This difficulty could be overcome by asking Parliament to delegate legislative powers to the king or his councillors, a practice which was adopted several times in the sixteenth century. In 1531 commissioners of sewers were empowered to make local statutes, subject to the royal assent.[144] In 1534 the king was empowered to appoint commissioners

[139] This was based on the Universal Declaration of Human Rights (1948). For the history of the convention see A. W. B. Simpson, *Human Rights and the End of Empire* (2001).

[140] Baker, *Magna Carta*, pp. 335–435, 450–1. An English statute cannot in theory be ignored as being contrary to Magna Carta, much of which has been repealed by Parliament as obsolete, though in the absence of clear language to the contrary it will be interpreted in accordance with c. 29.

[141] The Convention itself is enforceable through the European Court of Human Rights in Luxembourg, and English courts are bound by statute to take its decisions into account: p. 212, ante.

[142] *Case of the Joiners of London* (1582) in Baker, *Magna Carta*, pp. 312, 468–76; *Chamberlain of London's Case* (1590) 5 Co. Rep. 62; *Davenant v. Hurdys* (1599) Moo. K.B. 76, 11 Co. Rep. 86. These all concerned the city of London.

[143] E.g. to declare war and peace, or alter the coinage. Such matters are still dealt with by proclamation, though the last proclamation of war was in 1942.

[144] 23 Hen. VIII, c. 5.

to edit the ecclesiastical laws, and in 1543 to make laws and ordinances for Wales.[145] There were also instances of powers to bring statutes into operation. Such measures may have given rise to the concept of a 'Henry VIII clause', although term is now used (misleadingly[146]) to mean a clause which empowers a minister to repeal or amend an Act of Parliament. The latter kind of power only became notorious as late as 1929, when it was inveighed against by Lord Chief Justice Hewart.[147] It used to be thought that it was modelled on Henry VIII's Statute of Proclamations (1539), which empowered the Privy Council to issue proclamations with the same effect 'as though they were made by Act of Parliament'.[148] But that measure caused such consternation at the time that the House of Commons inserted a proviso that it did not authorize proclamations to the prejudice of life, liberty, or property, or in breach of any existing laws. In other words, it conferred little if any legislative authority at all, and its repeal eight years later had no practical effect. Proclamations were nevertheless widely used in the sixteenth and early seventeenth centuries, without statutory authority. By 1597 there was grumbling that the Privy Council was bent on governing by proclamation, and thereby usurping the function of Parliament, and under James I there were renewed fears that the king might start to legislate without Parliament. The matter was raised as a grievance in the Parliament of 1610, and in the same year the judges reaffirmed that the king could not alter the law by proclamation.[149] Thereafter it was beyond doubt that legislative sovereignty resided solely in Parliament. As an exercise of that sovereignty, Parliament could delegate as much of its law-making power as it chose, but the courts would reject as ultra vires any ministerial orders or regulations which were not clearly authorized by a 'parent' Act of Parliament. By far the greater part of English law, measured by volume of words, is now contained in delegated legislation.[150] And there is a growing tendency to confer 'Henry VIII' powers on ministers to change the parent legislation itself, merely by order, should it be found wanting.

Law Reform Movements

The many reforms effected by judicial decision and statute before the nineteenth century were sometimes sweeping but rarely if ever radical, and seldom the result of a planned programme of change. They usually presupposed and followed established reasoning and known concepts. The resulting legal edifice was likened by Blackstone to a medieval castle, an amalgam of different styles of architecture, full of venerable but disused monuments alongside modern embellishments, always in need of repair, but

[145] See pp. 38, 141, ante. The ecclesiastical laws never materialized.

[146] They might better be called Henry VII clauses, since that king was given power to annul certain Acts of attainder by issuing letters patent: 19 Hen. VII, c. 28.

[147] Lord Hewart, *The New Despotism* (1929). The first clear example of such a clause seems to be in the Local Government Act 1888.

[148] 31 Hen. VIII, c. 8; as to which see *OHLE*, VI, pp. 64–5.

[149] *Case of Proclamations* (1610) 12 Co. Rep. 74. The decision was not as clear as is commonly supposed: Baker, *Magna Carta*, pp. 151–4, 390–6.

[150] There is a standard procedure for promulgating them: Statutory Instruments Act 1946 (9 & 10 Geo. VI, c. 36). Over 3,000 were issued in 2014.

nonetheless a pleasing and serviceable structure with a continuous history.[151] The legal profession in general would have relished such a metaphor. Practising lawyers well know the danger and uncertainty attending drastic changes in the law. Coke, who effected many moderate and lasting reforms himself while on the bench, wrote repeated warnings against 'innovations and novelties'.[152] Hale, a notable law reformer, thought that much of the 'itching' for change among the people at the time of the Interregnum was caused by ignorance, fear, and envy of the lawyers; and it was as necessary to avoid 'error in the excess, the over-busy and hasty and violent attempt in mutation of laws' as it was to avoid 'error in the defect, a wilful and over-strict adhering in every particular to the continuance of the laws in the state we find them'.[153] Professional conservatism was, nonetheless, a virtue imperfectly appreciated by the lay public. In a world of latitats and demurrers and surrebutters, when lawyers wrote notes in French and submitted their bills in Latin, and when every lawsuit followed a labyrinthine path strewn with arcane documents, fictions and fees, laymen could be forgiven for suspecting that the whole system had been designed to increase the income of the legal profession. History does not generally bear out such suspicions: the abolition of fictions, for instance, did not result in any marked savings in cost or time.[154] Medieval and early-modern litigation was vastly cheaper, in real terms, than litigation today. But at two periods of history, more than others, dissatisfaction with the state of the law reached such a peak that Parliament initiated extensive programmes of reform. Both movements were concerned mainly to improve the procedure and institutions of the law rather than its substantive doctrines.

The Civil War and Interregnum

In the period from 1640 to 1660 the whole of the law was brought under scrutiny with a view to reform. In 1640 there had not been a parliament since 1629 and dissatisfaction with the common law had reached a climax following the *Case of Ship-Money* in 1638, when a majority of the judges upheld the king's power to imprison subjects for failing to pay a tax imposed under the royal prerogative.[155] The Long Parliament which first met in November 1640[156] lost no time in starting; away went ship-money and forced loans, the Star Chamber, High Commission and conciliar courts in 1641, to be followed in a few years by all the ecclesiastical courts. Then there was the 'Norman yoke' to be cast off, first by the abolition of military tenures and the Court of Wards in 1645,[157] and

[151] Bl. Comm., III, p. 268. Cf. the more peevish extension of the metaphor, referring to modern architects who had pulled down some of its most useful parts and left a 'huge, irregular pile': 32 HLR at 975.

[152] See e.g. B. & M. 78; and p. 206, ante.

[153] Hale, *Selected Writings*, pp. 167–83. It is possible that Hale took charge of law reform during the 1650s in order to quell the more extreme agitators; cf. p. 228, post.

[154] The fictitious action of ejectment was actually cheaper than a regular action, because no mesne process was needed.

[155] *R. v. Hampden* (1638) 3 State Tr. 825; p. 178, ante; p. 509, post. The judgment was annulled as 'utterly against the law of the land' by the Ship Money Act 1641 (16 Car. I, c. 14).

[156] It continued notionally until 1660, though after the king was executed in 1649, and the HL abolished (n. 158, post), only the Commons remained. The Commons, 'purged' and reconstituted during the Interregnum, asserted legislative sovereignty until the Restoration.

[157] See p. 277, post.

then by banning the use of Latin and French in records and law-books. In 1649 the king was executed and the monarchy itself displaced. Six weeks later the House of Lords was axed.[158] What was to be done next? If kings could be done away with, no other legal institution could be sacrosanct, and in the years that followed there was protracted discussion of legal reform. The initial impetus in the Long Parliament may well have been conservative, inspired by Magna Carta: a desire to put the clock back to the days before Stuart tyranny had whittled down the subject's fundamental rights. But popular ideas for reform soon knew no bounds. The withdrawal of press licensing brought hundreds of printed pamphlets advocating changes which ranged from the mild and obvious to the extreme and absurd. The revolutionary voices were the loudest, and they did not spare law or lawyers. The Levellers wanted to abolish the whole of the common law, including its courts and practitioners, and replace it by a pocket-book code in plain man's English. Their law would be administered by select laymen who conformed with party standards. This was not to be, save at the level of the county magistracy.[159]

The reformist spirit did, however, enter more moderate hearts, and it was the lawyers themselves who produced the best plans. Matthew Hale's law commission of 1652 contained a few radicals but was dominated by lawyers, who laboured to keep discussion on a technical plane. A central figure was William Sheppard (d. 1675), a country lawyer who became enthused by what he naively believed was the start of a great social and moral transformation; from 1653 to 1657 he was employed in London as a draftsman, pamphleteer, and co-ordinator of ideas. In 1656 he published an impressive array of proposals for reform: the fusion of law and equity; county courts for small claims; a hierarchy of appellate courts; abolition of the forms of action; uniformity of process; the end of special pleading and fictions; trial without jury for small claims; registration of title, and simplified conveyancing; abolition of primogeniture; abolition of imprisonment for debt; secular probate courts; survival of causes of action on death, and death to be a cause of action for dependents; abolition of benefit of clergy (with more rational restrictions on the death penalty); abolition of the *peine forte et dure*; prison reform; and also a mass of social reforms, including the introduction of banks and an income tax.[160] Few of these were Sheppard's own ideas, and some were far from new; but as a coherent agenda for reform the book seems astonishingly prophetic and might have served well enough as a guide for the reformers of the nineteenth century.

In so far as these proposals were acted on in the 1650s, which was not very far, all was undone in 1660.[161] Upon the Restoration of the monarchy the old forms of law were automatically restored, in their entirety, not excepting fictions and the use of Latin in records.[162] The disinclination to sever the good from the bad was an understandable

[158] Charles I was beheaded on 30 January 1649. The Commons, assuming the authority of Parliament, enacted in March that the HL be 'wholly abolished and taken away' as 'useless and dangerous to the people of England'.

[159] Revised guides to the law of justices, for the use of the new men now placed on the bench, were produced at government instigation by William Sheppard.

[160] *England's Balme* ('1657', but issued in 1656). Sheppard, a barrister of the Middle Temple, was rewarded with the coif in 1656.

[161] After the Restoration in 1660, the reign of Charles II was deemed to have commenced on the day of his father's execution, and all the ordinances of the Commons (without king or peers) were treated as invalid.

[162] For the unsuccessful attack on the fictitious bill of Middlesex in 1661, see p. 53, ante.

reaction to the repressive illiberality of the preceding regime. Military dictatorships are not renowned for their jurisprudence, and the unlearned members of Parliament had not known when to stop. Their High Court of Justice was a worse infringement of liberty than the Star Chamber had ever been, since it could inflict the death penalty without the safeguards of indictment or jury trial; it was an irregular political tribunal, and many lawyers refused to serve on it. The religious zealots who abolished bishops proved far more intolerant than any bishop had been since the break with Rome. The Blasphemy Act of 1648 made it a capital offence to deny the Trinity, or the authority of the scriptures, or that the bodies of men rose again after death, or that there would be a last judgment. Two years later, fornication (on a second conviction) and adultery were made punishable by death, a measure admittedly more symbolic than effective.[163] Actors and popular musicians were to be punished as rogues and whipped. The licentiousness of Charles II's court was an overreaction against this state of repression, but it is hardly a wonder that the legislative reaction was equally blind. Reform was not killed stone dead; many of the ideas continued to be discussed later in the seventeenth century. But 1660 marked the end of a powerful and sometimes disturbing movement for law reform. England would be free of law commissions for a long time to come.

The Nineteenth Century

The second wave of systematic reform struck the English legal system in the second quarter of the nineteenth century, and we have already noticed many of its effects. The changed intellectual climate which brought it about is often associated with the name of Jeremy Bentham (1748–1832), an eccentric genius who strived to reduce jurisprudence to the principles of a natural science. Bentham had attended Blackstone's lectures at Oxford in 1763 and had been called to the bar, but he regarded the common law with contempt and was dismayed by Blackstone's eloquent defence of the quirky status quo. He set himself the life-long task of constructing a rational system of law from first principles.[164] To this end he evolved a method which he called 'deontology', the logic of the will, the science not of what is but of what ought to be. The basic premise to which this method was to be applied was the overriding value of 'utility', a concept which Bentham had distilled from the works of Cesare Beccaria and Joseph Priestley. The end of all law should be the greatest good of the greatest number, the optimum balance between pain and pleasure. Bentham proceeded to try the 'whole province of jurisprudence' by this test of expediency, setting pleasures against pains and reconciling conflicting human interests in minute detail by applying an objective 'felicific calculus'.

The peculiar originality of Bentham's ideas, and the oddity of his language, held little attraction for contemporary lawyers. Preoccupied as he was with the elaboration of his abstract jurisprudence, he would not cultivate the ability to compromise which was necessary for a real-life reformer. The one scheme which Bentham did persevere with on a practical level – the Panopticon, a new kind of prison based on a beehive, which could

[163] It was difficult to secure convictions: *Puritans and Revolutionaries* (D. Pennington and K. Thomas ed., 1978), pp. 257–82.

[164] His ultimate goal was a completely new code of law: see p. 233, post.

be watched by a single eye – met with failure and financial loss. Bentham himself despaired of seeing his legislative science applied in practice, and contented himself with writing for future generations. His death came, with ironic symbolism, on the eve of the 1832 Reform Act. Yet, if Bentham's writings were esoteric, his personal influence on some of the reformers of the next generation cannot be doubted. He provided the practical men with the theoretical justifications for what they were trying to do. To Brougham, at any rate, 'the age of law reform and the age of Bentham are one and the same thing.'[165]

It was Henry Brougham (1788–1868) who took the lead in setting the parliamentary reforms in motion. Educated in Scotland,[166] strong-willed and impetuous of character, Brougham had no deep regard for the common law and its practitioners and was not hindered by any sentimental respect for professional feeling. He began his campaign as a young advocate, in the pages of the *Edinburgh Review*, and continued it in Bentham's *Westminster Review.* On coming to England, and being elected as a Whig member of Parliament, he represented himself as the broom which would sweep the cobwebs from Westminster Hall.[167] His elaborate programme of reform was announced from the floor of the House of Commons on 7 February 1828, in a celebrated speech which lasted six hours. The learned spiders who had spent their lives spinning the cobwebs of the old system in the dusty purlieus of Lincoln's Inn and the Temple immediately voiced their horror at the prospect of impending perturbation. But Brougham swept on, becoming lord chancellor in 1830, and after a mass of preliminary investigations and reports by parliamentary committees most of his proposals (and more besides) were put through in the following decades. Indeed, in 1845 he could boast that 56 of the 62 defects which he had identified in the 1828 speech had been removed.

Dicey discerned two consecutive trends in the reforms of the nineteenth century.[168] The first, which he assigned to the period 1825–70, he labelled 'Benthamism, or Individualism'. The reforms of this period were characterized as promoting individual liberties, or improving the means of protecting them. This was followed by a 'period of Collectivism' stretching from about 1865 into Dicey's own time. The principal objects of collectivist legislation were groups or classes of people, and the interests of groups were if necessary furthered to the detriment of individual freedom.

This was an over-simplified generalization, but there was certainly a perceptible change in the subject-matter of legislation. In Brougham's initial wave, all the concentration was on the legal system – procedure and jurisdiction – rather than on the substance of the law. That could be improved without threatening common-law principles. The second wave of legislation identified by Dicey was concerned with social reform, and with whatever changes in substantive law it necessitated: for instance, the improvement of factory conditions and the protection of workmen against loss from industrial injuries, the improvement of public health, the protection of the helpless and exploited, and removing the legal disabilities of the married woman. More recently this second

[165] H. Brougham, *A Speech on the Present State of the Law* (1828), repr. in *Speeches of Henry, Lord Brougham* (1838), II, p. 287. See also Cornish in *OHLE*, XI, pp. 55–9.

[166] He was admitted to the Faculty of Advocates in Edinburgh in 1800, and called to the English bar by Lincoln's Inn in 1808.

[167] His name was pronounced 'broom' (Brou'm).

[168] A. V. Dicey, *Law and Public Opinion in England during the 19th Century* (1905).

movement has been attributed to the influence of a new middle class of businessmen and industrialists who 'set about the creation of a wholly new kind of society in which administrative powers and processes replaced, as modes of social and economic control, the discipline of free choice and freedom of contract'.[169] There was here no obvious single agenda, no theory of law distinct from Bentham's, but rather a series of solutions to problems brought to the fore by increasing public awareness and technical knowledge, and a widened parliamentary franchise. This movement, if causally unrelated to the former, overlapped with it and depended on the same new machinery of reform, beginning – in Benthamite spirit – with the search for information.[170] The parliamentary select committees and royal commissions which investigated in minute detail the workings of the legal system could equally be employed in social enquiries, beginning (in 1832) with the condition of the poor. It was soon discovered that society could not be changed overnight merely by passing statutes to reform legal doctrine in accordance with the prevailing tenets of political economy. Principles gave way to pragmatism; even Bentham's utilitarianism, the greatest good of the greatest number, dissolved into political and economic disputes about what was good and how its achievement could in practice be maximized.

One result of these legislative programmes was that it took much of the responsibility for the state of the law away from the judiciary. The judges regarded themselves as insulated from the complexities of policy and incompetent to address them, since they were only able to deal with cases coming before them according to the evidence adduced by the parties. If they did try to adapt the common law according to their own notions of justice, which might be out of tune with the times, they earned heavy criticism for their pains. In interpreting statutes, they took shelter behind the sovereignty of Parliament and contented themselves with expounding the letter.[171] Parliament, for its part, took to introducing regulatory regimes which operated outside the courts and depended on administrative discretion.[172] More recently, in 1965, the task of improving the common law and ironing out inconsistencies was, by the establishment of the Law Commission, detached from the piecemeal method of exploring problems through the accidents of adversarial litigation. Law reform was itself institutionalized, though not without contemporary misgivings.[173] Judicial creativity nevertheless proved impervious to extinction, and it received a new impetus from empowering legislation such as the Civil Procedure Act 1997 and the Human Rights Act 1998.

Codification

Roman law had begun, and ended, with a code. However little the common law owed to Roman ideas, the example of the Romans was ever present as an inspiration to

[169] Atiyah, *Freedom of Contract*, p. 231.

[170] The need for full factual information, rather than received public opinion, as a prerequisite for reform was explicitly recognized in the 1830s: see e.g. A. Mundell, *The Philosophy of Legislation* (1834), pp. 188–208. For the rise of the information revolution see D. Eastwood, 62 BIHR 276.

[171] See p. 224, ante. Lord Denning MR was a notable exception, but he was criticized for his efforts to introduce more equity into the law.

[172] See pp. 159, 160, 162–3, ante.

[173] For the doubts aired in 1964–65 see S. Cretney, 59 *Modern Law Rev.* 631.

would-be codifiers of English law. The idea behind 'codification'[174] is that legal principles should be set down authoritatively in written form, so as to dispel the doubts and uncertainties which may attend law derived from scattered cases or from juristic literature. In its most extreme form, the compilation of a code may involve rewriting the whole law, as in the case of the Napoleonic *Code Civil* (1804);[175] at its least drastic, it is a matter of editing the existing sources of the law under legislative authority, as in the authentic collections of papal decretals found in the *Corpus Juris Canonici*.[176] Many have been the visions of a code of English law, but the practical achievement has been limited.

Two or three university men in Henry VIII's reign advocated the reduction of English law into a Latin code after the Roman example, but their impracticable plans failed to inspire confidence in the idea. Even the more popular scheme of 1534 to codify the ecclesiastical law foundered.[177] A few years later Sir William Staunford, a Common Pleas judge, put forward the more attainable proposition of a digest of the common law, following the titles of Fitzherbert's *Abridgement*, but with the material so ordered that the governing principles were made apparent.[178] A generation later, Francis Bacon advocated a reshaping of the law. In 1593 he revived his father's scheme for reducing the volume of statutes, which were 'so many in number, that neither the common people can half practise them nor the lawyer sufficiently understand them'.[179] Four years afterwards, the task was committed to all the lawyer members of the House of Commons; but nothing was achieved. In 1607 James I invited Parliament to scrape the rust off the laws, so that they might be made more comprehensible. The ultimate goal was to reconcile conflicting decisions, discard obsolete source-material, and prepare an authoritative restatement of the law.[180] Bacon elaborated this plan in his *Proposition touching the Amendment of the Law* (1616), calling for digests of the common and statute laws, with law commissioners to revise them and keep them up to date. The prospect was daunting, and Bacon's hopes were not fulfilled. His own attempts to formulate the elements of the common law served only to confirm that it could not be done. Coke was against the project, because codification required abridgment, and abridgments of the common law only led astray those who relied on them.[181] If Coke and Bacon could not produce a code, who could?

Bacon had envisaged the less drastic kind of codification. He did not propose to abolish the common law and put all its principles into statutory form, because like most of his contemporaries he regarded written law as technically inferior: 'there are more doubts that arise upon our statutes, which are a text law, than upon the common law, which is no text law'.[182] The idea was rather to arrange and prune the sources of the law

[174] The word was introduced into the English language by Bentham. For the European codification movement see O. F. Robinson et al., *Introduction to European Legal History* (3rd edn, 2000), chs 15–16.

[175] For a time after 1807 it was called the *Code Napoleon*, and it is best known by that name.

[176] See p. 135, ante. The so-called 'codes' of the Anglo-Saxons were of a different nature: see ch. 1, ante.

[177] See p. 141, ante. [178] See p. 199, ante.

[179] *Proceedings in the Parliaments of Elizabeth I*, III (1593–1601), p. 75. For Sir Nicholas Bacon's scheme of 1575 see 109 SS lxi.

[180] This had been attempted unsuccessfully in Scotland in 1575. James was then already king of Scotland, but was only aged 9.

[181] See p. 196 n. 48, ante; Baker, *Magna Carta*, pp. 344–5.

[182] *Life and Letters of Bacon*, VI (J. Spedding ed., 1872), p. 67.

in order to simplify research. Matthew Hale was more ambitious. Although he was the most restrained of the Interregnum reformers, he professed to favour the compilation of a *Corpus Juris Communis* in the Roman manner. He alone had the ability to compose it; but, given his reluctance to put his learning into print even in treatise form, he was hardly likely to attempt it. Less well informed contemporaries wanted a little booklet which could be carried in the pocket and read aloud in church on Sundays; but none of them had the necessary learning to undertake such a difficult project, which in practice would only have empowered the judges to make up new law to fill the vacuum. Bentham, as might be expected, went further than anyone. His ideal code was to be deduced from the principle of maximum felicity, and was to take no account whatsoever of previous law; he thought he could as easily produce a code for Russia as for England, and nearly did so.[183] Bentham lived to see the *Code Napoleon* adopted or imitated in many European countries. But he did not live to see even a draft English code. His notions of codification were attacked in his lifetime[184] and received no serious support after his death.

Some experiments with more limited pieces of codification were carried out in the nineteenth century. In 1833 Lord Brougham procured the appointment of a commission to codify the criminal law. The commission, which originally consisted of three law professors[185] and two practising barristers, produced eight reports between 1834 and 1845 but little of their work was adopted. However, the criminal law and the law of contract were effectively codified for use in India.[186] The Indian project was sufficiently promising for the matter to be reopened in England. In 1853 Lord Cranworth LC proposed a scheme which he hoped would result in a Code Victoria, beginning with a consolidation of statute law. The principal outcome was the 1861 consolidation of criminal legislation,[187] but there also began in 1868 the long series of Statute Law Revision Acts (repealing obsolete statutes), and in 1869 the office of parliamentary draftsman was created.[188] Codification proposals of the more ambitious kind envisaged by Bentham and Brougham ran aground in a mass of divergent ideas as to what they might achieve, and from a want of general enthusiasm: there was a countervailing view that 'to reduce unwritten law to statute is to discard one of the great blessings we have for ages enjoyed in rules capable of flexible application'.[189] Lord Westbury LC raised the matter in

[183] He also wrote to President Madison in 1811 offering to prepare a code for the United States, but in 1812 the president declared war against Britain and the offer was not formally declined until 1816.

[184] Notably by J. J. Park, *A Contre-Projet to the Humphreysian Code* (1828). Park opposed codification generally, but was particularly exercised by James Humphreys' outline code of real property law (1826), which had – perhaps fatally – received Bentham's approval. He became Professor of English Law at King's College London in 1831.

[185] Thomas Starkie (Cambridge), with John Austin and Andrew Amos (London). They were given a more limited commission in 1845 to digest all statutes touching criminal law: JHB MS. 1247 (original patent). This led to the Indictable Offences Act 1848 and Summary Jurisdiction Act 1848 (11 & 12 Vict., cc. 42–3), known as Jervis's Acts (after the A.-G.) though they were really (as Amos said) Starkie's.

[186] The Indian Penal Code 1862 (first drafted in 1835 by the Indian Law Commission under T. B. Macaulay) and the Indian Contract Act 1872. Most of their contents are still in force.

[187] Offences against the Person Act 1861 (24 & 25 Vict., c. 100). This did not include murder, manslaughter, robbery, or other common-law offences.

[188] The official title is parliamentary counsel to the Treasury. For the origins of the office see B. McGill, 63 BIHR 110. The first holder (1869–86) was Sir Henry Thring, who had drafted the Merchant Shipping Act 1854; he tried to reduce draftsmanship to scientific principles in *Practical Legislation* (1878).

[189] *Parliamentary Papers 1854*, LIII, p. 391, per Talfourd J.

Parliament in 1863, and his pleas resulted in the establishment of a royal commission under Lord Cranworth in 1866 'to enquire into the expediency of a digest of law'.[190] The commission recommended the preparation of digests of particular branches of the law, and jurists were invited to submit specimen drafts. Stephen Martin Leake produced a scheme in 1868, together with draft digests of contract and property law. His treatise on contract had a lasting influence on textbook writers;[191] but his draft codes did not lead to legislation, and in 1875 one writer said the Westbury scheme was universally considered worse than useless.[192]

Interest revived in 1876, when James Fitzjames Stephen QC published a *Digest of the Law of Evidence*, followed the next year by his *Digest of the Criminal Law*.[193] This led to the appointment of yet another royal commission, which in 1879 actually produced a draft Criminal Code; but the enactment of this code was defeated after opposition from Cockburn LCJ.[194] Better progress was made with less expansive subjects. Frederick Pollock had published a *Digest of the Law of Partnership* (1877), and Judge Chalmers, acknowledging the example set by Stephen and Pollock, produced a *Digest of the Law of Bills of Exchange* (1878). The last-named was the first to reach the statute-book, as the Bills of Exchange Act 1882, followed by Pollock's work as the Partnership Act 1890. Chalmers also drew up a digest of the law of sale, which became the Sale of Goods Act 1893.[195] These digests were more in the tradition of Justinian, Staunford, and Bacon than of Bentham. Their object was to restate in clear language the case-law of the time, every sentence being supportable by reference to the cases on which it was based. Chalmers believed this was the only way to start: 'I am sure,' he wrote in 1883, 'that further codifying measures can be got through Parliament if those in charge of them will not attempt too much. Let a codifying bill, in the first instance, simply reproduce the existing law, however defective. If the defects are patent and glaring, it will be easy enough to get them amended'.[196] Pollock took an even more conservative view of the function of a code: 'Codes are not meant to dispense lawyers from being learned, but for the ease of the lay people and the greater usefulness of the law. The right kind of consolidating legislation is that which makes the law more accessible without altering its principles or methods.'[197] There was little reason, however, why clear expositions of this nature should not remain in textbook form – what Maine called 'tacit codification' – a genre which Pollock himself developed. Textbooks may guide without relying on legislative force and without forfeiting the 'great blessing' of flexibility. Textbooks have indeed proliferated, whereas proposals for codification have abated, except in connection with

[190] See T. E. Holland, 'Codification' (1867) 27 *Edinburgh Rev.* 347; *Plan for the Formal Amendment of the Law of England* (1867).

[191] *Principles of the Law of Contracts* (1867). He was a prominent member of the Juridical Society, founded in the 1850s to promote the scientific study of law, but is best remembered as co-author of Bullen and Leake's *Precedents of Pleadings* (1860; 18th edn, 2017).

[192] R. K. Wilson, *History of Modern English Law* (1875), pp. 184–5.

[193] He had been largely responsible for the Indian Contract and Evidence Acts 1872 and became a High Court judge in 1879. Pollock compiled a tort code for India in the 1880s, but it was not enacted.

[194] See K. Smith, *OHLE*, XIII, pp. 187–216.

[195] Stat. 45 & 46 Vict., c. 61; 53 & 54 Vict., c. 39; 56 & 57 Vict., c. 71. See Lord Rodger in 108 LQR 570. For Lord Bramwell's unrealized arbitration code see V. Veeder, 8 *Arbitration Jo*. 329.

[196] *Digest of the Law of Bills of Exchange* (1964 edn), p. xlii.

[197] *Digest of the Law of Partnership* (1915 edn), p. viii.

specific projects for law reform. Since 1965 the Law Commission has had a standing charge to review the law with a view to its development, reform, and possible codification, but codification has not been a priority.[198]

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PART TWO

13

Real Property: Feudal Tenure

Until comparatively recent times, by far the most important part of the law was that concerning real property, which was altogether distinct from personal property. Land is a place to live, and a source of food and other commodities, including – if one has enough to let to others – money. It outlives its inhabitants, is immune from destruction by man, and provides a suitably firm base for institutions of government and wealth. Control of land in quantity could not, indeed, be readily divorced from power and jurisdiction, from 'lordship'. Land was for this reason the subject of feudal tenure, which will be explained presently. Its control was not limited to the present, and schemes of provision for the interests of successive generations of landed families led in due course to an elaborate system of rules governing inheritance and estates, which will be considered in a later chapter. Personalty, on the other hand, was not subject to tenure, inheritance, or future estates. This distinction will be returned to in still later chapters.[1]

In Roman law, and to some extent in the later common law, another fundamental distinction is that between ownership (a legal right) and possession (a fact). But the word 'owner' does not seem to have been much used by medieval lawyers. Ownership is not an immutable legal concept,[2] any more than 'property'.[3] The Latin word for ownership, *dominium*, is particularly confusing, since in medieval times it is also the word for lordship. And it is with lordship that the story must begin, because the early common law of real property was founded, not on a Romanesque notion of abstract ownership, but on feudal notions of lordship and tenure.

Tenure

Tenure is the name given to the relationship whereby a tenant 'holds' land of a lord. Holding, as distinct from owning, has to be understood in the context of the so-called feudal system. But the road to understanding is beset by two obstacles. The first is that the 'feudal system' was never itself a legal concept. It is merely a convenient modern label for certain features of earlier societies which had no contemporary name given to

[1] The distinction is not the same as that between land and movables: see p. 404, post.

[2] Statutes occasionally spoke of the 'owners' of land (meaning freeholders): e.g. Stat. 1 Hen. IV, c. 8; 22 Edw. IV, c. 7; 11 Hen. VII, c. 17, s. 2. But in other statutes (and year books) temp. Hen. VII the 'owner' of land is a person without any legal title, the beneficiary under a use: p. 270 n. 22, post. The word was most commonly applied to chattels.

[3] *Glanvill* and *Bracton* used *proprietas* for a feudal tenement, avoiding the ambiguity of *dominium*; but, after the 13th century, *proprietas* and 'property' normally denoted personalty. See further D. J. Seipp, 7 LHR 175; 12 LHR 29; J. C. Tate, 48 AJLH 280; pp. 403, 414, post.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

them. The second is that, long before historians gave it the label,[4] and started disagreeing about what it denoted, English feudalism had undergone a legal distortion. It had been systematized by the lawyers of the thirteenth and fourteenth centuries, whose constant engagement with questions of landed property had turned earlier social assumptions into doctrine and thereby created an intricate 'law of tenures'. Lawyers and historians in later times were beguiled by the clarity of the legal principles expounded in Littleton's *Tenures*, in the mid-fifteenth century, into thinking of them as eternal features of the common law. Littleton governed legal thinking about the land law for three centuries. But Littleton's system of tenures was not living feudalism even in his own time; it was a legal fossil, preserved and analyzed for good practical purposes far removed from those of the historian trying to understand the past.

Feudal institutions of a kind existed in Anglo-Saxon England, as elsewhere in contemporary Europe, in the sense that the occupation of land was commonly associated with vassalage, with bonds between lords and their men. Most Anglo-Saxon men seem to have had a lord, though the seignorial relationship could exist independently of the tenurial,[5] and the extent to which lordship and tenure of land had become interconnected before the Norman Conquest is an elusive question. Certainly by the tenth century thegns and royal ministers owed service in return for their lands, and the king's thegns had their own thegns to perform services for them. But there was no theory that all land was held ultimately of the king: not only could there be 'allodial' land (land not held of a superior), it may even have been the norm. The principal division of landholding was into folkland (held on customary terms) and bookland (held under a diploma specifying the conditions). Land 'books' were perhaps first used to make grants in perpetuity to the Church, but by the ninth century they were also used for grants to laymen. Both folkland and bookland carried public obligations of military or labour service, with the result that, whether such burdens arose from the tie of homage or merely from the grant of land, the continuing occupation of the land was linked with faithful service. A grant by land-book was also seen, perhaps principally seen, as making the grantee a lord (*landhlaford*) over the men who already lived on the land. Bookholders themselves made 'loans' of land to their own men in return for services, the performance of which was enforceable by forfeiture of the loan.

It is no evidential accident that feudalism suddenly comes into sharper focus under William I. The 'conquest' of England in 1066, and its ensuing occupation and settlement by a French warrior class, necessarily led to a renegotiation of landholding arrangements. William claimed the country by right rather than by conquest (in the legal sense), but the right had been vindicated by force and arms, and this was taken to justify the displacement of the English aristocracy who had fought against their rightful king. In reallocating what had been forfeited, the new assumption was made that all the land in the realm was held ultimately of the king. The reallocation began in the 1070s, when the tenancies in chief – the huge estates held directly of the king – were concentrated in the hands of elite Norman families. In 1085–86 a massive and thorough survey

[4] Maitland quipped that if a student was asked who introduced the feudal system into England, the correct answer (if properly explained) would be Sir Henry Spelman (d. 1641): *Constitutional History of England* (1908), p. 142.

[5] See p. 11, ante.

of the whole kingdom was undertaken, and the economic details of every holding, before and after 1066, were set down in the 'Domesday Book'.[6] All the landholders of any note, including major sub-tenants, were then gathered at Old Sarum (Salisbury) to do homage for their holdings. The Domesday record assumed some kind of de facto as well as legal continuity from the time of King Edward; but, of the 900 tenants-in-chief listed at that time, only thirteen were English. This was the real nub of the Conquest: the displacement or subjugation of the English, and complete control over all land-holding from the top downwards. No more was heard of bookland and folkland, or of allods.

The tenants in chief parcelled out their dominions in like manner, keeping some for themselves and distributing the rest in return for the homage and service of their own tenants, no doubt driving into a subordinate status many Englishmen who had formerly enjoyed allodial title. Land given to reward a vassal was now known by the Anglo-French word 'fee' (*feodum*).[7] Historians use the term 'subinfeudation' to describe the transaction whereby a grantee of land (other than for temporary purposes) was admitted to hold it as a tenant – to 'enter in the fee' of the grantor, who became his lord. Repeated subinfeudations resulted in a tenurial pyramid of uneven shape, from the king at the apex down to those who actually occupied and tilled the ground (the terre-tenants, or tenants in demesne). It is unlikely that the occupation of land, at the base of the pyramid, was drastically disturbed by the Conquest; there was little if any French immigration at peasant level. The unnamed country folk whose heads were counted in the Domesday survey kept their humble allotments and went about their daily chores much as they had done under the Saxon kings. But most of them now occupied their land under the subjection of new lords, commonly as tenants of manors, with heavy obligations imposed on them as the price of their holdings. The Norman tenurial structure had been erected above them, and self-evidently it was more concerned with power and personal relationships, and the wealth derived from them, than with possession of the soil itself.

The relationship between the tenant and the king, or his new Norman lord, might be characterized as contractual, in that the arrangement between them was more like that for a tenured appointment than an outright sale of property. Even though the initial transactions of the 1070s and 1080s were unequal, they bore the outward signs of agreement – an acceptance of what was offered – and they defined the terms on which land was held.[8] Sometimes these terms were set down in written covenants.[9] Every man's holding, except at the lowest level, had its fixed quota of services. The tenant bound himself to perform what had been settled as the consideration for his holding, and he was liable to forfeit his benefice if he committed a fundamental breach of his contract by failing in the service, by committing an unpardonable crime, or by being unfaithful.

[6] See R. Fleming, *Domesday Book and the Law* (1998). The implication of the colloquial name was that (like the Last Judgment) its dispositions were final: *Dialogue of the Exchequer*, p. 97.

[7] The French form *fief* was not used by English lawyers. The Latin equivalent was the root of 'feudal' and 'subinfeudation'. In Scots law the 'feu' persisted until 2000.

[8] The *Dialogue of the Exchequer*, i. 10 (p. 83), says that English tenants after the Conquest held not by inheritance but by contract (as presumably did the incomers). Some 13th-century canonists also characterized tenure as contractual: the fee was the consideration (*causa*) for the tenant's obligations.

[9] Garnett, *Conquered England*, pp. 94–5, citing 11th-century charters.

The lord in return protected the tenant as his man, guaranteed his security of tenure against all-comers (including himself),[10] and held court for him and for all his other tenants. Tenure was, however, much more than a commercial bargain. It was a life-long bond, comparable in some respects with marriage, which also began by contract but created a permanent status.[11] *Glanvill* called it a mutual bond of faithfulness.[12] The special relationship was sealed by the public ceremony of homage, when the tenant knelt reverently and placed his hands between those of his lord, making a solemn promise to become his man from that day forward of life and limb and earthly honour and to defend him against all men except the king. The lord accepted this with a formal kiss. It was immediately followed by an oath of fealty (*fidelitas*).[13]

A typical Norman landowner would have held numerous parcels of land. If some were held from different lords, the secondary homages were done saving the faith due to the 'liege' lord, who was either the king or the lord of the oldest or most important holding. Excepting what was retained for his own use, for instance to build a castle or house, most of the land would have been granted to sub-tenants in consideration of services defined to meet his needs. In respect of these subinfeudated portions the lord did not hold the land 'in his demesne' (*in dominico suo*), but held a 'seignory' (lordship) comprising the services and other profits due to him as lord.[14] The same was true of lesser landowners, except for the very poorest who had only enough land to work by themselves. These last were always tenants, never lords, the bottom layer of the feudal structure.

Most of these lowest tenants held of manors. The manor was an economic and social unit comprising a vill or hamlet of perhaps a hundred or so inhabitants, centred upon the mansion house or hall of a lord and (usually) an adjacent church.[15] In common-law theory it was a nucleus of tenants holding of the same lord and having a court to which they owed suit. This court controlled the agrarian activities of the manor, and often many other aspects of village life as well – from personal conduct to the manufacture of flour, bread, and ale. Each manor was a miniature feudal state, with its own customs and legislation administered through its own high court. At the higher tenurial levels there were similar but larger feudal units, called 'honours', with their own customs and courts. These seignorial courts generally acted in a consistent manner, and some of the customs which they observed reflected widespread social norms. But it was not until the king's courts took to overseeing them on a regular basis, and then in practice overtook them, that the lord and his *curia* became something less than an autonomous system

[10] For the lord's warranty see p. 248, post. The idea of warranty was essentially contractual.

[11] *The Mirror of Justices* (4 SS), p. 80, draws the analogy. The similarity explains why a woman could not in the 12th century do homage, which would mean becoming the lord's woman. If married, her husband could do it for her: *Glanvill*, ix. 1 (p. 103). A century or so later, a woman could do it herself by saying 'I do unto you homage'.

[12] *Glanvill*, ix. 4 (p. 107) (*mutua fidelitatis connexio*).

[13] At manorial level, new tenants swore fealty without doing homage.

[14] As between the lord above him and the tenant below him he was called a 'mesne' (intermediate). This word (from the late Latin *medianus*, modern French *moyen*) is not to be confused with 'demesne' (Latin *dominicum*).

[15] The right to appoint the parish priest (the right of patronage, or 'advowson') was often appendant to a manor, on the presumption that a previous lord had established the church before time of memory.

of feudal government. And that, as we shall see, is the context in which the common law of real property began.

The Variety of Services

The mutual bond arising from homage meant that the lord supposedly owed as much to his sworn man as the man owed to him, saving only reverence.[16] On the lord's side there were universal moral obligations; he was obliged to warrant (guarantee) his men's tenancies against adverse claims, to protect them, and to do them justice. The tenant's obligations, however, depended on the terms of his admission, and these were almost infinitely variable. At the upper levels of the feudal order, as organized by the Normans, there were three main kinds of tenure: military, civil, and spiritual (see Table B). The principal military tenure was *knight-service* (or tenure in chivalry[17]), whereby the tenant was obliged in time of war to provide one mounted officer in combat order for every knight's fee which he held. Other forms of military tenure were *castle-guard* (garrison duty) and *cornage* (horn-blowing, or border patrol). In theory, military feudalism provided the king with a reserve army of many thousand troops. The military obligations of tenants in chief could be passed on by subinfeudation, so that their under-tenants also held by knight-service. Civilian services were similarly provided for by feudal grants. Tenants in chief who were bound to perform services in person for the king were said to hold by *grand serjeanty*; and of this there were as many forms as there were services to be done, from looking after the king's wine cellars to holding his head on board ship when he was seasick. Other tenants might be required to render provisions, such as horses or armour for military uses, wine or food for the king's palace, sheep-skins or wax for his bureaucracy. Such services in kind, when due from tenants in chief, were called *petty serjeanty*. Spiritual tenure arose when grants were made to ecclesiastical bodies to hold by the regular celebration of *divine service*, or by *frankalmoin* (free alms), which was a general duty of saying prayers for the soul of the donor without any specific service being expressed.[18]

At the lower levels of tenure, the duties of the peasant were chiefly agricultural. If they were fixed – for instance, helping the lord with sowing or reaping at specified times – the tenure was called *socage*. This in terms denoted the tenure of free sokemen,[19] but it became (well before Littleton's time) a generic term for all free services other than knight-service, serjeanty, or spiritual service. It included simply paying rent. If the services were unfixed, so that the lord might in theory demand all manner of work at any time, the tenure was 'unfree' and was called *villeinage*.[20] The hallmark of villeinage, in the words of *Bracton*, was that the tenant was not entitled to know in the evening what work he was to do in the morning.[21]

[16] *Glanvill*, ix. 4 (p. 107); *Bracton*, II, p. 228.

[17] The French word (cf. cavalry) reflected the essential connection between a knight and his horse (*chival*). The Anglo-Saxons had fought on foot.

[18] For frankalmoin see D. Postles, 50 CLJ 330; B. Thompson, 16 *Anglo-Norman Studies* 221.

[19] *Bracton* and Littleton derived 'socage' from an old word for 'plough'. But *soke* was connected with jurisdiction (p. 11, ante), and sokemen were freemen owing suit of court. See further S. Stoljar, 6 JLH 33.

[20] See further pp. 325–6, 502, post.

[21] *Bracton*, II, p. 89; III, p. 131.

Under a hypothetical model of a feudal economy, as it might have been envisaged around 1100, the type of tenure would have denoted not merely the services due from a tenant but also his status and way of life. The king at the top had most of the bargaining power, the peasant at the bottom none. Everyone had his place in the hierarchy: tenure, rank, and economic position, were interdependent. Knight-service and serjeanty denoted high rank; villeinage was the servile state of the lowest caste. But life was not as neat as this in reality: or, if it ever was, it did not long remain so. By the thirteenth century it was common to hold different lands for different kinds of service, or the same land for a mixture of services. It was perfectly possible for a tenant to hold part of his lands by knight-service and another part by socage. Moreover, tenure by knight-service did not make the tenant a knight, any more than tenure in villeinage made him a villein. When legal logic took over, and the origins of tenures faded into the past, there was no incongruity in a knight holding land in villeinage, or a villein by knight-service.

Then again, even in a feudal economy, land was not the only medium of payment; it was not a liquid currency, and the kind of bargaining with land which occurred under William I could not recur with every passing generation. Within two centuries of the Norman Conquest, at most, buying services with land was a thing of the past. The main reason was that inheritance and alienability, both engrafted onto the system at an early stage,[22] worked against the contractual nature of the feudal relationship. The military system may have been the first to founder. Armies were only intermittently needed. Service was customarily limited to forty days in the year, including travel, a period too short to permit of service abroad without a special contract. No army after Norman times was in reality raised solely by the feudal levy, and the last serious levy of any kind was in 1327. Inheritance caused additional problems. When knight's fees descended or were alienated to women, children, old men, or monasteries, personal service in the field became impossible. Moreover, the division of estates upon inheritance by coheirs or by grant resulted in fractions of knight's fees, and no tenant could be expected to find part of a knight.[23] The answer to such problems was to collect money from the tenants and use it to pay mercenaries. This was effected with respect to most knight's fees within the century after 1066. Actual cavalry service was replaced by *scutage* (shield-money), a payment based on the number of knights to be provided. When the king went to war, the rate of scutage was proclaimed and levied proportionately on the tenants of knight's fees. These payments were not supposed to exempt tenants in chief from their personal service, but if they were not inclined to the sword they could buy licences to stay at home. By the fourteenth century scutage had itself become largely obsolete, and money for wars was raised by other forms of taxation.

Similar commutations were made of non-military services. Hereditary servants were not necessarily the best; even if their personal qualities were inherited, the sure expectation of an employment might remove an heir's impetus for training and self-improvement. Again, the practical solution was to commute the services to a money rent which the lord could spend on servants of his own choosing. As the need for feudal military

[22] See pp. 250–2, 280–1, post.

[23] The impracticable speculative solution of dividing the service into fractions of 40 days was first suggested long after knight-service was a military reality.

service declined in the thirteenth century, lords increasingly retained educated men to fight in the king's courts or to manage their estates; but the growing professional classes, and other non-military retainers, took their fees in money rather than in grants of land. This pecuniary feudalism – called by some historians 'bastard feudalism'[24] – suited both parties. For reasons which will be disclosed presently, by 1200 a lord had less direct control over tenants of land than he had over men paid in cash, while the recipient might well prefer the flexibility of a cash income which he could invest as and where he chose. By the middle of the thirteenth century hardly any personal services were being paid for with land, except at the lowest level. Knight-service and serjeanty were no longer exacted,[25] while most others had been commuted into monetary quit-rents which were losing value through inflation to the point where some were hardly worth collecting. Feudal services, the original raison d'être of the feudal system, had therefore lost much of their economic significance two centuries before Littleton. Yet, as we shall see, the legal importance of tenure continued unabated.

Tenure and Land Ownership

If the question were posed, whether under the early feudal system the land was owned by the lord or the tenant, there could be no short answer. Both might have regarded the land as theirs, and with perfectly good reason. Possessive pronouns are ambiguous. They are used to indicate contractual as well as proprietary rights – as when we speak of 'my job' or 'my seat in the theatre' – and to speak of 'my land' meant something equally real to both lord and tenant.[26] What the lord and tenant each had was a relationship defined by the land, but not ownership in the more absolute sense in which they might have owned a horse. Before the advent of the common law the tenant enjoyed few of the privileges which we now attribute to a property owner. He could not do what he liked with the land. He could not sell it without the lord's consent. He could not pass it on to others by last will. And his only protection against dispossession by the lord was the lord's moral or social obligation to protect his own men and their heirs. That was a strong obligation; but what mattered was seignorial acknowledgment and protection rather than property. The tenant's interest therefore stopped short at possession under a lord, which was not a legal abstraction but a fact. The fact of being in possession as a feudal tenant was called 'seisin'.[27]

The concept of seisin is difficult and controversial. The word did not begin as a term of art, and it was used in several different senses: for instance, it was possible to be 'seised' of things outside the feudal context.[28] Maitland saw that seisin held the clue to the 'elaborate labyrinth' of Victorian real property law, and yet he found its earlier history so perplexing that his two papers on the subject were tortured and inconclusive.[29] Under

[24] Usually in relation to later periods. See C. Carpenter, 95 EHR 514 (1980); S. L. Waugh, 101 EHR 811 (1986); P. R. Coss, 125 *Past & Present* 27 (1989); J. M. W. Bean, *From Lord to Patron* (1989).

[25] Those serjeanties which survived involved honourable services which *tenants* were anxious to preserve, e.g. at coronations.

[26] Cf. Milsom, *Natural History*, pp. 52, 54–5.

[27] Pronounced 'see-zin'.

[28] E.g. the king, though not a tenant, could be seised and disseised of land.

[29] 'The Mystery of Seisin' and 'The Beatitude of Seisin' in Maitland, *Collected Papers*, I, pp. 358–84, 407–57.

the influence of *Bracton*, he supposed that it must have been something like the *possessio* of Roman law, to be contrasted with *dominium* or right, though he acknowledged that this did not explain all its attributes. It had indeed been viewed, for centuries before Maitland, as a physical relationship between a person and the land, something transferred by delivering a turf, or the ring of a door, to establish the tenant's connection with the ground itself, just as one might deliver a horse to its buyer.[30] But Milsom offered the new insight that this may not have been the original understanding. Whatever may have been understood by the time of *Bracton*, seisin of land was not at first a relationship between person and land, but a relationship between two persons. It was not transferred in one plane, but vertically between lord and tenant, creating the tenure between them. The verb 'to seise' perhaps preceded the noun, and in this context it was what a lord did to invest his tenant.[31] Being seised therefore meant becoming (and then being) the sitting tenant,[32] the lord's acknowledged man or woman, admitted by him to enjoy the fruits of the tenement. It was more than mere possession, yet not equal to ownership.

For converse reasons, the interest of the lord could not exactly be called ownership either, though his *dominium* certainly carried more of the sense of an ultimate property right: the lord had once had the land, and might have it again if the tenant's interest ceased. It may be that some lords were sufficiently heedless of their customary obligations to seize profits or dispossess their tenants when they felt like it; but that was not how the system was supposed to work, nor – in times of peace – was it the norm in practice. Fulfilment of the lord's duty to guarantee his men's tenure was a point of honour; and, so long as tenants performed their obligations, lords generally had no cause to unseat them. Problems could certainly arise if successive lords inadvertently or disingenuously received homage from two men at different times in respect of the same land. Here the original feudal solution rested on the fact of present seisin. The unlucky claimant had a grievance, and was entitled – under the lord's warranty – to be compensated with other land of equal value in exchange (*escambium*), but the claim was essentially contractual:[33] the seisin of the sitting tenant could not properly be overridden by reference to some more abstract notion of title.[34] Another kind of problem arose if the tenant failed to perform his obligations. Here the lord's court could compel the tenant to answer for his default, coerce him by distraint of chattels, and in the last resort perhaps disseise him.[35] This may be the pristine sense of 'disseise': to unseat by judgment, rescinding the feudal contract.

[30] *Bracton*, II, p. 125; Co. Litt. 48.

[31] Even *Bracton* distinguished between the noun and the verb. *Bracton*, II, p. 125, refers to a donee putting himself in seisin without livery (i.e. without being seised), although such seisin is worthless. Cf. ibid., III, p. 124 ('in seisin' without being seised).

[32] Pollock & Maitland, II, p. 30, suggested a connection with the German *besitzen*, to sit. The element of sitting is more clearly present in the *sessio* of *possessio*. Seisin was sometimes translated as *possessio* in the 12th century: *OHLE*, II, pp. 670–1. The verb *seisire*, 'to seise', also (confusingly) meant 'to seize'.

[33] Cf. warranties on the sale of goods, p. 353, post. When land was conveyed by substitution (p. 263, post), the warranty could only be viewed as a covenant, and so it required writing (p. 340, post).

[34] Milsom, *Legal Framework*, pp. 58–9. The lord in such cases may have had some discretion: Hyams, 5 LHR 427 at 464; Hudson, *OHLE*, II, p. 346. A choice was unavoidable if there was any uncertainty as to who was in fact presently seised. But it was the lord's decision which constituted the title.

[35] Sutherland, *Assize of Novel Disseisin*, p. 82, denied that the lord could ever lawfully disseise his free tenant, citing *Bracton*. *Glanvill*, ix. 1 (p. 105), suggests it is possible only after a trial by battle (in the lord's court) or by grand assize. Cf. Milsom, *Legal Framework*, pp. 9 n. 2, 11 n. 1.

In this feudal world, then, it is best not to think of ownership at all, but of the mutual relationship inherent in seisin. The tenant was seised of the land in demesne, looking up to his lord for protection, and the lord was seised of the services, looking down to his tenant to perform them. Even if the land came back to the lord, he was still tenant of someone else. Only the king was not a tenant; but no king after William I had the kind of control exercised in the 1070s, and by the end of the twelfth century no one thought of kings as being in any meaningful sense owners of all the land in England.

Custom

If the Norman feudal system had once exhibited the contractual characteristics postulated above, the legal position by 1200 was very different. Two forces were transforming the interest of the tenant. The first of these was custom. Lords were expected to make their decisions 'rightly' or 'justly' through courts,[36] which were attended by all the lord's tenants and purported to follow the customs of each manor or honour. Manorial customs tied a lord's hands considerably, and most lords were content to submit to the restraint, just as kings submitted to their own law; power was more secure when regularized. The customs which made the most impact were those which governed the devolution of land on a tenant's death. There was a universal custom that fees were heritable, and there were particular customs as to the choice of heir. When a tenant in fee died, identifiable close members of his family therefore had the expectation of succeeding him, and the lord was supposed to accept the heir into his fee on the same terms as his ancestor. Indeed, a tenant in fee may well have thought of the land as belonging to his family beyond his own lifetime, and made arrangements on that footing. But it is important to understand that this was different from inheritance at common law. Custom and contract alone could not make inheritance a legal right of succession. Even if the tenant's interest was thought of as hereditary, seisin itself – the fact of the lord's acceptance – was not. Until the expectant heir was admitted by the lord's court he was not seised; and if he was passed over, whether by accident or design, the expectation of succession was effectively frustrated. A person might be displaced for a number of good reasons: for instance, if he was not around to make his claim, if he was thought personally unfit to perform the services, or unreliable, if he was not closely related and the rule of succession was unclear in his case, or if the deceased tenant had expressed a wish that someone else should succeed. Eldest sons always had a strong claim,[37] but the more remote the relationship of competing claimants the more the discretionary factors came to weigh. When written records began to matter, some manorial courts would take the trouble to set down qualifications or refinements of their customs to meet various contingencies; and some would even change their customs, with the express agreement of the tenants.[38] But whether customs were modified,

[36] See the wording of the 12th-century writs of right and novel disseisin, pp. 580, 582, post.

[37] However, even an eldest son could be displaced: e.g. Henry I (as lord) admitted the 2nd son of Geoffrey de Mandeville to the barony of Marshwood, Dorset, 'because he was the better knight'. A century later, in 1208, the barony was restored to the heirs of the eldest son, applying the common-law rules retrospectively. See Holt, *Magna Carta* (3rd edn), p. 111; Garnett, *Conquered England*, p. 99 n. 371.

[38] See p. 285, post.

reformed, reversed, or simply disregarded, could make no legal difference within the world of unreviewable feudal governance. A custom as to succession, especially if widespread, might encourage a strong expectation based on precedent; and yet it was the fact of seisin which mattered in practice. Only the lord could identify and 'seise' his tenant's heir, and it was the livery of seisin (not the law) which made him heir.

Henry II and the Common Law

The second and stronger force restraining the authority of the lord and his court was the common law. Ever since the Conquest the king, both as the ultimate feudal superior and as the fountain of justice within his realm, had taken upon himself the surveillance of seignorial authority. Where lords failed to do right the king would act. There was also a saying in the later twelfth century that no one was bound to answer in his lord's court for any free tenement without an order from the king.[39] Even if a tenant had gained seisin improperly, his lord could not honourably consider removing him unless charged to do so by royal writ. But it could be done by authority of a writ of right 'patent',[40] whereby the king ordered a lord to maintain 'full right' (*plenum rectum*) towards someone who claimed to hold of him by free service but was being kept out. When this procedure blossomed in the reign of Henry II it was not intended to introduce a new law of property. There was an earlier ancestry, in the form of occasional ad hoc remedies, but the most likely explanation for its development as a standard remedy is to be found in Henry II's promise to restore the inheritances of those displaced during the troubled reign of Stephen (1135–54).[41]

Such was the number of potential disputes in 1154 that a strategy was needed beyond ad hoc intervention. Consistency required regular judicial procedures to enquire into and settle the claims, the root of which was to be the same as Henry II's own claim to the kingdom. The object was to find out who had been last seised in time of peace (the time of Henry I) and, if that person had died, who was his heir. But, lest aggrieved subjects and their lords might be tempted to help themselves to justice and return the country to chaos, especially during his absences abroad, Henry made an ordinance forbidding informal action in the form of disseisin without judgment.[42] This meant that historic wrongs could only be redressed by a lord's court duly authorized by royal writ, or by the king's own court. In the case of tenants in chief, the mechanism was the writ *praecipe* (later the *praecipe in capite*), which took a hereditary claim directly to the king's court – the king being the lord. In other cases use was made of the old writ of

[39] *Glanvill*, xii. 2 (p. 137) and 25 (p. 148). Milsom said it began as a statement of fact rather than a rule of law: *Legal Framework*, pp. 57–8. Others see it as a new rule designed to enhance royal authority. A similar rule introduced in Scotland in 1318 was that no one should be 'ejected' from a free tenement without the king's writ.

[40] Patent means 'open'. For the formula see p. 580, post; and for some proceedings in writs of right see B. & M. 10–19.

[41] Henry I (d. 1135) had designated as heir his daughter Matilda (d. 1167), widow of the Emperor Henry V of Germany, but the throne was seized by her cousin Stephen, who was crowned. The Empress Matilda came to claim the throne in 1139, and 10 years of anarchy followed before Stephen recognized her son Henry as his future successor. Henry II became king after Stephen's death in 1154, as heir to Henry I.

[42] This was soon enforced by the petty assizes: pp. 252–4, post.

right patent, ordering the lord to do the right thing, and thereby impliedly authorizing him to unseat the present tenant.[43] This writ was now available as of course, and an 'or else' clause was always included in it, so that the king's court could take over if the lord failed to act – as well a lord might if he took the feudal obligation seriously.[44] The 'or else' clause provided for the sheriff to do right if the lord refused, but the sheriff was not always inclined to interfere. The usual procedure came to be to remove the case into the county court by the procedure called *tolt,* and from thence into the king's court by writ of *pone.* Right patent, *tolt,* and *pone,* then came to be seen as three steps in the process of commencing a suit in the king's court.

Historians have debated whether Henry II was pursuing a deliberate policy of enhancing royal justice at the expense of lords, as Maitland supposed, or was mainly concerned with undoing the injustices which had occurred during the anarchy, and empowering lords to play their part in achieving that end, as Milsom argued. On either view, however, the working of the common-law remedies brought about a substantial change of legal thought. The exigencies of the situation had required the dispossession of those who had gained seisin unjustly between 1135 and 1154, and it followed that assuring *plenum rectum* to those who were to be restored necessarily gave them a legal 'right' which was legally superior to seisin. The tenant who had done homage, and was still being acknowledged by the lord, was now liable to be dislodged by process of law as a result of historical enquiries into events which might have occurred before he or his lord were born, and by the application to those facts of certain invariable canons of inheritance.[45] The choice of an heir by the lord's court had ceased to be determinative. In fact, it was no longer necessary for the lord's court to decide anything at all in order to bring about an inheritance. The right descended metaphysically the moment the ancestor died. And in the indifferent king's court there was no room for the broader considerations of policy which might have weighed with a local seignorial management making a choice, especially when the decision under review was that of a lord long dead. Should there be a dispute, the question who should have seisin was now determined by applying uniform rules of common law.[46]

A major result of this change, and no doubt the deliberate purpose of the writ of right, was to give the rightful claimant to land more than just a contractual claim against his lord. His contractual right under the lord's warranty was to compensation with other land; but that was only an adequate remedy if the lord had enough other land. The effect of the writ of right was to give him a proprietary claim instead. He recovered the land itself, and it was the displaced tenant who now had to look for contractual

[43] For the form of these writs see p. 580, post; the *in capite* clause was added *c.* 1219 (123 SS lxxxviii). The principal meaning of *rectum* (in French, *droit*) is 'right' in the sense of justice. For *rectum* and *jus* cf. p. 34 n. 99, ante.

[44] Milsom, *Legal Framework*, pp. 58–60. It is not known how far lords did behave judicially: J. Biancalana, 88 *Columbia Law Rev.* at 454.

[45] See the case of 1199 discussed in Milsom, *Legal Framework*, pp. 181–2; *De Mara v. Bohun* (1198–1207) B. & M. 10; and cf. the case of the barony of Marshwood (1208) ante, p. 249 n. 37 (similar result achieved by royal charter).

[46] The common-law rules always applied to military tenures and were rapidly extended to all free tenures. Unfree tenures were not at first the concern of the central courts and continued to be subject to the varied local inheritance customs applied by lords' courts.

compensation under his own warranty.[47] What is more, the effect was retrospective: a decision by a seignorial court long ago could now be undone or ignored as contrary to law, even though it had been understood as final and unchallengeable when made. The lord's autonomy was evaporating in the process. We may even dare to say that the law had begun to recognize something like ownership, belonging to the person with 'right'. His entitlement was no longer just a contractual claim to *escambium*, or a reasonable expectation of being chosen if and when a vacancy occurred; it was now a right which could be enforced immediately at the expense of the person with actual seisin, and therefore in despite of the lord. In non-feudal language, seisin had become the bare fact of authorized possession, as against the hereditary legal right of the owner. Nevertheless, right and possession were for the time being still understood and described in the context of relationships between lords and tenants, and heirs continued to do (or at least owe) homage to their lords on taking up their inheritances.

Hereditary right depends on history, often remote history. However far back local or family memory might stretch in the twelfth century,[48] firm legal proof of events beyond living memory was unattainable in the absence of written evidence. This may be why the primary mode of trial in the writs of right was battle, an acknowledgment that historical claims could only be tested by a form of ordeal – albeit what was being tested was usually the more-or-less fictitious testimony of a champion.[49] The violence and uncertainty of battle may have appealed to Norman knights, but it was soon felt to be too high a price to pay for a chance of justice: whatever the theory, a man with the means to hire a good champion could too easily abuse the system and dispossess the weak.[50] That is why, in 1179, Henry II introduced for defendants the 'royal benefit' of choosing the grand assize, a form of jury, to enquire which party had the greater right: a concession to 'equity', as *Glanvill* put it,[51] and also to human reason. The procedure not only required the case to be removed forthwith into the king's court but also enabled factual questions other than that of prior seisin to be investigated – for example, a grant from the demandant's ancestor. But the privilege was confined to defendants, and the lingering possibility of battle being waged was one reason why writs of right became an unwelcome last resort in the legal armoury.

The Petty Assizes

An alternative and more direct way of controlling, or overriding, feudal jurisdiction was also devised in the reign of Henry II. Whereas the writ of right was designed to

[47] He could recover it in the adverse writ of right itself, by 'vouching to warranty' the lord under whose grant he claimed.

[48] See E. van Houts, *Memory and Gender in Medieval Europe 900–1200* (1999), ch. 4. For the following century cf. P. Brand, 16 *Anglo-Norman Studies* 37–54; S. Worby, *Law and Kinship in Thirteenth-Century England* (2010), pp. 126–9.

[49] A champion was supposed to be a witness of the ancestor's seisin, either in person or as someone to whom another tenant had passed the information on his death-bed.

[50] *Glanvill*, ii. 3 (p. 25), says it was a good objection that a champion was hired for reward; but since the objection was itself triable by battle it was none too effective.

[51] *Glanvill*, ii. 7 (p. 28). The grand assize was introduced by the Assize of Windsor (1179): J. H. Round, 31 EHR 268.

settle the ultimate right through the solemnities of judicial combat, the 'petty'[52] assizes of Henry II were intended to produce a speedy enquiry by sworn neighbours into more readily ascertainable questions of fact, in order to protect the immediate status quo. There were four species, the most important of which were novel disseisin (*c.* 1165)[53] and mort d'ancestor (1176). The other two, *utrum* (1164)[54] and darrein presentment (*c.* 1180),[55] related to ecclesiastical matters.

The assize of novel disseisin[56] investigated whether the plaintiff had been recently disseised of his free[57] tenement 'unjustly and without judgment'; if it was found that he had been, he was to be restored to seisin by judgment of the king's justices. A procedure for investigating disseisins had been introduced in the late 1150s, to deal with problems caused by the civil strife of King Stephen's reign, especially in relation to depredations of churches;[58] and the general remedy for private land followed around 1165, as a response to further social turbulence while the king was abroad in Normandy (1158–63).[59] The typical defendant envisaged when the assize was invented was not a rival tenant, or a forcible intruder (who might be ousting the lord as well as the tenant), but a lord acting 'unjustly and without judgment'.[60] Once writ formulae were settled, however, they were available to anyone whose case fitted the words, and disseisin was not inseparably locked into the feudal context. The wording of the assize could be extended to other targets, and it soon came to be used more widely, especially as more and more inferior lords had no courts in which to give judgment,[61] or did not care to use them.[62]

The other major petty assize was that of mort d'ancestor, introduced by the Assize of Northampton in 1176. The questions for this assize were whether the plaintiff's father (or other close ancestor) had been seised in fee – that is, of an inheritable estate – on the day he died, whether the plaintiff was his nearest heir, and whether the death was within

[52] So called to distinguish them from the more solemn 'grand assize', consisting of 12 knights. For the word 'assize' see p. 20, ante.

[53] The assize of nuisance was treated by *Bracton* as a species of novel disseisin, although it did not allege a disseisin: see p. 452, post.

[54] The assize *utrum* was charged to determine whether land was held in free alms (subject at that time to ecclesiastical jurisdiction) or was lay fee.

[55] This was brought when a church living was vacant, to determine who made the last presentation of an incumbent. If another's clerk had already been wrongly put in, the patron had to bring a writ of right of advowson.

[56] For the formula see p. 582, post; for specimen proceedings see B. & M. 29–34.

[57] As in the writ of right, the villein tenant was deliberately excluded. In many early assizes the core question was whether the holding was free or unfree: Milsom, *Legal Framework*, pp. 21–4, 167–8.

[58] This led to suggestions that the assize was influenced by canonical procedure: see Pollock & Maitland, I, p. 135; M. Cheney in *Law and Social Change*, pp. 25–6; M. McNair, 17 LHR 537. Others have seen an analogy with the Roman interdict *unde vi*: Sutherland, *Assize of Novel Disseisin*, pp. 22–3. But the English formulae did not use Roman language. For a possible English precursor see p. 62 n. 10, ante. And cf. the 'assize of fresh force' used in London before 1166: *CPMR 1323–64*, p. 141 n. 1.

[59] The original limitation period (the criterion of novelty) was the king's last voyage to Normandy: *Glanvill*, xiii. 33 (p. 167). Novel disseisin was traditionally associated with the Assize of Clarendon (1166), but it is not mentioned in texts of its deliberations. See Garnett, *Conquered England*, pp. 344–7.

[60] The writ also required D's bailiff to be summoned, if D could not be found, and this makes most sense if D was expected to be a lord.

[61] The casual vendor, though he became the purchaser's lord, had no reason to keep court for him, and without other tenants as suitors he could not do so. In any case, a court had to be immemorial: *Clerk v. Ferour* (1320) 104 SS 25.

[62] The increasing use of writs of false judgment in the 13th century meant that lords risked being amerced: see J. V. Capua, 27 AJLH 54.

the limitation period; if all three questions were answered in the affirmative, the plaintiff was entitled to be put in seisin.[63] The remedy was thus unquestionably aimed against lords, compelling them to admit heirs in accordance with legal or customary canons of inheritance – and thereby incidentally denying to seignorial courts any discretion in the matter. Not only were lords prevented from accepting the wrong heir but – perhaps more importantly in practice – they were deprived of the means of extorting excessive relief from a rightful heir. Mort d'ancestor could only be used by the children, siblings, nephews, or nieces, of the deceased, since their claims did not require delving too far back into the pedigree or ascertaining rules of succession in marginal cases; but it was supplemented in the early thirteenth century by writs available to grandsons, great-grandsons, and other kinsmen,[64] so that the common law came to control the choice of heir in every case. The assumption, as in the writ of right, was that the heir succeeded automatically and did not need acceptance – other than formally – by the lord's court.[65] But, unlike the writ of right, the assize worked by investigating specific questions of recent history. Mort d'ancestor was concerned only with descent from the person last seised, whereas the writ of right gave a higher claim to inherit from a person seised in the time of Henry I. Novel disseisin, likewise, was only concerned with recent facts. An unsuccessful party in either of the assizes could always go higher and bring a writ of right. It was for this reason that the petty assizes were characterized as 'possessory' rather than 'droitural'.[66]

Writs of Entry

A claim which rested on some fact other than pedigree or recent seisin had to be raised differently. In the thirteenth century a wide range of special *praecipe* writs was developed, chiefly designed (it seems) for the use of lords – grantors, or their heirs – against tenants who had been admitted under earlier grants which were either invalid or no longer availed them. Whereas novel disseisin and mort d'ancestor were typically aimed upwards, these were aimed downwards. Writs of entry followed the wording of writs of right by reciting a hereditary claim of right but then, admitting that the tenant (defendant) had 'entered' the fee of the demandant (plaintiff), went on to specify some flaw in his title to remain. Although the tenant had entered, and gained seisin, the demandant could by this means anticipate a defence (or voucher to warranty) by showing in his writ how the entry was not justified by the grant, or how the grant had ceased to be a good title, thereby forcing the tenant to take issue on that point. The special clause asserted that the tenant 'had no entry except by' the means which was then set out; and this explains the collective name, 'writs of entry'. The earliest may have been the writ of gage, to recover back land granted conditionally as security for a debt which had later

[63] For the formula see p. 584, post; for specimen proceedings see B. & M. 22–9.

[64] I.e. the writs of aiel (grandfather), besaiel (great-grandfather), and cosinage (any other blood relationship). These were not assizes but were in the form *praecipe quod reddat.*

[65] According to *Glanvill*, vii. 9 (p. 82) and ix. 4 (pp. 108–9), a person well known to be heir could stay put; the lord would then take the fee into his hand 'gently', without 'disseising' the heir, and receive his homage at once. According to *Bracton*, II, p. 245, 299, if such an heir was put out by the lord he could elect to bring novel disseisin (which carried damages) instead of mort d'ancestor. See also p. 260 n. 95, post.

[66] Droitural means based on right (*droit*).

been paid. This led to the writ of entry *ad terminum qui praeteriit,* where a tenant had been admitted for a term of life, or years, and the term had expired. Soon there were forms for use where the entry was made under a grant or title which was defective from the start:[67] for example, the writs of entry *dum non fuit compos mentis* and *dum fuit infra aetatem* (where the grant had been made by an insane or infant ancestor), *cui in vita* (where a husband had granted away his wife's land, and after his death she sought its return), and *sur disseisin* (where the entry was by disseisin but an assize had been frustrated by the death of either party). At first the writs of entry were limited in their scope, in that there could not be more than two steps ('degrees') in the chain set out as the defective title.[68] But in 1267 Parliament directed that they could be brought against tenants claiming in a more remote degree ('in the *post*').[69] The writs of entry thus went further into the past than the assizes, and were concerned more with right than with protecting the status quo; and yet, by confining enquiry to specific historical facts, they obviated the possibility of battle. Moreover, a writ of entry gave the demandant direct access to the king's courts.[70]

Later History of the Real Actions and Assizes

Even if the remedies developed under Henry II were not designed to curtail feudal jurisdiction, that was their effect. The lord's court ceased to be able to remove tenants, whether to expel them for wrongdoing or to install someone with better right, and the effective jurisdiction over land passed to the king's courts. The writ of right patent, though addressed to the lord, came to be simply a cumbersome way of starting an action at Westminster. But the action was so tedious, given the need for removal by *tolt* and *pone*, that a more convenient alternative was found. The plaintiff could bring a writ of right in the king's court alleging that the lord had waived his court (*quia dominus remisit curiam suam*),[71] on the assumption that the lord would not wish to claim it; and already in the thirteenth century this was the usual course. But the writ of right was losing ground anyway. It was not as popular as the assizes, which for immediate purposes handled more manageable questions in a more direct and expeditious way, and without the threat of battle. There was therefore a strong incentive, in the longer term, to allow the assizes to do more of its work.

The story of novel disseisin between the thirteenth and fifteenth centuries was one of continuous and even strained expansion. Its subject matter was extended beyond land to include intangible things such as rights of pasture (commons), rent-charges,

[67] For a specimen formula see p. 582, post; for specimen proceedings see B. & M. 19–21.

[68] The furthest reach was achieved by entry 'in the *per* and *cui*': i.e. the tenant had no entry except through (*per*) *A*, to whom (*cui*) *B* had granted.

[69] Stat. Marlborough (1267), c. 29: plaintiffs who could not use an existing writ of entry were to have a writ stating that the defendant had no entry except 'after' (*post*) the disseisin or defective grant, omitting the links. See Brand, 123 SS lxxvi–lxxviii.

[70] A writ of right by the lord would have had to be brought in the court of the lord's lord, and then removed by *tolt* and *pone*; then the demandant would have had to proffer a fixed sum for a jury to consider the invalidity of the grant. For such a proffer in 1210 see B. & M. 19.

[71] This clause, in use by the 1260s, satisfied the provision in Magna Carta (1225), c. 24 (1215, cl. 34), that no writ *praecipe* should issue whereby a free man might lose his court. A lord could appear in the king's court and claim his court.

and offices.[72] The novelty required of the disseisin was relaxed by legislative inertia, because the limitation period ran from a fixed date which was not moved forward from 1230.[73] And the notion of unjust disseisin was extended to include constructive disseisins, such as the acceptance of a tortious conveyance, or a conveyance from a minor; this enabled the assize to do some of the work of writs of entry. Then the idea of seisin itself was broadened from actual possession to include an attempt to gain possession by someone entitled to enter. This was an extraordinary turn; for now, if *A* had a right to enter on land of which *B* was seised, and *B* prevented his entry, this might be deemed a disseisin for which *A* could bring the assize against *B*.[74] The assize thus ceased to be concerned purely with factual questions of dispossession, and was being used to try rights of entry. Not that everyone with a right to land had a right of entry. In the mid-thirteenth century a person who was disseised was allowed but a few days to re-enter with force, after which he was obliged to seek his remedy at law; the disseisor, if he stayed long enough, gained seisin. In the fourteenth century, however, the disseisee was shown more favour through the doctrine of 'continual claim', which enabled a right of entry to be preserved for as long as there was a continuous claiming of the right and being kept out. As a result of these changes, the assize became effectively 'droitural' – trying right rather than just recent possession – and by 1400 the writs of right and entry had been largely driven out of use, except as a last resort where the assize was for some technical reason unavailable.[75]

From about 1400, the assize itself began to decline as a means of trying freehold title. Title could be put in issue in a miscellaneous array of personal actions: trespass *quare clausum fregit,* replevin for cattle distrained on the land, detinue of title-deeds, and actions on the statutes of forcible entry. In 1413 a forlorn protest was made against the use of trespass to try title, but Thirning CJ defended the innovation on the grounds of convenience: trespass could be tried in banc, whereas the assize was subject to 'great maintenance in the country'.[76] The fact that assizes were not commenced before the judges at Westminster meant that no central record was kept, and although this problem could be solved in individual cases by removing the record into the Common Pleas, this was an added expense. Another reason for the eclipse of the assize was the complexity of the rules of pleading and procedure which had resulted from its transformation. The advantage of trespass was that it enabled a straightforward question of title to be decided by a common jury. The disadvantage was that it lay only for damages, although a jury verdict on the title seems to have been sufficient for most purposes. Even this limitation was overcome by legal inventiveness in the sixteenth century,[77] and the final triumph of trespass enabled the law of title to real property to be freed from the shackles of medieval rules of pleading rooted in the feudalism of an earlier age.

[72] Stat. Westminster II (1285), c. 25.

[73] In its final form, settled in 1236, it was the first voyage of Henry III into Gascony (1230): Provisions of Merton, c. 8. Then a period of only 6 years, it had become 600 years by the time the writ was abolished in 1833.

[74] E.g. *Anon.* (1334) B. & M. 34.

[75] The writ of entry *sur disseisin* in the *post* remained in use for common recoveries: p. 301, post.

[76] Y.B. Hil. 14 Hen. IV, fo. 35, pl. 52, at fo. 36. 'Maintenance' here means improper influences on sheriffs and jurors.

[77] For the use of ejectment (a form of trespass) to recover possession see pp. 320–2, post.

The Lord's Rights under the Common Law

The most obvious effect of the common-law remedies was that by the thirteenth century the tenant was in reality owner of the land. The lord was the grantor from whom his title derived, but the grantor's continuing connection with the grantee and his land was tenuous, especially if there was no manor and no court. The lord's rights in his seignory still amounted to a form of freehold property, defined in terms of land, but they were more like a charge on the tenant's property than the dominion and control which once they had been. It by no means followed that they were insignificant.

Ownership of Services

Lords had at one time enforced their feudal entitlements in their own courts, but the intervention of the common law meant that distraint by the lord was confined to the impounding of chattels (most commonly cattle) and was reviewable in the royal courts. Distraint was a common preliminary to a type of lawsuit which a tenant could use to challenge the scope of his lord's claims. The procedure called replevin began in the county court and required the lord to restore the distrained chattels[78] on the tenant giving surety (*plevine* in French) to pursue an action and return the chattels if he lost; the suit was then usually removed to the king's court, whereupon the tenant counted against the lord or his agent for taking and detaining the chattels, and the defendant 'avowed' (set out his claim) for the services.[79] The lord's avowry had to be based on seisin of the services, originally by performance to himself or his immediate ancestor, but after 1285 by any performance within a limitation period.[80] If a tenant subinfeudated and then failed to perform his services, the lord could distrain on the terre-tenant, who then had to seek his remedy upwards – by writ of mesne – against the intermediate lord (his grantor), both for restitution and to compel the latter to perform in future.

The services were thus no longer seen as contractual. They had become as much a property right as the tenant's right to the land, with actions founded on a different kind of seisin – a seisin given to the lord by the tenant when services were first performed. Where the lord could not protect them by distraint – for instance, if the tenant was absent and had left nothing distrainable on the land, or if he was unable to avow – he was driven to use an assize of novel disseisin or a writ of right for customs and services, as appropriate. These actions enabled him only to recover the services; but by a statute of 1278[81] he was given the better remedy of recovering back the land itself (by a writ called *cessavit*) if the tenant ceased to perform for at least two years. Thus the lord, like the tenant, had become dependent for his rights on royal justice.

[78] If the lord had 'eloigned' (removed) the chattels, the tenant could resort to 'withernam', under which the sheriff took other chattels of equal value.

[79] If the defendant was a bailiff, he 'made cognizance' (acknowledged the taking) and justified it under the lord's title. For a specimen writ of *replegiare facias* see p. 580, post. After Stat. Westminster II (1285), c. 2, the proceedings were usually commenced by plaint and then removed into the royal courts by *recordari facias loquelam*. For the statute see P. Brand, 31 AJLH 43–8; 123 SS liv–lix.

[80] Stat. Westminster II (1285), c. 2, s. 2; P. Brand, 31 AJLH 48–51. Rare claims based on more remote seisin could be made by the *praecipe* writ of customs and services in the *debet* ('Command A. that he perform for B. the customs and services which he ought to perform').

[81] Stat. Gloucester (1278), c. 4; widened by Stat. Westminster II (1285), c. 21. See Brand, 123 SS lxxix–lxxxiii.

Incidents of Tenure

We have already noticed that by the early 1200s the contractual aspect of feudalism, of buying services with land, had proved to be evanescent. Military service had become little more than abstract theory; other services, if demanded at all, were mostly turned into rent and were losing value through inflation. Only at manorial level did lordship retain something of its earlier managerial character. And yet, despite all this, the superior forms of tenure were beginning to take on a new legal importance. The reason is that services were not the only right which the law gave to the lord. The casual side-effects of tenure were, indeed, becoming much more valuable than the services. Long before Littleton expounded the law of tenures in the fifteenth century, the principal attractions of being a feudal lord, at any rate a lord with numerous tenants, were neither the services nor the relics of jurisdiction but the windfalls which might be expected from time to time as 'incidents' of the tenurial relationship.[82]

Had feudal lords remained outside the control of the common law, these incidental benefits would have been whatever they could exact from their tenants within the constraints of custom and practicality. However, a necessary result of the developments of the common law under Henry II and Henry III was that the powers of a lord were limited and defined by law. The incidents of tenure, as listed and defined in the law books, represented the residuary entitlements left to lords after this had happened. Like the services, they became in the thirteenth century another species of property: a charge on the tenant's land, protected first by distraint and then (in the alternative) by yet another range of remedies introduced in the course of the century.

1. Suit of court

A primordial incident of tenure was suit (*secta ad curiam*), the duty of attending the lord's court and participating in its deliberations. When such deliberations ceased to matter, it became an unwelcome burden on the tenant and of no economic value to the lord, and so it shared the fate of the seignorial courts to which it was owed. It survived in the later medieval period only at the manorial level.[83] The king's tenants in chief – at any rate, if they held large estates known as baronies – once owed suit to the great council of the realm;[84] but it was established in the thirteenth century that attendance in Parliament depended on a writ of summons rather than tenure. Eventually, after much controversy, it became settled that even an ancient barony by tenure was not a dignity carrying a place in the legislature.[85]

[82] *Bracton*, II, pp. 115–16, characterized them as 'customs' belonging inherently to certain tenures without having to be specified in charters.

[83] Stat. Marlborough (1267), c. 9, recognized that suit might still be owed to the courts of 'magnates', but restricted the circumstances in which it could be demanded. It had come to be treated as a service, dependent on proof of usage, rather than as an automatic incident: P. Brand, *Kings, Barons and Justices* (2003), pp. 43–57.

[84] Magna Carta (1215), cl. 14.

[85] This was debated inconclusively in the case of the barony of Burgavenny (Abergavenny) (1598–1604) but treated as clear in 1669 and finally settled by the *Berkeley Peerage Case* (1861) 8 H.L.C. 21.

2. Aids

An omnipotent lord might exact financial contributions ('aids') from his tenants to assist him in meeting financial contingencies. But a power of random confiscation was inconsistent with the status of free men, and it was curtailed by the common law. According to *Glanvill*, feudal aids were not permitted for the purpose of pursuing the lord's own wars, but were permissible in moderation for the purpose of paying the lord's relief, knighting his eldest son, and providing a dowry for his eldest daughter.[86] Under the 1215 Magna Carta aids were limited to the last two cases, and also ransoming the king (or lord) from captivity; they were in every case to be reasonable.[87] This was a confirmation of the general understanding of the time, and was received as common law thereafter. In 1275 feudal aids (other than for ransom) were fixed by statute at twenty shillings per knight's fee, or per £20 of socage land.[88] As for non-feudal aids, it was acknowledged by the end of the same century to be a fundamental principle of the constitution that the king could not levy any aids, taxes, or 'prises' without the common consent of the realm, meaning Parliament.[89]

3. Fines on alienation

Because tenure was a personal relationship, alienation of the land by substitution – that is, by replacing one tenant with another, instead of subinfeudating – required the consent of the lord. And, if real consent was required, a price could be demanded. This was the 'fine for licence to alienate'. The fine was not generally payable on subinfeudation, which did not disturb the relationship between the vendor and his lord.[90] Fines for alienation were abolished when alienation by subinfeudation was ended in 1290;[91] but the legislation did not bind the Crown, and so fines from tenants in chief continued to add to the royal revenues until the seventeenth century. By a statute of 1327 the Crown was restricted to a 'reasonable' fine, and by custom this came to be fixed as one third of the annual value of the land.[92]

4. Relief and primer seisin

On the death of a tenant, the land returned for a time to the lord. If the tenant's interest had been limited to his own life, the lord was then free to choose a new tenant. If the tenant's interest had been granted heritably, the lord was under an obligation to admit

[86] *Glanvill*, ix. 8 (p. 112). By then few lords had overseas territories in which wars might be waged; but the author may have had crusades in mind.

[87] Magna Carta (1215), cl. 12 and 15 (not in the 1225 charter). The ransom provision recalled the enormous levy to redeem King Richard I in 1194 (just after *Glanvill* was written).

[88] Stat. Westminster I (1275), c. 36; 25 Edw. III, stat. v, c. 11.

[89] *Confirmatio Cartarum* (1297) (Stat. 25 Edw. I, stat. i), cc. 5–6. Cf. the similar provision in Magna Carta (1215), cl. 14, not included in the 1225 charter. The pseudo-statute *De Tallagio non Concedendo*, printed as a statute of 34 Edw. I, was a list of demands to the same effect.

[90] See p. 280, post. For an exception in the case of tenants in chief see the order of 1256 in B. & M. 7.

[91] By Stat. *Quia emptores*: pp. 263–4, post.

[92] Stat. 1 Edw. III, sess. ii, c. 12; Robert Constable's reading on *Prerogativa Regis* (S. E. Thorne ed., 1949), pp. 155–6.

the tenant's heir in his place. In the absence of legal restraint, lords might have taken the profits from a deceased tenant's land for themselves until the heir bought the land back by paying 'relief'.[93] Unscrupulous lords might frustrate inheritance altogether by demanding excessive relief. In the time of William II, although heritable grants were common, they were still precarious; even if the heir's identity was clearly ascertained, he might have to redeem the land for the market value or lose his place. This was ended by Henry I's Coronation Edict (1100), which announced that reliefs were to be 'just'. The limitation of relief to what was reasonable was a corollary of free inheritance. The just relief for a knight's fee was deemed to be 100 shillings, and that for socage land was later defined as one year's profits.[94]

Primer seisin was the lord's right to take the deceased tenant's land into his hands until the new tenant did homage and paid relief.[95] If the tenure was by knight-service, the lord could retain seisin and keep the profits until the heir came of age; this was wardship in chivalry, to be considered presently. Beyond the concept of wardship, primer seisin ceased to have any value for mesne lords after the time of Henry II; but the Crown claimed a prerogative right to take the profits of an heir's land for one year even if he was of full age, and this remained a valuable source of revenue until (together with relief) it was abolished in 1645.

5. *Escheat and forfeiture*

If a tenant in fee died without leaving an heir, the land necessarily fell back to the lord by way of escheat. Likewise, if the tenant was convicted of felony, his land escheated to the lord. This latter kind of escheat was later called 'forfeiture',[96] though in its original sense this occurred when a tenant committed treason – in which case his land went to the Crown and the rights of mesne lords were extinguished. Forfeiture was abolished in 1870, but escheat necessarily remains where a landowner dies intestate with no relatives or dependants.

6. *Customary dues*

In many places there were customary dues arising on the death of either the lord or the tenant, and the common law allowed these if they were reasonable. The most common was heriot, which entitled the lord to seize the best beast or chattel of a deceased tenant. Such customs were vestiges of more widespread pre-Conquest norms[97] which were not

[93] Relief (*relevium* in Latin) was a payment for 'taking up' an inheritance.

[94] A. J. Robertson, *Laws of the Kings of England* (1925), p. 277; *Dialogue of the Exchequer*, ii. 10 (p. 145); *Glanvill*, ix. 4 (p. 108); Magna Carta (1215), cl. 2; (1225), c. 2.

[95] *Glanvill* recognized the concept without using the term. *Bracton*, III, p. 245, said that if an undoubted heir had put himself in seisin, the lord did not in strictness have first seisin, but a 'simple' seisin shared with the heir. This was confirmed by Stat. Marlborough (1267), c. 16.

[96] The means of recovery was, nevertheless, the same 'writ of escheat' as was used in the other case. The word derives from *eschier*, to fall.

[97] Heriot had been an Anglo-Saxon term for the horses, armour, and weapons of a thegn, which were returnable to the king.

incorporated into the common law and therefore survived only as local customs, chiefly in relation to unfree tenures within manors.

7. Wardship and marriage

If a deceased tenant's heir was under age, and so unable to perform his feudal obligations, he was subject to wardship (*custodia*). In the case of military tenure, the lord retained the land in his custody and enjoyed its revenue as compensation for the loss of services, and for the burden of training the ward in feats of arms, before delivering seisin to him at the age of 21.[98] The common law accommodated wardship, but some safeguards were again necessary. The very least requirement was that the heir should in due course inherit all the capital that his ancestor left, and one of the first provisions of Magna Carta forbade the king and other guardians to commit waste in their wards' lands.[99] In respect of the income, however, a distinction was made between military tenure and socage. The guardian in socage, who was not the lord but a near relative of the infant heir, effectively became a trustee who (after 1267) could be compelled to render an account to the heir when he came of age at 14.[100] In the case of knight-service, by contrast, there was no accountability. Even when actual military service was no longer exacted, and training as a knight was discontinued, guardians unashamedly helped themselves to all the profits until the ward came of age. Although Magna Carta forbade the lord to take more than reasonable revenues, this referred to reasonableness vis-à-vis the ward's tenants – so as not to drive them away – rather than a reasonable share vis-à-vis the ward.

Guardians received into their custody not only the heir's land but also the heir's body.[101] Perhaps this originated as a form of protection for the ward – apologists argued that grasping relatives could not be trusted with the heir's life – but again it was exploited for profit. The guardian was entitled to select a suitable marriage for the ward, and arranging marriages for young heirs and heiresses, which might involve substantial transfers of wealth, was a valuable right. No marriage could be forced on unwilling children, because consent was a requisite of true matrimony; but if a ward declined a suitable marriage when it was offered, he or she had to compensate the lord to the value of the marriage. And if a ward had the audacity to marry without the lord's consent, the penalty was incurred (after 1236) of remaining in ward until the lord had received double the value of the marriage. The only legal concession made to the infant was that a guardian could not disparage a ward by offering a marriage with someone who was either legally unsuitable (such as a widow, a bastard, or a villein) or physically unsuitable (such as a leper, a deformed or blind person, or a woman beyond the age of childbearing).[102]

[98] In the case of a female heir, wardship lasted until the age of 14 or (if she remained unmarried) 16.

[99] Magna Carta (1215), cl. 4–5 (1225, c. 4–5).

[100] Stat. Marlborough (1267), c. 17. The means of enforcement was a writ of account.

[101] If the heir had several lords, the liege lord (p. 244, ante) took the body; but if any land was held of the king, the king was entitled to the body by his prerogative. The liege-lord rule was clarified by Stat. Westminster II, c. 16: on which see Brand, 123 SS lxii–lxviii.

[102] Magna Carta (1225), c. 6; (1215), cl. 6; Provisions of Merton (1236), cc. 6–7; Litt., s. 109. For changing ideas about what amounted to disparagement see 132 SS lxiv–lxvii, 1–19. For the esoteric technical reason why a male heir could decline a widow, but a female heir could not decline a widower, see ibid. lvii, 2, 11. For other issues raised in early litigation about wardship see S. S. Walker, 9 JLH 267.

The Value of Incidents

Unlike feudal services, the chief incidents of tenure were tied to the current income from the land and were therefore inflation-proof. The most profitable for lords were those which attached on a descent to an heir (wardship, marriage, primer seisin, and relief), especially if the heir held by knight-service and – as often happened – was under age on the ancestor's death. Being casual windfalls, they did not provide a regular source of income except for great lords who had many tenants. And yet, until means were found of avoiding descents, they fell due whenever a tenant in fee died, and that was an event no tenant could avoid. The greatest profits of all came to the Crown, since the king was ultimate lord of all land in the realm and also had special prerogative rights which other lords did not possess. On the death of anyone believed to be a tenant in chief, the king's escheator for the county seized all his lands until an inquisition post mortem had ascertained the facts relative to the king's rights and returned it to the Chancery or the Exchequer.[103] The value of this feudal revenue to the Crown explains why the system of tenures was preserved by the law long after its original purpose, in terms of services, had become obsolete. It also explains why, as late as 1536, when former monastic lands were granted out, the grants were usually made for an antiquated Norman service which no one in fact performed: knight-service attracted wardship. We shall see that most of the legislation concerning real property, from 1215 to 1540, was directed principally at the preservation of the incidents of tenure from devaluation or avoidance.

Mortmain

Grants to corporations – typically religious houses – were detrimental to feudal lords, since corporations were immortal and had no heirs.[104] A grant to a corporation meant putting the property into a dead hand, an 'alienation in mortmain'. This suggested an early dodge to avoid incidents. The tenant would alienate his land to a monastic house in order to hold it again of the house by a less onerous tenure, arranging to acquit the monks in respect of the services to the chief lord, and adding some other consideration; the interposition of a corporation between the terre-tenant and the chief lord prevented the accrual to the latter of any of the incidents which would have arisen on the tenant's death. This was prevented by Magna Carta: if land was given to a religious house in order to resume it again to hold of the same house, it was forfeited to the chief lord.[105] But even an outright charitable gift to a monastery had the same effect on the lord's incidents, and in 1279 a more sweeping reform was introduced.[106] All alienations to religious houses were forbidden, whatever the purpose and however effected.[107] The statute did not bind the king, however, and so the Crown had the power to grant

[103] See p. 108, ante. [104] See p. 213, ante. [105] Magna Carta (1225), c. 36 (1217, cl. 40).

[106] Stat. *De viris religiosis* (1279). This was prompted by a recent debate in the Yorkshire eyre: Brand, *MCL*, pp. 239–44. But there were precedents in Flanders (*c.* 1260) and France (1275): D. Heirbaut in *Law in the City*, pp. 54–71.

[107] If land was recovered in a lawsuit against a religious house, an inquisition (called *quale jus*) was held into the genuineness of the suit and the potential loss to the Crown: Stat. Westminster II (1285), c. 32. The 1279 legislation could otherwise have been evaded by a collusive action.

licences of exemption from the prohibition, preserving the possibility of gifts of land to monasteries provided a proper composition was made for the loss of incidents. So prevalent were such gifts in practice that by the sixteenth century perhaps as much as a quarter of the land in England was owned by religious houses, who were forbidden by canon law to alienate any of it. Only if a monastery was dissolved by surrender did its land return to the world of the living, and then it went to the king rather than the heirs of the donor. All the accumulated monastic land would come to the Crown in this way in the 1530s.[108] But the last vestiges of the mortmain legislation, necessitating a licence to alienate land to any corporation, remained in the law until 1960.

Quia Emptores Terrarum 1290

The manner in which a tenancy was transferred to a grantee could have a significant effect on the value of the lord's incidents. When land was sold for ready money, the vendor could either put the purchaser in his place as tenant (substitution) or make the purchaser his own tenant (subinfeudation). The latter was preferable for the vendor, both because it did not require his lord's approval and because the vendor retained a seignory which might yield occasional profits, perhaps even an escheat. The purchaser, on the other hand, lost nothing by subinfeudation that he would have gained by substitution. The only loser was the vendor's lord. If his tenant died seised of land held by knight-service, leaving an infant heir, the lord had wardship of the land and could take the full profits during the minority. But if the tenant had in his lifetime subinfeudated for a worthless service such as a peppercorn,[109] taking the purchase price in ready money, the lord had wardship only of the seignory – that is, the annual peppercorns. The annual value of the land, instead of being reflected in rent-service which would benefit the lord during a minority, had been capitalized as a lump sum which went into the vendor's pocket. Furthermore, the likelihood of an escheat was reduced as more tenants were inserted in the chain. Alienation by substitution could harm the lord in a different way, for instance if an old tenant substituted a young man with a long life-expectancy; but the lord could protect himself by demanding compensation in return for his consent. The main threat to the lord's revenues was subinfeudation.

The statute *Quia emptores terrarum*[110] was passed to solve this problem, and it affords clear proof that by 1290 the practical importance of tenure lay in the incidents rather than the services. In order to protect the incidents, the statute enacted that alienation was thenceforward to be by substitution, which was to be allowed without fine. As a consequence, no mesne tenures in fee simple[111] have been created since 1290 – no more feudal contracts to reward services with land – and through lapse or oblivion over the centuries mesne lordships have disappeared and most of the land in England has come

[108] For the legal aspects of the Dissolution of the Monasteries (1536–39) see *OHLE*, VI, pp. 709–15.

[109] It was the worthlessness which caused the problem. If the tenant had reserved a full rent, this would have suited the lord just as well as having to find a rent-paying tenant himself.

[110] B. & M. 8–9. Note also the directions given in 1256 to tackle the same problem in relation to tenants in chief: ibid. 7.

[111] The statute did not extend to estates less than fee simple. Tenants for life or in tail held of the reversioner or remainderman. The meaning of these terms will be discussed in ch. 15.

to be held in chief of the Crown. Another consequence of the statute was the increasing use made of the husbandry lease for years, which had some of the advantages of subinfeudation without being caught by the feudal rules.[112] The statute continues to keep the feudal system in abeyance, and it survived an attempt at repeal as recently as 1968.

Evasion and Preservation of Incidents

An equally important legal consequence of the incidents of tenure followed from the repeated efforts of lawyers to find ways of arranging their clients' property interests so as to attract the least burdens. The incidents which most needed avoidance were relief, wardship, and primer seisin, all of which arose when a tenant died and the fee descended to his heir. Though contingent on death, these were not death duties but inheritance duties; and, if death could not be avoided, inheritance could. The essence of most feudal tax-dodges was therefore to ensure that land passed to a successor without descending. This had to be arranged during the tenant's lifetime, because at common law land could not be disposed of by will. We have noticed the early device for avoiding inheritance by making grants in mortmain, which had been stopped in 1217. A later method, which had no legal success, was to divide the fee into a succession of life interests in the tenant, his heir, his heir's heir, and so on *ad infinitum*, so that each was intended to take a separate life estate directly from the original grant and inherit nothing by descent.[113] Another was for a father to convey the land during his lifetime to the heir apparent, or to the heir apparent jointly with himself so that the heir would take by survivorship and not by inheritance. Few fathers thought such a course wise. A fourth device was a collusive grant to friends on condition that they would convey the land back to the heir when he attained his majority. Such forms of evasion were countered at an early date by legislation,[114] or by judicial decision. But all were superseded by the institution of the 'use', which enabled the real owner of land to hide behind a legal facade. This requires a separate excursion in the next chapter, to complete the story of what happened to feudal property law, before we turn to the different kinds of legally recognized 'estate' which a tenant might hold.

Further Reading

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Simpson, *History of the Land Law*, pp. 1–56
Milsom, *HFCL*, pp. 99–151; *Natural History*, pp. 51–107
G. Garnett and J. Hudson (ed.), *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (1994)

[112] See p. 319, post.
[113] See p. 303, post.
[114] Principally Stat. Marlborough (1267), c. 6, which was broadly construed; B. & M. 7–8; Brand, 123 SS xcvi–xcviii.

Assumptions and Workings of Early Feudalism

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The Common-Law Actions and their Effects

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J. Biancalana, 'For Want of Justice: Legal Reforms of Henry II' (1988) 88 *Columbia Law Rev.* 433–536; 'The Origin and Early History of the Writs of Entry' (2007) 25 LHR 513–56

R. V. Turner, 'Henry II's Aims in Reforming England's Land Law: Feudal or Royal?' in *Law in Medieval Life and Thought* (E. B. King and S. J. Ridyard ed., 1990), pp. 121–35

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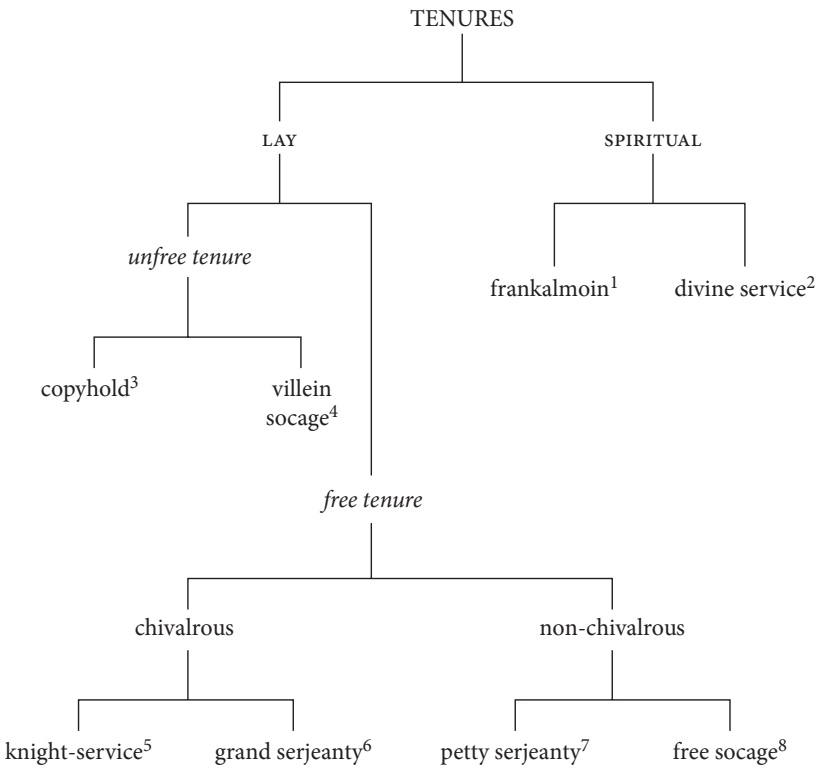
Table B. Types of tenure



1 Tenure 'in free alms' with no specified services, but the general duty of performing divine service.
2 Certain service, such as saying mass on certain days, finding a chantry chaplain, or distributing specified alms.
3 Uncertain villein services. See pp. 325–8, post.
4 Certain villein services, e.g. tenure in ancient demesne.
5 Military service, including castle-guard and scutage.
6 Certain non-military service to the king's person.
7 Service of rendering something to the king. According to some definitions it must have a military use.
8 Of two kinds: (i) common socage, the only form of tenure apart from frankalmoin and grand serjeanty remaining after 1925; (ii) customary socage, e.g. gavelkind, burgage.

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Real Property: Uses and Fiscal Feudalism

The distinction between the bare legal title to property and beneficial ownership under a trust has become the foundation of the modern English system of estates in land. But the technical distinction between legal and equitable estates did not begin by design. It emerged from a miscellany of extra-legal factual situations requiring recognition as a matter of conscience rather than law. The situations arose whenever a feudal tenant was personally obliged, either by contract or by the requirements of good faith, to allow another person to have the beneficial enjoyment of land vested in himself. The nominal owner who was obliged to observe such a trust was said in Latin to hold the property *ad commodum* or *ad opus* (for the benefit) of the beneficiary.

That this terminology did not originally represent a technical concept may be gathered from the use of similar language in analogous situations. Bailiffs and guardians had a trust reposed in them to look after property for the benefit of others. No title was vested in them, and yet they were said to look after (*custodire*) the property *ad opus* of the owner.[1] The same terminology was used for a receiver of money to the use of another. The word *commodum* is also the Latin for 'easement', a right enjoyed over another person's land, such as a right of way.[2] No doubt the case where the feudal tenant lacked any beneficial interest in his own property, by virtue of an obligation to allow another to enjoy it, was most easily described by analogy with these familiar situations. But the common law could only admit one 'right'. That belonged to the tenant entitled to seisin, to whom alone the protective writs were given. The holding *ad opus* therefore involved a separation of the title as recognized by law from the beneficial ownership as acknowledged in fact.

Origins of Uses

The earliest known instances of land being held *ad opus* were of a temporary nature. For instance, if a tenant wished to alienate his land by substitution, the proper feudal procedure was to surrender his interest to his lord on trust to admit the new tenant; and this remained the mode of conveyancing for copyhold estates until 1925. Between surrender and admittance the lord kept the land *ad opus* of the transferee. Another example is provided by the case where a man wished to transfer property into the names of himself and his wife, or to settle property jointly on himself and his heir apparent; he could not grant the land to himself directly, and so he would grant it to friends on trust to reconvey it in the required manner. But there were also situations where a permanent holding *ad opus* had advantages. Grants to the Franciscans afford an early instance.

[1] See J. Biancalana, 22 JLH 14. [2] See p. 456, post.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

Brethren of the Order of St Francis, forbidden to own land (but not to accept free accommodation), were permitted to enjoy the benefit of property vested in others; and so a person wishing to provide a home for the friars could grant land to a group of nominees to hold as a kind of charitable trust for their benefit.[3] The inns of court and chancery were occupied under similar trusts in later medieval times, not in their case through disability or out of charity but because it proved a convenient arrangement for a fluctuating body.[4] Both the lawyers' inns and the houses of friars thus acquired some of the features of corporate status without being incorporated.

Before 1290 a lord could have refused his consent to any alienation by substitution which prejudiced his own interests, but *Quia emptores* ended seignorial control over such arrangements. One consequence of this freedom, soon discovered, was that the prohibition of mortmain could be avoided by separating beneficial enjoyment from title. Pending the issue of a licence to alienate land to a religious house the grantor held it for the benefit of the corporation. But, if such an arrangement was effective, why purchase the licence at all? Land might be held permanently for the benefit of a corporation of monks just as it could for an unincorporated body of friars or lawyers. A statute of 1391 shows that feoffments[5] to the use of religious corporations were indeed being resorted to 'by subtle imagination, art, and scheming'; and so they were forbidden.[6] Another discreditable purpose of uses, noticed in the 1370s, was to place land beyond the reach of creditors.[7] By stopping such schemes Parliament incidentally started to give legal recognition to 'the use' as an institution.

Uses were not invariably dishonest. For instance, they enabled sensible plans to be made when a landowner risked travelling overseas, and they enabled land to be used as security for debts.[8] The most fruitful of the devices discovered in the fourteenth century – and the main reason for the sudden popularity of uses in the 1360s – was that which enabled a landowner to avoid the rule prohibiting wills of land.[9] A dying tenant could grant land to a group of friends and neighbours, or professional advisers, on trust to pay his debts after his death and transfer the residue to such beneficiaries as he should name. This enabled the land in effect to be devised or encumbered by will, and since nothing passed by descent the feudal incidents were avoided as well. Here again, there was a further advantage in making the arrangement permanent. The power which

[3] The Franciscans came to England in 1224, and in 1225 a site was conveyed to Oxford town for the benefit of the friars there. Similar arrangements were made elsewhere. A papal bull of 1230 confirmed that the friars might use and enjoy, but not own, property. See further S. W. DeVine, 10 JLH 1. Friars differed from monks, whose abbeys and priories were corporations which could own land: p. 213, ante.

[4] In their case the trust property may sometimes have been a lease rather than a freehold. For the inns as voluntary associations see *CPELH*, I, pp. 213–37.

[5] A feoffment (pronounced 'feffment') is a grant in fee simple. It is made by a 'feoffor' to a 'feoffee'.

[6] Stat. 15 Ric. II, c. 5. This did not prevent land being given to found chantries, which were not corporations: 132 SS 335. Chantries gained widespread favour as offering (so it was alleged) a means to speed souls out of purgatory. They were not dealt with until 1547, when the underlying theology was perceived to be a lucrative deceit: *OHLE*, VI, pp. 715–17.

[7] E.g. *Langedon v. Stratton* (1374) *CPMR 1364–81*, p. 175. In 1376 legislation was passed against fraudulent feoffments by persons who retained the profits at their will, in order to avoid execution of a judgment against the land: Stat. 50 Edw. III, c. 6 (B. & M. 103).

[8] For examples see Palmer, *ELABD*, pp. 118, 122–3.

[9] The common law did not allow a freehold to be left by will. It was, however, a widespread practice in towns by virtue of local custom.

it released did not need to await intimations of mortality. It made sense for any landowner to vest his land in feoffees to perform his will: that is, to carry out current instructions during his life, and his final or last will after his death. But the machinery had to be informal. If it was made a formal condition of the feoffment that the feoffees should perform their trust, a failure to perform gave a right of re-entry to the feoffor or his heirs. There was no other legal means of enforcement. Once the feoffor himself had died, only the heir could enter for breach; but if the condition took property away from the heir, as was the case with every will, this means of enforcement was in reality useless. Moreover, if the condition was to allow someone else the full rights of beneficial ownership, it was arguably repugnant to the feoffment and void.[10] The solution was not to impose a condition, but to make the feoffment merely upon trust that the feoffees would perform the will.[11] The feoffees then held the title solely for the benefit of the feoffor. Whatever he directed, they were expected to obey. This was most convenient for the feoffor. He remained the absolute owner in effect, because he continued to possess the land for his own benefit and take the profits, and he could sell the fee whenever he wished by directing the feoffees to convey to his purchaser. Yet he could in addition, if he so wished, defer the selection of his successors to the point of his own death. Thus the landowner achieved the power of disposing of the land either by last will or by *inter vivos* conveyance, as he pleased. It was this attribute of the holding *ad opus*, the permanent arrangement giving the beneficial owner the power to devise without impairing his other powers, which principally assured its establishment as a common institution. It also ensured that the device had to be a mere trust, because the effect of a will was necessarily to disinherit the only person capable of enforcing a legal condition.

The 'Use' as an Interest in Land

Each of the arrangements just described began as a temporary expedient which was found to have advantageous effects if extended into an enduring state of affairs. The permanent institution which resulted was called a 'use' (the law French word for *opus*) or a 'feoffment in trust';[12] and the beneficiary, when not the feoffor himself, was called *cestui que use*.[13] The trusting of feoffees with lands to be held in use was a fact of life long before it had any legal consequences. The Oxford friars had relied on charity, not law. The common law took no notice of a mere trusting,[14] since to have done so would have threatened its effectiveness as an arrangement outside the law. It was not that the trust was illegitimate, just legally invisible. In common-law theory the cestui que use

[10] But cf. *St Edmunds v. Anon.* (1371) B. & M. 103.

[11] By the mid-15th century it was not necessary to specify this, since any feoffment without consideration left a beneficial interest in the feoffor which could be devised by will: p. 270, post.

[12] For 15th-century examples see *OHLE*, VI, p. 654 n. 10. Cf. Litt., s. 462 ('sur confidence').

[13] Short for *cestui a que use le feoffment fuit fait* ('he to whose use the feoffment was made'). The word 'use' here has no connection with 'to use' but derives from *opus* via the Old French *oeps, oes*. Yet the Latin *usus* had the same meaning and is found in later English conveyances in the doublet *opus et usus* ('use and behoof').

[14] For the possibility of an action on the case see *Acres v. Stutevill* (1352) 103 SS 453 (where feoffees mortgaged the land). This idea did not take root; but cf. *OHLE*, VI, p. 660.

had 'no more to do with the land than the greatest stranger in the world'.[15] He was at best only a tenant at sufferance of the feoffees, and it was said in 1464 that the feoffees could sue him for trespass if he felled timber.[16] On one view, indeed, the cestui que use had no legal right to be on the land at all.[17] Yet the feoffees, being charged with a fiduciary duty, could not with a clear conscience obstruct the wishes of the cestui que use or derive any benefit from the land for themselves. Any possibility of individual unscrupulousness could be guarded against, without the need for recourse to law, by choosing a substantial group of feoffees such as lawyers or neighbouring gentry. But difficulties and questions were bound to arise as feoffments in trust became more common, and wills needed interpreting. A legal solution was required.

The first recourse may have been to the ecclesiastical courts, at least when wills were involved. We know, for instance, that in 1375 a group of feoffees were excommunicated for conveying land – allegedly under duress – contrary to the feoffor's will.[18] But the Chancery was a better resort, since the feoffees' consciences were in that court amenable to coercion by the threat of imprisonment.[19] The origins of the Chancery jurisdiction over uses are elusive for want of records,[20] but it was well settled by the 1420s, and in the course of the fifteenth century uses came to account for much of the chancellor's business.[21] The principles laid down by the courts in the fifteenth century turned the interest of the beneficiary into a new kind of ownership,[22] analogous to what was later called the 'equitable estate'. The estate rested on another person's conscience; but even if the feoffees all died, the trust continued and bound the heir of the last survivor;[23] and if the feoffees alienated the land, the trust bound the purchaser, unless he bought for value without notice of the trust, in which case alone his conscience was clear.[24] Uses were also commonly raised by implication. When the legal owner of land bargained and sold it to another, before the conveyance was completed an implied use was raised in favour of the purchaser, which the chancellor would enforce by a decree of specific performance. And if someone enfeoffed others without any consideration being given, or any express use declared, the feoffees automatically held the land to the use of the feoffor and his heirs (or his last will, if he left one). The recognition of this 'resulting' use, perhaps as early as 1465, confirms how usual it had become for feoffments to be made on secret or undisclosed trusts, or to perform the feoffor's will generally.[25]

[15] *Dod v. Chyttynden* (1502) B. & M. 113 at 114, per Frowyk sjt. Cf. *Dillon v. Freine* (1595) BL MS. Hargrave 373, fo. 14, per Walmsley J (tr. 'the use is but an idea, for it is not a title or interest in the land but is tied solely to the person who is trusted' and rests on his kindness).

[16] *Anon.* (1464) B. & M. 106 at 107, per Moyle J.

[17] *Dod v. Chyttynden* (1502) ibid. 113 at 115, 117, per Frowyk CJ (appointed CJCP that term).

[18] Helmholz, *Canon Law and the Law of England*, p. 343 (a case from Canterbury).

[19] *Anon.* (1467) B. & M. 108.

[20] In 1502 Vavasour J dated it to Edward III's time: ibid. 114. He may have been thinking of a case in 1360: J. Barton, 98 LQR 26. But a parliamentary petition of 1402 (Rot. Parl., III, p. 511) seems to assume the absence of a remedy at that date.

[21] For a specimen bill in Chancery *c.* 1426 see 10 SS 105.

[22] The English word 'owner' was used for the feoffor to uses in *Anon.* (1489) Y.B. Pas. 4 Hen. VII, fo. 8, pl. 9, per Wode sjt; Adgore's reading (*c.* 1490) B. & M. 112, 113; Stat. 4 Hen. VII, c. 4 (1490); 7 Hen. VII, c. 2. Thomas Audley (1526) defined a use as a property or ownership depending on trust: B. & M. 118.

[23] This rule was attributed to Fortescue CJKB (*c.* 1450): B. & M. 114 n. 28. The situation rarely occurred, because of joint feoffments.

[24] This rule may also belong to the 1450s: see *Cardinal Beaufort's Case* (1453) B. & M. 106.

[25] See ibid. 107–8, 112, 119–20. One consequence is that medieval conveyances frequently fail to disclose the identity of the true owner.

By the fifteenth century uses of land were common. Their prevalence is evident from a judicial remark in 1502 that, since some time in the previous century, the greater part of the land in England had been held in use.[26] By that date, moreover, the law of uses was beginning to percolate into the common-law courts as a result of a statute of 1484. Since so much land was privately conveyed to feoffees who had no visible connection with it, third parties could be at a considerable disadvantage in conveyancing. To protect those who purchased or took leases from landowners in possession, believing them from outward appearances to be in seisin, the statute provided that such a landowner could pass a title which was good against his own feoffees.[27] This remarkable legal magic enabled the beneficiary to transfer the seisin, or encumber the title, which he did not in law have, treating him as if he were the legal owner for this purpose. An important consequence was that the title to the use (the *jus usus*) increasingly had to be set out in common-law pleadings, in conjunction with the statute. Questions relating to uses thus fell to be determined by common-law judges, and the beneficiary's interest came to be governed by law as well as equity. The use could now be seen as a thing: an intangible thing which descended to heirs on intestacy, a thing which could be bought and sold or settled on a succession of beneficiaries. Nevertheless, the new kind of ownership was inherently foreign to the common law because it jarred with the feudal system.

Effect of Uses on Feudal Law

The main reason why so much land had been conveyed to feoffees in trust during the fifteenth century, at any rate by major landowners, was that it provided an escape from the inflexible certainty of the legal rules of succession. By last will the landowner could provide for younger sons, daughters, bastards, remote relations, or charities, could increase the provision given by law to his widow, and could charge the payment of his debts and legacies on real property. These objects could be achieved either by directing the feoffees to convey property directly to the chosen beneficiaries, or by directing them to sell or let the property and apply the proceeds as instructed. Whichever course was taken, it was the use and not the legal title which passed on the testator's death. The seisin had to remain in the feoffees, for without it they could not execute the will.

These advantages were accompanied by two problematic side-effects. The first was that conveyancing was rendered less certain. Uses were directed by the will of their creator rather than by terms of art, and there were difficulties of interpretation. They could be transferred informally, without livery of seisin, even by word of mouth. Purchasers of land might therefore find themselves adversely troubled by a hidden use, even if ultimately they could prove their moral innocence. This last problem was eased by the statute of 1484, but other uncertainties continued to be a source of complaint well into the sixteenth century.[28]

[26] *Dod v. Chyttynden* (1502) ibid. 113 at 117, per Frowyk CJ. This may have been an exaggeration: cf. n. 32, post.

[27] Stat. 1 Ric. III, c. 1 (B. & M. 110); *OHLE*, VI, pp. 655–9. For its effect on wills of land see *Anon*. (1527) B. & M. 120 at 122, per Fitzherbert J.

[28] See e.g. Thomas Audley's reading (1526) B. & M. 118–19. A troublesome question was whether a use in tail had the same characteristics as a legal fee tail: 94 SS *207–8*; *OHLE*, VI, pp. 695–6.

Secondly, and this was the cause of all the trouble which came in Tudor times, the employment of uses deprived lords – and most of all the Crown – of valuable feudal revenues. It is unlikely that this was the prime motive behind uses, but it was their universal consequence and increased their attraction.[29] The machinery of the use displaced inheritance and, therefore, avoided the incidents which attached on inheritance. Even if the beneficiary died intestate, so that the heir became entitled to the use, there was no descent of the land to which incidents could attach. Incidents would attach only if a sole feoffee died; but using a plurality of feoffees, besides providing safety in numbers, ensured that this would never happen. The feoffees were joint tenants, and so if one feoffee died the others absorbed his share by the right of accrual (*jus accrescendi*). So long as numbers were kept up, by periodic reconveyances, there was an 'unassailable mortmain'.[30] It was unassailable because the lord had living tenants – the feoffees – to whom the feudal rules applied; therefore, if the lord gained no incidents on the real owner's death, it was *damnum absque injuria.* Once this became common knowledge, it was foolish for any landowner to retain seisin of his own land or to purchase land in his own name. By having it vested in others he paradoxically became a more absolute owner than the common law allowed: he was released from the most burdensome incidents of feudalism, and from the inflexible rules of inheritance, and the estate was also freed from claims by his widow to dower.[31] A major and noticeable effect of uses, therefore, was that feudal revenue from reliefs and wardships in chivalry was by 1500 draining away. Littleton's account of feudal law might well have seemed like an obituary.

Tudor Legislation and Fiscal Feudalism

In the century between 1391 and 1490 little was done to protect the financial profits of feudalism against the effects of uses. Weak efforts were made by fifteenth-century royal advisers to amplify the scope of existing legislation, and to control feoffments to uses by tenants in chief; but no steps were taken before Henry VII's time to plug the loopholes which uses had created in the earlier law. The inertia has been attributed to the turmoil of the wars of the roses, in which kings lacked the political strength to stem tax avoidance by their own supporters; but more recently it has been suggested that the problem only grew to significance after the development of the common recovery to bar entails in the fifteenth century.[32] Although the Crown could control alienations by tenants in chief, when a tenant in tail suffered a recovery to uses control by that means was impossible.[33]

Henry VII and Henry VIII determined to revive at least some of the feudal revenues which had belonged to their predecessors, and which they needed in order to defray the expenses of government, foreign affairs, and the maintenance of their royal state.

[29] For an early recognition of the point see *Kyrkeby v. Salle* (1384) B. & M. 104.

[30] Milsom, *HFCL*, p. 211. It was the concept of joint tenancy and survivorship, rather than uses alone, which worked against the lord's interests.

[31] For dower, and its replacement by jointure, see pp. 289–90, post.

[32] Before then, most land at the level of knight-service was tied up in tail so that it could not be granted to feoffees. The relevance of this to uses was pointed out (in an unpublished lecture) by Professor J. Biancalana. Entails and recoveries are explained in chs. 15–16, post.

[33] A recovery was, in form, a judgment in favour of the rightful tenant, not an alienation. This drawback was dealt with in 1540: Stat. 32 Hen. VIII, c. 1, s. 15.

Extracting subsidies and benevolences from a reluctant Parliament did not have as much to commend it as a regular feudal revenue which could be collected simply by enforcing the old law of the land. The legislation of Henry VII did not tackle the main problem, the will of land, but by statutes of 1490 and 1504 the heir of an intestate cestui que use was subjected to the same incidents as if his ancestor had died seised.[34] Thus the heir in use was deemed to be a real heir for tax purposes. In addressing a blatant anomaly, the statutes were seen chiefly as closing a gap in chapter 6 of the Statute of Marlborough (1267); but they were not designed to, and in fact did not greatly enrich, the Crown.[35] They only applied on intestacy, and therefore served as a further encouragement to make wills. Henry VII introduced the office of master of the wards in 1503 to supervise the collection of feudal revenue; but it was Henry VIII who, for revenue purposes, raised feudalism from the grave. Historians have given to this artificial revival the name 'fiscal feudalism'.

The main Tudor onslaught on the use began in the 1520s. In 1526 the Council adopted a policy of tightening up on alienations by tenants in chief, to ensure that the Crown was fully compensated for any loss of incidents.[36] Then, in 1529, the king and his advisers made an agreement with a party of peers to introduce legislation whereby feudal incidents would be restored, but only to the extent of a half or a third of the amount due at common law.[37] As mesne lords would also have had one third of their own revenues restored, this seemed a fair compromise. But when the proposal was laid before the Commons in 1531 they rejected it outright. They knew that taxation could not be imposed without their consent; and uses were an established legal institution which they were keen to preserve, chiefly because it gave them the power to devise land. Henry VIII threatened them that if they would not accept the one-third compromise he would 'search out the extremity of the law' and not offer them so much again.[38] They unwisely declined this offer,[39] and the king was good to his word.

The king's counsel were able to take advantage of two lines of thought in attacking uses. The first was that, in applying the statute of 1484, the Common Pleas judges had been coming to the view that uses were generally governed by the common law. If that could be pressed far enough, wills of uses would be void, because wills of land were void at law. That, however, would have flown in the face of the common understanding. Judges, and even kings, had made wills of land. The other line of thought was that separating the legal title from the beneficial ownership was innately deceitful, and that chancellors in enforcing uses had been naively countenancing large-scale fraud and

[34] Stat. 4 Hen. VII, c. 17 (B. & M. 111); 19 Hen. VII, c. 15. The former dealt with wardship in chivalry and was modelled on a short-lived statute of 1483 (repealed in 1484) which applied only to the duchy of Lancaster. The latter dealt with relief and heriot from tenants in socage

[35] The 1490 statute did not mention primer seisin, which remained avoidable by means of the use until 1536.

[36] See Guy, *St German on Chancery and Statute*, pp. 78–9.

[37] The draft bill is printed in Holdsworth, *HEL*, IV, pp. 572–7 (with a contemporary list of 43 mischiefs arising from uses). The quid pro quo for the peers was that they were to be exempted from the proposed abolition of entails (which did not take effect). The idea of reserving a reasonable proportion to the king was taken from the duchy statute of 1483 (n. 34, ante).

[38] B. & M. 123 at 124.

[39] Edward Hall thought the king would have settled for a third, or even a quarter, but that 'forward and wilful persons' in the Commons could not see the danger they were in: ibid. 124.

undermining the common law. On this argument, uses might not be so binding in conscience after all. The author of the 'Replication' to *Doctor and Student* proclaimed uses to be a 'false and crafty invention' to deprive the king and his subjects of their feudal incidents. 'What a falseness is this,' he wrote, 'to speak and do one thing, and think another thing clean contrary to the same.'[40] Thomas Audley, as reader of the Inner Temple in 1526, and doubtless keen to propagate the new government policy, complained in the same vein against landowners who had employed uses 'for the evil purpose of destroying the good laws of the realm, which now by reason of these trusts and confidences is turned into a law called conscience, which is always uncertain and depends for the greater part on the whim of the judge in conscience…'.[41]

In 1532 Audley himself became that judge in conscience, placed by the king in a position to put his preaching into practice; and he lost no time in doing so. With the assistance of the king's secretary Thomas Cromwell, helpfully appointed to sit beside him as master of the rolls in 1534, he assembled the judges to discuss a test case adjourned from the common-law side of the Chancery. The question was whether a will made by a tenant in chief, Lord Dacre of the South (d. 1533), which would have deprived the king of his wardship and primer seisin, was valid. An inquisition post mortem found the will to have been made fraudulently, to deprive the king of his wardship, and the ensuing argument began on the footing that, if the will was void for fraud, the 1490 statute would apply as on an intestacy. But a bolder suggestion was also advanced by the king's counsel, passing over the fraud and reverting to the other line of thought: it was against the very nature of land to be devisable by will, and so a will of the use of land was just as invalid as a will of the land itself. The judges were either coaxed or coerced by Henry VIII into accepting this surprising contention, and they managed to do so with apparent if strained unanimity.[42] The decision flew in the face of all previous learning,[43] and is perhaps the only case in English legal history in which the Crown, unable to push a bill through Parliament, managed to change the common law instead. It was drastic in its effect and accomplished far more than Parliament had rejected, since there was no longer any concession as to two thirds. And it applied to every will, without the need for a verdict finding fraud.

Within a few months the Commons were persuaded to assent to a new measure concerning uses. The reason why the Commons gave way in 1536 was not merely that the status quo had been undermined. If all wills were invalid in 1535, merely because it was against the nature of land to pass by will, it followed that wills had always been invalid, and that any title dependent on a devise by will was also invalid. The decision

[40] 'Replication of a Serjeant at Law' (*c*. 1531) ibid. 125–6. This was refuted (probably by St German: p. 115, ante) on the footing that uses merely prevented incidents from falling due and did not deprive lords of any vested right.

[41] Audley's reading (1526) B. & M. 118–19. He became a serjeant in 1531. See also the anonymous reading of *c*. 1533, ibid. 119 at 120.

[42] *Re Lord Dacre of the South* (1535) ibid. 127; *OHLE*, VI, pp. 669–72. According to Spelman J, the initial division of judicial opinion was 5 against 5, but Port J mumbled and was counted on the wrong side; the resulting 'minority' were later persuaded to give way to the 'majority' view by the king's promise of 'good thanks'.

[43] When making the 1490 statute, Parliament itself had assumed that wills of the use were valid.

must have thrown into doubt a great many titles throughout the country.[44] Something had to be done about this. A telling clause in the 1536 bill provided that wills of persons dying before 1536 should be accounted as valid and effectual as they had been until recent decisions had brought their validity into doubt.[45] Though the case was not mentioned in words, this obviously alluded to *Lord Dacre's Case,* and the effect was to reverse it as to the past. This was the inducement which persuaded the Commons to accept without demur the sweeping legislative change which was to govern thenceforth. Far from being 'forced upon an extremely unwilling parliament by an extremely strong-willed king',[46] the statute itself – with this vital proviso – had become urgently needed.

The Statutes of Uses (1536) and Wills (1540)

The Statute of Uses (1536) carried the king's policies to the extreme of abolishing outright the power to devise for the future. This it achieved, without actually mentioning wills, by the neat statutory fiction called 'executing the use'. Local custom apart,[47] wills had only been effective where the legal title was vested in feoffees to uses, and therefore if uses were extirpated there could be no wills. But a simple abolition of uses would have been absurd, because its effect would have been that most of the land in England would have become beneficially vested in the lawyers and others who happened to be acting as feoffees, their consciences wiped clean by statute. The legal title had instead to be taken from those feoffees and given to the beneficiaries. The statute accordingly provided that where *A* was seised of property to the 'use, confidence, or trust' of *B*, *B* was thereafter to be deemed to be seised of the property 'to all intents, constructions, and purposes in the law, of and in such like estates as [he] had or shall have in use'.[48] Thus if *A* had been enfeoffed by *X* to the use of *B,* with livery of seisin, the statute effected a notional or fictional further livery of seisin from *A* to *B.* The cestui que use, *B*, would have the legal estate reunited with the use, and the feoffee (*A*) would be merely a channel through which the seisin passed in an instant of time to *B*. A similar fictional livery of seisin occurred if *A* covenanted to stand seised to the use of *B*, or bargained and sold the land to *B* (in which case there was an implied use).[49] The purpose and effect of the statute, in executing the use, was that the beneficial owner of land would always die seised, so that his last will would be ineffective at common law and the feudal incidents would attach on the descent to his heir. The common-law position was in that

[44] Serjeant Mountague, arguing the case for the Dacre family, said 'it would be a great mischief to change the law now, for many inheritances in the realm depend today on uses, so that there would be much confusion if [wills were treated as void]': B. & M. 130.

[45] Ibid. 134 (see s. 9).

[46] F. W. Maitland, *Equity* (1909), p. 35. The statement is true if *Lord Dacre's Case* is seen as the force exerted on Parliament. But the real story of that case was unknown in Maitland's time.

[47] The statute did not affect wills of town properties under local burgage customs, since they did not depend on uses; but these did not yield feudal incidents.

[48] Stat. 27 Hen. VIII, c. 10 (extracts in B. & M. 132).

[49] For the latter effect see p. 277, post. More strangely, if *A* conveyed land to *B* without consideration and without saying 'to the use of *B*', nothing passed at all, because the resulting use in favour of *A* was executed by the statute and the seisin which *A* delivered to *B* immediately rebounded on *A*.

respect so completely restored that the Crown regained its prerogative right of primer seisin in addition to wardship and relief.

Financially, the statute was a tremendous success. And as a piece of legal draftsmanship it was greatly admired by later generations. Francis Bacon called it the 'most perfectly and exactly conceived and penned of any law in the book'.[50] Yet, at the time of its passing, it aroused much popular opposition. Not only did it restore feudal incidents, but it imposed compulsory primogeniture on a society which had accustomed itself to wills; moreover it did so even for socage tenants, who were of little interest for revenue purposes, and not just for tenants by knight-service. The duke of Norfolk soon pronounced it the worst act ever made,[51] and it was one of the statutes attacked at the time of the Pilgrimage of Grace in 1536. Robert Aske, a lawyer prominent in that protest, threatened that if landowners were not allowed to leave part of their lands by will, so that they could pay their debts and provide for their children's marriages, lawyers would seek out loopholes in the legislation.[52] The king loftily told the protesters that the statute did not concern them, as 'base commons'.[53] But this time it was the king who misjudged the situation.

Within four years, the government had in effect accepted the audacious demand and fallen back onto the one-third compromise proposed in 1529. The Statute of Wills (1540) conferred for the first time the legal power to dispose of freeholds by will, save that tenants by knight-service had to leave at least one third to descend.[54] The preamble to the statute referred to the king's 'grace, goodness, and liberality' towards his loving subjects; but the fulsome wording disguised a major political retreat. On the face of it, this seems puzzling. The more serious petitions of the pilgrims of 1536, with respect to religion, had been resolutely denied. But their legal threat struck home, and the lawyer's pen proved mightier than mere wails of protest. By 1540 the government had reason enough to fear that conveyancers were on the verge of finding the loophole which Aske had threatened,[55] and so by an adroit manoeuvre changed the ground rules. The choice for the Crown was one third or nothing.

The Statute of Enrolments (1536)

The Statute of Uses introduced by a side-wind a second way of conveying a legal estate in possession. Since the thirteenth century, seisin had been transferable without reference to the feudal lord, but the ceremony of transfer required physical presence on the land and a symbolic delivery, such as handing over a clod of earth. The constructive

[50] Reading in Gray's Inn (1600), printed as *The Learned Reading of Francis Bacon* (1642), p. 25.

[51] M. H. Dodds and R. Dodds, *The Pilgrimage of Grace* (1915), I, p. 266.

[52] 5 EHR at pp. 563, 565; D. S. Berkowitz, *Humanist Scholarship and Public Order* (1984), pp. 228–9, 232–3. The main brunt of the protest was religious. Aske, a barrister of Gray's Inn, was executed in 1537.

[53] Dodds and Dodds, *Pilgrimage of Grace,* p. 137.

[54] Stat. 32 Hen. VIII, c. 1 (B. & M. 137). The Statute of Uses continued to prevent the use being left by will. The Statute of Wills required a Statute of Explanation in 1542: 34 & 35 Hen. VIII, c. 5 (extracts in B. & M. 139–41); P. Vines, 3 AJLH 113.

[55] Some Crown lawyers were sent to the Tower in 1540 for advising Sir John Shelton (d. 1539) on ways around the Statute of Uses, and their scheme had to be annulled by statute (33 Hen. VIII, c. 26). For the devices contemplated see B. & M. 135–7; 94 SS *203*.

transfer of seisin which occurred when a use was executed by the statute opened up a way of dispensing with this inconvenience. Since any contract to sell land raised an implied use in favour of the purchaser, the statute alone would have produced the result that as soon as *A* contracted to sell land to *B* the implied use would be executed in *B* and the seisin transferred by operation of law. This could not be allowed to happen automatically, because simultaneous contract and conveyance would have been highly inconvenient in practice. An interval was necessary for perusing the title, preparing appropriate documents, and paying over the purchase money. It was therefore enacted by the same parliament that a bargain and sale should not pass an inheritance or freehold 'except the same bargain and sale be made by writing indented [and] sealed, and enrolled in one of the king's courts of record at Westminster'.[56] Upon enrolment, but not otherwise, the Statute of Uses operated to transfer the seisin. The effect of this was that, from 1536, the 'bargain and sale enrolled' could be used to convey legal title as an occasional alternative to livery of seisin on the land.

The End of Fiscal Feudalism

Even after the retreat of 1540, the royal revenue from fiscal feudalism was substantial.[57] In 1540 the Court of Wards was set up, under the presidency of the master of the king's wards.[58] Its purpose was to supervise the collection of the feudal revenues of the Crown and to settle incidental questions of law, and it enjoyed a thriving jurisdiction for a century. Yet the policy of fiscal feudalism came under constant criticism. It was suggested that, if the Crown was helping itself to the income of wards, it ought to discharge its educational duties towards them. One Elizabethan master of the wards went so far as to plan a new university for this purpose, with a curriculum suitable for gentlemen, but nothing came of it. It was also urged, under both Elizabeth I and James I, that Crown and people alike would benefit if the irregular burdens imposed by fiscal feudalism were replaced by annual composition payments or other more rational forms of taxation. This was not achieved either. But a more drastic solution was effected by resolutions of the Long Parliament in 1645, confirmed by a statute of 1656, and this statute was one of the few pieces of Cromwellian legislation to be continued at the Restoration. Tenure by knight-service, and all its incidents, was completely abolished.[59] Fiscal feudalism was no more. Public revenue was thereafter raised by other methods, designed to spread the burden more widely: excise duty, house tax (measured by the number of hearths or windows), and in due course purchase tax, income tax, inheritance tax, capital transfer tax, value added tax, and so on. Mesne lords no longer had any reason to maintain their claims to seignories, except where manors were preserved as units, and so the feudal system was finally reduced to little more than abstract theory. Most

[56] Statute of Enrolments 1536 (27 Hen. VIII, c. 16); B. & M. 135. See J. M. Kaye, 104 LQR 617.

[57] It was not vast. It averaged *c.* £14,000 a year temp. Eliz. I, barely enough to cover the interest on the queen's foreign loans: J. Hurstfield, 8 *Economic Hist. Rev.* (new series) 53. Much of it was diverted into the pockets of ministers.

[58] Stat. 32 Hen. VIII, c. 45; H. E. Bell, *The Court of Wards and Liveries* (1953); *OHLE*, VI, pp. 229–31.

[59] Military Tenures Abolition Act 1660 (12 Car. II, c. 24). The onerous incidents of grant serjeanty were also abolished.

English landowners today hold their lands of the Crown by free and common socage,[60] the only incident of which is the bare duty of fealty, never demanded.

The story of uses has been told here as a coda to the history of feudal tenure. But the Statutes of Uses and Wills incidentally wrought changes in jurisprudence which went far beyond the effective restoration of lost revenue. Although the abolition of knight-service and onerous feudal incidents in the 1640s did away with the need for most of the law which the statutes had revived, the side-effects of the legislation on conveyancing and settlements lasted for three centuries and more. Those effects will be considered in a subsequent chapter.

Further Reading

Pollock & Maitland, II, pp. 228–39
Holdsworth, *HEL*, IV, pp. 407–80
Milsom, *HFCL*, pp. 200–22
J. L. Barton, 'The Medieval Use' (1965) 81 LQR 562–77
E. W. Ives, 'The Genesis of the Statute of Uses' (1967) 82 EHR 673–97
J. M. W. Bean, *The Decline of English Feudalism* (1968), chs. 3–6
R. H. Helmholz, 'The Early Enforcement of Uses' (1979) 79 *Columbia Law Rev.* 1503–13 (repr. in *Canon Law and the Law of England,* pp. 341–53); 'Trusts in the Ecclesiastical Courts 1300–1640' in *Trust and Treuhand* (R. H. Helmholz and R. Zimmermann ed., 19 CSC, 1998), pp.153–72
J. A. Guy, *Christopher St German on Chancery and Statute* (SS Supp. Ser. 6, 1985), pp. 75–86, 103–5, 113–14
S. W. DeVine, 'Ecclesiastical Antecedents to Secular Jurisdiction over the Feoffment to the Uses to be Declared in Testamentary Instructions' (1986) 30 AJLH 295–320
R. B. Palmer, 'Uses' (1993) in *ELABD*, pp. 110–32
J. Biancalana, 'Medieval Uses' in Trust and Treuhand (ante), pp. 111–52; 'Thirteenth-Century *Custodia*' (2001) 22 JLH 14–44
J. H. Baker, 'Uses, Wills and Fiscal Feudalism' [1483–1558] (2003) in *OHLE*, VI, pp. 653–86
N. G. Jones, 'The Authority of Parliament and the Scope of the Statute of Uses' in *Law and Authority* (2016), pp. 13–32

[60] The common law presumed, in the absence of evidence, a tenure in chief by knight-service: 94 SS *195* n. 1. The presumption now is of a tenure in chief by socage.

15

Real Property: Inheritance and Estates

We have seen how feudal tenure began as a contractual relationship whereby a lord rewarded a vassal with land, and how the tenant's interest subsequently evolved into a property right secured by the common law, subject to the lord's right to services and incidents. We have also pursued the history of the lord's rights down to their virtual abolition in 1645. Now we must go back to the beginning again, in order to examine more closely the changing character of the tenant's interest, particularly in terms of its duration.

The starting point is that, once a feudal contract was entered into, neither the lord nor the tenant owned the land absolutely. Each party had expectations of the other which the common law recognized and enforced: the lord was seised 'in service', and the tenant was seised 'in his demesne'. In purely feudal terms those respective interests lasted for life: the tenant became his lord's man when he took the oath of homage or fealty and ceased to be so when he or his lord died.[1] This lifelong status, in the case of a free man, was called freehold. But we have seen that the common law before 1200 also recognized a more extensive kind of interest in tenants whose heirs had a right to succeed them in their holdings. Indeed, the regulation of relief in Henry I's Coronation Edict shows that succession by heirs was already common in 1100.[2] So common was it, at all levels of tenure, that the word 'fee' became synonymous with this inheritable kind of tenancy. When a tenant died 'seised in his demesne as of fee', his heir was entitled to succeed. Where a tenant was seised only 'as of freehold' (for life), the inheritable fee remained in the lord, subject to the tenancy. In the latter case, therefore, the right to be tenant in possession was divided temporally: the tenant for life was presently seised in demesne and so remained until his death, whereupon the lord became seised in demesne. The notion that the right to seisin could be divided up on a time scale into present and future interests, and into interests of varying duration, was expressed by thirteenth-century lawyers in terms of the tenant's 'estate', a French word derived from *status*.[3] The purpose of this chapter will be to examine the development of the law relating to hereditary and life estates, the various species of which are shown in Table C, and that of the next chapter to show how such estates were used in planning property arrangements for families.

A hereditary fee was created when land was granted to a tenant on the footing that his heirs would succeed him, and by the 1130s it was common to insert explicit words

[1] A tenant who outlived his lord could nevertheless remain in seisin, because the original lord's warranty bound his heir.

[2] See p. 260, ante.

[3] Cf. *Walsingham's Case* (1573) 2 Plowd. 547 at 555 (tr. 'An estate in the land is a time in the land, or land for a time'). The word originally referred to the tenant's personal condition: T. F. T. Plucknett, 14 *Cornell Law Qly* at 269.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

of inheritance in charters evidencing grants. The earliest forms merely characterized the tenancy as hereditary in nature,[4] but by the thirteenth century it had become usual to mention heirs – 'to *A* and his heirs' – and the final formula, which remained in use until 1925, was 'to *A* and his heirs for ever'. These formulations did not, however, convey exactly what such words were thought to mean. The original understanding was not that the lord was conferring a perpetual form of property on the human tenant – words of perpetuity were at first used only in grants to the immortal Church – but rather that he was undertaking, for himself and his own heirs, an obligation to receive the homage of the tenant's heir (and the heir's heirs in turn) so that they would become seised.[5] Even when this obligation came to be enforced by the common law, the resulting right of inheritance need not have required any differentiation of estates in land beyond present and future interests. If the right of the heir had been perceived simply as a right to succeed to his ancestor's land and become the lord's sworn man for life, then a grant to *A* and his heirs would have been understood as creating successive life tenancies in *A* and his next heir or heirs – or perhaps an infinite succession of life tenancies through each generation of heirs. But this did not become the common law. By the thirteenth century, *A* was seen as having a more perpetual kind of ownership which he could transfer to others for ever, and thereby bar his own prospective heirs from inheriting. It is therefore necessary to begin by considering the legal effects of alienation, and how it affected the concept of inheritance.

Alienation

Alienation is the transfer of land from one person to another, and it is natural to think of property rights as including an unfettered power to alienate what is owned. But there was no reason inherent in feudalism why a tenant of land should have power to alienate what he held of a lord, because the lord had more right than the tenant to decide who should enter his fee. It would have run counter to the spirit of the feudal bond to allow a tenant unilaterally to substitute someone else in his place; the grantee would be a stranger to the lord, might be unsuitable, and could not become his tenant without being received as his man. Yet the possibility of alienation by substitution was never denied. It was always permissible for the tenant to assign his interest with the lord's consent, for which he might charge a fine.[6] But alienation did not invariably require the lord's consent. One way of removing the need for consent was by prior grant from the lord: that is, by a grant 'to *A*, his heirs, *and assigns*'.[7] The lord was then obliged to accept *A*'s grantees in the same way as he was obliged to accept *A*'s heirs. There was once a view, reflected in *Bracton,* that a grant 'to *A*, his heirs, assigns, and *legatees*' would similarly oblige the lord to accept someone designated in *A*'s will; but elsewhere in *Bracton* this is rejected, and it did not become law. The Anglo-Saxons had allowed land to be left by

[4] Early 12th-century charters say 'by hereditary right', 'heritably', or 'in fee and inheritance'.
[5] See Milsom, *HFCL*, pp. 105–7, 166–7. [6] See p. 259, ante.
[7] Some called this 'fee pure', more absolute than fee simple, because the word 'assigns' was thought to prevent it from coming to an end when the grantee's heirs died out: B. & M. 51, 57; Y.B. 21 & 22 Edw. I (RS), p. 365. But Bereford CJ held that 'assigns' had no force: Y.B. 33–5 Edw. I (RS), p. 362.

will, but the practice had been frowned upon in the 1180s as open to abuse by undue influence, and soon afterwards it collapsed under the logic of the common law.[8]

Assignment of the tenant's interest, or alienation by 'substitution', was not in practice common before the statute *Quia emptores* 1290, except at the level of unfree tenures.[9] By far the more usual device was for the alienation to be effected by subinfeudation. In that case the tenure between the alienor and his lord remained intact, but the alienee became the tenant in demesne and the alienor became his lord. In the twelfth century, seignorial consent or confirmation was often sought for grants of this nature, though it is not clear how far it was thought to be necessary, and by the time *Bracton* was written it was not. The lord's right to the services due from his tenant was not impaired by subinfeudation because, in the event of non-performance, the lord could distrain on the demesne.[10] At any rate, the tenant's interest was alienable freely by the mid-thirteenth century:[11] until *Quia emptores* by subinfeudation, and thereafter by substitution without fine.

The alienation of a seignory was affected by the same considerations: the privity of the tenurial bond was mutual, and so a lord could not by alienation impose a different lord on his tenant without the latter's submission. It was therefore requisite to the fully effective alienation of a seignory that the tenant should accept the new lord. This was called attornment, and it was effected either by words or conduct. However, there was no question of the tenant obstructing, or seeking compensation for, his lord's alienations. Although the lord could not force a tenant to transfer his homage to an enemy, he could force him to perform the services for a new lord, and by the thirteenth century that was enough to give the new lord seisin. Even after *Quia emptores,* tenants for life (or other particular tenants) had to attorn on the grant of a remainder or reversion to render it fully effective. The need for attornment was not abolished until 1705.[12]

Effects of Alienating the Fee

The tenant's right to dispose of his interest without the lord's consent raised a legal question in relation to the inheritable character of the fee. If a grant to a tenant and his heirs was understood merely as conferring life interests on one heir after another, each interest beginning with a new homage, it might be deduced that no tenant could alienate for a period exceeding his own life. Had that become law, the first grantor of a fee would have had the power to tie the land to the grantee's family until the end of time,

[8] Pollock & Maitland, II, pp. 326–9. A constitution of the 1180s prohibited death-bed wills. But the assize of mort d'ancestor had made such a measure unnecessary; the heir's right was paramount.

[9] For the statute see p. 163, ante. For a reason why substitution was rare see Milsom, *Legal Framework of English Feudalism*, p. 111; *HFCL*, p. 111. But for reasons why it was sometimes chosen see J. Hudson, *Land, Law and Lordship* (1994), pp. 209–11.

[10] See p. 257, ante. Magna Carta (1217), cl. 36; (1225), c. 32, provided that free men should not give or sell land without retaining sufficient to perform their services. This was aimed at grants to religious houses, which could not always be distrained: Milsom, *Legal Framework*, p. 119.

[11] Except for tenants in chief: B. & M. 7. Ecclesiastical bodies were restrained by canon law from alienating in fee; but they could grant for life or lives.

[12] Stat. 4 & 5 Ann., c. 3, s. 9. It remained necessary, of course, to give notice to the tenant.

or at least until the end of the family. Freedom of alienation would have stultified itself, because the first grant to a person and his heirs would have precluded any further grant of the same land to another person and his heirs, unless and until the heirs of the original grantee died out, which might never happen. Could any human disposition be allowed such eternal force? Could freedom of alienation include the freedom to prevent future alienation?

In the twelfth century no one asked the questions in those terms. But the dynastic instinct was strong, and it was not thought right that a man should be free wholly to disinherit his own heir by alienation. Manorial customs surviving into the next century reflect those earlier qualms, and the customs endured in manors because of the reality that unfree families were expected to stay put. In some manors the tenant could not indeed alienate beyond his own lifetime; elsewhere he could do so only if his heir consented; and in other places the heir had the right to buy back alienated land provided he paid its full value.[13] The situation with respect to free tenants is discussed in *Glanvill* (*c.* 1190), where a distinction is drawn between a man's acquisitions and his patrimony. What he had himself acquired he could alienate, provided he did not completely cut off his own issue (children and descendants); but what he had inherited he could alienate only in special circumstances, and even then he had to leave a reasonable share to the heir.[14] This approach, if pursued inflexibly, would merely have postponed the perpetuity; a single descent would have turned the land into inalienable patrimony. In any case, an heir did not necessarily suffer economic loss if his ancestor had subinfeudated for valuable services; instead of land he inherited the services, but the value might be the same. By the early thirteenth century, the old customary restrictions had – except at the manorial level – been abandoned. If land was given to *A* and his heirs, *A* received an inheritable fee which he could alienate in its entirety to *B* and *B*'s heirs.

The logic was reinforced by the concept of warranty, the guarantee of title made by a feoffor on behalf of himself and his heirs.[15] Around 1200 it became accepted that a feoffor's obligation to warrant the title of the feoffee and his heirs descended upon the feoffor's own heirs, so that the heirs were barred from reclaiming alienated land for themselves. But this doctrine presupposed that the feoffor's heirs were not seen as having a vested interest. The author of *Bracton* appreciated this point, and treated it as a substantive principle that the words 'and his heirs' in a grant gave no interest to individual heirs but merely defined as inheritable the character of the interest granted.[16] It would have been clearer if the 'and his heirs' formula had never been introduced, but it was held to mean the same as the word 'heritably' which had been in use a century earlier. Now it was expounded as a principle of common law that the heir took 'by descent' and not 'by purchase', which meant that he took his land by right of succession and not by virtue of a direct grant to himself. No one could be an heir except to an

[13] See G. C. Homans, *English Villagers of the 13th Century* (1941), pp. 196–9. The custom of pre-emption was more widespread in France, where it was called *retrait lignager.*

[14] *Glanvill*, vii. 1 (p. 69). The distinction survived in the Northampton custom that a man could only devise by will what he had purchased: 98 SS 535.

[15] See pp. 245, 248, ante.

[16] *Bracton*, II, pp. 66, 68. This also explained (p. 66) why the words 'his heirs' extended to the heirs of heirs, and so on.

ancestor; until the ancestor's death, there could only be an heir apparent.[17] When someone died seised, his heir had an absolute right of succession and neither the ancestor's last will nor the lord's disapproval could disinherit him. But if the ancestor had alienated in fee during his lifetime, the erstwhile heir apparent had lost his prospect of inheritance and had no further legal standing. The contemporary explanation was that the identity of an heir could not be known until the ancestor's death. An heir apparent might die; an heir presumptive might be displaced by the birth of a brother. A man could grant an inheritance, but only God could make an heir: *solus Deus heredem facere potest.*[18] And since an heir apparent or presumptive had merely an expectation, not a vested estate, no ascertained individual was cut off by an alienation inter vivos. The conceptual change was reflected in conveyancing practice. In the eleventh century a grantor in fee often had his heirs apparent join in the grant by name, but in the thirteenth century the grantor gave a warranty on behalf of his heirs, in generic terms, and before long such a warranty was implied whether or not the words were actually used.

The tenant who was granted land 'unto himself and his heirs for ever' thus had, under the thirteenth-century common law, something entirely different from a life estate. It is not improper to call it ownership. Since its continuity was no longer restrained by the claims of his heirs or his lord, what he owned was an estate of infinite duration. During his lifetime he could, if he wished, alienate it for ever, and his grantees would remain entitled even if his own heirs later died out. If, however, he died seised, the estate did not end but descended automatically to his heir.[19] This estate was called 'fee simple', and it was the totality of ownership out of which all lesser estates were carved. It was as absolute as fee pure, without the need to specify assigns, and it was as sempiternal and indestructible as the land itself, subject neither to creation nor annihilation by mortal men. The fee simple in every plot of land in England had always to be vested in someone, whether or not there was a lesser estate in possession. If the tenant died without heirs it would go to the lord by escheat, and if it could not be claimed by any subject it would be in the Crown. All that owners could do with it was to pass it from one to another or carve it up.

Nature of the Tenancy for Life

The life estate was obviously of shorter duration than the fee simple, but it was also different in nature. It was tied to the life span of the original grantee and could not be extended by alienation to someone who outlived him. Were it otherwise, the land might in possibility be kept permanently from reverting to the grantor by a series of alienations to younger men. It was therefore axiomatic that, although a life tenant was free to alienate the whole of his interest, that interest was always determined by his death, or the death of the person for whose life the estate was originally given.

[17] Or an heir presumptive: e.g. a female who might be overtaken as heir by a subsequently born male.

[18] *Glanvill,* vii. 1 (p. 71); cf. *Bracton*, II, p. 184.

[19] Descent vested the land automatically in the heir until 1897, when it was enacted that only the beneficial interest should descend, the legal title vesting instead in the personal representatives of the deceased: Land Transfer Act 1897 (60 & 61 Vict., c. 65).

The estate which arises when a life estate is acquired from another person is still known by its French name as an estate *pur auter vie*. The tenant *pur auter vie* had an estate which lasted until some other person (the *cestui que vie*) died. A problem insoluble by logic arose if the tenant *pur auter vie* died before *cestui que vie*: the estate could not pass to his heirs by descent, because it was not a fee; it did not escheat, because *cestui que vie* was still alive; and it could not be disposed of by will or by administration, because it was a freehold and not a chattel.[20] After early doubts, the estate was conceded, in default of any logical rule, to the first occupant: *occupanti ceditur*. By 1600, however, the grantor of a life estate was allowed to specify in advance who such successors were to be, as by saying 'to *A* and his heirs for the life of *B*': in that case, if *A* predeceased *B, A*'s heir would have the estate, not by descent but as 'special occupant'. The anarchic situation where there was no special occupant was not ended until 1677, when the Statute of Frauds conferred on tenants *pur auter vie* the power to devise their estate by will, and provided for the estate of an intestate tenant *pur auter vie* to be dealt with by his personal representatives in the same way as a lease for years.[21]

An obvious case of tenancy *pur auter vie* was where a life estate was assigned or granted by the original life tenant to another. But an equally common case was the lease for lives – a lease to one person for the lives of several others – where the estate was made *pur auter vie* from its inception and not derived out of another life estate. Such leases were used as an alternative to leases for years where it was desired to create an uninheritable freehold, as in the case of leases by ecclesiastical corporations and colleges which were only permitted to make short leases. The plurality of lives was a safeguard against the effect of premature death, and renewal was effected by the addition of new lives.

Because the tenant for life was a freehold tenant, with seisin, he was given the protection of the real actions. Nevertheless, by the thirteenth century his interest was coming to be seen as distinctly inferior to that of the tenant in fee, and closer in reality to that of a lessee for years. He was indeed called a 'lessee', and he was not allowed to abuse his position by injuring or discontinuing the inheritance. He was made liable for injuring the inheritance ('waste') in the same way as a tenant for years; after 1278 either kind of tenancy could be forfeited for deliberate waste, and the offending tenant was penalized with treble damages.[22] Discontinuance occurred when a tenant for life made a wrongful feoffment: the feoffee became seised and acquired a fee simple, albeit precariously, and the reversioner's estate was thereby 'discontinued' – that is, converted into a right of action to recover the fee. At common law the reversioner could only 'recontinue' the alienated tenement, by bringing his action, once the tenant for life had died; but after 1285 there was a remedy by writ of entry *in consimili casu* during the tenant's lifetime.

The later history of the tenancy for life reflected a divergence between the perception of a tenancy *pur auter vie* or for lives as being akin to a lease for years, and of a tenancy for the tenant's own life under a family settlement as more akin to full ownership. We have seen how tenants *pur auter vie* were in some respects assimilated to lessees for years in 1677. Much later, in 1925, the commercial lease for lives was actually converted

[20] According to *Hengham* and *Britton.* But *Bracton* and *Fleta* treated it as a chattel.

[21] Stat. 29 Car. II, c. 3, s. 12.

[22] Stat. Gloucester (1278), c. 5; p. 584, post (specimen writ). For the action of waste see S. S. Walker, in *Legal Records and the Historian*, pp. 185–206.

into a chattel interest by the provision that it should be treated as a lease for ninety years.[23] On the other hand, as will be seen in the next chapter, the tenant for life under a settlement came to have an entirely different kind of interest, and to be given powers both to alienate or encumber the fee and to commit waste.[24]

The Law of Inheritance

The existence of inheritance as a social custom, or even as a right guaranteed by a lord's grant, did not in itself necessitate inflexible rules as to who should be heir. The common understanding of inheritance was that a tenant should be succeeded by close members of his family, but which member exactly it should be was determined by various competing factors. There had once been an element of discretion in the choice of heir,[25] but there were also customary default rules. At the time of the Norman conquest there were strong traditions of equal partition between sons. There was also a widespread tradition, especially where partibility was ruled out, for the ancestor to nominate his own heirs.[26] This is evident in the descent of the English Crown: for it was on this basis that William I, William II, Henry I, Stephen, and John, all displaced nearer relatives who would have inherited under the later common-law rules. Customs guiding lords' courts were not as inflexible as law. At the manorial level, where old ways died hardest, we find that as late as the fourteenth century a lord could – at the request of his tenants – replace one system by another.[27] Some divergent earlier traditions lived on as local customs, usually in relation to copyhold tenures, into relatively recent times. Coparcenary – equal division between sons – was common in East Anglia; it survived as a general custom in Wales until 1536, and in Kent, as a feature of 'gavelkind' tenure, until 1926. Ultimogeniture – inheritance by the last born – survived as the custom called 'borough English', which (despite its name) was prevalent in hundreds of rural manors until 1926.[28]

In the case of free tenants, local customs and value judgments gave way in the twelfth and thirteenth centuries to the certainty of the common law. Since the common law protected inheritance as a right, by means of the writs of right and assize of mort d'ancestor, it had to prescribe how heirs were identified. Becoming an heir was no longer a fact but a matter of legal metaphysics, the science of descent. The customs adopted by the king's court therefore had the status of rules of law: no longer mere guidance as to who should inherit, they indicated who *had* inherited.[29] A grantor (or lord) had no say in these rules. He could choose whether to use the words 'and his heirs', but he could not choose who those heirs would be; nor could anyone else. No doubt this was a major advance in

[23] Law of Property Act 1925 (15 & 16 Geo. V, c. 20), s. 149(6).

[24] See pp. 309, 314, post.

[25] See pp. 249–50, ante.

[26] As late as 1317 a lord granted to a manorial tenant that she could nominate a child other than the first-born as heir: M. Morgan, *The English Lands of the Abbey of Bec* (1946), p. 71.

[27] E.g., Homans, *English Villagers of the 13th Century*, p. 126 (ultimogeniture replaced by primogeniture, and vice versa).

[28] It took its name from the English quarter of Nottingham, where it operated. As a manorial custom see G. R. Corner, 2 *Proc. Suffolk Inst. Archeol.* 227; 6 *Sussex Arch. Soc.* 164. For other peasant inheritance customs see the bibliography on p. 297, post.

[29] This became equally true of local customs: if pleaded and proved as fact, they were applied by the king's courts as rules of law.

securing good order. The uncertainty of discretion could beget serious disputes over the choice of heir, of which the Battle of Hastings and the civil war between Stephen and Matilda[30] had been extreme examples. But ending such disputes was not the driving force behind the formulation of rules of descent. Rules were the inevitable consequence of treating inheritance as automatic.

The Canons of Descent

The principal canons of descent, as they came to be fixed by the common law, were as follows:

1. The parentelic scheme

Proximity of kinship for the purposes of succession was measured according to a 'parentelic' calculus. The *parentela* of a deceased person comprised all living persons who traced their blood from him: that is to say, his issue. The search for the heir went successively through the *parentelae*, beginning with that of the deceased propositus himself, then that of his father, and so on. Each set of descendants had a better claim than those in the next degree of remoteness, so that lineal descendants of the deceased (his 'issue') were preferred to his collateral relatives, and brothers and sisters were preferred to uncles and aunts. Only if there were no surviving children, grandchildren, or more remote issue, did the law look to siblings, cousins, or other collaterals, for the heir. If collaterals were considered, those on the father's side were preferred to those on the mother's, in whatever degree.[31] Moreover, if the land had descended from the father's side, the mother's side was totally excluded, so that in the absence of heirs on the father's side the land would escheat. Similarly, if land descended through the mother, the father's side of the family was excluded by the same *jus recadentiae* ('right of return'); in this case the search for the heir went through the mother's line ascending, according to the above principles.

A second aspect of the parentelic scheme was that any deceased person was 'represented' by his own issue, however remote. Thus if *A* had an elder son *B* and a younger son *C*, and *B* died in *A*'s lifetime leaving a son *B1*, and then *A* died, *A*'s heir was *B1* and not *C*, because *B1* represented his father. This rule was not clear at the time of *Glanvill* – where it is said to be a vexed question (*magna juris dubitatio*) – and was established only after bitter struggles between grandchildren and their uncles; King John was such an uncle, and his accession to the throne in 1199 delayed complete acceptance of the representation principle until after *Bracton*. Before the rule was settled, a vestige of the older feudal world lingered on: whoever succeeded in getting in could stay in.[32]

[30] See p. 250 n. 41, ante. The international element rendered these insoluble by domestic means; but there were parallels at a lower level.

[31] *Clere v. Brooke* (1573) 2 Plowd. 442. In the 13th century there was a doctrine of alternation from side to side in each degree. Even in the 18th century it was unsettled whether the preference for the 'male line ascending' applied to different parentelic degrees: e.g. whether the brother of the paternal grandmother was preferred to the brother of the paternal grandfather's mother: see Bl. Comm., II, pp. 238–40 (Blackstone for the latter, Hale for the former).

[32] *Glanvill,* vii. 3 (pp. 77–8).

2. Males preferred to females in the same degree

When it was generally taught that male superiority was ordained by God, and when some men at least believed that they were more capable of managing affairs than women,[33] it is hardly surprising that land ownership was arranged on a patriarchal principle. The usual expectation was that family land would descend in the male line, together with the family name, and that when women owned land they would carry the title to men by marriage and motherhood. This was reflected in the legal rule that males were preferred for inheritance purposes to females of the same degree. Thus a brother was always preferred as heir to his elder sisters.[34] But the common law did not exclude female inheritance, because it gave greater weight to the parentelic system than to the exclusion of females. Women were entitled to inherit if there were no males in the same degree. Thus, if a deceased tenant left no sons, his daughters were preferred to his brother because they were lineal descendants within his own *parentela.*

3. Primogeniture and coparcenary

The most usual custom of succession before the Norman Conquest was coparcenary, or inheritance by all the sons or daughters of the deceased. The custom was still recognized in the twelfth century, when we hear of coparceners taking as one heir but holding their shares 'in parage'. This meant that the eldest only was tenant *quoad* the lord, taking the castle or principal mansion house, and his brothers held their shares of him by a special form of tenure in which there were no services or incidents and the tenant was somehow a peer of his lord. The change to primogeniture – absolute inheritance by the firstborn to the exclusion of his brothers – started with military tenure, as also with the Crown and great offices of state, since the attendant duties were indivisible. It was facilitated by the precariousness of the younger brothers' holding in parage; they had no seisin which the law could protect, and after dropping first from legal notice they soon dropped from moral notice also. By the time of *Glanvill* (*c.* 1190) knights' fees had ceased to be partible and all went to the firstborn, but land held in socage was still partible if it had been so of old. During the next century primogeniture spread to most free tenures, and it enabled estates to be kept intact over the generations, whatever the form of tenure. It nevertheless remained far from universal at the manorial level before 1925.

Primogeniture seems to have been applied by the Normans to women as well as men, if they succeeded to baronies or knight's fees. This was changed by a 'statutum decretum' in the early twelfth century,[35] which provided that if there were no sons the daughters all inherited equally as parceners. That understanding became law, and remained so ever after, except in relation to impartible hereditaments such as baronies[36] or offices

[33] See Plowd. 444–5; B. & M. 526, per Plowden. For a contrary view in the 16th century see p. 499, post.

[34] The rule applied to the descent of the Crown until 2013: Succession to the Crown Act 2013 (c. 20). But it last operated in 1901, when Edward VII displaced his elder sister (Princess Victoria, mother of Kaiser Wilhelm II). It still applies to hereditary peerages granted in tail male.

[35] The *statutum* is mentioned in a charter of 1145 but its date is uncertain. See F. Stenton, *First Century of English Feudalism* (2nd edn, 1961), pp. 39–40; J. C. Holt, 35 TRHS (5th ser.) 9 et seq.; J. Hudson, *OHLE*, I, p. 353.

[36] When the holder of an earldom or barony died leaving several daughters but no sons, its fate was in the discretion of the king. Under later peerage law – concerned with the dignity rather than land – it goes

requiring personal service.[37] However, according to *Glanvill*, multiple female heirs held in parage, so that only one – the eldest (or her husband) – did homage and was responsible for the service.[38] The others held their shares, in a sense,[39] of the eldest. The reason was feudal, but as the incidents of tenure became more important than the service the loss of multiple wardships and marriages became unacceptable. Parage was therefore abandoned by the early thirteenth century,[40] so that sisters took equally and in parallel as coheirs. It was still uncertain whether they took as 'one heir', with survivorship as in the case of joint tenancy; but the settled law by the end of the century was that female parceners were considered as analogous to tenants in common, with undivided separate shares. If the parceners could not agree on a partition there was an action *de partitione facienda* to compel a fair division by the sheriff.[41]

4. Exclusion of collaterals of the half-blood

When an heir was sought among a person's issue, it mattered not whether the issue had been born of one marriage or another, because all the issue were descendants of the whole blood. Thus a son by a second marriage would be preferred to a daughter by the first. Moreover, half-sisters could be coparceners as heir to their father. If, however, a tenant died seised without issue, having a half-brother (that is, a brother by a different marriage) and a sister by the same parents, the brother could not inherit because he was not related by the whole blood, and so the sister was heir. If there was no brother or sister of the whole blood, the land would escheat. The reason for this artificial rule was the subject of much speculation and controversy until it was abolished in 1833.[42]

Provision for Spouses and New Families

These rules of inheritance lasted, with few alterations, until 1926, when inheritance – as a principle of succession to legal estates in land – was abolished.[43] Their prolonged durability may be attributed less to their intrinsic merit than to the freedom with which, in later times, they could be modified. The common law ensured that, unless land was disposed of or settled inter vivos, it would benefit a family only in a lineal, dynastic

into 'abeyance' until all but one line of descent fails, and then the abeyance can be terminated. In 1989 the barony of Grey of Codnor was called out of abeyance after 493 years.

[37] Partition of offices could prove troublesome. In 1780 George III allowed the office of lord great chamberlain to be partitioned between 2 coheirs; but the consequence is that, while the marquess of Cholmondeley has a half share, several persons now hold 1/100th shares in the office.

[38] *Glanvill*, vii. 3 (p. 76). Hudson (*OHLE*, II, p. 353) questions whether this is what normally happened.

[39] According to *Glanvill,* there was no homage, and no incidents of tenure, until the 3rd degree of descent. See Milsom, *SHCL*, pp. 231–60. Cf. the analogy of *maritagium*, p. 291, post.

[40] Its end was supposedly settled by the 'Statute' of Ireland *De coheredibus* 1236, which was not a statute but a writ explaining the law for the justices in Ireland. It was doubtless already clear law in England.

[41] The action of partition was extended to joint tenants and tenants in common in 1539: Stat. 31 Hen. VIII, c. 1.

[42] Inheritance Act 1833 (3 & 4 Will. IV, c. 106). The rule did not apply if the elder brother predeceased the father, because the half-brother then inherited as heir to the *father.* Nor did it apply in the case of an entail, because descent was then traced from the first donee and not from the deceased. For earlier uncertainties about the half-blood see Brand, 123 SS clxiv–clxvii.

[43] Administration of Estates Act 1925 (15 & 16 Geo. V, c. 23), s. 33(1). The principles for the devolution of land on intestacy were thereupon assimilated to those for personal property.

sense. Spouses, parents, younger sons, daughters having brothers, and illegitimate children, could not inherit on a landowner's death. The dynasty was nevertheless completely unprotected by the common law against disherison by a conveyance made during the owner's lifetime. Both drawbacks invited avoidance, and in practice inheritance according to the rules just outlined came to operate only as a default-mode of devolution when a tenant died seised in fee without having made any alternative provision.

The owner of land might attempt to circumvent the fixed laws of succession by making alternative arrangements in his lifetime. He could withdraw parcels of the patrimony to make gifts to members of his immediate family, especially on marriage; or he could attempt to tie up the family estates in such a way as to restrict the dispositive powers of his descendants. In deciding whether, and to what extent, to give effect to such arrangements, the law had to resolve the conflict between the interests of the living family in an extended sense and the dynastic instinct to preserve the unity of the patrimony in the male line. There was a similar tension between the social desirability of ensuring that land remained freely marketable and a paternalistic concern to restrain the rash prodigality of youthful heirs. The law had to hold some kind of balance between the living, the dead, and the unborn.

Dower

A widow was not her husband's heir, and so provision for her had to be made inter vivos. Husband and wife were accounted one person in law,[44] and grants from one to the other were generally void, but with one important exception. A husband could make a gift to his wife on the day they were married, at the church door, and this would take effect on the husband's death if she survived him. This was called 'dower', and under the supervision of the Church the endowment of wives at the church door became a regular feature of the marriage service. The lands[45] to be assigned as dower were nominated before the nuptials, after negotiation between the families. At the wedding ceremony, after the husband had given his wife the ring (saying, 'with this ring I thee wed'), he gave her tokens symbolizing dower, adding 'and with this dower I thee endow'. This symbolic livery gave a widow the right to an estate for life in the lands so nominated, an estate which the husband's heir was obliged to warrant.[46] Disputes about dower were frequent in the early royal courts, especially where there had been successive marriages. To protect the heir, the common law forbade the assignment of more than one third of the husband's lands as dower, and the heir could have the widow's allotted share reduced by a writ of admeasurement if there was any dispute. An alternative arrangement was for the husband to endow his wife generally of all his lands, without nominating any specific property. The widow was then entitled to claim a life estate in a reasonable

[44] See pp. 522–3, post.

[45] At one time dower of chattels or money was also possible: see e.g. *Beatrix, late queen of Germany v. Earl of Cornwall* (1274) 69 SS 59–64; 111 SS 21–7. It disappeared in the 14th century, and by 1406 a judge could deny that it was ever law. Dower of 'worldly goods' nevertheless lived on in the marriage service, and is still in the Book of Common Prayer. See *CPELH*, III, pp. 1361–79

[46] This was dower *ad hostium ecclesiae* (at the church door). There were other, but less common, varieties: dower *ex assensu patris*, dower *de la plus beale*, and customary dower. These are explained in late-medieval readings on Magna Carta, c. 7: 132 SS 20–90.

share of her husband's land, which the law fixed as the maximum possible, that is, one third.[47] In the time of *Glanvill* it was a third of the lands owned in fee by the husband at the time of the marriage, but the law soon allowed the widow a third share also of land acquired during the marriage. Under Magna Carta this entitlement to dower became an automatic right, independent of any agreement or words of endowment at the time of marriage, though it could be overridden by an express assignment of less.[48] Later in the thirteenth century the possibility of overriding the law was denied, so that a widow became entitled to reject specified dower and claim her common-law third. The assignment of specific dower had one advantage for the widow, in that she could enter upon it immediately, without wrangling; but it was replaced in practice by jointure.

Dower was an estate of freehold, a tenancy for life which the widow held of the husband's heir. But estates arising by operation of law have usually proved inconvenient, for people prefer to make their own arrangements. The widespread practice of vesting land in feoffees to uses made it far less common, because the Chancery did not recognize dower in respect of uses, and dower did not attach at law on the death of a joint feoffee. Widows had, nevertheless, to be provided for, and it became usual from the fourteenth century onwards to negotiate in a pre-nuptial agreement what the wife would have if she survived her husband; some specific land was then settled on the husband and wife jointly for the life of the survivor, so that a widow would have the land until her death. This was called 'jointure',[49] and it was often expressed to be in recompense for, or in satisfaction of, dower. The Statute of Uses 1536, by executing uses, would have revived common-law dower on a wide scale; but it was enacted that this should only avail wives who had no jointures, so that jointresses should not become entitled to dower as well.[50] The possibility of dower being claimed by a vendor's widow had always been an anxious consideration for purchasers, but the problem was aggravated after 1536 since the claim might turn on the legal efficacy of the jointure arrangements. Various devices to bar dower were therefore invented,[51] so that an unfettered title could be passed. The problems were ended by the Dower Act 1833, which empowered husbands to bar dower by will or by alienation inter vivos.[52] In 1925 dower itself was abolished in respect of husbands dying thereafter.

Curtesy

The man who married an heiress was in a different position. If he survived his wife, her land did not descend at once to her own heir, because during the marriage the husband had been seised of his wife's land and done homage for it to her lord. The husband's

[47] *Glanvill,* vi. 1–2 (p. 59). Custom might allow more: e.g. gavelkind gave the widow one half.

[48] Magna Carta (1217), cl. 7 (1225, c. 7). It was further enacted that the widow could stay in the principal house for 40 days (her 'quarantine'), while her dower was assigned. This gave little protection in the event of dispute.

[49] Cf. the earlier *maritagium* (p. 291, post), which usually came from the bride's father. Jointure came from the groom's side, and *maritagium* was replaced by a money portion from the bride's father.

[50] Stat. 27 Hen. VIII, c. 10, s. 4; B. & M. 134. A widow could refuse a jointure conveyed after marriage, and take her dower instead.

[51] Principally the final concord, a fictitious lawsuit in CP, as to which see pp. 302, 524, post.

[52] Stat. 3 & 4 Will. IV, c. 105.

seisin entitled him to remain tenant of his wife's land after her death, for the rest of his own life, displacing or postponing the lord's right to wardship of the heir. Unlike the tenant in dower, he did not hold it of the heir or need an action to recover it; he just stayed in. The widower in this case was called tenant *per legem Angliae* (by the law of England) or 'by the curtesy of England'. In fact the continuation of seisin by widowers was by no means peculiar to England, but English law was thought more 'courteous' (or generous) than others in that the estate was not terminated by remarriage. A mysterious prerequisite to tenancy by the curtesy was that a child of the marriage, capable of inheriting, should have been born; but it was not necessary that it should have survived the mother.[53]

Curtesy was abolished with respect to estates in fee simple in 1925, but it survived until 1997 as a doctrine of equity[54] in relation to entailed interests.

The Marriage-Gift and the Conditional Gift

The provision of *dos* at the time of marriage was universal throughout Europe and recognized by the Church. But the terminology was not uniform. To the common lawyer *dos* meant dower,[55] whilst in other systems it meant dowry: a gift to the wife, or to husband and wife, by the bride's parents or other relatives. In early medieval England dowry was called *maritagium* (marriage-gift), and *Glanvill* said that every free man could give a reasonable part of his land to a woman (or rather 'with a woman to her husband') at marriage, whether or not his heir consented.[56] It was a more generous arrangement than dower, in that the land was intended to descend to the children of the marriage, and their children, to set up the new family. Yet it was not thought appropriate to give an absolute fee, which might pass to collateral heirs or be given away. It was therefore effected without the normal tenurial arrangements which accompanied subinfeudation. Most commonly the gift would be 'in frank-marriage' (*in liberum maritagium*), in which case the donees held of the donor free of all services for three generations. Homage was not taken from the donee, because that would have given rise to a warranty availing collateral heirs on a failure of issue. Instead the donor retained seisin, so that he could take back the land if the new family failed. The donee's position was in consequence weak and unstable. Indeed, *Glanvill* called the arrangement 'a bare promise rather than a true gift'. After three descents, however, the third heir became liable to perform services and could insist on doing homage, thereby activating the warranty which would bar any reverter for want of issue. There was once again an ordinary fee simple. This three-generation principle was not spelt out in the charters of gift, but it apparently grew from twelfth-century custom and from a general understanding that

[53] Some said it had to be heard to 'shout and wail within four walls'. The reason given was that males were excluded from the birth chamber, and so proof would depend on hearing: Pollock & Maitland, II, p. 418 (citing a case of 1277). Later authorities established that evidence other than crying was admissible to prove a live birth. Cf. the similar rule requiring the birth of issue, whether or not it survived, in relation to marriage-gifts and conditional gifts: p. 293, post.

[54] Equity allowed curtesy of an entail in trust, though not dower.

[55] For dower see pp. 289–90, ante. In other jurisdictions words such as *dotalium* were used for dowry. All these terms were related to the Latin verb *dotare*, to endow.

[56] *Glanvill*, vii. 1 (p. 69).

the instability of the *maritagium* should cease once the new family was well established and the risk of a failure of heirs had become slight.

Similar family gifts were made to younger sons or brothers, or to women otherwise than on marriage, but in these cases the *maritagium* could not be used. There was instead a grant of the fee upon an express condition restricting inheritance to issue (descendants), and usually providing for a reversion to the donor (or a remainder over) on failure of issue. There was a particular reason for imposing such a condition if the gift was made to a second son,[57] namely that a grant in fee was liable to go awry because of the rule that the lord could not be heir. On his father's death, the second son donee held of his elder brother as lord, and if the second son then died without issue the elder brother could not be his heir; the land would therefore go a younger brother or a sister, or whoever was next in line, instead of returning to the main line of the family.[58] A conditional gift limited to issue prevented this. Homage was taken – the grant would otherwise be too insecure – but the condition achieved the same effect as the *maritagium* in excluding collateral heirs and providing for a reversion to the donor on failure of lineal heirs. The cut-down fee which resulted was called a fee tail (*feodum talliatum*). The typical form of words was 'to *H* and the heirs of his body begotten' or (as in frank-marriage) 'to *H* and his wife *W* and to the heirs of their two bodies begotten (or the heirs of *H* begotten on *W*)'. The words of inheritance, used to create a fee, were thus cut down by the addition of 'words of procreation' calculated to eliminate collaterals. In the thirteenth century, words of procreation and conditions of reverter were increasingly inserted into grants in frank-marriage as well, to reinforce or adjust the rules derived from custom.

Although conditional gifts became common, most were not made with long-term consequences in view, and to some lawyers of the thirteenth century it was unthinkable that a donor should by such means restrict the course of an inheritance indefinitely. If a man gave away a fee, he should not be able to restrain the donee and his heirs from alienating it in fee. Maitland thought this attitude came from a bias in favour of free alienation, Plucknett that it was a perverse combination of the logic concerning warranty with some Romanist learning in *Bracton* about conditions.[59] But the legal thinking is not easy to recapture, and it was unsettled before the 1280s. In 1258 there was an unsuccessful petition for legislative reform in the case of marriage-gifts on the grounds that conditions of reverter to prevent alienation had proved ineffective, though in what respect they had failed to work was not spelt out.[60] In the case of other conditional gifts, the dislike of restraints on alienation turned the legal construction of the words against the likely intention of donors. We have seen that the words 'and his heirs' in a grant did not vest anything in heirs apparent, and that a grantor could not restrict the class of heirs. Bearing in mind those principles, the words 'to *H* and the heirs of his body' could

[57] An analogous problem arose if the gift was made to the donor's second younger brother.

[58] See *Seintliz v. Aubri* (1286) B. & M. 26. *Glanvill*, vii. 1 (pp. 72–4) devoted considerable space to these questions (which 'frequently arise').

[59] The heirs apparent of the donee who alienated would be obliged to warrant the grant, since it took effect before they had inherited anything under it: *Bracton*, II, p. 68; Plucknett, *CHCL*, pp. 550–1; *Legislation of Edward I*, p. 130.

[60] Petition of the Barons 1258, c. 27 (B. & M. 44). The point was still contentious in 1272: Biancalana, *The Fee Tail*, p. 55. The petition may have referred to tacit as well as explicit conditions. In 1285 it was said that a condition of reverter was 'inherent' (implied) in all gifts in frank-marriage: Stat. *De donis*, B. & M. 52.

be taken to mean 'to *H* in fee once he has an heir apparent of his body' (a condition precedent) rather than 'to *H* in fee so long as he has issue capable of inheriting' (a condition subsequent). On this interpretation, the fee became alienable as soon as an 'heir' (that is, an heir apparent) was born.[61] A qualification of this view, found in *Bracton*, was that although the donee's estate turned into an alienable fee as soon as issue was born, an alienation would remain effective only so long as there were heirs in tail who could warrant the grant: that is, surviving issue of the original donee.[62] On either view, the donee could alienate after the birth of issue, but the doubt was whether the third-party grantee would have an absolute fee simple or what later lawyers called a base fee, which would end if and when the issue of the donee in tail failed.

The Bractonian view, in giving the donor in tail a reversion on failure of lineal issue of the donee, doubtless reflected some of the thinking behind gifts in tail, but it did not deal with the main intention, that tenants in tail ought not to deprive the lineal issue of their patrimony by alienation. This became a major issue in the 1280s. In 1281 a case was pleaded on the footing that the condition of a fee tail was fulfilled merely by the birth of issue, even if it did not survive.[63] Once children had been born to the donee, the fee became absolute, and so a subsequent alienation by the donee could not be upset by a failure of the donee's issue. Although no judgment was entered on the roll, the likelihood is that the plaintiff abandoned his suit when the judges intimated their acceptance of that position. This was probably a change from the previous orthodoxy. At any rate, it evidently caused consternation. If the law did not permit the condition of a gift in tail to take effect according to the intention, land might be alienated to strangers contrary to the spirit of a gift aimed at keeping it within the family. A remedy rapidly followed, in the form of the important statute *De donis conditionalibus* ('Of conditional gifts').[64]

The Statute *De Donis* 1285

The statute of 1285 was designed to protect the intentions of donors from being frustrated by artificial legal thinking. It ordained that in future when land was given to a man and wife and the heirs of their bodies, or to one person and the heirs of his body, or in frank-marriage, the 'will of the donor manifestly expressed in the terms of the gift (*forma doni*)' was to be observed.[65] The issue and the donor were given writs of 'formedon'[66] – a French word derived from *forma doni* – to protect their statutory

[61] *Deen v. Londonthorpe* (1284) B. & M. 47; *Hotot v. Chartres* (1285) ibid. 48 at 51, per Fishburn sjt; discussed by Brand, 123 SS xlvii–liii. In *Countess of Aumale v. Countess of Gloucester* (1276) B. & M. 44, it was stated that a *maritagium* could be alienated if the wife had borne a child capable of inheriting and still living.

[62] *Bracton*, II, pp. 68, 144. Cf. *Hotot v. Chartres* (1285) B. & M. 48 at 51, per Kelloe sjt ('Whenever the blood fails the reversion is good').

[63] *Delariver v. Spigurnel* (1281) B. & M. 46 (record only); McCauliff, 66 *Tulane Law Rev.* at p. 974; Biancalana, *The Fee Tail*, pp. 31–2. It gave rise to a complaint in the parliament at Acton Burnel in 1283, but the principle was followed in the cases of 1284–85 cited in n. 61, ante.

[64] Stat. Westminster II (1285), c. 1 (B. & M. 52–3). The statute recited the mischief that donees could alienate once issue had been born. Maitland and others assumed that this mischief was of long standing, but it probably arose from the case of 1281.

[65] See further pp. 299–300, post.

[66] They were derived from the writ of entry, and all three types (in the reverter, descender, and remainder) had been in use before 1285: see B. & M. 46, 47; S. F. C. Milsom, 72 LQR 391; P. A. Brand, *MCL*, ch. 10; p. 295, post.

interests by allowing them to enforce the terms according to the intention. This was doubtless seen as a blow for common sense, but the overriding of legal logic produced some wondrous strange results.[67] For one thing, donors were now able to restrict the inheritance in ways not permissible at common law. Thus, a gift in tail could be restricted to *A* and the heirs *male* of his body,[68] this being the 'will of the donor', whereas a grant to *A* and his heirs male (without words of procreation) passed a fee simple inheritable by females, since the purported restriction by gender was void at common law. The entail therefore became, amongst other things, a means of excluding female heirs.[69]

An even odder legal result was that two fees would exist simultaneously in the same land, an inherently unfeudal notion comprehensible only in the sense that the fee had become conceptualized as an estate or time in the land which could vest either in possession or in the future. The fee tail (or 'entail') created by the statute was different from the common-law conditional or curtailed fee in that it did not become alienable on birth of issue. If a tenant in tail alienated, his issue could recover the land by bringing formedon 'in the descender'.[70] Moreover, the estate was not necessarily eternal but might come to an end on failure of issue of the donee, in which case the donor or his heirs could bring formedon 'in the reverter' against anyone holding over. It was also possible for a gift to contain successive remainders in fee tail to different people, each enforceable by formedon 'in the remainder'.[71] The fee simple stayed in the donor, but it was a future fee which would not fall into possession unless the donee's issue and the remaindermen's issue all failed, which might never happen. It was, however, logically necessary that it should be vested in someone, to fill the residue of eternity which would be left if and when the entails ended. In this respect the statute contributed to the doctrine of estates. The common-law actions, as we have seen, had given rise to something like ownership of land in place of vertical feudal relationships. But what was owned was still not the land itself; it was a metaphysical interest in land, a legal abstraction. And, viewed metaphysically, different inheritable interests might exist in the same land at the same time.

Reversions and Remainders

Before 1285 English lawyers had come to speak of interests in land as 'estates', which might be in possession, in remainder, or in reversion. This tripartite classification was not based on duration but on the time when enjoyment was to begin.

The reversion is the most obvious future estate. If a tenant in fee before 1290 granted a life estate or made a gift in fee tail to another, he became the grantee's lord, and when the grantee's interest ended it came back to him by escheat. Once the feudal dimension

[67] See also p. 300, post (Milsom's 'juridical monster').

[68] *Helton v. Kene* (1344) B. & M. 58. The losing argument was that the requirement of male issue was simply a condition precedent to the creation of a fee tail which could then descend to or through females. For conflicting views in 1329 see 98 SS 710, 730.

[69] This became usual in early-modern settlements, but it was less common in medieval times: Biancalana, *The Fee Tail*, p. 175.

[70] At first this restriction on alienation only affected the original donee, but the settled common law extended it to all tenants in tail. For the duration of the inalienability see pp. 299–303, post.

[71] For remainders see the next section. There could be a final remainder in fee simple to someone other than the donor, in which case there was no reversion.

was removed, and the same arrangement was analyzed in terms of estates, the lessor for life and the donor in tail were said to have a 'reversion', because the land would go back or revert to them when the lesser estate (the 'particular estate') ended. The reversion, viewed as an estate in the land, was an absolute fee simple, an estate of infinite duration, as freely alienable as the fee simple in possession, but with the right to possession postponed until the particular estate ended. Thus, to say that a reversion was a 'future estate' is true only of the right to possession, for the estate was a vested reversion from the moment when the particular estate was created. If the tenant in possession tried to alienate the fee so as to 'discontinue' the reversion, the reversioner could forthwith bring a writ of entry.[72]

If a grantor limited successive interests by the same grant, for instance 'to *A* for life and then to *B* and his heirs', the future interest given to *B* was not a reversion because it was to stay away from the grantor.[73] It was therefore called a remainder, from the Latin *remanere* (to stay away). If the remainder was in fee simple, the grantor had nothing left and there could be no reversion. But the remainder could be an estate of shorter duration than a fee simple, in which case the grantor would still have a reversion in fee simple. That is why successive remainders could be carved out of the same fee simple: for instance, 'to *A* for life, remainder to *B* for life, remainder to *C* for life', or 'to *W* for life, remainder to *X* in tail, remainder to *Y* in tail, remainder to *Z* in fee simple'. Provided all the remaindermen were ascertained persons, the principal restriction was that no remainder or reversion could be limited to follow an absolute fee simple.[74]

The law had some initial difficulty accommodating the remainder. The reversion was, in feudal terms, a lordship; and in non-feudal terms it is common sense that a man who gives away a slice of his cake keeps the cake. But a remainderman was neither lord nor heir, and was not seised of anything; he took by a form of succession unknown to feudal law, and it was not at first clear what remedy he might have to protect such an interest. In *Bracton* he is a quasi-heir, to whom the land could be said to 'descend', in a loose sense, according to the *forma doni.* Perhaps the implication was that the remainderman should use a fictitious action of formedon in the descender.[75] In fact the writ of formedon in the reverter seems occasionally to have been used, until in 1279 approval was given to a new writ of formedon in the remainder.[76] In formedon, the remainderman relied on the seisin of both the grantor and the first grantee, and it came to be thought that the right to seisin passed to him via the first grantee. Though not strictly a 'right', the remainder was by then seen as a kind of legal estate protected from destruction

[72] Entry *in consimili casu*, founded on Stat. Westminster II (1285), c. 24.

[73] The distinction was not at first sharp: e.g. *Bracton* (II, p. 70) described a remainder as reverting.

[74] See further p. 304, post. There could be a remainder or reversion after a base fee, which was a conditional fee simple: p. 302, post.

[75] See *Northorpe v. Southchurch* (1287) B. & M. 53. Weyland CJ said that the person claiming a remainder had no estate, neither fee nor right, during the life estate; Serjeant Kelloe replied that 'the fee and right must have resided in someone'. The court was perplexed, but the action succeeded.

[76] *Ferlington v. Brewosa* (1279–81) 10 IJ 322; cf. Lovetot J in B. & M. 54 (recalling a case before 1275 in which a formedon in the remainder was quashed). Formedon in the descender continued to be the appropriate remedy for the heir of a remainderman: *Barre v. Hales* (1329) 97 SS 459.

during the precedent estate.[77] But this theory availed nothing if the remainder was 'contingent' and not vested.

Contingent Remainders

A contingent remainder was a remainder limited to take effect upon an event which might not happen before the determination of the particular estate, if at all, or limited to a person not ascertained at the time of the grant.[78] The commonest case put in the year books was the remainder to the heir of a living person: for example, 'to *A* for life, remainder to the heir(s) of *B*'.[79] This was contingent, because *B* might survive *A*, in which case he would not have an heir on *A*'s death. In such a case, the location of the fee during *A*'s lifetime was elusive. Either it stayed in the grantor until it was ascertained whether there would be a remainder (that is, whether *B* would die in *A*'s lifetime); or it stayed in the grantor until the remainder vested in possession; or it just went into the clouds (*in nubibus*) until it vested.[80] On any of these views, the remainder could only be valid if it vested before the particular estate ended, for otherwise there would be an abeyance of seisin and no feudal tenant, a legal impossibility. Whether it was valid even if it did vest in time was once a moot point in the inns of court, because on one view a remainder ought to be certain from the time of the grant. The contingent remainder seems nevertheless to have become acceptable by the end of the fifteenth century.[81] It was judicially approved by a dictum of Fitzherbert J in a remarkable case of 1535,[82] and finally recognized by judicial decision in 1550.[83] Its subsequent importance grew out of the attempts of conveyancers to make perpetual settlements, which will be considered in the following chapter.

Further Reading

Pollock & Maitland, II, pp. 1–28, 240–356
Holdsworth, *HEL*, III, pp. 101–37, 171–97
Plucknett, *CHCL*, pp. 521–30, 546–52, 558–70
Milsom, *HFCL*, pp. 166–77; 'Formedon before De Donis' (1956) 72 LQR 391–7 (repr. in *SHCL*, pp. 223–9); 'Inheritance by Women in the 12th and 13th Centuries' (1981) in *Laws and Customs*, pp. 60–89 (repr. in *SHCL*, pp. 231–60)

[77] *Northorpe v. Southchurch* (1287) B. & M. 53, per Scoter sjt (speaking to the reporter afterwards). Scoter invented a new term for this kind of interest – an 'inclination' – but this did not pass into legal vocabulary.

[78] J. C. Gray defined a remainder as contingent when 'in order for it to come into possession, the fulfilment of some condition precedent other than the determination of the preceding freehold estate is necessary': *Rule against Perpetuities*, p. 89. A reversion could never be contingent.

[79] Cf. 'to *A* for life, remainder to *B* and his heirs', which was not contingent if *B* was a living person, because on *A*'s death either *B* or his heir would be in existence and ascertainable.

[80] *Sutton's Case* (1366) B. & M. 76 at 77, per Fencotes sjt. In *Blakett's Case* (1410) ibid. 79, Hankford J considered this to be nonsense. When it was suggested in 1594 that contingent uses went up into the clouds during their abeyance, Clarke B retorted that 'they should stay up there for ever, and never come down': ibid. 173. Cf. ibid. 89.

[81] Constable's reading on *De donis* (1489) 71 SS 179. Cf. *Faryngton v. Darell* (1431) ibid. 80, esp. at 82, per Babington CJ ('It has been the point of a moot case').

[82] *Melton v. Earl of Northumberland* (1535) B. & M. 87; discussed in 55 CLJ 249 (repr. in *CPELH*, III, pp. 1380–97).

[83] *Colthirst v. Bejushin* (1550) B. & M. 89.

J. L. Barton, 'The Rise of the Fee Simple' (1976) 92 LQR 108–21
T. G. Watkin, 'Feudal Theory, Social Needs and the Rise of the Heritable Fee' (1979) 10 *Cambrian Law Rev.* 39–62

Manorial Customs

G. Homans, *English Villagers of the Thirteenth Century* (1941; repr. 1960)
R. J. Faith, 'Peasant Families and Inheritance Customs in Medieval England' (1966) 14 *Agricultural History Rev.* 77–95
R. M. Smith, 'Some Thoughts on "Hereditary" and "Proprietary" Rights in Land under Customary Law in 13th and Early 14th Century England' (1983) 1 LHR 95–128
Z. Ravi and R. Smith (ed.), *Manorial Society and the Manor Court* (1996), esp. chs. 1–5
L. R. Poos and L. Bonfield (ed.), *Select Cases in Manorial Courts 1250–1550* (114 SS, 1998), pp. lxxxvi–clxvii

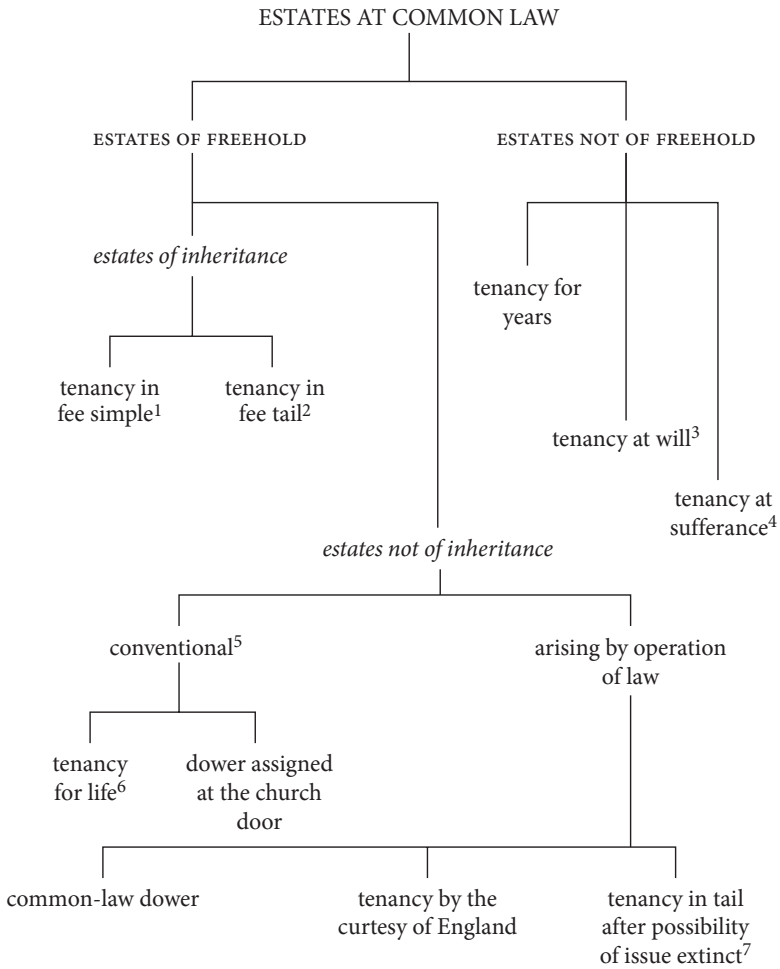
Dower

J. S. Loengard, '"Of the Gift of her Husband": English Dower and its Consequences in the Year 1200' in *Women in the Medieval World* (J. Kirshner and S. Wemple ed., 1985), pp. 213–55; 'Rationabilis Dos: Magna Carta and the Widow's "Fair Share" in the Earlier 13th Century' in *Wife and Widow in Medieval England* (S. S. Walker ed., 1993), pp. 59–80
J. Biancalana, 'For Want of Justice: Legal Reforms of Henry II' (1988) 88 *Columbia Law Rev.* at 514–34; 'Widows at Common Law: the Evolution of Common Law Dower' (1988) 23 IJ 255–329; 'The Writs of Dower and Chapter 49 of Westminster I' (1990) 49 CLJ 91–116
P. Brand, 'Earning and Forfeiting Dower in Medieval England' (2001) 22 JLH 1–20

***Maritagium, Fee Tail, and* De Donis**

B. M. Updegraff, 'The Interpretation of "Issue" in *De Donis*' (1925) 39 HLR 200–20
C. A. McCauliff, 'The Medieval Origin of the Doctrine of Estates in Land' (1992) 66 *Tulane Law Rev.* 919–1013; 'The Medieval English Marriage Portion' (1993) *38 Villanova Law Rev.* 933–1002
J. Biancalana, *The Fee Tail and the Common Recovery in Medieval England 1176–1502* (2001)
J. M. Kaye, *Medieval English Conveyances* (2009), pp. 134–63

Table C. Estates in land



1 Absolute, conditional, or qualified.
2 General or special (limited to issue of a particular marriage, or to male heirs).
3 Including the copyhold tenancy, which was at the will of the lord according to the custom of the manor.
4 Including the interest of cestui que use in possession.
5 I.e. arising by act of the parties.
6 Including tenancy *pur auter vie*, which might be an estate *quasi* of inheritance in case of special occupancy: e.g. to *A* and his heirs for the life of *B*.
7 A fee having some of the attributes of the life estate, since it cannot descend.

16

Real Property: Family Settlements

A family settlement was an arrangement whereby ownership of land was tied to a particular family by limiting the powers of the tenant in possession.[1] Its main object was dynastic, to keep most of a family's landed wealth intact in the main line of descent. The settlor's aim was therefore to restrain his descendants from disposing of the patrimony for their own personal benefit or distributing too much of it irretrievably to the wider family of the moment. We have already seen this instinct at work in marriage-gifts and gifts in tail, and in the statute *De donis* which was passed in 1285 to protect such arrangements according to the donor's intention.[2] We shall now consider how durable such settlements were, and how the various estates described in the previous chapter were fashioned into more elaborate family settlements designed to balance the needs of the extended living family with the interests of the family line.

The Durability of the Fee Tail

The broad draftsmanship of *De donis*, in giving statutory force to the 'will of the donor', raised the legal question whether land could now be tied up to descendants without limit of time, if that was the donor's wish. Were the issue in tail to have successive life interests for ever, so that no one could alienate the fee so long as issue continued? Or did any of the pre-1285 thinking survive? The statute was silent as to the period, or number of generations, for which the terms of the gift were to be inviolable. It did say that the will of the donor was to be observed 'so that those to whom a tenement is so given shall not have the power of alienating the tenement', which seemingly referred only to the original donees. Some contemporary commentators concluded that the statute only restrained the donees themselves from alienating. On the other hand, it was observed that the next clause in the statute referred to an entail failing for want of issue of the original issue, which suggested that a longer reach was intended.[3] The interpretations could be reconciled by saying that the issue could alienate in fee, but not so as to prevent a reversion on failure of issue.[4] However, according to Bereford CJ, who had been a serjeant in 1285, the statute had simply failed to say what was meant: that the issue were to be restrained from alienating until the fourth degree.[5] An anonymous lecturer at the same period explained that for three generations the donee and his issue had

[1] Usually by creating various estates in succession; but a simple gift in tail may be regarded as a form of family settlement.

[2] See p. 293, ante.

[3] See the near-contemporary lectures noted in Biancalana, *The Fee Tail*, pp. 88–9, 107.

[4] I.e. the alienation would result in a base fee: cf. p. 293, ante; p. 302, post.

[5] *Belyng's Case* (1312) B. & M. 57; and see *Daniel v. Bere* (1292) B. & M. 55. The 4th 'degree' (or step in the title) here meant the 3rd descent to an heir, the gift to the donee being the 1st step.

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only life interests (freehold), not fee.[6] After that there was still fee tail rather than fee simple, because as far as the reversion was concerned the entail would last only as long as there were issue of the donee.[7] These opinions suggest that lawyers were for a time minded to extend some of the customary characteristics of the *maritagium* to all gifts in tail, on the assumption that that was the presumed will of the donor. This was all very well, but none of it was in the statute. By the 1330s writs of formedon in the descender were being issued at the behest of heirs claiming even in the fifth degree of descent, and several petitions were presented to Parliament seeking clarification of *De donis*. But Parliament had no clarity to bestow on the subject. The enigmatic response in 1341 was that it was wrong to suppose the statute only restrained the first issue from alienating.[8]

Bereford CJ's interpretation may have persisted for most of the century,[9] but it was given up by the 1400s. There must have been repeated debate during this period in the nascent inns of court, where statutory texts were subjected to a close and critical analysis at the readings. Since the statute said nothing about three generations, the profession fell back on abstract logic. And logic dictated that, since an heir could not inherit more than his ancestor had, an estate which was inalienable upon its creation must remain inalienable on every descent. Each successive heir in tail, until the end of the line, could therefore bring formedon in the descender to undo any attempt to discontinue the tail. This impeccably rational but deeply unattractive conclusion gave the fee tail a character almost the exact opposite of the fee simple. It was a rigid, unalterable, inalienable perpetuity: a 'juridical monster'.[10] No one could 'own' entailed land beyond his own lifetime. Unless some escape could be found, vast quantities of land would be tied up indefinitely. But the pressures in favour of free alienation proved irresistible, and ways were found of 'barring' the entail and converting it into a fee simple. The means, however, were not supplied by Parliament. No doubt the legislative knot which tied up the entail could only be untied by statute; but it was possible to cut the cord without undoing it.

Barring the Entail

If a tenant in tail conveyed the entailed land to a stranger in fee simple with warranty, the issue in tail would be bound by the warranty provided they had land of equal value ('assets') descending to them from the same ancestor.[11] This was the first means of barring the entail, though the requirement of assets by descent made it a precarious device, and it did not bar the remainderman or the reversioner. A warranty without assets could

[6] B. & M. 57 (c. 1310).

[7] *Pygot v. Abbot of St Agatha's* (1316) 52 SS 132 at 138, per Bereford CJ.

[8] 58 SS cxxx. Cases raising the doubts: *Lobalm v. Templer* (1330) 98 SS 653; *Heckington v. Ryby* (1333) Y.B. Pas. 7 Edw. III, fo. 18, pl. 21; Biancalana, *The Fee Tail*, p. 112 (claim in the 5th degree unsuccessfully resisted). Cf. *Rotuli Parliamentorum hactenus Inediti* (Richardson and Sayles ed.), pp. 227, 230 (petition to Parliament in 1333).

[9] A garbled version of it was being taught to conveyancers at Oxford *c.* 1400: B. & M. 62. But it is absent from early 15th-century readings on *De donis* (e.g. 71 SS lxix, cxxix).

[10] Milsom, *HFCL*, p. 177.

[11] At common law warranties were binding without assets, but by 1300 assets were required if a lineal warranty was to bar heirs in tail; this was attributed to the 'equity' of Stat. Gloucester (1278), c. 3 (referring only to tenants by the curtesy), coupled with *De donis*. The word 'assets' was not plural, but was the French *assez* (sufficient).

operate as a bar only if it was 'collateral' – that is, if it descended from someone other than the ancestor in tail[12] – but this was even more difficult to arrange with confidence than the descent of assets. In the second quarter of the fifteenth century a more effective means was found, by combining the warranty with a judgment (a 'common recovery') in a collusive real action.

In the simplest form of common recovery, one or more accomplices[13] brought a writ of entry against the tenant in tail on an imaginary title in fee simple;[14] the tenant vouched a third party to warrant his title; the vouchee agreed to warrant but defaulted; judgment was then given for the accomplice to recover the fee simple against the tenant in tail, and for the tenant in tail to recover land of equal value (*escambium*) from the vouchee by reason of his warranty. This was called 'suffering' a recovery. If the title in fee simple had been genuine, the tail would necessarily have been barred; the right could hardly be destroyed by a usurper giving the land away in tail. But in the case of collusive real actions the law usually allowed interested parties to intervene and protect their interest. This explains the use of the warranty. Its effect was to give the barred issue a right to recover *escambium* against the defaulting vouchee, and this compensation prevented them from upsetting the recovery even where the title was fictitious. The device depended on finding a vouchee willing to bear the brunt. And the solution, from around 1460, was to employ a humble official of the Common Pleas. The same person lent his name to all comers, for a fee of four pence, and was known as the 'common vouchee'.[15] He would make himself scarce when his name was called, and – since the *escambium* could only be recovered in land – the issue in tail were cut off with a worthless right to execute judgment against the non-existent lands of a landless nobody. Just to make sure, a fictitious record of successful execution was entered on the roll.[16]

This devious device could not be faulted in law,[17] since in theory the issue were saved from harm by their entitlement to compensation, and the long-established legal procedure on which it was based had not included means-testing for vouchees – in the real world they had been the landowners who made the grants in the first place, or their heirs. By the end of the fifteenth century it was so well established that over 200 common recoveries a year were being entered on the rolls of the Common Pleas. There were some moral qualms. St German, in the dialogue *Doctor and Student* (*c.* 1530), raised the question whether it was consistent with good conscience to allow the defeat of entails by fictions; but his Student stood by professional opinion in answering that the device was too common to be overturned, and that the policy of *De donis* in 'exalting and

[12] Much technical learning about lineal and collateral warranties is set out in Robert Constable's reading (1489) on *De donis*, 71 SS 181–5.

[13] Often trustees, who upon execution of the recovery became seised of the fee simple to the use of the former tenant in tail.

[14] The common form was that D derived his title from a disseisin by Hugh Hunt. This imaginary person was doubtless a relative of Humphrey Hunt, plaintiff in *Taltarum's Case* (n. 17, post), and also a common disseisor. See *OHLE*, VI, p. 695.

[15] The first was Robert Kyng (by 1464), who operated jointly with Denis Guyer in the 1470s and 1480s. Thereafter a line of succession can be traced: 94 SS *204–5*. Unlike Hugh Hunt, they were real people.

[16] Biancalana, *The Fee Tail*, pp. 291–9.

[17] It was judicially acknowledged in *Taltarum's Case*, i.e. *Hunt v. Smyth* (1472), though the recovery there was for technical reasons ineffective: B. & M. 67; discussed by C. D. Spinosa, 36 AJLH 70 at 78–90; Biancalana, *The Fee Tail*, pp. 268–76; cf. Coke's comment, B. & M. 184. 'Taltarum' was actually Thomas Talcarn.

magnifying the blood' deserved no support.[18] The statute had lost any esteem it may once have had. In 1600 Egerton LK declared without fear of contradiction that it would have been much better if *De donis* had never been passed, because it had caused more lawsuits than any other statute.[19] No one, however, dared to repeal it.[20]

After 1484 entails could also be barred by a final concord (or 'fine') with proclamations. The fine had a much longer history than the recovery, and took the form of a collusive action of covenant ending in a formal compromise entered on the record; but its new function of barring entails was of statutory origin and seemingly intended to supplement the recovery, with proclamations as a safeguard against abuse.[21] It was effective to bar the issue in tail, and it would bar remaindermen and reversioners if they failed to make claim within five years of their right coming to them.[22] Whether a common recovery might go further than this and bar future interests absolutely and immediately was for a time unclear; but in 1592 it was settled by the opinion of all the judges – choosing free alienability over comprehensible legal theory – that it would indeed bar remaindermen and reversioners, and any incumbrances made by them.[23] By that time there was usually also a double voucher, making the tenant in tail a vouchee,[24] so as to extinguish all possible titles, and there might be multiple vouchers of other interested parties (including feoffees to uses and beneficiaries under uses) before the voucher of the tenant in tail. Despite their arcane nature, common recoveries were in everyday use between the 1470s and the 1830s. Any landed family's muniments would usually include a number of exemplifications[25] of recoveries and 'chirographs' of fines.[26] These were usually accompanied by deeds 'declaring the uses' of the fine or recovery, that is, laying out the terms on which the disentailed land was resettled.

But this is not the whole story. Just as many vendors and purchasers wanted an effective means of barring old entails, so there were settlors who wanted to set up new entails which would be unbarrable. Even before the common recovery was perfected, conveyancers had begun to experiment with conditions to prevent barring. It was contrary to a maxim of common law for a feoffor to impose a condition restraining

[18] *Doctor and Student* (91 SS), pp. 156–9; B. & M. 71–4. The Student's theological interlocutor seemed unconvinced. Spelman knew of a priest who had remorse in his conscience at suffering a recovery which might have allowed his sister to inherit: 93 SS 21.

[19] B. & M. 74. Coke said the same: 4 Co. Rep., preface (1604).

[20] Henry VIII planned to do so, with a saving for the nobility, but the Commons did not agree: p. 273 n. 37, ante. It is still on the statute-book.

[21] Stat. 1 Ric. III, c. 7; 4 Hen. VII, c. 24; *OHLE*, VI, pp. 698–9. This legislation reversed the provision in *De donis* that a fine of entailed land should be void, with the proviso that a fine would only be operative if no objection was made within 5 years. A fine was said to be 'levied' rather than 'suffered'.

[22] *OHLE*, VI, p. 698. The resulting estate was a 'base fee' (i.e. a determinable fee simple), which descended to heirs general only so long as there were issue of the donee.

[23] *Capel's Case (Hunt v. Gateley)* (1592) 1 Co. Rep. 61. This commenced in 1581, and in 1583 the judges tried to induce a compromise, 'because the precedent would touch all purchasers in England': Coke's notebook (135 SS), no. 116. Judgment was finally given in 1592 after much debate in the Exchequer Chamber.

[24] I.e. D vouched the tenant in tail, who vouched the common vouchee. For the effect of this see Bro. Abr., *Fauxefier de Recoverie*, pl. 30 (abridging *Taltarum's Case*); Biancalana, *The Fee Tail*, pp. 300–1.

[25] The exemplification was an official transcript of the plea roll under the CP seal.

[26] A final concord was engrossed by the chirographer of CP in triplicate. Each party received a copy, and the 3rd (the 'foot') was kept on file. The terms could be enforced by a writ of *scire facias*.

alienation, since a grant in fee simple left nothing in the feoffor;[27] but, in the case of a gift in tail, the donor had a reversion and a restraint would reinforce the policy of *De donis*. In an early example of 1360, a manor was given in tail on condition that if the donees or their heirs alienated in fee, or leased beyond their own lives, the donor should have a right of re-entry. It was not until 1493 that the device was questioned, but it was upheld.[28] This was a drastic form of remedy, because it brought the whole settlement to an end. Attempts to restrain alienation without destroying the rest of the settlement were initially unsuccessful: one or two judges around 1400 are said to have experimented for their private purposes with gifts to a son in tail, remainder to the next son if the first attempted to alienate, and so on, but these failed because in law conditions could only be enforced by re-entry by the donor and his heirs.[29]

Uses, and devises by will, offered the conveyancer more flexibility: already in 1431 it had been noted that a devise had peculiar qualities for settlement purposes.[30] An entail in use was arguably unbarrable in conscience before the Statute of Uses (1536), inasmuch as the feoffees were morally bound to preserve the tail; but the Chancery did not intervene to stop recoveries by injunction. By 1516, conveyancers had instead invented a new kind of perpetuity clause, to achieve with uses and devises what had previously been impossible at law.[31] This took the form: to the use of *A* and the heirs of his body until he alienated, or attempted to alienate, and then over to another. Eventually these clauses also were struck down by the courts.[32] Notwithstanding *De donis*, it was 'against the reason and policy of the common law' to create perpetuities, and so an entail was treated in law as inherently barrable. The judges thus contrived, first by fiction and then by judicial legislation, to circumvent the unforeseen consequences of a loosely drawn medieval statute. Thereafter it could be said with some truth that the most practicable difference between the fee tail and the fee simple was the mode of conveyance.[33] Nevertheless, entails were not barrable until the issue was of full age; and, as we shall see later in the chapter, they remained the basic building block in family settlements for centuries.

Remainders and Executory Interests

Behind these developments may be detected the recurrent theme that the present owner of land in fee, be it fee simple or fee tail, should have the power to alienate the land for a period exceeding his own life. The way to prevent such alienations, if it could be done at all, was not to impose a restraint on the fee – which was repugnant to the very idea of fee – but to postpone the fee in such a way that the tenant in possession of the land

[27] Y.B. Hil. 21 Hen. VI, fo. 33, pl. 21; Hil. 8 Hen. VII, fo. 10, pl. 3; Hil. 21 Hen. VII, fo. 11, pl. 12; Litt., s. 360. This was said to be the old learning of the inns of court: B. & M. 64, per Kebell; cf. 105 SS 211, 225. But the old learning permitted a restraint on alienation to a particular person or class of persons (usually monks or Jews).

[28] *Hulcote v. Ingleton* (1493) B. & M. 63; 102 SS 87; 113 SS 138.

[29] *Rikhill's Case* (*c.* 1395) B. & M. 77; *Thirning's Case* (*c.* 1400) ibid. 79. Coke drew the lesson that lawyers should never do their own conveyancing.

[30] *Faryngton v. Darell* (1431) B. & M. 80 at 83–4, per Paston J. See also *Dale v. Broune* (1495) ibid. 87.

[31] See the will of Richard Haddon (d. 1516), alderman of London: p. 306, post. A similar device was used by Anthony Fitzherbert's brother John in 1517: p. 307 n. 47, post.

[32] See pp. 306–7, post.

[33] D. Barrington, *Observations on the Statutes* (1766), p. 101. Barrington described the whole fictional procedure as 'unintelligible trumpery'.

for the time being had only a life interest. If the fee could be kept always in remainder, no tenant in possession would be able to alienate beyond his own life without securing the concurrence of the remaindermen in fee.

Remainders could not be used, however, simply to split up a fee between a person and his own heirs so that the heirs took by way of remainder and not by descent from their ancestor. Thus, if land was granted 'to *A* for life, remainder to *A*'s heirs', this gave the fee simple at once to *A*, so that on his death the heir took by descent and not by remainder, and the lord would not lose his incidents.[34] This construction also meant that *A* could alienate the fee, because his heirs had no estate in remainder. For the same reason, a grant 'to *B* in tail, remainder to *B*'s heirs in fee simple' was ineffective. The same person could not have fee simple and fee tail simultaneously.[35]

Another possibility which occurred to the legal mind was to create a perpetual succession of remainders. But the efficacy of such a settlement depended on the extent to which the law would permit contingent remainders. It was determined in 1550, after some doubts, that 'everyone who is the lawful owner of land may give it to whatever person, in whatever manner and at whatever time he pleases, so long as his gift is not contrary to law or repugnant'.[36] But, as we have seen, the law required the remainder to vest at the latest by the time the particular estate came to an end. Moreover, until vesting, the contingent remainder had no legal existence; it did not belong to anyone, and was not property. It followed that a contingent remainder could be destroyed by the ending of the particular estate before it vested. For example, if land was granted to *A* for life, remainder to the heirs of *B*, and *A* made a grant in fee to *C* during *B's* lifetime, the remainder was destroyed; by the time *B*'s heir was ascertained, there was no precedent life estate to support it.[37] The common law thus brooked no substantial risk of perpetuities once the entail became barrable. The usual settlement before 1536 was in the form of an entail, sometimes with a prior life estate for the settlor, limiting successive entails in remainder to named sons, who took not as heirs but as named living persons with vested interests. A remainder in tail after another entail might not, of course, come into possession until a remote time after the gift, if ever; but there was no perpetuity, because (at least, after 1592) it could be barred by common recovery.

The Statutes of Uses and Wills shook this common-law system to the foundations, by raising new possibilities which for a century and a half threw the land law into turmoil.

Executory Interests

Before 1536 most feoffments to uses resulted in passive uses in fee simple. Settlements of the use were sometimes made by will, and their effect depended on the testator's wishes rather than rules of law. The chief legal difficulty in the years leading up to the statute had been the 'use in tail', which had given lawyers nightmares. The makers of *De donis* had not contemplated equitable interests; but, if the statute could be construed to extend to uses, it would mean unbarrable entails, for it would be impossible to bar such

[34] *Sutton's Case, alias The Provost of Beverley's Case* (1366) B. & M. 76. [35] *Anon.* (1320) 104 SS 114.

[36] *Colthirst v. Bejushin* (1550) B. & M. 89 at 93, per Mountague CJ; p. 296, ante. For earlier doubts see *Melton's Case* (1535) ibid. 87; 55 CLJ 249; *CPELH*, III, pp. 1380–97.

[37] See 1 Co. Rep. 135v–136 (1595). The year-book opinions conflicted: Plucknett, *CHCL*, pp. 562–4.

an entail by common recovery.[38] Little discussion of the status of remainders in use has come to light; but precedents are certainly to be found which broke the legal rules. There would have been no reason, other than some kind of analogy,[39] to subject them to the common-law principles governing the vesting of the legal estate. So long as the feoffees' estate conformed to the legal rules, the seisin would never be in abeyance, and the feoffees would be obliged in conscience to hold the land to the use of whatever remainders the settlor declared. The problem here began with the Statute of Uses. The statutory magic of 1536, whereby the interest of cestui que use was transubstantiated into a legal estate, gave rise to two bewildering conundrums.

The first conundrum was whether the statute executed future interests at all, and if so how. Suppose a grant 'to *A* to the use of *B* for life, and after *B*'s death to the use of *C*'. The statute executed the use by giving seisin to *B.* And the statute expressly said that uses in reversion or remainder were also to be executed. But what happened to the seisin on *B*'s death? The statute only operated where someone was seised to the use of another. If the 'remainder' was to be executed by the statute, it had to be supposed that *A* was somehow still seised to the use of *C* on *B*'s death. Some thought that was so; but the theoretical obstacle was that the statute had already taken *A*'s seisin and given it to *B,* and there was nothing in the statute to say that *B*'s seisin could go back to *A*. Legal imagination solved the puzzle by supposing that, when the use was executed in *B*, a spark of title (which Dyer called the *scintilla juris*) nevertheless lingered in *A* for the purpose of igniting the estate expectant on *B*'s death.[40] *C*'s interest was called an 'executory interest'; it was due to be executed (by being turned into a legal estate) upon some contingency, but until that happened it was a mere expectancy. Similar, if not worse, problems arose under the Statute of Wills (1540), because there might not even be feoffees in whom the spark could be kept alight. The courts dealt boldly with such nice puzzles, and by the end of Elizabeth I's reign it was clear that all future interests in use had this property of being 'executory': they did fall under the statutory magic, but only when the time came for them to be executed.

The second conundrum followed from the solution to the first. Given that executory interests became legal estates when executed, did this make them subject to the legal rules about remainders? Strict logic at first denied it, since there had been no restriction on future interests in use before 1536. As Manwood J explained in 1575, 'uses are not directed by the rules of the common law but by the will of the owner of the lands; for the use is in his hands as clay is in the hands of the potter, which he in whose hands it is may put into whatever form he pleases'.[41] The Statute of Uses expressly decreed that beneficiaries should be deemed to be seised 'of and in such like estates as they had in use', and the Statute of Wills gave full liberty and authority to a freeholder to devise the

[38] See Biancalana, *The Fee Tail*, p. 310; *OHLE*, VI, pp. 695–6.

[39] As in *Shelley's Case* (1581), p. 306 post, some rules could have been treated as principles of construction, but the overriding principle in interpreting uses was to follow the settlor's intention.

[40] *Brent's Case* (1575) B. & M. 157 at 162, per Dyer CJ. In 1595 Peryam CB quipped that the *scintilla juris* was about as real as Sir Thomas More's Utopia: ibid. 171. Whether the doctrine was necessary remained a topic of debate until its abolition in 1860; some thought it enough that Parliament had willed the result.

[41] *Brent's Case* (1575) B. & M. 157 at 159. Contrary to the note ibid. (2010 impression), the case arose from a settlement of 1564 on the marriage between Anne, daughter of Richard Brent (d. 1581), and Thomas Paulet: 134 SS, pl. 171.

legal estate 'at his free will and pleasure'. The obvious conclusion was that, however the clay was moulded, the legislation fired it into legally watertight hardness.[42]

If this conclusion was sound, conveyancers could now achieve whatever they wished by adding the magic words 'to the use of' in their settlements. Seisin could be made to skip and jump as never it could before, or even put into storage to await future contingencies. Conveyancing counsel in quest of the unbreakable settlement were not slow to explore these new avenues and to invent (in Coke's words) 'upstart and wild provisoes and limitations such as the common law never knew'. In the nature of things, a generation had to expire before these devices could be tested in the courts. As the questions began to emerge in the middle of Elizabeth I's reign, the judges soon repented of their earlier logic and sought excuses for avoiding it. One of the first reactions was to rule against the creation of a succession of life interests. A draftsman might wish to ensure that in every generation the eldest son would take by remainder, for life, and not as heir. But the courts applied the spirit of the year-book remainder rules: although it was accepted as possible to devise a remainder to an eldest son, or an 'heir' (in the singular), provided the true intention was that he should not take by inheritance, this could not be done in indefinite succession: all contingent remainders had to vest before the determination of the first particular estate.[43]

The next clear indication that executory interests should be governed by the legal rules came in *Shelley's Case* (1581), in which Coke made his legal reputation at the Bar by persuading all the judges that a grant 'to the use of *A* for life, remainder to the use of the heir male of the body of *A* in tail male' gave *A* a fee tail at once and not a life estate.[44] There was no discussion of perpetuities. What in medieval times had been a feudal rule was now turned into a rule of construction applicable to uses, that where an ancestor is given an estate of freehold, and in the same conveyance an estate is limited to his heirs, 'the heirs' must be taken as words of limitation of the estate and not as words of purchase. No full reasons were given for what was evidently a difficult decision;[45] but it is significant that the judges rejected the defendant's argument that they had only to give effect to the settlor's intention. The year-book rules were being extended to executory interests as a matter of law, in the interests of certainty.

In the mid-1590s the spectre of perpetuities began to haunt the courts once more, as the inventions of another generation were brought before them. The executory interest, like the contingent remainder, was destructible; if the supporting estate of the feoffees was destroyed before the interest was executed, the *scintilla juris* was snuffed out and

[42] Ibid.; *Cranmer's Case* (1572) 3 Leo. 20 at 21, per Manwood J and Dyer CJ. For doubts in the 1560s and 1570s see Henderson, 26 AJLH 110–14.

[43] *Haddon's Case* (1576) B. & M. 156; sub nom. *Manning v. Andrewes*, 1 Leo. 356 (where Haddon's name is misprinted as Hart); *Perrott's Case* (1594) Moo. K.B. 368. The first case arose from the will of a testator who died before the Statute of Uses.

[44] *Wolfe v. Shelley* (1581) B. & M. 163. Here *A*'s heir male by descent (his grandson *B*) was *en ventre sa mère* at *A*'s death; a fee tail would have descended to *B*, whereas a remainder would have vested in *A*'s 2nd son, as the nearest male heir living at *A*'*s* death. But the merits were clouded by religion and politics: Simpson, *Leading Cases,* pp. 13–44.

[45] Coke supplied them in a report circulated in 1582, but Anderson CJ (who had been of counsel on the other side) accused him of reporting what had not been said: B. & M. 169. Unknown to them, the principle had been anticipated by John Spelman at a moot in 1519: BL MS Harley 5103, fo. 82v.

with it the possibility of execution.[46] This inherent debility had given rise to perpetuity clauses in the form, 'to *A* and the heirs of his body until he *attempted to alienate*, and then over to *B*'. The purpose was to take out *A* before the destructive alienation actually occurred. The device had been known even before 1536,[47] and was in common use by the 1560s. In one version, the estate would be made to pass to the next remainderman, cutting off *A*'s issue as well as *A*; but the preferred form was simply to take out *A* and pass the estate to his issue in tail 'as if *A* were naturally dead'. These perpetuity clauses were for a time accepted by the courts.[48] But they caused a good deal of discontent, even in landed families: they hindered the advancement of younger sons and daughters, prevented a landowner selling land to pay debts or exchanging it for more convenient property, made eldest sons disobedient to their fathers (confident that they could not be disinherited), and set close relatives against each other (watching for attempts to alienate).[49] The courts eventually succumbed to these objections and struck perpetuity clauses down: first (in 1595) those which took out the offending tenant during his lifetime so that the estate went to his issue,[50] and then (in 1613) those which shifted the whole estate tail to the next remainderman.[51] Coke hailed the 1613 decision as having finally buried perpetuities, 'a monstrous brood carved out of mere invention, and never known to the ancient sages of the law… At whose solemn funeral I was present, and accompanied the dead to the grave, but mourned not'.[52]

These decisions were based more on policy than on logic, and they were difficult to reconcile with the earlier principle that uses were in all good conscience governed only by the settlor's wishes. It would have saved much confusion in the law if the judges at this point had felt able to abandon that principle completely. Coke strongly recommended it, arguing that 'the best construction of the statute of 27 Hen. VIII concerning uses is to make them subject to the rules of the common law, which are certain and well known to the professors of the law, and not to make them so extravagant that no one will know any rule to decide the questions that will arise upon them'.[53] But that proved an impossible aim. The difficulty was that, when conveyances had been drawn a generation or two earlier, it was believed that there was greater flexibility. Given the diversity of legal opinion as to the exact scope of the Tudor legislation, the hopes and intentions of settlors deserved some consideration. Various exceptions to the common-law rules were therefore conceded in the case of executory interests. The judges allowed shifting or leaping uses: that is, where a fee simple was to pass from one person to another upon a contingency. And they allowed springing uses: usually where the freehold was to commence after a term of years. Both kinds of interest had been forbidden by the legal

[46] *Chudleigh's Case, Dillon v. Freine* (1594) B. & M. 169; *Archer's Case, Baldwyn v. Smyth* (1595) ibid. 94.

[47] John Fitzherbert (d. 1517) made a devise in tail, proviso that upon any attempt to alienate or mortgage the estate the use was to pass to the next heir male: *OHLE*, VI, p. 700. Fitzjames CJ used a similar device in 1537: ibid. 701; 110 SS 237; Plowd. 414.

[48] See e.g. *Scholastica's Case* (1571) 2 Plowd. 403. This was reversed by the KB in 1595: 10 Co. Rep. 42; BL MS. Add. 25198, fo. 72.

[49] See also the hard case which persuaded Plowden never to draw such a settlement again: B. & M. 175.

[50] *Cholmeley v. Humble* (1595) B. & M. 178; *Germyn v. Arscott* (1595) ibid. 176; *Corbett v. Corbett* (1600) ibid. 175; *Mildmay v. Mildmay* (1602) ibid. 179; *Hethersal v. Mildmay* (1605) ibid. 180. The last three all concerned the same settlement by Sir Walter Mildmay (d. 1589), chancellor of the Exchequer.

[51] *Mary Portington's Case, Portington* v. *Rogers* (1613) B. & M. 182.

[52] Preface to 10 Co. Rep.

[53] *Digges's Case* (1600) as cited in 6 Co. Rep. 34.

remainder rules.[54] Then, in 1620, they reached the stunning conclusion that executory interests of this kind were indestructible, precisely because they did not depend on a prior estate of freehold. The case arose from a devise 'to *A* in fee simple, but if *A* should die without issue during *B*'s life then to *B* in fee simple'. This could not be a legal remainder, because it followed a fee simple; and its effect, if allowed, would have been to create something like an entail in *A*, remainder to *B*. *A*, thinking that he *was* tenant in tail, suffered a common recovery to his own use in fee simple. But the recovery was held ineffective to destroy *B*'s interest. The devise had therefore created a fee simple which in reality worked as an unbarrable entail during *A*'s life. Dodderidge J dissented vigorously, on the grounds that entails should always be barrable: 'Common recoveries are the anchor-hold and assurance which subjects have for their inheritance, and it would be dangerous to give liberty to anyone to invent such an estate as cannot be cut down by some means.' The other judges replied that there was no perpetuity here, for two reasons: first, the contingency might never happen, and second, the fee was not wholly inalienable because *A* and *B* could together suffer a recovery.[55] They also noted that it was common in a devise to direct the devisee to make payments to executors or younger brothers, and for default of payment the land itself should go to them; it was thought vital that this form of security, which depended on a shifting fee, should be protected.[56]

The failure of the judges to produce a coherent system from the confusion was perhaps the worst legacy of the sixteenth-century legal revolution. Even in the mid-seventeenth century the average landowner must have found the law of real property, as Oliver Cromwell did, 'an ungodly jumble'. From about that time, however, the practical difficulties were eased by the introduction of standard patterns of strict settlement which were known to achieve what they intended.[57] And the juristic confusion over the validity of executory interests was ended by the definite, if unsatisfactory, rule in *Purefoy v. Rogers*.[58] If a contingent use or devise could not be a common-law remainder at its inception, it was presumed to be a valid executory interest under the Statutes of Uses or Wills. But if it could by possibility take effect at law, the legal rules applied, and if the remainder did not in fact vest in time it failed.

Powers

Another side-effect of the Statute of Uses was the creation of legal powers. A power, in the conveyancing context, is an authority granted to someone to dispose of (or encumber) an estate which he does not himself own. Powers were not recognized at common law, though where wills of land were permitted by local custom the testator could give the executors a power of sale: this struck Babington CJ in 1431 as amazing, that a man could thus transfer a freehold which he did not have, 'in the same way as a man can get fire from a flintstone even though there is no fire inside the flint'.[59] But powers to

[54] In 1597 a bill was introduced in Parliament to ban shifting and springing uses, but it failed: see 35 LQR 258.
[55] *Pells v. Browne* (1620) B. & M. 186; Palm. 131; 2 Rolle Rep. 196, 217.
[56] See *Purslowe v. Parker* (1600) Rolle Abr., II, p. 793, to the same effect.
[57] See pp. 313–14, post.
[58] *Purefoy d. Broughton v. Rogers* (1671) B. & M. 95.
[59] *Farynton v. Darell* (1431) B. & M. 70 at 74.

appoint, transfer, or revoke uses were well known before 1536,[60] and they were effective in conscience. The reasoning which established the executory interest likewise turned these powers after 1536 into legal powers: that is, when exercised they altered the legal title by operation of the statute.[61] Executory powers were used in settlements for a variety of purposes. The settlor might reserve to himself a power to revoke or vary some of the terms, or to appoint some of the remaindermen later; the tenant for life might be given the power to lease or mortgage beyond his own lifetime;[62] or the trustees might be given a power of sale or mortgage. Such powers were essential to the working of the strict settlement, as it developed in the seventeenth century. The effective owner under such a settlement was only a tenant for life, but for practical reasons he had to be given a range of powers which encroached upon the inheritance.[63]

Trusts

Another essential ingredient in later settlements was the trust. Although the Statute of Uses was sweepingly expressed, it did not abolish conscience or eradicate the possibility of equitable interests in land. The chancellors' jurisdiction therefore continued to be exercised in situations not covered by the terms of the statute. There were several such situations. First, if *A* made a lease for years to *B* to the use of *C*, the use was not executed, because *B* as a lessee for years was not 'seised' to the use of *C*.[64] Second, an 'active use' was not executed. If the feoffee had duties to perform, such as the collection and distribution of income, the payment of debts, the management of an estate, or the execution of a conveyance, the duties could not be performed metaphysically by operation of law (as could a bare transfer of seisin), and so the feoffee had to retain the legal estate. On the same principle, a use in favour of a purpose rather than a person was not caught by the statute; a purpose could not be fulfilled by fiction. Thus charitable trusts in support of educational foundations, or for the relief of poverty, were protected and enforced by the Chancery.[65] These were called active or special trusts,[66] as opposed to the passive or general use which alone was contemplated by the statute. A fourth category where the statute did not operate was that of repugnant, fraudulent, or 'troublesome' uses.[67]

[60] E.g. *Calendar of Inquisitions Post Mortem: Hen. VII*, I, p. 439 (power for life tenant to sell land if heir disobeyed will, 1482); ibid., II, p. 397 (power for settlor to nominate ultimate remainderman in fee simple, 1503); Dyer 136 (power to appoint remainders on failure of issue, 1505).

[61] *Anon.* (*c.* 1595) Moo. K.B. 608 (power in a 1577 settlement). Cf. the large authority over the legal title given to cestui que use by the statute of 1484 (p. 271, ante); this was also, in effect, a power.

[62] E.g. the 1576 marriage settlement discussed in *Whitlock's Case* (1609) 8 Co. Rep. 69 (tenant for life given power to lease for other lives; held, he could reserve a rent on such a lease to his own heirs).

[63] See pp. 314–15, post.

[64] In 1573 it was said that the opinion of the Middle Temple had once been otherwise, but the point had been settled by all the justices of England: B. & M. 145. The law is stated clearly in *Cranmer's Case* (1572) 134 SS, appendix 1, no. 6, per Jeffreys sjt; *R. v. Englefield* (1591) 1 And 293.

[65] Supporting universities and grammar schools and relieving the poor were lawful charitable uses, as opposed to superstitious uses (e.g. chanting for souls in purgatory), which were invalid after 1547: *OHLE*, VI, pp. 715–17; *A.-G. v. Porter* (1592) 1 Co. Rep. 22.

[66] 'Trust' was originally a synonym for 'use', but came to be used to distinguish equitable estates which were not executed by the Statute of Uses: see Style 40, per Twisden.

[67] *Corbett v. Corbett* (1600) B. & M. 175 at 178–9, per Walmsley J; *Mildmay v. Mildmay* (1602) B. & M. 179 at 180, per Warburton J. Their example of a troublesome use was: to *A* and his heirs on Mondays and *B* and his heirs on Tuesdays.

The most important case in the fourth category was the double use, where land was conveyed to *A* to the use of *A* himself to the use of *B*, or to *X* to the use of *A* to the use of *B*. In the first situation the statute did not apply at all, because *A* was not 'any other person' and was already seised; in the second it did apply, and so *A* became seised. But it was a question in both cases whether the inconsistent further use in favour of *B* was executed by the statute. This was authoritatively settled in *Jane Tyrrel's Case* (1557), when the judges in the Court of Wards held that it was not, because it was 'void and impertinent' and repugnant to the first use.[68] It followed that the seisin remained in *A*, unmoved by the statute. Nevertheless, since *A* was never intended to hold the land beneficially, it would have been unconscionable not to hold him to the second use. That was work for the Chancery; and there is evidence that, in suitable cases, the chancellor was enforcing such second uses from at least 1560.

The earliest reported case concerned a duchess who had sold and conveyed her land to a lawyer, ostensibly to his own use, but in truth subject to a secret trust that he would hold the land to the use of the duchess and reconvey it on request. The expressed use prevented a resulting use in favour of the duchess, which would have been executed by the statute and so rendered the transaction nugatory, [69] but it was equally at odds with the true secret use, the execution of which would likewise have defeated the object.[70] The arrangement was occasioned by the flight of the Protestant duchess to Poland to escape the Marian persecution, as a necessary precaution to protect her estates from confiscation, and it was enforced by Sir Nicholas Bacon LK soon after Elizabeth I's accession. The reporter noted that 'the course of the Chancery (*cursus Cancellariae*) by reason of equity' differed from the common law in allowing a secret trust to be set up contrary to an express use.[71] Similar logic applied to an express trust following a use executed by the statute. There is a dearth of reported cases, but by the time of James I deliberately created trusts were commonplace.[72]

By enforcing the second use the Chancery was not infringing the letter or subverting the purpose of the Statute of Uses, but was properly exercising its jurisdiction in conscience. The jurisdiction in such cases was consequent upon the legal decision in *Tyrrel's Case*, for the intervention of equity would have been otiose if the second use had been caught by the statute. But what began as a mere trickle of special cases grew within a century into common form, so that from the seventeenth century until the repeal of the Statute of Uses in 1926 the most usual way of creating trusts was by a conveyance 'to *X* and his heirs unto and to the use of *Y* and his heirs, in trust nevertheless for *Z*'. This

[68] *Jane Tyrrel's Case* (1557) B. & M. 141; 1 And. 37; N. G. Jones, 14 JLH 75. Here an express use was limited upon a bargain and sale enrolled (which contained an implied use, executed by the statute), and the majority view was that 'a use cannot be engendered of a use'.

[69] A monetary consideration, probably fictitious, was recited for the same purpose.

[70] The secret use might also have been considered 'active', another reason preventing its execution.

[71] *Bartie, dowager Duchess of Suffolk v. Herenden* (1560) 93 LQR 36 (decision recollected in 1572); B. & M. 142; N. G. Jones, 19 CSC 164–6. Other examples of the 'course': *Dudley v. Ellis* (1559) 54 CLJ 545 (unreported); *Earl of Pembroke v. King* (1572) B. & M. 143 (the occasion for noting the 1560 case).

[72] They are noticed in print in *Sir Moyle Finch's Case* (1600) Co. Inst., IV, p. 85 at 86; *Foord v. Hoskins* (1615) 2 Buls. 337, as explained at 74 LQR 554; *Sambach v. Daston* (1635) B. & M. 149. See further N. Jones, 'Trusts in England after the Statute of Uses' (19 CSC 173); pp. 328–30, post.

vested the legal estate in *Y* as trustee for *Z*, the interposition of the first use being necessary to prevent the execution of the use in *Z* (which was now, for the sake of distinction, called a trust). Not for the first time, the courts had allowed policy to triumph over unintended legislative hindrances. It could be said in 1738 that 'a statute made upon great consideration, introduced in a solemn and pompous manner . . . had no other effect than to add at most three words to a conveyance'.[73] The statute had, of course, lost its real purpose upon the abolition of military tenures in 1645.

The reasons for the creation of trusts in the sixteenth and seventeenth centuries were different from those which had brought about uses and occasioned the statute. They no longer enabled devises of land, since wills made after 1540 were (with qualifications) valid at law. And, had there been any intention of evading feudal incidents, it is unthinkable that chancellors would have connived at it. But there were various other reasons for wishing to separate the legal from the beneficial ownership of land. Some might be temporary, for instance where the trustee was to make a conveyance at the direction of the feoffor. Or they might be more permanent, as where the trustee was required to look after the land and its revenues during the minority of a beneficiary, or during the whole lifetime of an unthrifty son,[74] or to hold the title for the benefit of a married woman,[75] or to keep the true ownership secret, or to pay debts.

Prominent among the reasons for creating trusts were the technical advantages gained in settlements by the interposition of trustees to preserve contingent remainders, to bar dower, and to prevent the operation of the rule in *Shelley's Case*.[76] The first of these devices is said to have been invented by royalist conveyancers in the 1640s because of the insecurity of estates during the Civil War, though it did not become common form until much later. The safeguard was achieved by inserting in settlements, after a life estate to *X*, 'remainder (after the determination of *X*'s interest for any reason in his lifetime) to trustees for the life of *X* in trust to preserve the contingent remainders expectant upon his decease from being destroyed, remainder to *X*'s eldest son . . . '. This was designed to prevent *X* from destroying the settlement. But it would only work if the trustees' remainder was not itself contingent and liable to destruction, and this became controversial. In 1740 Willes CJ warned the House of Lords that if the trustees' estate was held contingent all settlements for the last 200 years might be questioned: 'But can we conceive, my lords, that everyone has been mistaken for these 200 years, and that this new light is just now arisen to us?' A subtle reason was duly found for treating the estate as vested.[77] Yet again the courts had modified the legal rules to satisfy policy; but this time it was a policy in favour of dynastic settlement.

[73] *Hopkins v. Hopkins* (1738) 1 Atk. 581 at 591 per Lord Hardwicke C. His lordship's historical sense on this occasion was no better than his arithmetic.

[74] E.g. BL MS Lansdowne 1074, fo. 312 ('to *X* for life, remainder to trustees for the life of *X*'s eldest son, remainder to that eldest son's heirs').

[75] This enabled a married woman to own property independently of her husband: pp. 524–5, post.

[76] E.g. *Duncomb v. Duncomb* (1695) 3 Lev. 437.

[77] *Smith d. Dormer v. Parkhurst* (1740) B. & M. 98.

Lord Nottingham's Doctrine of Perpetuities

Trusts might have provided the ultimate means of establishing perpetuities. There was no reason inherent in their nature why they should be subject to the legal rules about remainders, because the rationale of those rules did not extend to equitable interests. Nor were trusts in theory caught up in the doctrinal confusion over executory interests, since by definition they could not be executed. They should therefore have continued in the supposedly uninhibited state which uses had been in before 1536. As a matter of policy, however, there was as much reason to forbid perpetual settlements in equity as in law.

When Lord Nottingham C set about formulating and clarifying the law concerning trusts in the Restoration period, one of his concerns was to find a clear doctrine of perpetuities. The doctrine which he laid down was one of his major achievements; it offered such a simple and acceptable solution that it was adopted by the common-law courts as well as the Chancery. Instead of testing settlements by a mass of abstract and often arbitrary principles relating to the character of each contingency, such as the earlier rules against double or uncommon possibilities, Lord Nottingham proposed that the validity of a contingent interest should depend solely on the remoteness of its time of vesting. If it would necessarily vest within the lifetime of a person or persons in being at the date of the settlement, it was valid.[78] Though later called the 'rule *against* perpetuities', the decision was seen by contemporaries as introducing a measure of relaxation in favour of complex contingencies which had formerly been impermissible but were not remote in time. Sir Francis North, who succeeded to the great seal in 1682, thought the new principle too liberal: 'A perpetuity is a thing odious in law and . . . is not to be countenanced in equity. If in equity you should come nearer to a perpetuity than the rules of the common law would admit, all men being desirous to continue their estates in their families would settle their estates by way of trust; which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth.'[79] He reversed the decree; but Lord Nottingham was upheld by a unanimous House of Lords. The decision approved a particular perpetuity period (a life in being), but it did not set the outer limits of permissible remoteness. Eighteenth-century decisions added twenty-one years plus the human gestation period. The reason for this quirky calculus lay in the law of entails. It had always been acceptable to settle land on *A* for life, remainder to *B* and his heirs in fee tail. This postponed the fee during *A*'s life, and also for practical purposes during the minority of *B*, because an infant tenant in tail could not suffer a common recovery. In the extreme case that, on *A*'s death, *B* had just died leaving an infant heir *en ventre sa mère*, the fee might be postponed for twenty-one years and a further nine months or so beyond the life of *A*. That was therefore adopted as the maximum period that the law would allow; but it came to be regarded as a period 'in gross', so that it did not have to be related to an actual beneficiary's life, or minority, or period of gestation.[80] The doctrine did not apply to charitable trusts, which could be created in perpetuity.[81]

[78] *Howard v. Duke of Norfolk* (1682–85) 79 SS 904; B. & M. 189. [79] B. & M. 194.

[80] *Jee v. Audley* (1787) 1 Cox C.C. 324; Simpson, *Leading Cases,* pp. 76–99; *Cadell v. Palmer* (1833) 1 Cl. & Fin. 372.

[81] See *CPELH,* III, p. 1419 n. 19.

The Strict Settlement

The kind of family settlement which was perfected between 1640 and 1700, and remained in use for three hundred years, was based on the common-law arrangement which gave only a life estate to the owner of the land for the time being, and successive remainders in tail to each of his children in order of seniority. This could be protected against destruction by the insertion of trustees to preserve the contingent remainders, and trustees were also charged with raising sums of money for the maintenance of various members of the family. Such an arrangement was called a 'strict' settlement.[82]

Strict settlements were frequently executed upon marriage, with provision for the bride's jointure and pin-money (an annuity for her personal use during the marriage) and suitable support for other family members. The settlement would be laid out in a conveyance to the trustees of the settlement; the uses in favour of the life tenant and remaindermen were executed as legal estates by the Statute of Uses, while the trusts imposed on the trustees subsisted in equity. A typical settlement on marriage might be in the form:

1) To the settlor in fee simple until the solemnization of the marriage, and then to the intended groom (*H*) for life, subject to a rent-charge to provide *H*'s wife with pin-money during *H*'s life. If any land was to be assigned as jointure, this was settled on *H* and his wife jointly; but this might be effected by a separate conveyance.
2) Remainder, in the event of a premature determination of *H*'s life estate, to the trustees during the life of *H* to protect the contingent remainders expectant on his decease from being destroyed.
3) Remainder (as to an appropriate part of the property) to trustees for a long term of years (say, 500 years from the death of *H*) to raise portions for his daughters and younger sons,[83] and a jointure for *H*'s widow if land was not granted in jointure by the settlor.
4) Subject thereto, remainders to each of *H*'s unborn sons severally and successively in order of seniority, in tail male; followed (sometimes) by successive remainders to each of the same sons in tail general, so as to let in a grand-daughter on failure of *H*'*s* male issue. The first remainder in tail vested on the death of the life tenant, subject to the portions term.
5) Subject to all the foregoing (including the portions term), remainder to *H*'s daughters as tenants in common, in tail male, with cross remainders. The effect of cross remainders was that on the death of any one daughter without male issue (or on the failure of her male issue) her share remained to the others as tenants in tail in common. An alternative formula was to give successive remainders to each of the daughters in order of seniority, as in the case of the sons, so that the eldest would

[82] The expression is found in 1715: 1 P. Wms 291.

[83] Portions were lump sums by way of advancement. The life tenant was sometimes given power to fix the amount of the portions later. For the mechanics of these trusts see p. 323, post.

take before the rest. A remainder to a female might be made conditional upon her husband assuming the name and arms of the settlor.[84]

6) Remainder or reversion in fee simple, usually to either *H* or the settlor and his heirs for ever.

Despite its long-term language, this type of settlement was intended to last only for one generation. It was binding on the life tenant, since if he attempted to break the settlement the trustees' estate came into effect to prevent it. And it was binding on the eldest surviving son as tenant in tail until he came of age, because until his majority he could not bar the entail. The understanding was that in each generation there would be a new settlement, reducing the estate of the tenant in possession to a life tenancy and postponing the fee for another generation. If the eldest son came of age during his father's lifetime, he would be able to break the settlement as soon as he succeeded; but this could be forestalled if his father persuaded him to co-operate in a resettlement, achieved by means of a common recovery to bar the entails of the old settlement. The son might be induced to agree to this by the grant of an immediate income charged on the land. It could not be assumed, however, that sons would normally reach the age of majority in their father's lifetimes, and in fact most resettlements were made voluntarily when they came to marry. The pressure then came from the bride's family, to ensure that proper provision was made for her, since she was not included in the previous settlement. It was also necessary to rearrange the remainders in every generation so as to advance the groom's future daughters in the line of succession before his uncles and aunts, and to provide portions for his daughters and younger sons.

It was not necessary to tie the whole of a family's land in strict settlement. Some of the estates could be left to descend to the heir. Nevertheless the widespread employment by the landed classes of the strict settlement, with resettlement in each generation, served to shackle much of the land in England to the same families until Victorian times and beyond. Economic and social historians dispute how far strict settlements achieved a suitable balance between the primogenitive dynastic spirit and a more affective feeling for the extended family.[85] Certainly the effect was to tie the land itself dynastically. The land was transmitted intact in the main line, subject to the economic interests of the various other members of the family charged upon it, rather than divided up among them. But the economic undesirability of tying up so much land in settlement was widely felt, especially in the nineteenth century. It was not simply that the land could not be prised out of landed families by the *nouveaux riches* anxious to acquire real property. Nor was it only that the 'great estates' were slowly swallowing up the lesser through marriage, so that landed wealth was becoming concentrated in fewer families. Even from the point of view of the landed family, there were management problems. The 'owner', being only a tenant for life, could not without special powers exercise the necessary functions of granting long leases, mortgaging, felling timber, and

[84] This was achieved by a royal licence to assume the surname (either instead of or in addition to the licensee's name) and the arms, followed by a grant of arms. An additional surname was usually linked to the old name with a hyphen.

[85] For this debate (1983–93) see E. Spring, 18 *Canadian Jo. of History* 379; 16 *Albion* 1; 41 *Econ. Hist. Rev.* 454; 8 LHR 273; *Law, Land and Family: Aristocratic Inheritance in England 1300–1800* (1993); L. Bonfield, 1 LHR 297; 39 *Econ. Hist. Rev.* 341; 41 *Econ. Hist. Rev.* 461; A. J. Erickson, 43 *Econ. Hist. Rev*. 21.

mining, which belonged to an absolute owner. Without ways of raising cash, improvements could not be carried out; without the means of exchanging one piece of land for another, estates could not be consolidated. The requisite powers had to be conferred on the tenant for life by each individual settlement, according to the foresight of the settlor and his counsel. As conveyancing precedents were elaborated, deeds of settlement (even in modest families) became increasingly lengthy and complex, requiring several skins of parchment. Even so, many landowners were compelled to seek private Acts of Parliament as the only escape from unforeseen problems. Eventually, in Victorian times, the most commonly needed powers were conferred by public general statutes on all tenants for life of settled land.[86]

The final stage in the development of the law of settlements realized the economic fact that, local sentiment apart, a family's wealth did not need to be tied to specific pieces of land. There was no economic reason why a tenant for life should not be permitted to exchange settled land for other land of like value, or indeed for other forms of capital, provided the settlement continued. This was suggested by the law reformer James Humphreys as early as 1826, but such a bold measure had to await the great agricultural depression of the 1880s, which made it desirable to convert land into more profitable investments. Legislation was then passed to give every tenant for life under a settlement the power to sell the land in fee simple. On his doing so, the settlement was not destroyed but attached itself to the proceeds of sale.[87]

In the twentieth century the strict settlement became for various reasons an unsatisfactory way of arranging the devolution of property in a family. It survived for a time as a means of ensuring that the estates of the nobility followed the peerage titles, which were usually limited in tail male, but for most purposes the devolution of wealth could be managed in other ways with less liability to tax. Between 1900 and 1970 the rate of death duties increased about a hundred-fold, and many settled estates were so badly hit by the burdens of taxation – especially during the carnage of the Great War, when father and sons might be slain in rapid succession – that they had to be sold. As in all periods, conveyancers were astute to seek out ways of reducing the incidence of taxation; but the old law of settlements was doomed to decline with the old landed gentry whose fortunes it had governed for so long. Towards the end of the century the Law Commission decided that the time had come to lay the traditional form of settlement finally to rest. Parliament agreed, and as from 1 January 1997 it has not been possible to create new entails.[88]

Further Reading

Holdsworth, *HEL*, VII, pp. 78–238
Plucknett, *CHCL*, pp. 552–7, 588–602
Milsom, *HFCL*, pp. 178–99, 225–39

[86] Settled Estates Act 1856 (19 & 20 Vict., c. 120); Settled Estates Act 1877 (40 & 41 Vict., c. 18); supplemented by the Settled Land Act 1882 (45 & 46 Vict., c. 38). See S. Anderson in *OHLE*, XII, part 1.

[87] Settled Land Acts 1882 (previous note), 1890 (53 & 54 Vict., c. 69), and 1925 (15 Geo. V, c. 18).

[88] Trusts of Land Act 1996 (c. 47), Sch. 1. The commonest form of settlement now is a bequest to a spouse for life, and then to children.

Cornish & Clark, pp. 123–32, 166–72
Simpson, *History of the Land Law*, pp. 81–102, 119–38, 208–41
S. Anderson, 'Property' (2010) in *OHLE*, XII, pp. 3–109
J. C. Gray, *The Rule against Perpetuities* (4th ed., 1942), pp. 126–90
D. E. C. Yale, [on perpetuities in equity] (1954) 73 SS lxxiii–xci; 'Equitable Estates in the 17th Century' [1957] CLJ 72–86
J. L. Barton, 'The Statute of Uses and the Trust of Freeholds' (1966) 82 LQR 215–25; 'Future Interests and Royal Revenues in the 16th Century' (1981) in *Laws and Customs*, pp. 321–35
J. H. Baker, 'The Use upon a Use in Equity 1558–1625' (1977) 93 LQR 33–8; 'Family Settlements' [1483–1558] (2003) in *OHLE*, VI, pp. 687–707
G. L. Haskins, 'Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule against Perpetuities' (1977) 126 *Univ. Pennsylvania Law Rev.* 19–46
L. Bonfield, *Marriage Settlements 1601–1740: the Adoption of the Strict Settlement* (1983); and see p. 314 n. 85, ante
B. English and J. Saville, *Strict Settlement: a Guide for Historians* (1983)
A. L. Erickson, 'Common Law versus Common Practice: the Use of Marriage Settlements in Early Modern England' (1990) 43 *Economic History Rev.* 21–39; *Women and Property in Early Modern England* (1993)
I. Ward, 'Settlements, Mortgages and Aristocratic Estates 1649–1660' (1991) 12 JLH 20–35
C. D. Spinosa, 'The Legal Reasoning behind the Common, Collusive Recovery: Taltarum's Case' (1992) 36 AJLH 70–102
N. G. Jones, 'Jane Tyrrel's Case (1557) and the Use upon a Use' (1993) 14 JLH 75–93; 'Trusts for Secrecy: the Case of John Dudley, Earl of Northumberland' (1995) 54 CLJ 545–51; 'The Influence of Revenue Considerations upon the Remedial Practice of Chancery in Trust Cases 1536–1660' (1997) in *Communities and Courts*, pp. 99–113; 'Trusts in England after the Statute of Uses: a View from the 16th Century' (1998) in *Itinera Fiduciae* (19 CSC), pp. 173–205; 'The Use upon a Use in Equity Revisited' (2002) 33 *Cambrian Law Rev*. 67–80
H. J. Habakkuk, *Marriage, Debt and the Estates System: English Land Ownership 1650–1950* (1994)
J. Biancalana, *The Fee Tail and the Common Recovery in Medieval England 1276–1502* (2001)
D. A. Smith, 'Was there a Rule in *Shelley's Case*?' (2009) 30 JLH 53–70

17

Other Interests in Land

Not all interests in land were subject to the developments described in the preceding chapters. Several kinds of interest grew up outside the feudal scheme of real property, but since they did so for different reasons they are a miscellaneous collection. The kind of property which was the subject of seisin, and was protected by the *praecipe* actions, came in modern times to be called real property (or realty), supposedly because it could be vindicated by a remedy *in rem*: that is, an action to recover the property (or *res*) itself.[1] Other kinds of property, such as leases for years or movable chattels, were distinguished as 'personal property' (personalty), because the remedy for infringement lay *in personam*: usually an action for damages. Some interests in land were outside the common law altogether: unfree tenancies were at first protected only by actions in seignorial courts, and the interests which came to be classified as equitable were protected only by personal actions in Chancery. The various species of property recognized by the common law are shown in Table D.

Classifications are only as good as the purpose they serve, and these legal classifications of property do not make sense for every period.[2] The very idea of 'property', as we have seen, is not easy to apply to land in a feudal context. And the so-called 'real' actions were not originally conceived of as enabling recovery of the *res* but as requiring the successful demandant to be put in seisin. Some interests in land which began outside the feudal common law, and were not linked with seisin, were subsequently brought within it – for example, marriage-gifts,[3] copyholds,[4] and uses executed by the Statute of Uses.[5] And some forms of personalty came eventually to achieve protection *in rem* while retaining some of the characteristics of chattels (such as being uninheritable). They became known as 'chattels real'. The prime example is the term of years.

The Term of Years

A term of years – or lease for years – is an estate in land for a fixed period of time, usually but not necessarily a number of years. Such a term was not a freehold interest and was exempt from the feudal notions of seisin and tenure, inheritance, and future interests. It may surprise the uninitiated to learn that an estate in land for nine hundred and

[1] Real property in this sense was not limited to land: for other types see 'hereditaments' in Table D at p. 337, post.

[2] Pollock & Maitland, II, pp. 181–3. The distinction between real and personal seems to have begun as a subdivision of chattels into chattels real (leases and wardships) and chattels personal (goods and animals). Blackstone distinguished real and personal property, but without linking the distinction to remedies: Bl. Comm., II, pp. 16, 384.

[3] See p. 291, ante. [4] See pp. 325–8, post.

[5] See p. 275, ante. In *Butler v. Baker* (1591) Coke's notebook, BL MS Harley 6686, fo. 8v, Clench J. said that at common law a use was a chattel.

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ninety-nine years is a chattel, whereas an estate which lasts only for one man's lifetime is a freehold. The distinction obviously does not represent the quantity of an estate, measured in terms of duration; it is a distinction of quality which lost its rational basis many centuries ago.

The classification of the lessee's interest as a chattel was sometimes accounted for by its not having been protected by the writ of right or the assize of novel disseisin. If the lessee had no protection *in rem*, his property was not real but personal. The different explanation given in *Bracton* for denying these remedies to the lessee was that the possession of land for a certain period could not be called a 'free tenement' or freehold (*liberum tenementum*), which was the only subject-matter of such actions.[6] Both explanations are, however, circular. The distinction was based on a factual state of affairs rather than legal reasoning. Maitland criticized *Bracton* for drawing an analogy with the Civil law usufruct, an arrangement whereby ownership was separated from enjoyment of profits, and said that 'English law for six centuries and more will rue this youthful flirtation with Romanism'.[7] But it seems that the author of *Bracton* was simply borrowing Roman terminology to describe reality.

The true reason why the lessee had no place in the feudal framework is to be found in the original purpose and function of the term of years. Whereas the primordial units of feudal ownership were the life-long freehold and the hereditary fee, both sealed by homage, the letting for years was a temporary arrangement usually intended to secure a loan of money.[8] The lessee was more interested in the money than the land, and if he died it was expedient for the security to pass with the debt, or be devisable by will, not descend to heirs. It was a matter of commercial contract, and so if the lessee was evicted by the lessor his remedy was the writ of covenant. But the lessee's possession had to be secured against third parties. As against those claiming as grantees from the lessor, he was given the writ *quare ejecit infra terminum*, which gave recovery of possession for the residue of the term but suffered from a number of drawbacks.[9] Against the rest of the world his remedy lay in damages for trespass: by the 1360s the species known as *de ejectione firmae,* the action of ejectment.[10] Ejectment could also be used against the lessor himself, and this was a necessary remedy if the lease was not by deed. Yet the freehold remained in the lessor, and he alone could bring the assize if his lessee was evicted by a third party.

The capital interest enjoyed by the tenant for years was characterized before 1300 as a 'chattel' rather than as an estate in land.[11] It could be bought and sold, but not entailed or settled, and on the death of the lessee it passed to his personal representatives along with his movables. The tenant could not alienate beyond the term: if he purported to do so, it was a disseisin of the lessor, who could bring an assize against the alienee. The categorization of leases as chattels, in accordance with the reality at the time of their earlier

[6] It was not incongruous in the 13th century to describe a lessee as being 'seised' of a tenement (but not of a free tenement): e.g. Pollock & Maitland, II, pp. 106 n. 3, 114 n. 2. In Normandy and in Scotland novel disseisin could be used in the 14th century by a lessee for years.

[7] Pollock & Maitland, II, p. 115.

[8] See p. 330, post. It was not invariably so used. For some 12th-century examples of ecclesiastical leases for years see J. Hudson, *Land, Law and Lordship* (1994), pp. 59, 239. For an 11th-century example see 106 SS 22.

[9] See *OHLE*, VI, p. 635. The writ was invented by William Ralegh CJKB in the 1230s.

[10] For the form of the writ see p. 584, post. For the date see 100 SS lxxiii.

[11] Herle CJ said that it was not an estate in law: *Anon.* (1333) Y.B. Mich. 7 Edw. III, fo. 45, pl. 8.

history, became permanently embedded in the common law, so firmly entrenched that it served to conceal a fundamental change in their nature after the thirteenth century.

Change in Nature of the Term of Years

Most leases at the present day involve letting the beneficial enjoyment of land at a rent. The lessee is regarded as the owner of the land during the term, and the lessor as the owner of a reversion which entitles him to the rent. There is a parallel with the sort of arrangement achieved before 1290 by subinfeudation at a rent, which was called 'fee farm' (from the Latin word *firma*, rent). The usual purpose of the fee farm was to produce a regular periodic income for the feudal lord. The farmer (*firmarius*), whether or not he paid a premium at the start, was a rent-payer. Like the lessee of today, he wanted possession of land for his own use, and that is what he was paying for.

When the statute *Quia emptores* ended subinfeudation in 1290,[12] it incidentally deprived landowners of this method of securing an income. They could still alienate their property in fee farm by substitution, reserving the rent as a charge on the land rather than as a feudal service; but they would then have to part with their property permanently and their manors would be diminished. A similar effect to subinfeudation could, however, be achieved by leasing the land for years to a rent-paying tenant for years; and within a century of *Quia emptores* the husbandry lease at farm (*dimissio ad firmam*) was in everyday use.

At the same time as the husbandry lease gained in popularity, the mortgage by way of a term declined.[13] The typical lessee for years was no longer a money-lender but a farmer in the later sense, a husbandman with insufficient capital to buy the land in fee but able to pay rent out of the fruits of his labour. The lease for years then took on, by analogy, some of the features of feudalism. The lessor began to be called the lord, the lessee his tenant; the landlord could distrain for the rent, as for a service, and it was said that the lessee owed him fealty.[14] In these changed circumstances, the farmer tenant needed the same kind of legal protection as the freehold tenant, and the fact that the subject of his ownership was classed as a chattel was an historical accident which seemed to deny him a just remedy. Fourteenth-century precedents have been found in which lessees managed to recover their terms in the action of ejectment,[15] possibly through benign confusion with *quare ejecit*.[16] But the obvious technical objection to this was that a trespass action was concerned only with past wrongs, remediable in damages, and not with continuing rights.[17] Inability to recover the term seems for this reason to have been the orthodox legal position until 1499.[18] The abandonment of this

[12] See p. 263, ante. For the implications in this context, see Milsom, *HFCL*, pp. 116–17.

[13] See pp. 330–1, post.

[14] Litt., s. 132.

[15] *Anon.* (*c.* 1301) CUL MS. Ee.6.18, fo. 85 (but with a note of dismay); *Anon.* (1383) B. & M. 197 ('trespass'); *Paules v. Janet* (1389) CP 40/519, m. 113 (judgment to recover term and £100 damages). A later example is *Pynchemore v. Brewyn* (1481) B. & M. 197; and see *Trussell v. Maydeford* (1493) Caryll Rep. 156 at 157, per Kebell and Wode sjts.

[16] For recovery of the term in *quare ejecit* see B. & M. 195, 197, 199.

[17] See the *Old Natura Brevium* (*c.* 1516) B. & M. 200. This was printed from a late-medieval manuscript.

[18] *Brancaster v. Master of Royston Hospital* (1383) B. & M. 196, per Belknap CJ (who said the proper remedy was covenant). See also *Anon.* (*c.* 1495) ibid. 199.

orthodoxy was hastened by the willingness of fifteenth-century chancellors to protect the possession of the lessee, a challenge which goaded the King's Bench into a major change. After 1499 it was settled that the form of judgment in the action of ejectment, where the term had not expired, was that the plaintiff recover his term as well as damages for the trespass.[19] The recovery could be enforced by the judicial writ *habere facias possessionem*, whereby the sheriff was ordered to put the plaintiff in possession, thus giving the plaintiff the effect of a real action. It was an act of judicial legislation by Fyneux CJ and his brethren, accepted also by the Common Pleas, and it transformed the legal character of the leasehold interest. A term of years was now an estate in land, a commodity safe to invest in. It had become real property, recoverable *in specie*: a chattel still, but a 'chattel real'.[20]

Further Security of the Termor

The judges and the legislature took further steps to protect the termor in the first half of the sixteenth century. There were three situations in which the term of years was liable to destruction without the consent of the termor, and if the termor was to be treated as a property owner these had to be remedied. The first problem was that if the lessor died leaving an infant heir in ward, the guardian could evict the lessee during the wardship, on the ground that the seignory existed before the lease and therefore the lord's rights took priority.[21] This harsh rule was reversed by the King's Bench under Fyneux CJ in 1514, then restored (at least in the Common Pleas) by the opinion of Fitzherbert J and others, until finally laid to rest by all the judges in the 1540s.[22] The second problem was that a lease could be destroyed by a common recovery of the reversion. If the lessee knew that a recovery was under way, he could intervene to protect his interest; but if the lessor suffered a recovery without the lessee's knowledge, it was too late to help.[23] The remedy in this case came from Parliament, which passed a statute in 1529 enabling a lessee to 'falsify' such a recovery by bringing *quare ejecit* or ejectment.[24] The third situation was where the king became entitled to the reversion by virtue of an inquisition which did not mention the lease; this was remedied in 1548.[25]

Use of Ejectment to Try Freehold Title

Ejectment after 1499 gave the leaseholder a remedy more convenient in its practical working than anything available to the freeholder. He could recover possession by an

[19] *Gernes v. Smyth* (1499) B. & M. 200 n. 8 (affirming CP); followed by CP in *Soole v. Edgare* (1525) ibid. n. 9; *Anon.* (1530) Pollard Rep., 121 SS 256. As late as 1572 Dyer CJCP denied that this was law: B. & M. 201.

[20] Estate: *Partridge v. Straunge* (1553) Dalison Rep., 124 SS 10 at 11, per William Coke J. Chattel real: *OHLE*, VI, p. 634 (1505).

[21] *Anon.* (1306) B. & M. 203; *OHLE*, VI, p. 637 n. 47. Fitzherbert said this was 'the old learning': Spelman Rep. 142; B. & M. 204.

[22] B. & M. 204–5; 121 SS 280; *OHLE*, VI, pp. 637–8; *Corbet's Case* (1599) 4 Co. Rep. 81. See also Arnold, 35 CLJ at 326; 94 SS *182*.

[23] *Anon.* (1507) Caryll Rep. 561; *Anon.* (1529/30) 121 SS 319; *OHLE*, VI, pp. 638–9. Cf. the Inner Temple discussion in 105 SS 75 (1480s).

[24] Stat. 21 Hen. VIII, c. 15.

[25] Stat. 2 & 3 Edw. VI, c. 8, s. 1.

action free from the technicalities of the writs of entry and possessory assizes, with the speedy mesne process appropriate to a trespass action, and a trial by jury at nisi prius. The position of a lessee plaintiff in litigation therefore excited the envy of plaintiffs claiming fee or freehold, and by about 1565–70 they had found a way of utilizing ejectment for their own purposes. Obviously, a freeholder could not bring ejectment. But this was not an insuperable obstacle. Freeholders could grant leases, and a freeholder might therefore grant a lease solely for the purpose of bringing ejectment, trusting the nominal lessee to plead his freehold title and then surrender the lease once possession had been recovered. By the end of the century, according to Sir Thomas Egerton, this device had caused 'a great decay of the true knowledge and learning of the law in real actions', and had 'almost utterly overthrown' the assizes and writs of entry.[26] This he thought unfortunate, because defendants might not learn until the trial what title was being claimed. But there was no going back. Within a century, according to Twisden J, 'real actions were so much out of use that there was ne'r a judge in Westminster Hall did know what to make of them'.[27]

The device was simple in theory, but there was the practical problem that the lessee had to be given a semblance of possession from which he could be ejected. This might be attended by evidential, not to mention physical, risks. There was also the legal difficulty that, in accepting a lease for this purpose from a tenant out of possession, the lessee might be guilty of maintenance. But here the legal mind was capable of a far greater feat of creative imagination. In its perfected form, the action of ejectment to try freehold title was brought by a wholly imaginary lessee (usually called John Doe) against an equally imaginary person[28] who was supposed to be the lessee of the person in possession and to have ejected John Doe. These fictitious creatures were puppets of the real claimant, who could pull their strings without having to make a physical entry, put the lessee in possession, and wait for him to be personally ejected by the real defendant. The real plaintiff could at the same time avoid the expense of mesne process to procure the fictitious defendant's appearance. Since he controlled the fictions, he could make the non-existent defendant enter an appearance to the action. His attorney then wrote a letter from the fictitious defendant to inform the real defendant that an action had been commenced against him, enclosing a copy of the declaration, and inviting him to come and defend his title. This was the point where the genuine litigation began. The real defendant might well have read the letter with aggrieved astonishment, but he had to go along with the charade or he would lose possession. Here the court could have proved awkward, and the Common Pleas was instinctively inclined that way; but during the seventeenth century the judges recognized the advantages of the remedy and lent it their support. When the real defendant was given leave to intervene – which he was entitled to do, as the reversioner – he was required to sign the 'consent rule'. This was an order of court which obliged him to accept the fictions and enter a plea of Not Guilty. As a result, the only matters which could be put to the jury

[26] B. & M. 201 n. 5. Cf. Dyer CJ's similar grumble in 1573: 3 Leo. 51.

[27] Treby Rep., I, p. 278 (1669).

[28] Most often called Richard Roe, but sometimes given a pejorative name such as Shamtitle or Thrustout. P was sometimes called Goodtitle. But any name would do.

were those relating to the freehold title, not the lease, entry, and ouster;[29] and, since they were raised under the general issue, the more slippery technicalities associated with the pleading of title were eliminated.[30] A new form of action had been invented, and the web of supporting fictions had effectively become due process of law.

Ejectment soon replaced the old real actions and petty assizes in all the cases where it would lie, but it was not quite universal. The fictions enabled the plaintiff to take a short cut only where, on the facts, he could have chosen to go the long way. It followed that, since a valid lease could only be granted by a person entitled to enter, the apparatus could not be set up if the real plaintiff had no right of entry. The action was therefore not available if the plaintiff's right of entry had been 'tolled' – taken away by law – through failure to exercise it in time; for instance, after a descent from a disseisor to his heir (when the entry was 'tolled by descent cast'), or after the expiration of the twenty-one year limitation period ordained in 1624.[31] Furthermore, ejectment would not lie for those types of real property which in their nature could not be entered upon and leased: for instance, advowsons, rights of way, and unassigned dower.

For nearly three centuries from Elizabeth I to Victoria the usual action to recover real property thus involved two non-existent parties. The very title of an ejectment action – for example, *Doe d. Smith v. Roe*[32] – concealed the reality. In 1833 ejectment was raised to the status of being the only permissible real action, except for the writ of right of dower and the action of *quare impedit* for advowsons. John Doe and Richard Roe were finally retired in 1852 when fictions were abolished.[33] The action to recover possession of land was nevertheless still governed by the law relating to ejectment, not that of the old real actions which it had replaced.

Leases and Settlements

The usual husbandry lease was not for a long period; twenty-one years would have been normal, and ninety-nine years was the longest beneficial term created in the ordinary course of events before the mid-sixteenth century. In medieval times longer leases may have been regarded as unsafe because they were precarious. But the protection extended to the lessee in the first half of the sixteenth century opened the way to using long leases as a conveyancing device. Leases for as long as a thousand years began to appear, perhaps with the intention of avoiding feudal incidents.[34] It also occurred to conveyancers that, if long leases could be used in creating settlements, there might be a way of avoiding the rules about contingent remainders and executory interests. Moreover, the splitting of ownership between a long-term lessee and a reversioner, neither of whom could convey the freehold in possession, brought perpetuities back within reach.

A preliminary obstacle in the way of using leases to support family settlements was the doctrine that there could be no estates in chattels.[35] It was, however, possible to settle

[29] If D gave any of those matters in evidence, P could withdraw the action and recover costs against D.
[30] For the forms used see B. & M. 201. For their origin see *The Law's Two Bodies,* pp. 51 n. 21, 123–4.
[31] Statute of Limitations 1624 (21 Jac. I, c. 16).
[32] I.e. Doe (nominal P) on the demise of Smith (real P) against Roe (casual ejector).
[33] Real Property Limitation Act 1833 (3 & 4 Will. IV, c. 27); Common Law Procedure Act 1852 (15 & 16 Vict., c. 76).
[34] See *Risden v. Tuffin* (1597) Tothill 122; 117 SS 264; *Anon.* (1599) Cary 9; *Jenney v. Stewart* (1599) 117 SS 267, 282, 319; N. G. Jones, 19 JLH 62–74.
[35] See pp. 414–15, post.

the use and occupation of chattels, and such uses were not executed by the Statute of Uses, which spoke only of hereditaments.[36] In the 1550s it was held that a testator could devise a term of years to *X*, and if *X* should die during the term then to *Y*.[37] *Y*'s interest was not technically a remainder, since at law there could be no remainder in a chattel; it was a quasi-remainder or 'possibility of remainder'. If and when the time came, the whole of the remaining term passed from *X* to *Y*. The effect of such devises was much in doubt in the later sixteenth century. The better opinion in the 1550s was that the first devisee took the whole term and could therefore destroy the executory devise;[38] but it was settled in 1578 that the second devisee had more than a mere possibility and that his interest could not be destroyed by the first devisee.[39] In 1583 the distinction between the property in the lease and the 'use and occupation' was abandoned by a majority of judges in the Exchequer Chamber, and thereafter executory devises of terms were generally upheld and the future interests protected from destruction.[40]

Since the executory devise was now indestructible, and since the carving up of leases was not subject to the rules about the abeyance, postponement, or shifting of the freehold, these developments seemed indeed to offer good prospects for perpetuities. But a perpetuity for a thousand years would have been as mischievous as a perpetual fee, and an entailed lease would have contravened the policy of the law since it would not have been barrable by common recovery. The judges saw these threats coming and refused to allow a term to be devised in tail,[41] or in any other way which tended towards a perpetuity. The most extreme reaction occurred in *Child v. Baylie* (1623),[42] where a 76-year lease was devised to *A* and his assigns, but if *A* should die without issue then to his brother *B.* This was not a perpetuity in the later sense, but the court said that it 'tends to create a perpetuity' and declined to uphold the limitation to *B*. The decision of the Exchequer Chamber in that case had to be abandoned when the perpetuity doctrine was reformulated later in the century by Lord Nottingham C.[43]

Although they were outlawed as a means of creating perpetuities, leases came to serve a number of legitimate purposes in settlements. In particular, they were used in the classical strict settlement as a means of raising money for portions and other purposes tangential to the transmission of the inheritance,[44] the advantage being that a lease for years did not disturb the remainders in tail.[45] The technique was for the settlor to limit a long lease to trustees, who were empowered to raise the money by way of sale, subdemise, or mortgage of the term. When the debt was thereby discharged the term was said to be 'satisfied', and the settlement might provide for the term thereupon to

[36] *Mantell's Case* (1542) *OHLE*, VI, p. 677 n. 158. See also p. 309, ante; and p. 415, post.

[37] *Anon.* (1550) B. & M. 206 (Hales J dissenting); *Anon.* (1572) ibid. 207.

[38] *Anon.* (1541) B. & M. 205; *Anon.* (1552) ibid. 206 n. 25; *Anon.* (1553) Dalison Rep., 124 SS 15, pl. 7; *Foster v. Foster* (1572) B. & M. 205, endnote.

[39] *Weltden v. Elkington* (1578) B. & M. 208.

[40] *Amner d. Fulshurst v. Luddington* (1583) B. & M. 210; *Clarke v. Manning* (1608) ibid. 211; *Lampet d. Lampet v. Starkey* (1612) ibid. 213.

[41] *Peacock's Case* (1576) cit. 10 Co. Rep. 87; *Lovies's Case* (1613) 10 Co. Rep. 78; *Leventhorpe* v. *Ashbie* (1635) Rolle Abr., I, p. 611.

[42] *Child d. Heath v. Baylie* (1623) B. & M. 214.

[43] See p. 312, ante. Lord Nottingham C expressly disapproved of *Child v. Baylie:* B. & M. 193.

[44] See p. 313, ante.

[45] The remainderman took his estate subject to the term, but the expectation was that the capital sum would be raised at once (e.g. by mortgage or a sale of timber) so that the remainder could take effect in possession free of the term (but subject to any mortgage).

cease. Alternatively, the equitable interest in the term could be directed to 'attend the inheritance', so that it devolved as if it were realty.[46] The equitable term could then do what a legal term could not, and follow the entails of a settlement. The advantage of keeping satisfied terms on foot in this way was that they prevented the freehold from being covertly encumbered; a lessee was protected against estates and charges on the land created subsequent to the lease. Since a purchaser might well insist on such protection, it was a prudent precaution in case of a future sale. For these reasons, the insertion of long terms in settlements became the usual practice from the mid-seventeenth century onwards.[47] So prevalent was it, that attendancy on the inheritance would be implied in equity even if no express provision was made in the settlement.[48]

Leases and Conveyancing: Lease and Release

The artificial term of years proved remarkably helpful to freeholders. It was useful not only in recovering and protecting freeholds, but also in replacing both livery of seisin and the 'bargain and sale enrolled' as the standard modes of conveyance of a freehold estate in possession. (For the various modes of conveyance see Table E.) Livery was inconvenient, since it usually involved the appointment of attorneys to deliver or accept it on the land, with witnessed memoranda endorsed on the deeds to attest that it had taken place. The registration procedure introduced by the Statute of Enrolments was equally inconvenient, and intrusively public.[49] A loophole in the 1536 legislation provided a way of avoiding both. A contract by a freeholder to grant a lease was executed by the Statute of Uses in the same way as a bargain and sale of the freehold, because by implication the freeholder was seised to the use of the intended lessee by virtue of the contract. The Statute of Enrolments, however, did not extend to contracts for leases.[50] Therefore if *A* contracted to lease land to *B*, *B* acquired a legal lease at once by virtue of the Statute of Uses,[51] and if *A* then granted ('released') the reversion to *B* by deed,[52] the fee simple would have passed from *A* to *B* in two stages without any livery or enrolment being necessary. As a deliberate device for conveying the fee without formality, this procedure was traditionally attributed to Sir Francis Moore (d. 1621), a celebrated Chancery practitioner. It was certainly in general use around his time,[53] and in the course of the seventeenth century a nominal lease for one year followed by a release

[46] There are Elizabethan examples of trusts of leases to prevent incumbrances. The use of satisfied terms for this purpose had been thought of by 1630. See N. G. Jones, 19 CSC 181, 189–90.

[47] A precedent of 1647, with an express direction to attend the inheritance, will be found in *Howard v. Duke of Norfolk* (1682) B. & M. 189.

[48] See Yale, 79 SS 150–60. It was abolished by the Satisfied Terms Act 1845 (8 & 9 Vict., c. 112).

[49] See pp. 276–7, ante.

[50] A similar loophole was that a covenant to stand seised to uses in consideration of marriage, or of 'natural love and affection', was executed under the Statute of Uses without being subject to the Statute of Enrolments (because there was no 'bargain and sale'). It therefore passed a legal fee simple without formality. But this did not happen if there was a monetary consideration.

[51] At common law an agreement for a lease created only a bare interest (*interesse termini*) until possession was delivered.

[52] Future estates were conveyed by deed, because livery of seisin was impossible.

[53] E.g. *Lutwich v. Mitton* (1620) Cro. Jac. 604.

became the common form of conveyance.[54] In a later period, the release became the only deed actually made, since the recital of a previous bargain and sale in the deed would estop both parties from denying it. This fiction by estoppel was given the force of law in 1841, but practice was simplified four years later by a statute which at last enabled corporeal hereditaments to be transferred by straightforward grant.[55]

Tenancy at Will

Sometimes a lawful occupier of land had a beneficial interest and yet no recognizable estate, because he did not hold the land for any defined period. Examples are the lessee for years who 'held over' (with real or implied permission) after the end of his term, or cestui que use in possession. In the sixteenth century such occupiers were classified as 'tenants at sufferance' because, although they were not trespassers, they had no legal rights in the land at all.[56] Then there were cases where a person was deliberately given an interest in land to last only as long as the grantor liked: this was called 'tenancy at will'. Such a tenancy would arise by implication if a lease was granted without a term being fixed. The lessee at will could be given notice to quit at any time, but the law gave him a reasonable time to leave and also the right to any crops he had sown during the tenancy (his *emblements*). By the early sixteenth century another common arrangement was the periodic tenancy, a tenancy to run from year to year at the pleasure of both parties. The courts inclined to the view that this took effect as a lease for one year (or two, depending on the words used) followed by a tenancy at will.[57] In later times, however, the precarious status of a tenancy at will was avoided where possible by construing demises for uncertain terms as successive yearly leases.[58]

The most important kind of tenant at will in medieval times, and the principal example discussed in *Bracton* and Littleton, was the unfree tenant who held at the will of his lord.

Villein Tenure and Copyhold

Much of the land in medieval England was held of the lord of a manor by 'base', 'unfree', or villein tenure. Its distinguishing characteristic, for lawyers, was that the services were uncertain. The early separation of villein tenure from villein status[59] opened briefly the prospect that a freeman who held in villeinage might be able to sue for his holding in the royal courts; but by the time of *Bracton* free status and freehold were also distinct legal entities. The common-law analysis of the position was similar to that of

[54] It was not quite universal: e.g. it could not be used for conveyances by corporations, since corporate bodies could not be seised to uses.

[55] Conveyance by Release Act 1841 (4 & 5 Vict., c. 21); Real Property Act 1845 (8 & 9 Vict., c. 106).

[56] Cf. licensees, pp. 333–5, post. The cestui que use might become a trespasser if the feoffees asked him to quit: p. 213 n. 51, ante.

[57] *OHLE*, VI, pp. 643–4. The leading case is *Burgh v. Potkyn* (1522) Spelman Rep. 136; 119 SS 125. See also *Anon.* (1505) Caryll Rep. 457.

[58] *Right d. Flower v. Darby* (1786) 1 Term Rep. 159; Bl. Comm., II, p. 147.

[59] See pp. 501–4, post.

the lease for years.[60] A tenant in villeinage did not hold in his own name but in that of his lord; if a stranger evicted him it was a disseisin of the lord and not of the tenant. The tenant, even if free in status and seised of his tenement,[61] was not seised of freehold; and it followed that he was not protected by the *praecipe* actions or assizes. The most accurate description of his status at common law was that he was a tenant at the will of the lord. If the lord evicted him, this was a determination of the lord's will and the tenant could hope for no more than his emblements in an action at common law.[62] Moreover, since the tenant had no freehold seisin, he could not make a feoffment without disseising his lord. The only way in which his tenancy could be alienated was by surrendering to the lord on trust to admit the alienee as a new tenant.

The tenant was not entirely without legal protection. Though legally a tenant at will, he held 'at the will of the lord according to the custom of the manor', and this custom was enforceable in manorial courts. The rolls of manorial courts, which survive in large numbers after the thirteenth century, show that in reality unfree tenants enjoyed heritable and alienable estates similar to those of the common law, restrained only by analogous incidents of tenure. Indeed, manorial entails are almost as old as entails at common law.[63] A tenant's title was secured by recording the surrender and admittance on the court roll, and it became usual for the tenant to be given a copy of the court roll recording the admission, as his record of title. This practice accounts for the name 'tenant by copy of court roll', which came into use in the fourteenth century.[64] The admittance was sometimes symbolized by the delivery of a rod: the tenure was then called 'tenancy by the virge', and it survived in many places until 1925.

Social and economic changes – the effect of the Black Death on the labour supply and peasant mobility, the commutation of unfree services for fixed payments, and the widespread acquisition of base tenancies by men of substance – all combined to make the notion of villein tenure an anachronism before 1400. The term 'villeinage' was increasingly reserved for servile status, while in the context of tenure it gave way in the fifteenth century to the socially neutral 'copyhold';[65] but the change of attitude required also a legal change. The decline of feudal reality had long since made the freehold tenant the legal landowner vis-à-vis his lord, and the new reality demanded that the same should happen to the copyholder.

Legal Recognition of the Copyholder

The common law hardened too early for the copyholder to be accommodated directly: as a tenant at will he could not have an action against his lord, or any action based on freehold seisin. An attempt by a copyholder in 1390 to obtain judicial review of a

[60] *Bracton*, II, p. 89, even said that, as against the lord, a villein's tenement was a chattel.

[61] It was accurate to say he was 'seised' of his copyhold, since he was put in by a lord: *OHLE*, VI, p. 646. *Bracton* (previous note) wrote of a villein being disseised by his lord.

[62] *Anon.* (1368) Y.B. Mich. 42 Edw. III, fo. 25, pl. 9.

[63] See L. Bonfield, 47 CLJ 411; L. Poos and L. Bonfield, 114 SS cliv–clix.

[64] Tenancy 'per copy de court rolle' is mentioned in the case of 1368 (n. 62, ante). The traditional learning was set out in Litt., ss. 73–7 (B. & M. 218).

[65] The word is used in a statute of 1484, recognizing copyhold as a qualification for jury service in the tourn: Stat. 1 Ric. III, c. 4.

manorial judgment was thwarted on the same ground: the freehold was in the lord, and the lord's management decision was not a reviewable judgment.[66] There were, nevertheless, two means of protection which began to be used in the fifteenth century. One was the Chancery subpoena. Since it was arguably unconscionable for a lord to flout the immemorial customs of his manor, a copyhold tenant might complain to the chancellor if the lord failed to act conscionably.[67] The second was trespass: the tenant, though not seised of freehold, did have possession and was therefore allowed to bring trespass against third parties who evicted him.[68] By 1500 it was at least arguable that the tenant could also set up his copyhold estate as a defence if sued by his lord in trespass.[69] The prevailing view until the 1550s was that trespass could not be brought by the tenant against the lord if evicted; but the fact that respectable opinion could be marshalled against this entrenched rule is valuable evidence as to the changed perception of the copyholder's position.[70]

The common law eventually solved the problem by allowing the copyholder's lessee to bring ejectment, so that the land itself could be recovered on proof of title. Despite nagging doubts in the conservative Common Pleas, which required proof of a custom to lease the copyhold,[71] the new remedy was firmly established in the King's Bench.[72] Copyhold thereupon became an estate in land recognized by the common law. This threw up some nice legal questions. In theory, estates in copyhold were not subject to common-law rules but to the customs of each manor, which had to be proved as facts. However, manorial customs had in reality veered towards the common law except where deliberate efforts were made to preserve differences, and the later royal courts assimilated copyholds to freeholds by presuming that the rules were the same in the absence of contrary evidence. Remainders were recognized, if recorded upon the admission of the particular tenant. And entails of copyhold were accepted, at any rate if there was a custom of bringing formedon in the manorial court. This latter feat required the utmost ingenuity, since the equity of *De donis* (1285) had somehow to be coupled with notionally immemorial custom (1189). But the courts came to acknowledge the reality, and by the end of the sixteenth century they were also inclined to allow such entails to be barred by recovery in the manorial court; if they were now reputed as common-law estates, they ought to have the same qualities.[73] All in all, as Coke remarked, time had dealt favourably with copyholders. But some distinctions between

[66] *Philippot v. Wade* (1390) Y.B. Hil. 13 Ric. II, p. 122, pl. 8 (writ of false judgment).

[67] *Anon.* (1453/54) B. & M. 218; Gray, *Copyhold, Equity and the Common Law*, pp. 23–51. The obvious analogy with uses was noted in *Dillon v. Freine* (1595) BL MS Harley 1697, fo. 43v at 47v, per Peryam CB.

[68] *Rikhill's Case* (1400) Y.B. Mich. 2 Hen. IV, fo. 12, pl. 49.

[69] *Anon.* (1491) Caryll Rep. 51. Such pleas met with demurrers: *Tropnell v. Kyllyk* (1505) Caryll Rep. 489 (no judgment); *Saye v. Penreth* (1516) CP 40/1016, m.517d (judgment against tenant).

[70] The point was debated by all the new serjeants in 1531, but not settled till the 1550s: B. & M. 219–25; *OHLE*, VI, pp. 647–50.

[71] *Wells v. Partridge* (1596) Cro. Eliz. 469. Some held that even a customary lease was not sufficient: *Anon.* (1572) Coke's *Notebooks*, I (134 SS), no. 52. And that a *habere facias possessionem* would not lie: *Anon.* (1573) B. & M. 225, 230 n. 26.

[72] *Anon.* (1552) B. & M. 225; *Melwich v. Luter* (1588) 4 Co. Rep. 26.

[73] *Dell v. Hygden* (1595) B. & M. 226 (undecided). Popham CJ pointed out that many titles depended on recoveries of copyhold land and there would be 'great garboil [turmoil] in the commonwealth' if they were overturned: Coke's notebook, BL MS Harley 6686A, fo. 141v. The present writer's home was the subject of a copyhold common recovery in 1655.

copyhold and freehold, including for the former the necessity of conveyance by surrender and admittance in a manorial court (or before the lord's steward), remained embedded in the law until 1926.

The Trust as an Interest in Land

The survival of equitable interests after the Statute of Uses, and the emergence of the trust, have already been mentioned.[74] Although the trust was not deployed by conveyancers for the same reasons as the medieval use, its development mirrored that of the use, in that equitable relief began in individual cases of unconscionable behaviour and then became a matter of routine: when that occurred, the beneficiary came to have a distinct interest in land, governed by known rules. This may have seemed a more straightforward process the second time round, because many of the rules already established for uses could be reused for trusts; but the old rules were not always best suited to their new role, and some had to be left aside. The achievement of creating a coherent body of trust law, and freeing it from the unsuitable aspects of the old law of uses, is generally credited to Lord Nottingham C (d. 1682).

In Coke's time trusts were still regarded by some as mere unassignable personal rights of action, rather than as interests in land.[75] Coke himself, reading on the Statute of Uses in 1592, said that a trust was neither *jus in re* nor *jus ad rem*, and that although uses were as old as the common law they were 'abhorred in the law'.[76] Even Lord Keeper Egerton took a narrow view of trusts. He once refused relief to a third-party beneficiary on the ground that there was no privity,[77] and he was most unwilling to enforce a trust against a purchaser of the legal estate without clear evidence of express notice.[78] Something more approaching hostility is evident from a Lincoln's Inn reading of 1623, in which trusts were attacked as introducing yet more uncertainty into the law, so that legal estates ('the ancient darling of the common law') had become 'as shadows'. The reader advocated complete extirpation.[79] It was still arguable in the middle of the century that trusts were not interests in land but merely choses in action,[80] and lingering suspicion is encountered as late as the 1680s.[81] By that time, however, thanks largely to Lord Nottingham C, the trust had undeniably become a form of real property. It was now an inheritable equitable interest more closely analogous to a legal estate in land

[74] See pp. 309–11, ante.

[75] *Earl of Worcester v. Finch* (1600) Co. Inst., IV, p. 85; *Anon.* (1601) B. & M. 148, per Coke A.-G.; *Ogle v. Lady Shrewsbury* (1632) 118 SS 636. See also *Wytham v. Waterhowse* (1596) B. & M. 146; Cro. Eliz. 466.

[76] Reading in the Inner Temple (1592) BL MS Hargrave 33, fo. 138; cf. Co. Litt. 272v (1628). The first proposition was adopted by Peryam CB in 1594 (1 And. 343) and by Egerton LK in 1596 (B. & M. 146). In Roman law a *jus in re* was a property right enforceable against the world, whereas a *jus ad rem* was a property right enforceable only by virtue of contract or obligation.

[77] *Yelverton v. Yelverton* (1599) 117 SS 270, no. 308.

[78] *Wildegoose v. Wayland* (1596) B. & M. 148; but cf. 117 SS 258, no. 199 (sub nom. *Ragland v. Wildgoose*).

[79] Henry Sherfield's reading (1623) B. & M. 149. This was an unconscious echo of Audley's attack on uses in 1526: ibid. 118; p. 274, ante.

[80] *R. v. Holland* (1648) Style 20 at 21. Hale's contrary argument that a trust was an estate in land was only partly accepted by the court, which said it might or might not be, 'as the case falls out'.

[81] See *Howard v. Duke of Norfolk* (1683) B. & M. 194, per North LK (quoted on p. 312, ante).

than to a chose in action, albeit that several basic principles formerly applicable to uses had been dropped.[82]

The artificial trust was not the same as a personal confidence reposed in a human conscience, and so a corporation could in equity be a trustee.[83] The beneficial interest was held to prevail over claims against the trustee's legal estate by third parties, such as a widow claiming dower, or a judgment creditor.[84] After 1677 a trust was regarded as part of a deceased beneficiary's assets for the purpose of administering his estate, and even the legal estate of the trustees could be taken in execution to satisfy claims against the beneficiary.[85] The trust was assimilated to the legal estate in other respects: for example, so far was the beneficiary regarded as the real owner of the land that the common-law rules forbidding restraints on alienation were applied to his equitable estate.[86]

By these means, as Lord Mansfield CJ put it in 1759, the trust had become in Chancery the same as the land itself and the trustee 'merely an instrument of conveyance'.[87] The beneficiary was the owner, and his estate was subject to rules of property as definite as those which governed legal estates. The old problem caused by the informality with which equitable interests could be conveyed, and which had been one of the objections to uses, was tackled in the case of trusts by legislation: after 1677 a declaration of trust in land was void unless 'manifested and proved' by writing.[88] Trusts could arise informally, however, by implication of law, and the basic principles of implied and constructive trusts were another legacy of Lord Nottingham's chancellorship.[89] From this period also the courts of equity developed distinctions between the rules governing trusts and those governing other equitable interests (such as the equity of redemption[90]). One important distinction was that between trusts and powers.[91] A bare power of appointment carried with it no duty, and so there was no need (as with the trust) for named or ascertainable beneficiaries. Most powers were personal and could not be assigned.[92] The court was unable to remedy the non-execution of such a power, though it could set aside improper appointments and would sometimes remedy formal defects in proper appointments. If, on the other hand, a power was coupled with a trust, there had to be ascertainable beneficiaries so that the court could decree equal distribution among them if the trustee failed to appoint; if there were not, the trust itself would fail.

The trust thus joined contract and tort as one of the major conceptual categories of English law, and its applications extended beyond the area of landed property to encompass stocks and other funds. This is reflected in the nineteenth-century treatises

[82] See Lord Nottingham's essay on this subject, ibid. 150–3.

[83] So also could the king. Neither could be seised to uses so as to transfer the freehold.

[84] *Medley v. Martin* (1673) Rep. t. Finch 63 (creditor); *Tassel v. Hare* (1675) 73 SS 230, no. 339 (doweress); *Finch v. Earl of Winchilsea* (1715) 1 P. Wms 277 (judgment creditor).

[85] Statute of Frauds 1677 (29 Car. II, c. 3), s. 10. This was penned by Lord Nottingham. For the trust as assets see B. & M. 152. Note also *Sympson v. Turner* (1700) ibid. 154.

[86] Excepting the case of the married woman, where the restraint was allowed in her own interest: p. 525, post.

[87] *Burgess v. Wheate* (1759) 1 Eden 177; 1 Wm Bla. at 162.

[88] Statute of Frauds 1677 (29 Car. II, c. 3), s. 7; B. & M. 153.

[89] See Yale, 79 SS 101–60. For the attendancy of trust terms see p. 324, ante.

[90] See p. 332, post. [91] For powers see p. 308, ante.

[92] *R. v. Englefield* (1591) 7 Co. Rep. 11; 4 Leon. 135, 169 (power to revoke uses held not forfeitable for treason).

on 'trusts and trustees',[93] which treated the subject as an autonomous body of law and not merely as a branch of conveyancing. Trusts of personal property are in modern times at least as common as trusts of land, and to a large extent the same rules govern both. Under the scheme of estates introduced by the legislation of 1925, the trust became even more important as the only medium for creating an estate in real property other than a term of years or a fee simple absolute in possession.

Mortgages

From the earliest times debtors owning property have used it as security for loans of money. This was called a gage (*vadium*). Whether the gage was a chattel[94] or land, possession was handed over to the lender, to be returned on payment. In some early forms of gage no term was fixed: the gagee retained possession until he was fully satisfied. Another early form, as we have seen,[95] was a lease of land for years to the gagee, the term being the period of the loan. If the gagee took the profits in reduction of the loan, this was a 'living' gage;[96] but if – as seems to have been more usual – the lender was entitled to repayment as well as the 'fruits and rents' accruing during the term, it was a dead gage ('mortgage'). The latter arrangement, though sinful as giving the lender a usurious return and (in the view of *Glanvill*) 'unjust and dishonourable', was legally valid.[97]

By the fifteenth century the name 'mortgage' had come to be used for any arrangement whereby a loan was secured by a conveyance of real property. The self-redeeming living gage had long since gone into disuse. It had cast on the lender the responsibility of refunding himself, without profit, and it was less attractive than a passive security in the form of land which would become the lender's absolutely if the borrower failed to pay on time. Two ways of effecting such security were in use in the thirteenth and fourteenth centuries: either the mortgagor leased the land for years to the mortgagee, with the proviso that if the debt was not paid by a certain date the mortgagee would have the fee,[98] or the mortgagor conveyed the fee to the mortgagee forthwith, on condition that he might re-enter (and regain the fee) if he paid by a certain date.[99] The first form, though originally the more common of the two, had the disadvantage that the mortgagee was not seised and at that date had no security if the mortgagor retained or regained possession; it also fell foul of the emergent doctrines of estates, under which a term of

[93] E.g. Thomas Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (1837); Henry Godefroi, *A Digest of the Principles of the Law of Trusts and Trustees* (1879).

[94] In the case of chattels, the law by Tudor times distinguished a pawn (where the lender had possession but not ownership) from a gage (which transferred title to the lender).

[95] See p. 318, ante.

[96] The 'vifgage' is found in Norman law, but the term was not used in England. *Glanvill* resorted to circumlocution in describing it, and Littleton cannot have heard of it when he thought up a new explanation for 'mortgage': Litt., s. 332. It later seemed the natural counterpart to mortgage: Co. Litt. 205.

[97] *Glanvill*, x. 6, 8 (pp. 121, 124). The canon law regarded it as usury to take interest on a loan, and usurers were liable to punishment in the spiritual courts. The common law did not invalidate usurious agreements, though statutory penalties were introduced in 1495: Stat. 11 Hen. VII, c. 8. In 1545 Parliament set a permissible upper limit of 10 per cent.; in 1713 this was reduced to 5 per cent., where it remained until the repeal of the usury laws in 1854.

[98] *Bracton*, III, p. 286.

[99] This was the classic form by Littleton's day: Litt., ss. 332–44.

years could not be enlarged into a fee without a physical transfer of seisin. The second form gave the mortgagee a fee simple defeasible by condition subsequent (that is, payment). Besides being a stronger title, it had the advantage that it was arguably non-usurious. A disadvantage was that, if the mortgagee died before being paid, the fee descended to his heir and therefore attracted dower and feudal incidents, whereas the debt which it secured devolved as personal property on his executors.

One way of avoiding all the difficulties was to convey land to feoffees upon trust that if the money was paid they would hold to the use of the mortgagor and if not to the use of the mortgagee.[100] After 1536 such mortgages were executed by the Statute of Uses, so that the mortgagee became seised, but the seisin would skip to the mortgagor on redemption.[101] In the seventeenth century a further alternative device came into almost universal use, the long term of years with clause of defeasance.[102] This was much used in raising money under the terms of strict settlements.[103] The mortgage by demise went out of use again in the nineteenth century, when the fee-simple mortgage returned, with the difference that the condition of defeasance was replaced by a covenant to reconvey on payment.[104] Since 1925 most mortgages have been effected by means of a charge, created by deed, without any estate passing to the mortgagee.[105]

A different form of security (after 1285) was the 'statute merchant' – and (after 1353) its analogue the 'statute staple' – whereby the borrower could by means of a registered contract charge his land and goods without giving up title or possession; if he failed to pay, the lender became a tenant of the land until satisfied, under a special kind of tenancy which was treated as a chattel for succession purposes but was protected by the assize. At first these devices were only for merchants, and were the only kind of mortgage available to alien merchants, who could not own freehold land. Then in 1532 a 'recognizance in the nature of a statute staple' was introduced for non-mercantile parties, though it was of little use outside the Metropolis since the statute had to be registered in one of the central courts at Westminster or in the City of London.[106] Statutes and recognizances, after surviving into the eighteenth century, had become obsolete by the time they were abolished in 1863. They were, nevertheless, the closest models for the mortgage by way of legal charge, which has become the norm since 1925.

The borrower under a statute or recognizance remained in possession of his land, and it later became a common practice under the common-law forms of mortgage likewise to allow the mortgagor to remain in possession as a tenant at will or at sufferance of the

[100] E.g. *Sir William Capell's Case* (1494) B. & M. 269. For 14th-century antecedents see Palmer, *ELABD*, pp. 122–3.

[101] *Anon.* (1552) B. & M. 156. Cf. *Powtrell's Case* (*c.* 1550) 121 SS 339, per Hales J (treated as a covenant).

[102] See 79 SS 45, 151; I. Ward, 12 JLH at p. 30. It was sometimes strengthened by a covenant to convey the reversion to the mortgagee in case of non-payment.

[103] See pp. 313, 323, ante.

[104] The advantage of a reconveyance over a re-entry was that it made the title easier to prove.

[105] This device, introduced by the Law of Property Act 1925 (15 & 16 Geo. V, c. 20), s. 85, was given the same legal effect as a mortgage by demise (s. 87). The mortgage by demise was an inappropriate model for the increasingly common house-purchase mortgage (p. 333, post), since the lessor would be paying 'rent' to the lessee, and the normal duties of a tenant (e.g. repair) were more appropriately imposed on the mortgagor. Since 2002 registered land cannot be mortgaged by demise.

[106] Statute of Merchants (1285), 13 Edw. I, stat. iii; Statute of the Staple (1353), 27 Edw. III, stat. ii, c. 9; Stat. 23 Hen. VIII, c. 6. Cf. tenancy by *elegit* (p. 74, ante), which provided a similar security for the judgment debtor.

mortgagee. Indeed, the mortgage deed might contain express provision for this.[107] The mortgagor who stayed in possession was legally in a similar position to the cestui que use: at law he could be evicted at will, though he might expect protection in Chancery.

The mortgagor could redeem his land by discharging his debt according to the bargain, but at common law the condition had to be performed punctiliously according to its wording. If the mortgagor defaulted, even in a minor way, the land passed absolutely out of his hands. If the mortgagor died before payment, there was a view in the thirteenth century that the heir could not take his place and redeem the inheritance; strict performance had become impossible, and there was no room for 'equity'. In this one case, the common law did come round to a more equitable doctrine, for by the time of Littleton (*c*. 1460) the heir was allowed to redeem because of his interest in the land.[108] But that was the limit of common-law equity. The date of payment had to be adhered to strictly, and if the money was not tendered in time for it to be counted out before sunset of the appointed day, the land was lost.[109] As in the case of the penal bond, this gave the moneylender more security than he reasonably needed, and the harsh consequences of the common law required softening in Chancery.

The Equity of Redemption

The equitable doctrine of mortgages grew from the same root as the doctrine of penalties.[110] The moneylender was morally entitled to repayment of the debt, and perhaps some reasonable interest, but not to an unconscionable pound of flesh. No doubt relief in Chancery was first given on the hard facts of particular cases, as where the forfeiture for non-payment was grossly excessive,[111] or where punctual payment was prevented through misfortune or sharp practice;[112] but in the early seventeenth century it became an established doctrine that in equity the mortgagor was the true owner of the land.[113] Under this new doctrine, even if the legal estate passed to the mortgagee for non-payment, the mortgagor was entitled to a reconveyance on tender within a reasonable time of the principal sum with interest and costs. While the debt remained outstanding, only the court, by making a decree of foreclosure, could transfer the beneficial interest to the mortgagee if payment was unreasonably delayed.[114]

The mortgagor was said to have an 'equity of redemption'. This was so inseparable from the mortgage that the parties could not contract out of it, and the mortgagee could not by his conduct 'clog' the equity.[115] Even if the mortgagee forfeited his own

[107] See e.g. *Powseby v. Blackman* (1623) Cro. Jac. 659. Another device, where the mortgage was by way of demise for (say) 500 years, was for the mortgagee to subdemise to the mortgagor for 499 years, without reserving rent, the subdemise to be void in the event of non-payment by a certain date.

[108] *Britton*, II, p. 128 (using the word *equité*); Litt., s. 334.

[109] *Wade's Case* (*c*. 1602) 5 Co. Rep. 114.

[110] See pp. 346–7, post.

[111] E.g. *Bodenham v. Halle* (1456) 10 SS 137; *Sir William Capell's Case* (1494) B. & M. 269.

[112] Cary 1; Co. Inst., IV, p. 84.

[113] This was long attributed to *Emmanuel College*, *Cambridge v. Evans* (1625) 1 Ch. Rep. 18. But the concept was well known long before then, whereas the Evans case (*rectius* Ewens) was not concerned with the equity of redemption at all: see D. Waddilove, 73 CLJ 142.

[114] If the mortgagee took possession without going to the court, he remained a trustee and was strictly accountable for the profits.

[115] E.g. by spending money on improving the land: *Bacon v. Bacon* (1640) Tothill 133.

land for treason, the mortgagor's equity was safe.[116] The equity of redemption had thus become a right inherent in the land, and the mortgagor had acquired real protection. Just as the typical fifteenth-century landowner had not been seised of his own land, but was in possession as a cestui que use, so the landowner of the seventeenth, eighteenth, and nineteenth centuries was often in possession of his land (or some of it) only as the owner of an equity of redemption. Like the trust, this interest had become an equitable estate; it could be bought and sold, settled in tail, and even mortgaged. But it was open to the same objection that it made the law of property less certain. Hale CJ said in 1673 it had 'received too much favour', and that 'by the growth of equity on equity the heart of the law is eaten out'.[117] It nevertheless became a settled feature of English property law, and already by the end of Lord Nottingham's chancellorship (1673–82) it was the subject of a sophisticated body of principles governing priorities.[118] Some of the learning was laid aside in the nineteenth century, when it became usual to give the mortgagee a power of sale, thereby avoiding the need for a decree of foreclosure.[119]

Until Georgian times the mortgage was used principally by landowners as a way of raising capital needed in the short term, and the mortgage debt would be repaid in a lump sum or a few large instalments. The more typical mortgage today is used to finance a house purchase by repayment out of personal income, in frequent instalments and over a much longer term. This became common in the nineteenth century and enabled wage-earners to purchase their own homes, not only providing them and their families with more security but giving more of them a right to vote. Banks were quick to see the investment possibilities of large numbers of relatively small long loans, but the business was increasingly taken over by building societies. The earliest building societies were formed in the late eighteenth century to enable a group of members to build new houses, whereupon they were wound up; but in the next century permanent societies were formed to lend money to buyers. By the 1830s permanent building societies were so numerous that legislation was passed to regulate them,[120] though it was only in the twentieth century that they acquired the largest share of the lending market, and only towards the end of that century that – as a result of mortgages – most of the country's housing had come for the first time to be owned by its occupants.

Licences

A licence to go upon or use land, being merely an authority to do what would otherwise be a tort, does not in itself possess the characteristics of a property right. It is inalienable:

[116] *Pawlett v. A.-G.* (1667) Hardres 465. The original mortgagee's heir (Edmund Ludlow of the Inner Temple) had been attainted by Parliament as a regicide.

[117] *Roscarrock v. Barton* (1672) 1 Ch. Cas. 217 at 219; Nottingham, *Prolegomena* (Yale ed.), pp. 284–6. Even Nottingham thought equitable relief had the 'ill consequence' of making it harder to borrow money on mortgage: *Manual of Chancery Practice* (Yale ed., 1961), p. 165.

[118] See Yale, 79 SS 62–87. The Chancery also recognized the equitable mortgage, where title-deeds were deposited with the lender as security: 73 SS ciii–civ; *OHLE*, XII, pp. 133–5 (revived in the 1780s).

[119] A series of statutes, beginning in 1860, conferred a power of sale on all mortgagees in the absence of a contrary provision. See *OHLE*, XII, pp. 135–41.

[120] Regulation of Building Societies Act 1836 (6 & 7 Will. IV, c. 32). There have been numerous subsequent regulatory statutes. See generally E. J. Cleary, *The Building Society Movement* (1965); Cornish & Clark, pp. 147–8.

if *A* licenses *B* to visit his house for dinner, he cannot substitute *C*.[121] It is not enforceable *in rem*: a countermand is effective, even when it is a breach of contract, and so the licensee who ignores a countermand becomes a trespasser at common law.[122] A fortiori, a licence cannot be invoked against a purchaser from, or lessee of, the licensor. Licences are not much mentioned in the common law before the fifteenth century. Their only effect, outside the law of contract, seems to have been to provide a defence against the licensor in an action in tort.

In the later year books there are, nevertheless, said to be some limits to the power of countermand. For one thing, a licence might amount to a lease for years. A licence to occupy land for a fixed term was not necessarily a lease, because it might not give the licensee exclusive possession; but this was a matter of construction.[123] Then again, a licence could not be revoked if it was coupled with a grant of an easement or profit. Moreover, if it included the right to take a profit, the licensee could assign it, or could at least delegate the exercise of it to others.[124] One medieval explanation for this distinction was that things of pleasure were purely personal and could be revoked without substantial loss, whereas things of profit were more highly regarded by law. The explanation which prevailed later was different. Whereas a bare authority was inherently revocable, a grant of property was not. The critical distinction was between a bare licence and a grant.[125] A grant of an easement or profit required a deed; a lease did not, but it required an intention to confer the right of exclusive occupation for a fixed period. With this distinction the common law rested. Despite contrary rumblings from time to time, the law could not confer the attributes of real property upon a bare licence. Equity was not so cautious. By the nineteenth century it was settled that equity would restrain the revocation of a licence if the licensee had been allowed to improve land on the understanding that it would not be revoked, or if the licensee had given consideration for a 'contractual licence'. It was subsequently maintained that, as a result of the Judicature Acts, the equitable doctrine prevailed over the law to the extent that a contractual licensee could persist in exercising a countermanded licence without becoming a trespasser.[126] In the second half of the twentieth century Lord Denning, and other judges, held that an irrevocable licence to occupy land could even give rise to an 'equity' or constructive trust binding purchasers with notice.[127] Such a licence was not an 'interest in land', and yet it seemed that something like it was being elevated above the realms of contract in order to protect the position of those who bargained for the use

[121] Y.B. Mich. 18 Edw. IV, fo. 14, pl. 12, per Choke J.

[122] Y.B. Mich. 39 Hen. VI, fo. 7, pl. 12; Trin. 20 Edw. IV, fo. 4, pl. 2, per Wode sjt. The later cases are reviewed in *Wood v. Leadbitter* (1845) 13 M. & W. 838. Cf. *Beverley v. Dodmore* (1367) CP 40/427, m. 33; Palmer, *ELABD*, p. 378 (trespass *vi et armis* for ejecting a woman guest from D's inn at night).

[123] *Prior of Bruton v. Ede* (1470) 47 SS 31; *Anon*. (1489) Y.B. Mich. 5 Hen. VII, fo. 1, pl. 1; Thomas Moyle's reading (1533) *OHLE*, VI, p. 642 n. 92.

[124] *Duchess of Norfolk v. Wiseman* (1497) Y.B. Trin. 12 Hen. VII, fo. 25, pl. 5; Hil. 13 Hen. VII, fo. 13, pl. 2. Cf. Port 37.

[125] *Note* (*c*. 1520) Spelman Rep. 161, per Broke sjt; *Webb v. Paternoster* (1619) 2 Rolle Rep. 143, 152; Poph. 151; Palm. 171; Godb. 282; Noy 98.

[126] *Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd* [1948] A.C. 173.

[127] *Errington v. Errington and Woods* [1952] 1 K.B. 290; *Binions v. Evans* [1972] Ch. 359; *Re Sharpe* [1980] 1 All E.R. 198. Cf. the Housing Act 1980, s. 48, under which a licensee from a local authority could have a statutory 'secure tenancy'.

or occupation of real property without becoming tenants. The historical parallel with the recognition of the use and the lease for years is obvious. However, in this instance it was found undesirable to recognize a new species of property, since the existence of a constructive trust ought to depend on the particular facts of each case.[128]

Further Reading

Holdsworth, *HEL*, III, pp. 198–217
Simpson, *History of the Land Law*, pp. 71–7, 141–3, 242–69
Milsom, *HFCL*, pp. 101–2, 152–7, 161–5, 224–5, 230–1
Cornish & Clark, pp. 132–6
J. H. Baker, 'Agrarian Changes and Security of Tenure' [1483–1558] (2003) in *OHLE*, VI, pp. 631–52

Leases for Years (and Ejectment)
Pollock & Maitland, II, pp. 106–24
P. Bordwell, 'Ejectment takes Over' (1970) 55 *Iowa Law Rev.* 1089–147
M. S. Arnold, 'The Term of Years' [14th century] in (1976) 35 CLJ at 323–30
W. M. McGovern, 'The Historical Conception of a Lease for Years' (1976) 23 *UCLA Law Rev.* 501–28
J. Baker, 'Litigation over Real Property' [1483–1558] (2003) in *OHLE*, VI, pp. 710–25

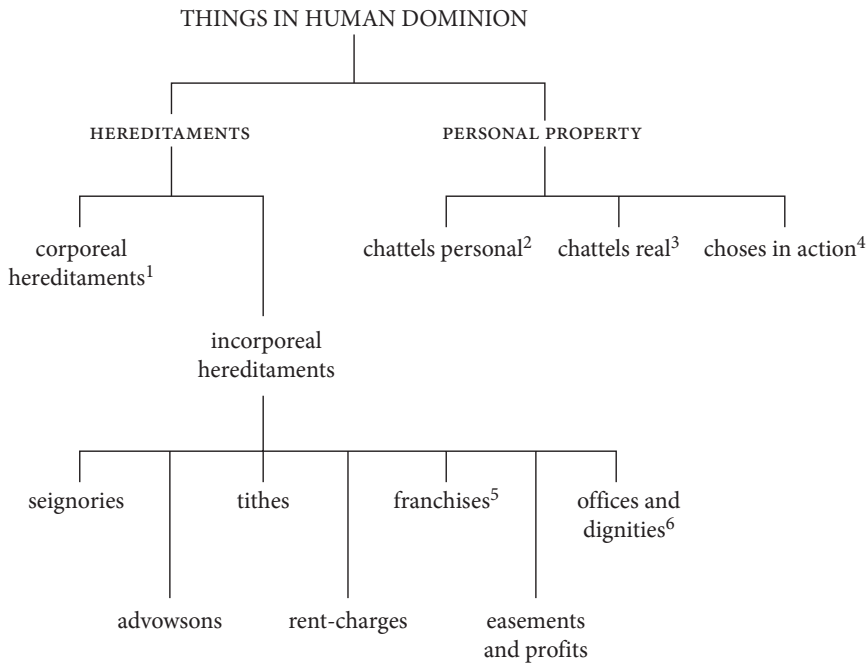
Villein Tenure and Copyhold[129]
Pollock & Maitland, I, pp. 356–83
Simpson, *History of the Land Law*, pp. 144–72
C. M. Gray, *Copyhold, Equity and the Common Law* (1963)

Trusts
D. E. C. Yale, 'An Essay on Mortgages and Trusts and allied Topics in Equity' (1961) in *Lord Nottingham's Chancery Cases*, II (79 SS), pp. 7–207
G. S. Alexander, 'The Transformation of Trusts as a Legal Category, 1800–1914' (1987) 5 LHR 303–50
N. Jones, 'Trusts in England after the Statute of Uses: a View from the Sixteenth Century' in *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (R. H. Helmholz and R. Zimmermann ed., 19 CSC, 1998), pp. 173–205; 'The Trust Beneficiary's Interest before *R. v. Holland* (1648)' (2007) in *Law in the City*, pp. 95–118; 'Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham' (2010) 31 JLH 273–98; 'Uses and "Automatic" Resulting Trusts of Freehold' (2013) 72 CLJ 91–114
M. Macnair, 'The Conceptual Basis of the Trust in the Later Seventeenth and Early Eighteenth Centuries' (1998) in *Itinera Fiduciae* (19 CSC), pp. 207–36

Mortgages
R. W. Turner, *The Equity of Redemption* (1931)
J. L. Barton, 'The Common Law Mortgage' (1967) 83 LQR 229–39
S. Anderson, 'Mortgages' (2010) in *OHLE*, XII, pp. 132–58
D. Waddilove, '*Emmanuel College v. Evans* (1626) and the History of Mortgages' (2014) 73 CLJ 142–68; 'Why the Equity of Redemption?' in *Land and Credit* (C. Briggs and J. Zuijderduijn ed., 2018), pp. 117–48

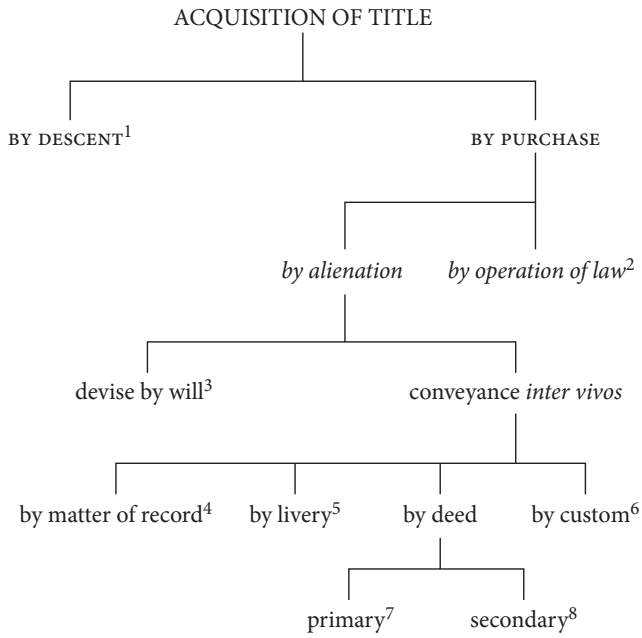
[128] See *National Provincial Bank v. Ainsworth* [1965] A.C. 1175 (HL); *Ashburn Anstalt v. Arnold* [1989] Ch. 1.
[129] For manorial customs see p. 297, ante.

Table D. Types of property



1 Land, including the minerals, vegetation, buildings, fixtures, and title-deeds.
2 See ch. 22, post.
3 Including terms of years, tenancies at will, and wardships severed from seignories.
4 See p. 404, post.
5 Including palatinates, private liberties and jurisdictions, markets and fairs, tolls, forestry rights (such as parks, chases, and warrens), and rights to take royal revenues or profits (such as treasure trove, wreck, whales, mines royal, and swans).
6 Including peerages, baronetcies, and armorial bearings.

Table E. Modes of conveying real property



1 Three modes: (i) at common law, (ii) in tail (limited to issue), (iii) customary (e.g. gavelkind, borough English).
2 E.g. by escheat, forfeiture, limitation, general occupancy.
3 Either by borough custom or (after 1540) by statute.
4 E.g. Act of Parliament, letters patent under the great seal, deed enrolled, final concord, common recovery.
5 Only in the case of corporeal hereditaments; the livery of seisin was usually accompanied by a deed to evidence the estate granted.
6 E.g. surrender and admittance in court customary.
7 Creating an estate, e.g. gifts, demises, declarations of trust.
8 Dealing with a pre-existing estate, e.g. releases, quitclaims, confirmations, surrenders, assignments, disentailing devices.

18

Contract: Covenant and Debt

From the law of real property we now turn to the common law of obligations, which in today's language comprises the law of contract, quasi-contract (now largely reconstituted as restitution), and torts. The law of torts governs infringements of interests protected by the law independently of private agreement, whereas the law of contract governs expectations arising out of consensual transactions between individual persons or bodies. The latter type of obligation may be analyzed in terms either of the *right* to performance of the contract or of the *wrong* of breaking the contract and thereby causing loss. The mature common law knows only the latter aspect; it provides for damages to compensate for breach of contract, but to obtain specific performance of a contract recourse must be had to equity. This is somewhat remarkable, given that the earliest form of action concerning contractual obligations was designed both to compel performance and to provide compensation for wrong. Moreover, the story begins, as well as ends, with an apparently comprehensive contractual remedy. But the English law of contract has not evolved lineally from a single starting-point. Its history has been affected by evidential problems, jurisdictional shifts, and the extension of trespass actions to remedy the deficiencies of the *praecipe* writs.

Before embarking on the story, it is necessary to be aware of some shifts in the meaning of terms. The word 'contract', in particular, possessed a more confined meaning for medieval common lawyers than it now does. It did not mean a mere consensual agreement, or an exchange of promises, but denoted a transaction – such as a sale or loan – which transferred property or generated a debt. The modern sense of 'contract', as a legally binding agreement, was conveyed by the word 'covenant' (*conventio*). But 'covenant', as we shall see, was to acquire a restricted technical meaning because of the limited way in which actions of covenant were allowed to work in the central courts, and it then became necessary to find a general word to replace it. 'Contract' would not at first do, because of its special connotations. Pleaders sometimes used Latin neologisms corresponding with 'agreement' (*agreamentum*) and 'bargain' (*bargania* or *barganizatio*), but the word which ultimately prevailed was 'undertaking' (*assumptio*[1]). We shall see in the next chapter how this was brought about by the development of forms of action designed to remedy wrongdoing, in effect making it a tort to damage someone in breach of an undertaking. By about 1600 the action of *assumpsit* had expanded to take over the work of the older actions based on covenants and contracts, and then the word 'contract' began to acquire its looser modern sense of a binding agreement. Serjeant Sheppard noticed this shift of meaning in 1651: 'a contract, taken largely, is an agreement between two or more concerning something to be done,

[1] This also underwent a shift of meaning, from a factual enterprise to a promissory commitment: see pp. 350–1, post. In practice the verbal form *assumpsit* (he undertook) came to be used as the noun.

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whereby both parties are bound to each other, or one is bound to the other. But more strictly it is taken for an agreement between two or more for the buying and selling of some personal goods whereby property is altered.'[2] It will be noted that even the stricter sense now incorporated the notion of an agreement: 'contract', however defined, had taken on the meaning formerly borne by 'covenant'. By the end of the seventeenth century the present-day distinction between contract and tort was also in place.[3]

Our main historical questions nevertheless arise not so much as questions of terminology as of remedies. What agreements were to be enforced, and in which courts? And what procedures were available to enforce them? In the ancient communal assemblies, and in the medieval town courts where most mercantile litigation was conducted, the answer was simple. The plaintiff made a complaint in some standard form, and proof was by oath; everyone knew that contracts ought to be performed and debts paid, and no more law than that was usually needed. In the royal courts – that is, at common law – the answer was constrained by the writ system.

The Action of Covenant

Before 1200 there was a royal writ in the *praecipe* form to enforce covenants, and the formula settled in the thirteenth century was: 'order the defendant to keep the covenant' (*praecipe D quod teneat conventionem*) made between him and the plaintiff.[4] This writ was usually brought to enforce covenants concerning land, such as leases, and was said to have been invented for that purpose,[5] but its wording was not so restricted. As was acknowledged by Parliament in 1284, the range of writs of covenant was infinite.[6] The form of action was applicable on the face of it to all consensual agreements; it gave specific performance where appropriate, damages where not. No more could be desired of a contractual remedy. But history did not stop in the thirteenth century, and the seemingly comprehensive action of covenant would be reduced to playing a somewhat peripheral role in the history of contract.

A covenant relating to land was usually put into writing in a deed or charter, sealed and witnessed. Most everyday agreements were not so formal; but the early royal courts did not think it their function to hear minor disputes. *Glanvill* and *Bracton* both say that the royal courts had little to do with 'private' agreements, apparently meaning agreements not recorded in court.[7] Oral agreements were best left to the local courts, where proof by compurgation was used. At first this was not a rigid exclusion. We find occasional covenant cases in the thirteenth-century eyre rolls in which the plaintiff had no written evidence, and this was fatal only if he had no suit either.[8] Provided the

[2] W. Sheppard, *Faithfull Councellor* (1651), p. 93. [3] See p. 427, post.

[4] For the form see p. 582, post. For a 12th-century prototype see 77 SS 493, no. 154. Cf. p. 342 n. 25, post.

[5] *Weedon v. Mauntel* (1285) B. & M. 311, per Fishburn sjt.

[6] Statute of Wales (1284), c. 10 (B. & M. 309). For a building case in 1226 see Ibbetson, *HILO*, p. 22.

[7] The principal kind of recorded agreement which they had in mind was the final concord, used to transfer title to land (p. 302, ante).

[8] I.e. transaction witnesses: see p. 7, ante. See *Dun v. Basset* (1234) Fifoot, *HSCL*, p. 261 (P lost because he produced no suit 'save his own single voice', nor a charter); *Cadigan v. Say* (1256) B. & M. 309.

plaintiff produced 'good suit', the defendant was put to answer, and could either wage his law[9] or put himself on a jury.[10] Even so, writing was obviously better. In 1292 an action of covenant was brought in the Shrewsbury eyre for the loss of a loaned horse; the defendant objected that there was no writing, but the justices overruled the objection. No reason is reported. There must have been some nascent evidential principle in play,[11] but evidently it did not apply on the facts. By 1321, however, the royal judges had decided that the only acceptable evidence of a covenant in the royal courts was a deed, a written document under seal. In the London eyre of that year a bill of covenant was brought against a carrier who had covenanted to carry a load of hay from Waltham to London, and had taken delivery, but had failed to bring it. The action failed for want of a deed. Counsel protested that, surely, it was not necessary to have a deed for a cartload of hay, but Herle J retorted that the judges would 'not undo the law for a cartload of hay'.[12] The policy of excluding minor cases had somehow become an absolute rule related to the use of a deed. The rule could not be displaced for a particular county by showing that it had never been applied there in previous eyres; it had become common-law procedure, binding eyres as well as central courts.[13]

It is clear that the new rule did not imply a narrow understanding of what a covenant was: a covenant was just an agreement, and the deed was merely evidence, albeit indispensable evidence (in superior courts), of the agreement.[14] What is still unclear is how the evidential rule requiring a deed came into being, and how it was justified at the time. It is apparent, firstly, that it came in by degrees, starting perhaps with leases containing special terms,[15] and other claims to land;[16] secondly, that some kind of principle was in place by 1292 but was not universally applicable; and, thirdly, that it was resisted longest, and with some success, in cases where a breach of covenant was associated with overt physical harm.[17] More significantly, it was not a rule peculiar to covenants, but was applied to any claim based on a mere word, such as a claim to a rent-charge, an assignment of a reversion, a grant of a remainder, a warranty of land (in the

[9] E.g. *William, son of Benedict v. Kersebroc* (1225) B. & M. 307; *Esthanney v. Drayton* (1248) ibid. 307 (denial of the covenant); *Syfrewast v. Syfrewast* (1248) ibid. 308 (denial of breach).

[10] 4 LHR at 77, 87. The Statute of Wales (1284) (B. & M. 309) spoke only of jury trial. Even when the plaintiff had a deed, a plea of performance had to be tried by jury: *Aubrey v. Flory* (1321) B. & M. 316. This was because the deed contained no evidence of non-performance.

[11] *Corbet v. Stury* (1292) B. & M. 312; discussed in *CPELH*, II, pp. 560–1; III, pp. 1115–19. Richard Stury was a prominent Salopian who became MP for Shrewsbury in 1295; the horse was lent to him for a jousting. There is an action in the same eyre roll by Stury against Roger Foliot, whose lance did the damage.

[12] *Case of the Waltham Carrier* (1321) B. & M. 319. This was the earliest clear reported decision. It may have been clear because it was a simple case of not doing something promised.

[13] *Wetenhale v. Arden* (1346) Kiralfy, *Source Book*, p. 181.

[14] *Picton v. St Quintin* (1304) B. & M. 314, per Est sjt ('the writing would only have provided evidence of the covenant'); *Case of the Waltham Carrier* (1321) ibid. 319; *Case of Adam, the Apprentice* (1321) ibid. at 320, per Herle J.

[15] *Exceptiones contra Brevia* (*c.* 1280) 4 JLH at 81–2 (where 'terminus' might mean either the term of years or a term in the lease).

[16] E.g. *Bishop of Durham v. Percy* (1284) B. & M. 310 (covenant to make a feoffment).

[17] *Corbet v. Stury* (1292) B. & M. 312 (damaged horse); *Turgys v. Rokele* (1304) B. & M. 315 (waste by a lessee); *Warner v. Leech* (1330) Kiralfy, *Source Book*, p. 184 (surgeon not treating an arrow wound). In the London eyre, too, there was hesitation over the surgeon: *Anon.* (1321) B. & M. 320.

absence of homage), or a claim to dower *ex assensu patris*.[18] It also applied to a defence based on words.[19] No doubt the need for such a rule was influenced by the fictionalization of suit at Westminster. The plaintiff's suit could not appear at nisi prius but had to turn up in banc, and, once this came to be seen as an unreasonable deterrent to litigation, the suit became immune to examination – assuming that real people turned up at all. Whatever a plaintiff said in his count about having 'good suit', an action on an unwritten covenant had come in reality to depend on the plaintiff's own bare word, and that was not evidence.[20]

Once the rule was established, it could still be said that any kind of agreement was enforceable by the writ of covenant; but now the plaintiff would only succeed if he had a deed to prove the agreement. The result was that informal agreements were shut out from the central courts, and the development of a law of consensual contracts was stifled by the formal requirement of a seal. Contemporaries would not have viewed this as a denial of justice, since local courts were best suited to dealing with informal agreements. It was true that one could not be expected in real life to put every covenant into writing; but then again, one should not be able to bother the king's central courts with every unwritten covenant. The hardship in the case of the Waltham carrier was a rare mischance, for the plaintiff would have succeeded without question had no eyre been sitting at the Tower of London – and it was the last ever to do so. In the mayor's court of London, and probably in all other local courts, covenants continued to be actionable without a deed; and this was as much the law of the land as the stricter evidential rule of the central courts and eyres.[21] It was also a procedural mishap: the plaintiff might have succeeded had he brought detinue on the bailment in Waltham, since the deed rule did not extend to detinue. The change was not, therefore, a change in the law so much as a demarcation of jurisdiction. Its restrictive character no doubt made sense in the eyres, which were unable to cope with the volume of business brought to them. But the central courts came rapidly to regret the policy, and later in the fourteenth century the argument that one could not make a deed for every little agreement was being turned around to justify alternative remedies.[22] The consequences will be considered in the next chapter.

The fate of the action of covenant was not merely to be restricted to plaintiffs forearmed with deeds, since even for them covenant ceased to be the usual remedy. The scope of specific performance was unclear,[23] and plaintiffs seeking such a remedy were drawn into the Chancery. Unliquidated damages were an unreliable remedy in other

[18] For this last see *Cressingham v. Bulmer* (1301) 105 HLR 2015; *CPELH*, III, p. 1113. The action required proof of paternal consent, which could only be known from his words. Serjeant Herle argued successfully that 'A man's will is a thing so secret that one cannot know it without a special deed bearing witness to it.' For the other cases see *CPELH*, III, pp. 1112, 1119–20, 1127.

[19] *Grangeos v. Husee* (1292) Y.B. 20 & 21 Edw. I (RS), p. 254.

[20] For the fictionalization of suit in actions of debt see p. 344, post; and for its relevance here see Milsom, *HFCL*, pp. 247–8; Philbin, 105 HLR 2015–16.

[21] *Welshe v. Hoper* (1533) B. & M. 324 (borough court). For London see 102 SS 10.

[22] *Stratton v. Swanlond* (1374) B. & M. 402 at 404, per Cavendish CJ; *Aylesbury v. Wattes* (1382) ibid. 556 at 557, per Skipwith J (quoted at p. 348, post).

[23] It was in practice a remedy only for lessees: *Brancaster v. Master of Royston Hospital* (1383) B. & M. 196; Ibbetson, *HILO*, p. 88. The absence of later judgments for specific performance may perhaps be attributable to the use of ejectment instead of covenant: p. 319, ante.

cases, and so if parties were going make covenants under seal it was better policy to use the conditional bond with a penalty, which gave a more secure remedy through the action of debt, whether or not the main agreement was set down in a separate deed of covenant.[24] This became a common practice in the fourteenth century. A further constraint followed in the fifteenth century. It was then held that the formula *praecipe quod teneat conventionem* was appropriate only for defendants who were still able to keep their covenant, and not as a means of obtaining compensation for imperfect or tardy performance.[25] If a builder constructed a house so badly that it collapsed, it was futile to order him to keep the covenant – the plaintiff wanted compensation for the damage. Likewise if the building was completed late, thereby putting the plaintiff to inconvenience and expense, or if a man sold goods which turned out to be defective. There is no reason to suppose that in the thirteenth century there had been any difficulty about giving damages in covenant in such cases; indeed, they were the very cases in which damages, as opposed to specific performance, were appropriate.[26] The reason for introducing the new learning, as we shall see, was not to deny a remedy but to justify the use of a better remedy.[27]

The Action of Debt

At least as old as the writ of covenant was the writ of debt, whereby the defendant was to be ordered to render or yield up a sum of money, or a quantity of fungibles,[28] which he owed to and unjustly withheld from the plaintiff (*praecipe D quod reddat P £n quas ei debet et injuste detinet*).[29] Medieval lawyers saw a debt as more akin to a property claim than to breach of promise. It was something withheld, to be demanded and recovered, not a form of damages. The *praecipe quod reddat* formula was also used for land and movable property, and debt was indeed scarcely distinguishable from detinue, which lay for detaining chattels.[30] The difference between detinue and debt resulted from the necessary distinction between specific chattels, which were owned, and money or fungibles, which were owed. If *D* owed *P* a quarter of barley, this was a debt because *P* could not assert property in any identified barley. But if *D* detained a specific sack of barley which belonged to *P*, then *P*'s remedy was detinue. Again, if *P* lent *D* £10, this was a debt because the actual coins became *D*'s property and his duty was to render the sum of £10 in whatever lawful coin he chose. But if *P* delivered to *D* a bag of coins to the

[24] See pp. 345–6, post. Indentures of covenant were widely used for important agreements, but usually backed up with penal bonds, enforceable by action of debt: *OHLE*, VI, pp. 819–21.

[25] This was the unintended consequence of freezing a particular formula. In the 12th and 13th centuries there were precedents for a writ *quare non tenet conventionem*, which would have prevented the 15th-century construction. See Ibbetson, *HILO*, p. 22.

[26] Statute of Wales (1284), c. 10 (B. & M. 309 at 310); *Weedon v. Mauntel* (1285) B. & M. 311. Note also *Abbot of Haughmond v. Clifford* (1330–33) ibid. 320.

[27] I.e. actions on the case, which did not require a deed: see ch. 19.

[28] Fungibles are goods defined by weight or measure and generic character, but not identified in particular. They are interchangeable, so that a debt owed in fungibles (e.g. grain) is paid in kind. The term *res fungibilia* is Roman; there was no equivalent technical term in English law.

[29] For the full form, see p. 582, post. For 12th-century precedents see *Glanvill*, x. 2; 77 SS 254. The form of judgment was to recover the debt and damages for its withholding.

[30] See p. 416, post.

value of £10 to look after for him, the property in the coins remained in *P* and he could sue for them by writ of detinue.[31] Covenant would also lie in these cases if *D* made a promise to deliver the barley or to pay the money,[32] and such a promise might well be implicit in most contracts; but the decision to exclude unwritten covenants from the central courts pushed the action of debt to the fore.

The existence of a debt, as of a covenant, might depend on private transactions and thus present evidential difficulties. But the royal courts did not here insist on a deed as the only acceptable mode of proof. Certainly a deed was a superior way of proving a debt, and it was the only way in the case of a mere grant to pay, an acknowledgment of indebtedness, or an action against a surety, since those depended on the party's word;[33] but if the debt arose from an informal transaction the central courts continued to allow an action based on suit, against which the defendant could usually wage law. The same distinction applied in discharging a debt: a release required a deed, whereas an accord with satisfaction did not. This difference of approach helps to clarify the evidential rule. A covenant or grant without writing consisted in fleeting words, and no action was allowed in the royal courts for mere breath. On the other hand, a sale, a loan, a hiring, were all visible conduct 'of which knowledge may be had'; the duty to pay was generated by an act, and therefore did not depend merely on words.[34] The deed likewise was an act (*factum*), in that the specialty was sealed and delivered before witnesses as an 'act and deed'. The distinction between words and deeds ran deep in English law.[35]

Debt on a Contract

If he had no deed, the creditor had to show in his count some transaction or 'contract' as the reason why the debt was owed. The authors of *Glanvill* and *Bracton* theorized about *causa debendi* (reason for owing) in the language of Roman law, but in the year books the same principle is usually expressed in terms of *quid pro quo*.[36] A plaintiff could maintain an action of debt if he had conferred some valuable recompense upon the defendant in return for the duty: the furnishing of this *quid pro quo* executed the contract on his side and created the relationship of creditor and debtor. Without this reciprocal exchange the agreement was not a contract but a bare pact, and no

[31] *Anon.* (1339) B. & M. 294.

[32] *Anon.* (1292) ibid. 248; *Anon.* (1293) ibid. 249; *Franssey's Case* (*c.* 1294); *La Zuche v. Rokeny* (1297) ibid. 250. For earlier examples see Ibbetson, 4 LHR at 73 n. 14. There remained an election in later law also: *Sicklemore v. Simonds* (1600) Cro. Eliz. 797.

[33] Cf. the unsuccessful argument in *Stisted v. Bishop of Ely* (1284) B. & M. 247 (debt for salary due on a retainer), where D said he need not answer a bare assertion (*simple dit*) or 'mere wind' (*simple vent*). For the surety see *Anon.* (1344) ibid. 254; *Anon.* (1369) ibid. 255; cf. *Anon.* (1330) 98 SS 743 (action allowed, though no 'cause').

[34] *Loveday v. Ormesby* (1310) ibid. 276; *Anon.* (1338) ibid. 255, per Shareshull J. This also explains the effect of satisfaction, i.e. something given as consideration to discharge a debt, such as a horse, hawk, or robe: B. & M. 288.

[35] Cf. pp. 447, 465, post.

[36] Cf. *La Zuche v. Rokeny* (1297) B. & M. 250 at 251, 253, where it is said that the plaintiff in debt must show a 'cause' (*causa*) and not merely the will of another person.

action lay upon a bare pact: *ex nudo pacto nulla oritur actio*.[37] The borrower of money had *quid pro quo* in the use of the money, the buyer in the goods bought, the hirer in the use of the thing hired, the employer or client in the services rendered, and so on. Performance of a covenant could also generate a duty to pay. If a carpenter was retained to build a house for £100, there was a covenant which bound him to perform; but not until he built the house was there the *quid pro quo* which entitled him to bring debt for his £100.

The rendering of *quid pro quo* justified proof of the debt by suit, without the need for a deed. But in such cases the defendant usually had the option of waging his law that he did not owe the money.[38] Since the suit was not (after the thirteenth century[39]) examined, and the oath-taking was a formality not subject to cross-examination, the defendant was effectively his own judge. It is true that many defendants in late-medieval and Tudor times chose jury trial instead of the immediate escape offered by wager of law. Doubtless they wanted more time, or lacked the means to hire the oath-helpers in banc. Nevertheless, from the creditor's point of view, the mere possibility of the procedure being invoked was a drawback. It became unwise to give substantial credit without formal security.

Most actions of debt on a contract were in common form, since most debts fell within the well-known categories of sale, hire, loan, payment for services, and account stated; their object was debt collection rather than dispute resolution. If the parties pleaded to issue it was invariably the general issue, 'He owes nothing' (*Nil debet*), and this effectively prevented the development of a law of contract in the medieval period. There was no way in which detailed questions could arise, unless a scrupulous defendant enquired whether he could safely wage law on the facts which he informally disclosed;[40] but even then the defendant had the final decision, and it was off the record. *Quid pro quo* might sound like a learned doctrine, but in truth it was just a collective name for the recompense found in all the common debt counts. Doctrinal discussion could occur only when a new form of count was tried out, which rarely happened. One such discussion took place in 1458, and it revealed no judicial consensus as to what the law of contract was. Some thought *quid pro quo* had to be a benefit conferred on the defendant. One judge thought it could include the conferment of a benefit on a third party, or an act of charity. Another thought that it was not always necessary anyway, provided there was a burdensome act done at the defendant's request. And no one was clear whether it could include spiritual matters, such as marriage. No final decision is reported.[41] In time, something like the doctrines of consideration and privity might

[37] The maxim was cited in 1477 (B. & M. 268, per Townshend sjt) in response to a question from Morton MR, a canonist. That may have been a flaunting of Roman learning, but the maxim was known earlier: e.g. Y.B. Mich. 9 Hen. V, fo. 14, pl. 23, per Cokayne J. See also p. 361, post.

[38] For cases where he could not see B. & M. 233, 235–41, 258, 266–8.

[39] The suit had once been examinable: e.g. *Veil v. Bassingbourn* (1226) B. & M. 231. This was debatable by the end of the century: *Musard v. Hanton* (*c*. 1293/94) cited in Brand, 'Aspects of the Law of Debt', p. 241; B. & M. 232. For its disappearance see *Canon Warren's Case* (1343) ibid. 234.

[40] Reported examples of such questions are not found until the 16th century: e.g. B. & M. 241–3.

[41] *Anon.* (1458) B. & M. 263. The action was for marriage-money promised by a bride's father to the groom. The objection that such a *causa* was 'spiritual' was raised by demurrer, again inconclusively, in *Elys v. Hoberd* (1480) Y.B. Hil. 19 Edw. IV, fo. 10, pl. 18; CP 40/871, m.136. See also the question of 1477 in B. & M. 268.

have been developed in the action of debt;[42] but the opportunity did not arise, because – through means which will be disclosed in the next chapter – debt on a contract was to follow covenant into a long retirement.

Debt on an Obligation

The other species of the action of debt was that founded on a document under seal. Debt on an obligation (or bond) remained a common action in the central courts until the nineteenth century, and its popularity derived from the widespread use of the conditioned bond to give security to important agreements.

A bond was a deed[43] containing an acknowledgment that a sum of money was owed by the 'obligor' to the 'obligee'. It was usually in Latin, in the form: 'Know all men . . . that I, *A*, am firmly bound to *B* in £100 to be paid at Michaelmas next following.' To this a condition was added, so that the £100 became a penalty payable as a debt if the condition was broken.[44] The condition, endorsed on the bond (or written below it) in English, either set out the terms of the underlying agreement or (if they were complex) referred to terms to be found in a separate indenture. The wording of the condition in a performance bond was usually in the form: 'The condition of this obligation is that if *A* shall build a house [*or whatever*] according to the following specifications . . . [*or,* perform the covenants in an indenture of the same date] then this obligation shall become void, or else it shall stand in full strength.' The principal advantage which this device had over a straightforward covenant was that a certain sum of money, fixed in advance as a liquidated debt, could be obtained for any non-performance of the condition, without the need to prove loss. Even an agreement to pay money could be strengthened by making a bond to pay a larger amount (often twice the debt) in default of payment on the day; this was later known as a 'common money bond'. In this case, however, since a monetary penalty would give little protection against an insolvent debtor,[45] it was a wise precaution to take bonds with the like condition from substantial sureties as well. Another familiar variety was the arbitration bond, designed to compel submission and to enforce with a penalty any future award made by the arbitrators.[46]

So popular were conditioned bonds that by Tudor times actions of debt on an obligation were the commonest single class of actions in the Common Pleas rolls. As with debt on a contract, little in the way of substantive law was needed or canvassed. Since the action of debt was brought to enforce the penal obligation and not the underlying agreement, many of the later problems in the law of contract did not arise; they were hidden on the back of the bond. A deed was of such a 'high nature' for evidential

[42] For a later discussion see *Lady Chandos v. Sympson* (1602) B. & M. 273; p. 376, post.

[43] A sealed tally did not qualify, unless words were written on it: *Anon.* (1320) 104 SS 87 and note; *Anon.* (1378) B. & M. 282. Cf. *Abbot of Lilleshall v. Cole* (1287) ibid. 231.

[44] This formula came into standard use in the mid-14th century: see Palmer, *ELABD*, pp. 82–7, 324–8; Biancalana, 26 JLH 103. A back-to-front form is found in *Warren v. Poyle* (1320) B. & M. 278. Penalties had already been used in other forms of contract: Biancalana, 64 CLJ 212.

[45] The use of a deed, however, with or without a condition, gave priority over simple debts.

[46] See p. 33, ante.

purposes that few parol[47] defences were allowed against it. One defence necessarily open to the defendant was to show that the proffered document was for some reason invalid. The plea that the writing was not his deed (*Non est factum suum*) enabled him to show that it was not executed as a deed, or that it was delivered in escrow (that is, upon a condition), or that it was a forgery, or that he had been tricked into executing it because he was illiterate and the contents had been misread to him. A deed could also be invalidated for duress, incapacity (such as infancy), or 'suspicion' – where it appeared to have been tampered with after execution. In the case of a conditioned bond, it was alternatively open to the defendant to plead performance or discharge of the condition. Here parol evidence could be admitted to prove the condition and its discharge, because the condition was not part of the deed itself but went in defeasance of it. Thus, in the case of a common money bond, parol evidence could be given to show payment of the sum mentioned in the condition (discharge by performance), or in the case of a performance bond to show that something beyond the defendant's control had supervened to make it impossible (discharge by frustration). Such defences were aimed at destroying, rather than contradicting, the deed. But where the defendant admitted the force of the deed he could not without the aid of another deed plead payment of the penal sum mentioned in the bond itself. The deed stated that he owed the money, and therefore parol evidence was inadmissible to show that he did not.[48] Hence an obligor might be forced to pay twice on the same bond; the law said it was his own folly not to have had it cancelled or to have obtained an acquittance under seal. There was no defence even where the debtor paid, the bond was returned, and the obligee wrongfully stole it back and sued on it. There was simply no way in the world that a statement in a valid deed could be contradicted by oral evidence.[49] Under the harsh logic of the common law it was 'better to suffer a mischief to one man than an inconvenience to many, which would subvert the law. For if matter in writing could be so easily defeated and avoided by such a surmise, by naked breath, a matter in writing would be of no greater authority than a matter of fact.'[50]

Bonds and Relief Against Penalties

The action of debt on an obligation remained in use until the nineteenth century, being the only form of action which could be used to enforce a debt evidenced by a bond. The reason for the longevity of bonds themselves is less than straightforward. When they first developed, the main advantage was the provision for a penalty; and this, after

[47] 'Parol' means word, as opposed to deed; it includes the written as well as the spoken word, if the writing is unsealed.

[48] *Fishacre v. Kirkham* (1289) 112 SS 322; *Abbot of Grace Dieu v. Anon.* (1306) B. & M. 277. The rule depended on the way bonds were worded, as an acknowledgement of debt. In the case of a covenant, the deed evidenced only the agreement, not its breach, and so performance could be pleaded and proved by parol: *Eden v. Blake* (1605) ibid. 325.

[49] *Glaston v. Abbot of Crowland* (1330) B. & M. 278; *Donne v. Cornwall* (1486) ibid. 283. The remedy was to bring trespass for taking the bond, and hope that the damages would compensate for the overpayment. For equitable relief in such cases see p. 112, ante.

[50] *Waberley v. Cockerel* (1542) B. & M. 284 at 285.

overcoming some early qualms,[51] the common law allowed to be recovered in full. By the end of the fifteenth century, however, the Chancery had adopted the more sympathetic approach that it was unconscionable for a creditor to recover more than he was actually owed. If a creditor tried to extract more than the principal debt or actual damages, with reasonable interest and costs, relief became available.[52] By the eighteenth century this had also become law, so that it was unnecessary to have recourse to the Chancery. Statutes of 1696 and 1705 enabled the defendant to discharge his liability by paying into a court of law the principal and interest; the creditor could only sue execution for this sum.[53] These restraints, nevertheless, had little effect on the popularity of conditioned bonds, which remained in widespread use until Victorian times. They still gave procedural advantages, in that judgment was formally entered for the whole penalty and this stood as security in case further damages or costs were incurred.[54] And the use of a deed continued to have other advantages, such as a more favourable limitation period,[55] and the preference sometimes given to specialty debts over simple debts on insolvency.[56] But the last two advantages stemmed from the seal, not the penalty, and the procedural advantages disappeared with the reforms which made equitable relief available in any action.[57] The use of penal bonds could then have effects more adverse than beneficial, since a penalty served only to limit the damages, which might in the event turn out to be greater than the penalty; and so they went out of use.

Gaps in the Medieval Law

By the end of the year-book period it was evident that the law of contract, as governed by the actions of covenant and debt, had serious limitations. Actions of debt on a simple contract, though numerous, were subject to wager of law, and however well this may have worked in the country it seemed an outmoded obstacle at Westminster. Wager of law was problematic not merely because of the obvious dangers of misuse, which increased once oath-helpers were available for hire. One could not wage another's law, and so if a debtor died his simple debts died with him; the debtor's executors could not

[51] E.g. *Umfraville v. Lonstede* (1308) 19 SS 58, per Bereford J (referring to equity); *La Zuche v. Rokeny* (1297) B. & M. 252 at 253 (usury); *Scott v. Beracre* (1313/14) 27 SS 27 (usury). Usury was raised, but to no effect, in *Anon.* (1346) and *Haunsard's Case* (1352) B. & M. 281; Palmer, *ELABD*, p. 81.

[52] *Capell's Case* (1494) 102 SS 13. For the 16th century see E. G. Henderson, 18 AJLH 298.

[53] Performance bonds: Administration of Justice Act 1696 (8 & 9 Will. III, c. 11), s. 8 (real damages to be assessed at trial). Money bonds: Administration of Justice Act 1705 (4 & 5 Ann., c. 3), ss. 12–13. The legislation had been anticipated by the common-law courts, which had begun to discharge debtors from judgment (by the device of a perpetual imparlance) on payment of principal and interest into court. As early as 1541, revenue courts had been authorized to accept 'matter in good conscience' as discharging debts owed to the king by specialty: Stat. 33 Hen. VIII, c. 39, s. 79.

[54] If the bond was to perform covenants, the judgment could be resorted to by means of *scire facias* if further breaches occurred.

[55] Before 1833 there was no limitation period for actions on bonds, but after 20 years payment was presumed. The 20-year period was reduced to 12 years in 1939.

[56] Until the Administration of Estates Act 1869 (32 & 33 Vict., c. 46) executors were bound to pay bonds before simple debts.

[57] The result was that judgment could no longer be given for the penalty. The 1705 Act was belatedly repealed in 1948, and the 1696 Act in 1957.

wage his law, and jury trial could not be forced on them.[58] The action was also limited in scope. It could only be brought for a sum of money fixed at the time of the contract. If a house was built, but no price fixed beforehand, nothing could be recovered for work or materials. Neither could debt be brought on a sale of goods which had no existence at the time of the sale; for instance, the sale of a crop not yet grown. The doctrine of *quid pro quo* also prevented a contract being formed by an exchange of future promises or (arguably) by a promise to benefit a third party.

Some types of claim that today would be considered contractual could be framed by using actions other than debt and covenant: for instance, waste against a lessee for not repairing, or account against an agent.[59] Otherwise the sensible course was to use deeds, and the rise of the conditioned bond shows that the lesson was widely learned. But this was not a wholly adequate solution. Even if laymen were conscious of the magic of parchment and wax, formalities were bothersome, and people often trusted the words of others without further security. It was hardly practicable to go to market with indentures in one's purse.[60] The social expectation was that a man's word should be as good as his bond, and there was no reason why the law should not follow suit.

Contract Suits in Chancery

The restrictive attitude of the early common law towards contract litigation was calculated to drive plaintiffs elsewhere, to the county, hundred, city, and borough courts. A few also went to the ecclesiastical courts.[61] Nevertheless, the royal courts could not continue to brush aside informal contracts on the supposition that relief was available elsewhere. As many local courts decayed, lacked jurisdiction, or were found inadequate, and the Church was prohibited from giving temporal remedies for breach of contract, so practical justice in all but very minor matters became coterminous with the law of Westminster Hall. And, if the common law remained inflexible, the Chancery was an obvious forum for redress. Since it operated on the party's conscience, it could order specific performance when it was unavailable in covenant, and could give other remedies where the common law gave none. The creditor who lost his deed might yet enforce his debt or covenant, while the debtor who had paid would be relieved from paying again. Sometimes petitioners sought relief simply on the ground that if they brought debt in the Common Pleas they would be barred by wager of law, contrary to good conscience. Claims were entertained in Chancery for just rewards for services, where no certain sum had been fixed, and for the enforcement of wholly executory contracts. By 1500 the chancellor had assumed a general jurisdiction in contract, and it was said that 'a man shall have remedy in the Chancery for covenants made without specialty if the party have sufficient witnesses to prove the covenants'.[62]

[58] This was the explanation in the 15th century: Milsom, 77 LQR at 264. Cf. the argument in *Anon.* (1330) 98 SS 743 at 744 (executors not privy to the *causa*). But executors could be sued in debt on a bond, or on contracts where wager of law did not lie.

[59] For the writ of account see pp. 386–90, post.

[60] *Aylesbury v. Wattes* (1382) B. & M. 556 at 557, per Skipwith J.

[61] See p. 139, ante.

[62] *Diversite de courtz et lour jurisdictions* ('1523') [1526], sig. Avi.

This advance by the Chancery was no slight factor in influencing the common-law judges to recognize and nurture new or better remedies than those obtainable through the *praecipe* writs. Equity, in the widest sense of the word, was not the sole prerogative of chancellors, and the Chancery was not the ideal forum for commercial cases since it had no juries and lacked the common-law writs of execution for recovering money. The nearest common-law equivalent of the Chancery subpoena was the writ of trespass, complaining of a wrong done. But, whereas the chancellor could in each case act upon free-ranging principles of conscience, the common lawyers could only use the better remedy if they could somehow represent contractual causes of action as trespasses. The earliest cases involved no real distortion; but by 1602, as we shall see in the following chapter, the whole law of contract was to be subsumed under the law of tort.

Further Reading

Pollock & Maitland, II, pp. 184–227
Fifoot, *HSCL*, pp. 217–67, 289–329
Milsom, *HFCL*, pp. 243–82
Ibbetson, *HILO*, pp. 17–38, 71–94
W. T. Barbour, *History of Contract in Early English Equity* (1914)
A. W. B. Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 LQR 392–422 (repr. in *Legal Theory and Legal History*, pp. 111–41); *History of the Common Law of Contract: the Rise of Assumpsit* (1975), pp. 1–196
W. M. McGovern, 'Contract in Medieval England' (1968) 54 *Iowa Law Rev.* 19–62; (1969) 13 AJLH 173 at 173–90; 'The Enforcement of Oral Contracts prior to Assumpsit' (1970) 65 *Northwestern Univ. Law Rev.* 576–614
M. S. Arnold, 'Fourteenth Century Promises' (1976) 35 CLJ 321–34
D. J. Ibbetson, 'Words and Deeds: the Action of Covenant in the Reign of Edward I' (1986) 4 LHR 71–94
R. C. Palmer, 'Covenant, *Justicies* Writs, and Reasonable Showings' (1987) 31 AJLH 97–117; *English Law in the Age of the Black Death* (1993), pp. 62–91 (on conditional bonds)
[P. F. Philbin], 'Proving the Will of Another: the Specialty Requirement in Covenant' (1992) 105 HLR 2001–20
J. Biancalana, 'Actions of Covenant 1200–1300' (2002) 20 LHR 1–57; 'Contractual Penalties in the King's Courts 1260–1360' (2005) 64 CLJ 212–42; 'The Development of the Penal Bond with Conditional Defeasance' (2005) 26 JLH 103–17
P. Brand, 'Aspects of the Law of Debt 1189–1307' in *Credit and Debt in Medieval England c. 1180–c. 1350* (P. R. Schofield and N. J. Mayhew ed., 2002), pp. 19–41
J. Baker, 'Debt and Formal Contracts' [1483–1558] (2003) in *OHLE*, VI, pp. 819–37; 'Deeds Speak Louder than Words: Covenants and the Law of Proof 1290–1321' (2012) in *Laws, Lawyers and Texts*, pp. 181–203 (repr. in *CPELH*, III, pp. 1107–28)

19

Contract: *Assumpsit* and Deceit

In the writs of covenant and debt, the plaintiff demanded the performance of a contract as a right. In turning to trespass, a plaintiff had to present his case in a different light. Trespass writs were not designed to compel performance, but to provide monetary compensation for loss suffered through wrongdoing. The *ostensurus quare* formula of the trespass writ therefore required the defendant to come and explain why he had done something wrong. That, to a medieval lawyer, seemed fundamentally different from a truly contractual remedy, the object of which was to give effect to what the parties themselves had agreed.[1] This distinction was to lose most of its significance by 1600, but there was no dramatic leap from contract to tort. The extension of trespass was slow, and was resisted at – or soon after – every step. The first step, however, was into territory where the boundary marks were indistinct.

Breach of Covenant as Trespass

Misfeasance

When a breach of covenant caused physical damage, as where a carrier damaged goods or a surgeon mishandled an operation, there was little or no hesitation in seeing the misconduct as trespass. There was a wrongful act ('misfeasance') which needed explaining, and since the complaint was of a harmful act rather than of a mere failure to keep one's word there was no need for a deed.[2] Yet it was not an act of force against the king's peace;[3] the surgeon could not be sued for battery, nor the bailee for trespass to chattels, without recourse to fiction. Fictions were not unknown. But the use of trespass in such cases, without subterfuge, was sanctioned by the decision in the middle of the fourteenth century to admit actions of trespass in the central courts where no force and arms were involved. There was then no difficulty in allowing actions in which the plaintiff's special case was that the defendant had caused damage while carrying out an undertaking. Such cases were already known in London and other local courts; the change was not in substantive legal thought but in the scope of royal jurisdiction. By the fifteenth century the standard phrase used in writs on the case based on undertakings was that the defendant 'took upon himself' (*assumpsit super se*) to do something, and then did it badly to the damage of the plaintiff. The word *assumpsit*, which gave its name to the new action, later became inseparably paired with the phrase *fideliter promisit* (faithfully

[1] See Vampage's remarks in 1428, quoted at p. 363, post.
[2] As to whether a deed was needed even in covenant in such cases, see p. 340, ante.
[3] *Anon.* (1390) B. & M. 346 (horse overworked by bailee). Cf. p. 68, ante.

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promised);[4] but it did not originally have a promissory connotation itself. Like the English word 'undertaking', it had the primary meaning of taking something on. The assertion of an undertaking showed why the writ was brought on the case and not for a forcible breach of the peace.

The first known case in the superior courts where liability was imposed on someone who had embarked upon a task[5] and performed it badly was the *Humber Ferry Case* of 1348.[6] The plaintiff complained by bill of trespass (without *vi et armis*) that the defendant, a ferryman, had received his mare to carry across the River Humber and had so overloaded his ferry that the mare perished. Counsel for the defendant argued that the action should have been covenant, because no wrong (*tort*) was alleged. But the choice of action was hardly a technical mistake. No one used deeds when taking ferries; if the plaintiff could not sue in trespass, he was without any remedy at all. The trial judge was untroubled by the defendant's argument: overloading the ferry, so that the mare perished, was a trespass. No further explanation was needed. Unlike the Waltham carrier of 1321, who had done nothing positively harmful, the ferryman had caused damage by a wrongful act which would have been wrong even if there had been no agreement between the parties.

The second reported case was an action by writ against a veterinary surgeon for killing a horse by his negligence.[7] This time the word used for the undertaking was *manucepisset* ('taken in hand'), a word familiar to pleaders in London, though in a parallel action the same plaintiff used *assumpsisset*.[8] As in the previous case, it was argued that the action should have been covenant. Serjeant Belknap frankly submitted in reply that the plaintiff could not bring covenant because he had no deed, and so it was reasonable to bring this action on his case. The defendant then argued that the writ should have been for a trespass *vi et armis*, as indeed it might have been a few years earlier;[9] but this submission was dismissed, since negligent treatment was not 'force'. The writ was upheld. A few years later, in a similar action against a surgeon for negligently maiming the hand he had undertaken to heal, the writ was quashed because it omitted to name the place where the undertaking was made. Evidently the undertaking was seen as the basis of the action. Cavendish CJ actually called it an action of 'covenant', and said it could be maintained without a deed, 'because a man cannot always have a clerk to

[4] The word *assumpsit* (or rather the pluperfect *assumpsisset*) occurs by 1361: Palmer, *ELABD*, p. 355. The words 'faithfully promised' occur without *assumpsit* in *Broadmeadow v. Rushenden* (1364) B. & M. 400. The combination became common in the early 16th century.

[5] The record says 'received to carry safely', but the report rendered *recepit* as 'emprist', the French for *assumpsit*.

[6] *Bukton v. Tounesende* (1348) B. & M. 399 (KB at York). Cf. a *vi et armis* writ against a boatman for throwing a horse overboard (possibly an exaggeration of less violent misconduct): *Laneham v. Botild* (1346) Palmer, *ELABD*, pp. 174, 328.

[7] *Dalton v. Mareschal* (1369) CP 40/434, m. 271d; B. & M. 400 (*Waldon v. Mareschal* in the year book). Mareschal pleaded that the horse was injured by a windmill-sail and that he applied his cure diligently.

[8] *Dalton v. Brereton* (1370) CP 40/439, m. 49d; B. & M. 402. The 2010 impression of B. & M. incorrectly says these were KB cases, and that the D (William Brereton, 'marschall') was the William Mareschal of the reported case (previous note), though he is more likely a namesake (cf. William Mareschall of Walmgate in the other writ).

[9] In 1354 and 1360 appeals of mayhem were brought against unskilful surgeons: *ELABD*, pp. 388, 341, 342–3. A barber-dentist was even sued for false imprisonment (perhaps in the chair) as well as battery: *Pentryche v. Tolle* (1361) ibid. 343.

make a specialty in respect of such a small matter'.[10] In 1388 the Common Pleas, more benevolently, accepted that the writ could be brought either in the county where the undertaking was made or in the county where the damage was done.[11] The defendant physician in that case pleaded that he had cured the plaintiff 'according to the form of the covenant', and Thirning CJ spoke of the undertaking as a covenant.

It is evident from these reports that, although trespass on the case lay for the wrong and damage, the undertaking was treated as part of the cause of action and also that – since it was not unilateral meddling – it was in reality a covenant. However, no one suggested in the misfeasance cases that there should be a deed. The escape route was now clearly marked.

Trespass on the Case for Deceit

The avalanche of actions on the case in the second half of the fourteenth century also brought into the central courts an action for deceitful contract-making, primarily for use against sellers who made false warranties of their wares. The first known writ was brought in 1382 against the vendor of a blind horse.[12] The formula was: 'whereas *P* had bargained to buy from *D* a horse, *D*, knowing the horse to be blind, falsely and fraudulently sold it to *P* by warranting it sound in eye and limb'. The wrong lay in persuading the buyer to buy something which he would not have bought had he known the truth. Despite the language of the writ, which usually alleged knowledge on the part of the seller that the warranty was false, the seller's state of mind was – or rapidly became – non-issuable.[13] The essence of deceit for this purpose was not the defendant's deceitfulness, but the plaintiff's having been deceived.

In the 1382 case, and in a similar one the following year, the defendant objected that the action was in effect an action of covenant and that the plaintiff showed no proof of the covenant 'except bare word'. The objection failed. 'Do you suppose,' said one of the judges, 'that a man can always carry his indentures in his purse in Smithfield?'[14] Judicial policy had clearly changed since 1321; but still the law was not being undone so much as sidestepped. In suing for breach of warranty, the buyer was not seeking to enforce the contract, which had already been performed, but was claiming damages for the consequences of being deceived. The distinction may be illustrated by an example. If *D* promised to deliver to *P* ten yards of cloth, and sent five, *P*'s complaint was of a failure to perform the promise; but if *D* sold *P* a specific bale of cloth and asserted that it contained ten yards, whereas it only contained five, *P* had in law bought the cloth and his

[10] B. & M. 402. Kiralfy (*Source Book*, p. 185) identified the case as *Stratton v. Swanlond* (1374) KB 27/453, m. 100d. This identification is accepted in B. & M. but is problematic. A similar case, alleging a promise, is *Broadmeadow v. Rushenden* (1364) 103 SS 422; B. & M. 400 (verdict for D). See also *Birchester v. Leech* (1390) 88 SS 63 (£10 damages recovered).

[11] *Skyrne v. Butolf* (1388) B. & M. 405 at 406, per Thirning CJ. Butolf was a 'leech' (physician).

[12] *Aylesbury v. Wattes* (1382) B. & M. 556; record also in 103 SS 447. A similar formula was used by a *hirer* in 1396: 103 SS 451. There is a prototype action on a warranty of a horse in *Ferrers v. Vicar of Dodford* (1307) B. & M. 555; but there P was a royal officer needing the horse for military purposes.

[13] 100 SS lxxxiv (issue always taken on warranty, not on knowledge); *Note* (*c.* 1505) B. & M. 567, per Frowyk CJ; *CPELH*, III, pp. 1319–25.

[14] *Aylesbury v. Wattes* (1382) B. & M. 557, per Skipwith J (Belknap CJ privately expressing 'merveille'); *Rempston v. Morley* (1383) ibid. Smithfield was the London horse and cattle market.

complaint was that he had been misled. The buyer's complaint in the latter case was not that the contract remained unperformed, since he had received the very bale which he had bought, but rather that he had suffered from its performance, being now the owner of a deficient and unwanted chattel. That was a trespass, because of the misleading, not merely a broken word.

A warranty was generally essential to an action for deceit, for without one the rule was *caveat emptor*. If someone sold wine or a horse without warranty, 'the other must buy it from him at his own risk, and his eyes and taste should be his judges in that case'.[15] Most of the pleadings in such actions therefore involved denials of warranty, or assertions that the plaintiff bought at his own risk or using his own judgment.[16] In the fifteenth century it was agreed that the action would not lie, even on a warranty, if the untruth of the statement was evident to the senses. Thus, if *D* in the previous example warranted the cloth to be blue, when it was red, *P* could not complain of deceit unless he was blind or the cloth was stored in another place.[17] Nor would the action lie in respect of statements relating to the future: for instance, a 'warranty' that seeds would grow, or that a horse could be ridden so many miles a day without collapsing. Such things were outside human control, and therefore inherently unwarrantable. Whether or not they were promises which sounded in covenant,[18] they were not statements about the present condition of the goods when sold, and so they were not misrepresentations of fact which could deceive.[19]

The burden of this learning was that a warranty was different from a promise or covenant. It was a statement of present fact rather than an undertaking to do something. But the main reason for drawing the distinction was to justify the use of an action on the case without a deed; in reality the distinction between promise and warranty may not have been as clear as some lawyers tried to make it.[20] A warranty that fungible goods would be equal to sample could properly be seen as a promise *de futuro*,[21] and it was sometimes said in the fifteenth century that if a warranty were put into a deed an action of covenant would lie upon it.[22] This conceptual indistinctness may explain how, as we shall see presently, deceit could be made an important element in *assumpsit* cases as well.

[15] A. Fitzherbert, *Novel Natura Brevium* (1534), fo. 94C, translated in B. & M. 386. There was an apparent exception in the case of food or wine which was unfit for human consumption: pp. 357, 380, post.

[16] E.g. *Fitzwilliam's Case* (1406) B. & M. 560 (wine tasted before purchase). For 14th-century examples see 100 SS lxxxiv.

[17] *Drew Barantine's Case* (1411) B. & M. 561; *Anon.* (1471) ibid. 563 at 564–5; Hales' reading (1532) ibid. 387 at 390–1.

[18] In legal usage, dating from the 13th century, to 'sound in' means to partake of the nature of, or to be actionable in a particular form.

[19] *Anon.* (1471) B. & M. 563 at 564; Hales' reading (1532) ibid. 386 at 390. The problem could be avoided by framing the warranty in terms of merchantability or soundness at the time of sale. Cf. *King v. Braine* (1596) ibid. 569.

[20] See the London case of *Mauncestre v. Bolom* (1305) *CPMR 1298–1307*, p. 263, where a warranty was treated as a covenant.

[21] See e.g. two cases of 1317 from St Ives fair court in 23 SS 102, 105.

[22] *Somerton v. Colles* (1433) B. & M. 427 at 430, per Cottesmore J; *Shipton v. Dogge* (1442) ibid. 434 at 437, per Paston J; *Anon.* (1471) ibid. 563, per Choke J. On the need for a deed to support a warranty of land see *Falston v. Falston* (1370) Y.B. Mich. 44 Edw. III, fo. 25, pl. 1, at fo. 27.

Actions on the Ordinance of Labourers

Another way in which contractual actions reached the fourteenth-century royal courts in the guise of trespass was opened up by the Ordinance of Labourers (1349). The ordinance, together with the Statute of Labourers (1351), was passed to deal with fluctuating labour conditions after the Black Death, and made workmen compellable to remain with and serve their masters on pain of criminal punishment. It was held during Edward III's reign that a civil action lay on the legislation against a servant who left his service. Such an action, though trespassory in form, was regarded as depending on the agreement to serve, and so issue could be joined on the 'covenant'.[23] The relationship of master and servant obviously sounded in covenant, and yet the statutory action did not require a deed, presumably because the duty to serve was also now a public duty imposed by law.[24] The action went further than *assumpsit* for misfeasance, because it lay for the mere failure to serve, and represented a major new departure. It showed that a bare covenant, without more, could be enforced without a deed.[25] But it was confined to labourers and servants of the inferior sort, and did not extend to craftsmen retained to do piece-work[26] as independent contractors or to professional men, such as chaplains retained to sing mass,[27] because they were not compellable to serve. Against them a writ of covenant was still needed, unless they committed misfeasance. But the distinction gave rise to difficulties. A 'carpenter' might be a labourer who sawed and joined for his daily wages, or he might be the builder who employed the labourers.[28] This is doubtless why actions against carpenters provided the next battleground for the action on the case.

Assumpsit for Nonfeasance

Writs of *assumpsit* against carpenters and the like, for failing to carry out work, are found from the 1360s;[29] and some of the early cases raise interesting points about the interdependence of craftsmen retained to work on different aspects of a building.[30] But in 1400, and again in 1409, actions of this kind were challenged on the ground that the plaintiff had no deed. The judges agreed in both cases that an action would lie on the Statute of Labourers without a deed, and also that an action on the case would lie for

[23] B. & M. 422–3 n. 6; *Thelnetham v. Penne* (1378) 88 SS 7 ('plea of trespass', but issue on 'covenant').

[24] *Mussenden v. Thomas* (1371) Y.B. Mich. 45 Edw. III, fo. 15, pl. 15; CP 40/443, m. 371; B. & M. 423 n. 6. Cf. *Berford v. Balard* (1389) 88 SS 60 (unemployed D compelled to serve without a covenant).

[25] According to Hankford J (in 1409) this was deliberate legislative policy: B. & M. 422 n. 6. The statute did not, however, mention a private remedy.

[26] *Creting's Case* (1373) Y.B. Mich. 47 Edw. III, fo. 22, pl. 53 (embroiderer).

[27] *Parson of Abbots Ripton v. Can* (1376) Y.B. Trin. 50 Edw. III, fo. 13, pl. 3; CP 40/462, m. 100d (decided on demurrer); Putnam, *Statute of Labourers*, p. 432.

[28] This distinction was recognized in Stat. 34 Edw. III, c. 9 (1361). Cf. *Pecche v. Otteford* (1364) Y.B. Pas. 38 Edw. III, BL MS. Add. 32087, fo. 59; CP 40/417, m. 142; Putnam, *Statute of Labourers*, pp. 184, 419 (questioned whether a carpenter was a labourer). For other cases see B. & M. 424–5 n. 11.

[29] *Chabbok v. Saman* (1361) Palmer, *ELABD*, p. 335 (thatcher failing to roof a house); *Plomer v. Palmere* (1365) ibid. (carpenter). These are precedents of writs only. For a judgment see *Adlingfleet v. Maidstone* (1362) n. 37, post.

[30] *Nothonby v. Wryght* (1394) 103 SS 431; *Mundevyle v. Rouhevede* (1398) ibid. 434.

misfeasance, but that the action on the case for nonfeasance would not lie because it was brought merely to enforce a covenant.[31]

It was long thought that the core objection here was to bringing an action on the case where there was already an older action, the so-called rule against double remedies. Never mind that the older action was unsatisfactory; the action on the case was to fill gaps, not to provide escapes. But that doctrine seems to belong to the sixteenth century.[32] In the early 1400s the objection was framed in terms of the lack of writing, not of the choice of writ; if a deed was essential evidence of an agreement,[33] it was as necessary in trespass as in covenant. In the course of the fifteenth century, however, the objection shifted to the substance of the action. To the legal mind there is a fundamental difference between misfeasance and nonfeasance. Misfeasance is legally wrong in the absence of contract, whereas nonfeasance is not. In the misfeasance cases the 'undertaking' had not necessarily been promissory; it was a form of conduct, and its original role – by excluding what was once the only remedy (trespass *vi et armis*) – had been to create a justification for the new one (trespass on the case).

The notion of an undertaking to do something in the future, something which in the event was never done, brought in a subtle difference of meaning which alert lawyers had already foreseen in the fourteenth century. No task was here embarked upon, no physical harm done. Undertaking in this sense was the same as agreeing or promising, and so an action for passive non-performance necessarily sounded in covenant rather than trespass. Most of us spend all our lives not building houses and not carrying loads of hay, but we do not thereby wrong anyone. It is wrong only when we have agreed to do it, and wrong only because of the agreement. Even when there is a covenant or undertaking, not doing cannot naturally be called a trespass.[34] A benevolent promise to build a house, followed by inaction, was not more obviously a legal wrong than a malevolent promise to knock a house down, followed by inaction; and the latter was no tort, because a man was not liable for his expressed intentions without an act done.[35] Nevertheless, the line between misfeasance and nonfeasance could sometimes be blurred by the way facts were described. In 1493, when a barge owner was sued for the loss of a cargo of malt in the River Thames through negligent steering, the defendant's counsel thought it worth arguing that a failure to exercise care or control was only nonfeasance; but the court, viewing the facts more expansively, held it to be 'a great misfeasance'.[36] It was a matter of substance, not of draftsmanship.

The year-book discussions suggest that the objections to bringing *assumpsit* for pure nonfeasance prevailed until the end of the fifteenth century. The plea rolls, on the other

[31] *Wootton v. Brygeslay* (1400) B. & M. 422 (*Watton v. Brinth* in the year book); *Anon.* (1409) ibid. 424. No such objection was taken in a contemporary action for nonfeasance against a professional person (a manorial steward): *Anon*. (1401) ibid. 423.

[32] *Orwell v. Mortoft* (1505) B. & M. 448 at 451; *Lord de Grey's Case* (1505) ibid. 646; *Anon*. (1522) ibid. at 647; *Pykeryng v. Thurgoode* (1532) ibid. 452; *Anon*. (1543) ibid. 456; *OHLE,* VI, p. 840. The theory derived the action from the statute *In consimili casu* (p. 69, ante), which only authorized new writs where none was available before: *Carvanell v. Mower* (1533) 121 SS 425 at 426; *Cantrell v. Churche* (1601) B. & M. 649 at 650, per Anderson CJ; *Wright v. Swanton* (1604) ibid. 479 at 480, per Anderson CJ.

[33] See p. 340, ante; *CPELH*, III, pp. 1127–8.

[34] See *The Six Carpenters' Case* (1610) 8 Co. Rep. 146 ('not doing is no trespass'). For a modern instance see *Fagan v. Metropolitan Police Commissioner* [1969] 1 Q.B. 439. See also p. 442, post.

[35] *Haukyns v. Broune* (1477) B. & M. 691, per Wode.

[36] *Johnson v. Baker* (1493) ibid. 441, 442 n. 49; Caryll Rep. 135.

hand, contain many undetermined actions based on nonfeasance dating back to the fourteenth century. It is unlikely that many of these cases came before the court judicially,[37] but obviously the clerks of the court were happy to issue mesne process upon writs alleging nonfeasance, and presumably most of the cases were settled without recourse to legal argument. But one reason why the nonfeasance barrier was so often ignored in practice may have been the difficulty in applying it. If a doctor gave inert medicine, or treated the wrong part of the body, so that the patient's health declined for want of proper treatment, was that misfeasance or nonfeasance? Even if was nonfeasance in respect of performing the agreement, it had contributed to the physical deterioration because of the patient's reliance; and that may explain why the nonfeasance point was not much pressed in medical and veterinary cases.[38] Nonfeasance by a custodian of goods could likewise result in physical damage, as where someone looking after a hundred sheep did nothing to stop them drowning.[39] But taking control of the sheep could be regarded as an act; it was not the same as failing to take on the custody at all, and it was worse than a mere detinue.[40] Nonfeasance by a carpenter could likewise cause physical damage. If a carpenter undertook to roof or repair a house, and did nothing at all, the contents of the house might be spoiled or the timbers rotted by rain; this might resemble a trespass.[41] Now, if such physical damage was actionable, might not the next step be to recognize economic loss? For instance, if the carpenter failed to build or repair a mill, there would be a loss of income while it was out of action. That very case was discussed in the Common Pleas in 1425, and the problem was treated not as a scholastic problem about misfeasance and nonfeasance but as a problem of causation: whether the defendant's failure had caused the plaintiff damage.[42] When pressed, the defendant's serjeant declined to risk a demurrer – which would have required an admission that he did not build as agreed – and so the matter was left undecided. But Martin J remarked scornfully in the course of argument that, if the plaintiff's approach was adopted, 'then one would have an action of trespass for every broken covenant in the world'. That seemed preposterous, and he did not live to see it; but it is almost what happened.

The law that could not be undone for a cartload of hay might now, at last, be laid aside. And yet, however imperfect the distinction between misfeasance and nonfeasance, and however galling the competition from the Chancery, there was still the fundamental

[37] The only judgment noted by Palmer was in *Adlingfleet v. Maidstone* (1362) B. & M. 421 (not carrying peat required for winter fuel). Cf. the *Case of the Waltham Carrier* (ante, p. 340), where covenant had failed to provide a remedy on similar facts 40 years earlier.

[38] See *Anon.* (1435) B. & M. 431 at 432, per Newton sjt; *Marshal's Case* (1441) ibid. 409 at 410, per Newton CJ (applying cure to heel instead of hand); *Tailboys v. Sherman* (1443) ibid. 438 at 439, per Ayscough J.

[39] *Anon.* (1487) B. & M. 440. Townshend J, who gave the judgment, himself owned 12,000 sheep. Possibly D was a farmer rather than an insubstantial shepherd, who would hardly have been good for the damages. But a surprising number of earlier actions were brought against shepherds (so named) for losing hundreds of sheep: Palmer, *ELABD*, pp. 350–6; *Marshall v. Shepherd* (1418) CP 40/629, m. 192d (100 sheep worth £10).

[40] The plaintiff in detinue had to prove a bailment, and could only recover the drowned sheep: *Note* (*c.* 1530) B. & M. 444. Cf. *Anon.* (1449) ibid. 439 (*assumpsit* against a bailee of hay; argued that P should have brought detinue).

[41] *Watkins' Case* (next note) B. & M. 425 at 426, per Babington CJ. Such a case was made in *Rokeby v. Huntyngton* (1387) 103 SS 428 (undertaking to roof, apparently by a lessor rather than a contractor).

[42] *Feriby v. Wyke* (1425) B. & M. 425 (sub nom. *Watkins' Case*, following the year book); identified from CP 40/656, m. 16. Feriby was a London brewer, not a miller.

objection to be overcome. Mere inaction was not a trespass.[43] If some other source of liability could be found besides the agreement, which (without more) sounded in covenant, that difficulty would vanish.

Occupational Duties

We have already seen that servants could be sued in trespass on parol retainers. In that case the duty to serve, though partly founded on covenant, was also founded on a status derived from legislation. Status may also have played a part at common law, in that certain occupations were regarded as carrying public duties as well as private.[44] Attorneys and legal officials served the litigants who retained them, but under the disciplinary control of the courts. It would therefore have seemed straightforward that an attorney should be sued in trespass for failing to continue an action.[45] In 1455, when *assumpsit* was brought against the clerk of the juries for failing to make an entry in his roll as promised, it does not seem to have occurred to anyone to object that this was nonfeasance.[46] The same liability for nonfeasance was thought to attach to counsel.[47] Medical practitioners were perhaps regarded in a similar way: in London an action against a surgeon might result in professional discipline as well as damages.[48] That may be another reason why nonfeasance seems not to infect medical cases.

Deceitful Non-Performance

The second idea which facilitated the use of actions on the case for nonfeasance was that of deceit. We have seen that the action on the case for deceit arose in the context of warranties by sellers. Here, too, status could impose liability in the absence of express contract; purveyors of victuals, who had long been subject to statutory regulation and communal control, were made liable to an action on the case for selling unwholesome food even if they made no warranty.[49] The liability of lawyers had begun with the old writ of deceit, which lay for fraudulently acting in someone else's name. But lawyers were also amenable to trespass on the case for deceit, for instance if counsel dishonestly helped the other side.[50] Such a broad notion could be put to wider use.

[43] Cf. *Anon.* (1487) B. & M. 440, per Rede sjt ('An action on the case does not lie for nonfeasance, because for that the party shall have a writ of covenant'); *Johnson v. Baker* (1493) B. & M. 441, per Rede sjt. The argument is no longer that a deed is needed (cf. p. 355, ante), but that trespass is the wrong action for a breach of covenant.

[44] For the 'common callings' of innkeeper and carrier see p. 435, post.

[45] E.g. the case of 1387 noted in 100 SS lxvi n. 584. For an earlier example in London see *Gardiner v. Bury* (1345) n. 50, post. Both examples use words of deceit. For the punishment of deceitful lawyers see p. 166, ante.

[46] *Holt v. Chevercourt* (1455) Y.B. Mich. 34 Hen. VI, fo. 4, pl. 12; CP 40/778, m. 432. The argument was chiefly about causation.

[47] *Anon.* (1435) B. & M. 431 at 432; *Shipton v. Dogge* (1442) ibid. 434 at 435.

[48] Milsom, *HFCL*, pp. 318–19.

[49] *Caunt's Case* (1430) B. & M. 561 at 562; *Anon.* (1471) ibid. 563 at 564; *Anon.* (1491) ibid. 566; *Note* (*c.* 1505) ibid. 567; Hales' reading (1532) ibid. 387 at 391.

[50] The remedy was foreshadowed in London: *Gardiner v. Bury* (1345) *CPMR 1323–64,* p. 218 (attorney failing to plead). For an attorney who failed to wage law as instructed (nonfeasance) but pleaded a plea depriving his client of wager of law (misfeasance) see *Chudelegh v. Napton* (1400) B. & M. 560 (writ only). See also A. K. R. Kiralfy, *Action on the Case* (1951), p. 219 (writ only).

Deceit first came to the rescue of nonfeasance in the context of land purchasing. The earliest reported case, in 1401, concerned a manorial steward who 'covenanted' in return for 5s. to obtain a copyhold estate for the plaintiff, and then deceitfully procured the lord to admit a third party; the Common Pleas allowed an action on the case for deceit.[51] Then came *Somerton's Case* in 1433,[52] where a confidant had been retained to purchase a manor for Somerton, but 'scheming wickedly to defraud' him had maliciously revealed all to a third party, whom he then helped to buy the manor. This time there was full discussion of nonfeasance, but in the end the court held that the action lay because of the deceit in disclosing secret information. If the defendant had simply done nothing, he would not have been liable without a deed, but the deceitful conduct entitled the plaintiff to bring an action on his case.

Soon after this, the deceit formula was being tried out in situations where there was nothing like real fraud, but simply a failure to do something which would have benefited the plaintiff. In *Doige's Case*,[53] a 'plea of falsity and deceit' was brought by bill against a vendor of land who had prevented herself from performing the contract of sale by conveying to a third party. The defendant felt sufficiently sure of her ground to demur specially to the bill, on the ground that the facts amounted to a covenant, and the point was debated by all the judges of England in the Exchequer Chamber. Much was made of the disablement, the common link with *Somerton's Case*; according to the doctrine freshly invented for the purpose,[54] an action of covenant could not be brought to compel someone to keep an agreement which could no longer be kept. The purchaser eventually succeeded, and the decision stood as law thereafter.[55] *Assumpsit* could thus be brought for nonfeasance if there was deceitful disablement from performance. Pleaders were quick to absorb the lesson and came to imagine deceit everywhere. By the sixteenth century it was usual to insert a 'craftily scheming to defraud the plaintiff' clause in every *assumpsit* action, even when there was nothing in the facts to justify it; the allegation itself helped to dispose of the technical objection about nonfeasance, and since it was not traversable the substance ceased to matter.[56]

Assumpsit as a Contractual Remedy

Although *Doige's Case* was framed as a bill of deceit, and the plaintiff's recovery justified by virtue of the act of disablement, the true nature of the complaint could be seen differently. It looks as though Mrs Doige had simply changed her mind on receiving a better offer, and on that footing the plaintiff had two alternative causes of complaint: the

[51] *Anon.* (1401) B. & M. 423. The nonfeasance point was not even taken.

[52] *Somerton v. Colles* (1433) CP 40/685, m. 143 (initial process); B. & M. 427. The writ said D was retained *de consilio*, but his 'counsel' was not necessarily that of a lawyer; he was a neighbour. The action for revealing 'counsel' was not an innovation: see *Dean and Chapter of Lichfield v. Ilshawe* (1400) ibid. 421 (retainer but no *assumpsit*; Ilshawe, formerly an under-sheriff, probably was a lawyer); *Pany v. Wy* (1431) CP 40/683, m. 309d ('counsel' of co-defendant).

[53] *Shipton v. Dogge* (1442) B. & M. 434 (KB). The defendant Joan, widow of William Dogge, is traditionally known by the year-book spelling 'Doige'. Shipton had sued her without success in CP: n. 60, post.

[54] See p. 342, ante. [55] See the cases in B. & M. 423, endnote.

[56] See *OHLE*, VI, pp. 851–2. In the early 16th century actions of *assumpsit* were sometimes called actions of deceit, or deceit on the case: ibid. 769, 851. In a case of 1514 this description was used even though deceit was not formally alleged: p. 361 n. 69, post.

failure to convey the land, or the failure to return the deposit. The language of deceit might be taken to suggest that his chief object was restitution. But the plaintiff sought more than restitution,[57] and the prevailing judicial opinions treated the claim as purely contractual. There was a bargain; and it was of the essence of bargains that they were reciprocal. If Mrs Doige had conveyed the land and not been paid, clearly debt would have lain against the purchaser. And it seemed to Newton CJCP that it would be 'merveilous ley' (amazing law) if the bargain did not bind the other way as well.[58] This was the language of *quid pro quo,* turned around to avail the payer. On this view, the disablement was not the essence of the cause of action; and in any case it was debatable whether Mrs Doige actually had rendered the contract completely incapable of performance.[59] The purely contractual analysis had been made, independently of disablement, two years earlier in a similar case in the Common Pleas (possibly concerning the same contract). Thomas Browne, one of the prothonotaries, had on that occasion stated that, 'If a man pays a sum of money to have a house made for him, and it is not done, he shall have an action of trespass on his case because the defendant has *quid pro quo* and the plaintiff is damaged'.[60] The reporter added that this was 'privately denied to him', and it seems the action did not succeed; but it must have set Newton CJ thinking.

Browne was indeed well ahead of his time in recognizing something like the Tudor doctrine of consideration; but already by the end of the fifteenth century it was orthodox learning that a person could bring *assumpsit* for nonfeasance when he had paid for something which had not been done. The final word on the subject in print was a dictum of Fyneux CJ at a reading in Gray's Inn in 1499.[61] He said that a purchaser who had paid for land could bring *assumpsit* against the vendor for failing to convey, and likewise that a man could sue a carpenter for failing to build a house because he was damaged by it.[62] No mention was made of deceit. Fyneux was an innovator, and in his thirty years as chief justice prepared the way for the King's Bench to restore its fortunes by developing new remedies. Jurisdictional policy clearly underlay his concluding remark, that a plaintiff who chose *assumpsit* 'need not sue a subpoena'. Be that as it may, the use of *assumpsit* as a substitute for covenant and the subpoena was not thereafter challenged by the Common Pleas.[63]

[57] The damages were laid as £200, but only £20 was awarded, which suggests that the deposit of £110 had in fact been repaid.

[58] *Shipton v. Dogge* (1442) B. & M. 434 at 436. This reasoning was accepted by Fortescue CJKB and Paston J.

[59] It was pointed out that she could in theory have bought the land back and then performed. And yet, if time was of the essence, she had irrevocably disabled herself by missing the completion date.

[60] *Anon.* (1440) B. & M. 432 at 433. This may be *Shepton v. Dogge (No. 1)*, which was already pending: CP 40/717, m. 239d (Pas. 1440); continued in B. & M. 433 (Pas. 1442).

[61] B. & M. 442; *OHLE*, VI, p. 844. Though interpolated in the year books for 1505, the passage was taken from Fitz. Abr., where it is dated 1499 and marked 'In greis Inne'. (Gray's Inn had nevertheless not fully digested the lesson in 1516: B. & M. 443.)

[62] In the carpenter example, he mentioned damage but not prepayment, but whether he was intending a distinction between what later became two forms of consideration (benefit and detriment) is unclear: see *OHLE*, VI, p. 847. In 1505 Frowyk CJCP thought prepayment necessary in the carpenter case as well: p. 360, post.

[63] For CP judgments see *OHLE*, VI, p. 845 n. 40. Their acquiescence was limited to covenant. The overlap with debt, detinue, and the assize of nuisance, caused disagreements until the end of the century.

It did not follow that *assumpsit* would lie in every case where covenant lay.[64] Most early statements of the law stressed the need for a prepayment. Frowyk CJ, speaking in 1505, was explicit: 'if I covenant with a carpenter to make me a house, and pay him £20 to make the house by a certain day, and he does not make the house by the day, I shall have an action on my case because of the payment of my money; and yet it sounds only in covenant, and without payment of the money in this case there is no remedy'.[65] The remark shows that failing to perform a promise was not by itself actionable. There had to be something more than nonfeasance: it might be misfeasance, it might be deceit, or it might be injurious reliance, for instance by entrusting goods to the defendant or paying him in advance. Any of these elements would turn a breach of covenant into a trespass. There was no single concept of contractual liability underlying *assumpsit,* just a miscellany of diverse kinds of wrong.[66]

The insistence on prepayment, a requirement which was not new in 1505, or even in 1440,[67] is the closest we come to a glimpse of contractual theory in these cases. But the reason for it is not divulged in the year books, except in Browne's brief aside. As Browne hinted, it reflected two separate notions – both of which were discussed in *Doige's Case*. One was that bargains ought to be reciprocal: *quid pro quo* was not simply a technical requirement in debt, but the defining element of reciprocity in all bargains. An agreement without *quid pro quo* was not a bargain. But a bargain with *quid pro quo* was binding on both parties, and the archetypal form of *quid pro quo* was prepayment. The second notion was that if someone made a promise on which the promisee relied to his detriment, the promisor ought to make good the resulting loss. The notion here was not so much that the promise should be enforced, for the party's bare word was not actionable, but that the party who incurred damage through relying on the word should be indemnified. This squared comfortably with the reasoning which had for a time prevailed against actions for nonfeasance: *assumpsit* did not lie to enforce the covenant, which required a deed and perhaps a different writ, but redressed the injury suffered by acting – or refraining from action – in the belief that it would be kept. It was also a principle of moral philosophy, akin to the modern doctrine of promissory estoppel. The carpenter's failure to build a house was a wrong only in the sense that the customer had been deprived of an expectation. The customer was in no worse position than if the promise had never been made. He had no house yesterday, and he has no house today. If, however, the customer was put in a worse position by relying on the promise – for instance, by loss of an advance payment, or because the failure to build left him without a home[68] or a business – then an action on the case was an appropriate remedy.

Two unreported but clear judgments under Fyneux CJ exemplify what had by then become established law in the King's Bench. The first, in 1514, was that an action lay for not conveying a house within the time agreed, part of the price having been paid in

[64] Except, perhaps, during the period of greatest uncertainty: e.g. *Gybbes v. Wolston* (1483) CP 40/883, m. 355 (*assumpsit* to hand P's money to a creditor, which he failed to do; no *quid pro quo* or deceit were alleged, but damages were recovered).

[65] *Orwell v. Mortoft* (1505) B. & M. 448 at 452 n. 12; Caryll Rep. 465, 493.

[66] See also the discussion in *Taylour v. Whyte* (1543) B. & M. 445.

[67] See *Watkins' Case* (*Feriby v. Wyke*) (1425) B. & M. 425; *Somerton v. Colles* (1433) ibid. 427.

[68] See *Pykeryng v. Thurgoode* (1532) B. & M. 452 at 453, per Spelman J.

advance.[69] This judgment accorded with *Doige's Case* and with his own dictum of 1499. The second pointed to a broader principle. The defendant had been paid to teach the plaintiff's son grammar and other 'sciences' so that he could go to Oxford, but had not done so, with the result that the son not only learned nothing new but forgot all the grammar he had previously learned, wasted three and a half years of his life, and lost the opportunity which would have flowed from an adequate education. The father recovered damages, but they were seemingly calculated to reflect his loss rather than his son's.[70]

The Doctrine of Consideration

Browne's two notions may have become conflated in lawyers' minds before any attempt was made to explain them in doctrinal terms. The first attempt to supply the missing doctrine was made by an early Tudor jurist who drew on his acquaintance with the canon law notion of *causa*. Morally was one bound by all one's promises, but in law one was bound only by those made seriously and upon good cause.[71] A promise made without cause was a naked pact (*nudum pactum*), and no action could arise from a naked pact: *ex nudo pacto non oritur actio.*[72] Cause was not a concept understood by English lawyers in any technical way, and it seems to have been equated with serious intention as evidenced by a mutual bargain. In 1565 Plowden explained that 'because words are often spoken or uttered by a man without great advisement or deliberation, the law has provided that a contract by words shall not bind without consideration'.[73] By that date, but not for long before, 'consideration' had become the common-law equivalent of 'cause' and the key to liability in *assumpsit*.

Consideration, like cause, was a conveniently ambiguous word to choose for the purpose. On the one hand, the consideration for a promise could mean that which was given in return for it, or (more largely) the reason why it was made. In the context of bargains it was the element of exchange which effected the passing of property, and in this sense it is encountered in the fifteenth century: 'a consideration', said Gregory Adgore in about 1490, 'may change the use'.[74] But consideration could also mean cause of action, the reason why a promise was actionable: 'if I give certain money to someone to make me a house by a certain day, and he does not make it by the day, there this is a consideration why I shall have an action on my case for the nonfeasance'.[75] In the sixteenth century both senses came together. The cause or consideration for the promise

[69] *Laverok v. Wygan* (1514) KB 27/1008, m. 72d; *OHLE*, VI, p. 845. The action was described as 'a plea of deceit on the case', though the usual formal allegation of deceit was omitted.

[70] *Igulden v. Roberth* (1516) KB 27/1018, m. 35; *OHLE*, VI, p. 848. The damages were laid ambitiously as £100, but the father, who had paid £4 in advance, recovered only £7.

[71] St German, *Doctor and Student* (1531) 91 SS 228–33; B. & M. 520. Cf. Y.B. Mich. 16 Edw. IV, fo. 9, pl. 5, per Jenney sjt ('parols sans reason ne liera nulluy').

[72] The maxim was known to 15th-century common lawyers in the context of debt: see p. 344, ante. It remained in common use until the 17th century.

[73] *Sharington v. Strotton* (1565) B. & M. 524 at 526.

[74] Reading on uses (Inner Temple): CUL MS Hh.3.10, fo. 22v. His analysis of bargains (B. & M. 519–20) shows some borrowing from *Bracton*; by consideration he apparently meant *quid pro quo.*

[75] *Anon.* (*c.* 1530) B. & M. 444 at 445 (contrasted with *nudum pactum*). Cf. *Lucy v. Walwyn* (1561) ibid. 521 at 522–3, per Nicholls (who speaks even of consideration for an action in tort).

was the cause of action in *assumpsit*. It therefore had to be set out by the plaintiff. In 1539, and again in 1563, the King's Bench held that an undertaking was not actionable without showing *causa* or consideration.[76] From about 1539 onwards pleaders accordingly began to insert in *assumpsit* declarations an 'in consideration of…' clause setting out the prepayment or other *quid pro quo,* or some act done in reliance on the undertaking. Thus the miscellaneous elements which had been recognized as making nonfeasance tortious all came to be associated with 'consideration' as an indispensable requirement in *assumpsit.* And what was shown had to be a 'good' consideration. It had to be lawful and of some value, though the courts would not investigate its adequacy: 'a penny or a jug of beer is as much obliging in a promise as £100'.[77] So long as the parties made their agreement in binding form, they were treated as being the best judges of their own bargains. But it was necessary that the consideration be present or future; something already done could not 'move' the promise, and therefore a promise to pay for something past was gratuitous and unenforceable,[78] unless done at the defendant's request.[79] By 1598 a binding contract could be defined, in terms still acceptable today, as 'a mutual agreement between the parties for something to be performed by the defendant in consideration of some benefit which must depart from the plaintiff, or of some labour or prejudice which must be sustained by the plaintiff'.[80]

In assessing whether the Tudor doctrine of consideration was truly based on contractual theory, the principal test might well be the case of executory mutual promises. If *D* promised to perform a service for *P* in return for *P*'s promise to remunerate *D* if he performed the service, the only consideration for *D*'s promise was *P*'s promise. For this consideration to be of value, the law had to treat *P*'s promise as binding; but *P*'s promise was supported only by *D*'s and was in terms conditional on *D*'s performance. There was no logical way of breaking the vicious circle, unless it was accepted that mutual promises could make a binding contract by supporting each other. The possibility of an action on mutual promises occurred early in the sixteenth century, when Fyneux CJ himself brought an action on facts similar to those of *Doige's Case* except that he had not paid money in advance.[81] But the first reported discussion occurred forty years later in *Lucy v. Walwyn*, and it happens to be the first reported argument about consideration by that name. Walwyn had promised Lucy to do his best to obtain two manors for him, in consideration that the plaintiff would pay him £5 on completion, but in the event Walwyn bought the manors for himself. There was here no prepayment.

[76] No *causa: Marler v. Wilmer* (1539) KB 27/1111, m. 64; *CPELH*, III, p. 1180; Ibbetson, 41 CLJ at 142. No consideration: *Isack v. Barbour* (1563) KB 27/1107, m. 55; *CPELH*, III, p. 1196.

[77] W. Sheppard, *Grand Abridgment* (1675), I, p. 64. It was a saying in the 16th century that a penny was good consideration even for a conveyance of land: J. Rastell, *Expositiones Terminorum* (*c.* 1525) B. & M. 520; Inner Temple moot (1562) ibid. 523. But a penny could represent 'earnest' (evidence of intention to be bound) rather than consideration in the later sense: cf. p. 409, post.

[78] St German, *Doctor and Student* (1531) B. & M. at 521; *Sharington v. Strotton* (1565) ibid. 524.

[79] *Hunt v. Bate* (1568) B. & M. 529; *Onley v. Earl of Kent* (1577) Dyer 355; *Sidenham v. Worlington* (1585) B. & M. 530 at 531; *Lamplugh v. Brathwait* (1615) Hob. 105; Moo. K.B. 886. For the last case see D. Ibbetson in *Landmark Cases in the Law of Restitution* (C. Mitchell and P. Mitchell ed., 2006), ch. 1; and 8 CSC 88–96.

[80] *Slade v. Morley* (1598 hearing) B. & M. at 468, per Tanfield. Cf. Coke's similar formulation in *Stone v. Withipole* (1589) ibid. 533 at 534.

[81] *Fyneux v. Clyfford* (1518) KB 27/1026, m. 76; *OHLE*, VI, p. 845. There was no verdict or judgment. Note also *Strete v. Yardley* (1528) B. & M. 443.

Yet, despite the argument that there was no consideration, no *quid pro quo*, the court gave judgment for the plaintiff.[82] A counter-promise was as good a consideration as an executed act.[83] From this point the English law of contract might truly be said to be consensual. Even though the remedy was dressed in a trespassory guise, liability could now arise from an executory agreement without any act or deed.

Assumpsit in Lieu of Debt

Judgments in *assumpsit* for nonfeasance were not common in medieval times. The principal importance of establishing the remedy was that it prepared *assumpsit* for a bolder purpose, which was to storm the great citadel of debt. This brave feat seems not to have been contemplated before 1500. The failure to pay money owed is a particular species of nonfeasance, but sounding in debt rather than covenant. Perhaps it is not an abuse of ordinary language to speak of debt as a wrong: the variant English versions of the Lord's Prayer use the words 'debt' and 'trespass' interchangeably.[84] Yet, as we have already seen, for a lawyer there is all the difference between a wrong, which is a spent act requiring redress, and a continuing duty such as a debt, which requires enforcement. 'Debt begins by contract and consent of the parties, and the demand is an indebtedness (*dutie*); but trespass begins by a wrong (*tort*) and without the consent of the parties, and the demand is to have a wrong punished.'[85]

The reasons for wishing to extend *assumpsit* to money claims were not identical to those for extending it to breaches of covenant. There was already a remedy in the royal courts for which a deed was not required. Simple debts could therefore be recovered at common law, and the *praecipe* writ of debt had lived on while covenant was fading into relative unimportance. But the disadvantages of debt on a contract were outlined in the preceding chapter: wager of law, the uncertain scope of *quid pro quo*, the need for a sum certain, and the lack of a remedy against executors. No doubt it was the final judicial acceptance of *assumpsit* for nonfeasance, around 1500, which suggested a solution. The first reported hint of it was an action in the Common Pleas in 1505 for non-delivery of sixty quarters of barley bought by the plaintiff. Instead of bringing debt, which would clearly have lain on the facts, the plaintiff asserted that the defendant had undertaken, covenanted, and bargained to deliver the barley, but (scheming craftily to defraud him) had converted the barley to his own use and failed to deliver it. The propriety of using case was raised by a demurrer to the evidence, and most of the judges proved hostile. The plaintiff had made the mistake of alleging conversion; doubtless his object was to make out a disablement, but since no particular sixty quarters had been set aside for him there was no property of his to convert. The lack of property also distinguished the case from that of the carrier,[86] though the language of non-delivery was calculated to blur the

[82] *Lucy v. Walwyn* (1561) B. & M. 521.

[83] See also *West v. Stowell* (1577) ibid. 529 at 530; Coke's autograph notebook (134 SS), no. 30.

[84] See p. 67, ante. Cf. *Four 13th Century Law Tracts* (G. Woodbine ed., 1913), p. 112 ('trespass can only be pleaded in three ways… the third is debt wrongfully withheld, or another wrong of that kind').

[85] *Somer v. Sapurton* (1428) B. & M. 259 at 261, per Vampage (reading 'one' and 'the other' as debt and trespass).

[86] Cf. *Tailboys v. Sherman* (1443) ibid. 438 (*assumpsit* for not delivering wine).

distinction. Only Frowyk CJ seems to have perceived that the true gist of the action was the same as in the nonfeasance cases; there was no need for a change of property, or a conversion, because the prepayment and the deceit by themselves met the requirements for an *assumpsit* action.[87] No judgment was entered, but for later generations it was Frowyk CJ's dissent, not the majority opinion, which settled the matter.

Most of the development from this point onwards occurred in the King's Bench, which was well disposed towards furnishing litigants with attractive remedies.[88] From the 1510s there was a steady flow of actions of *assumpsit* for money or fungibles. Many of the earliest actions were to recover money which for technical reasons could not be claimed in debt: actions by or against sureties,[89] actions against executors,[90] and cases where the sum was not fixed in advance[91] or was due in a foreign currency.[92] Alongside them, however, were cases in which the declaration merely showed that the parties had entered into some specified transaction which resulted in a simple debt, that the defendant undertook to pay the debt, and that the defendant 'little regarding his promise but craftily scheming to defraud the plaintiff' had failed to pay; the plaintiff would then allege consequential loss in being unable to pay his own debts, or in losing the profits of further bargains which he could have made with the money. These actions were resisted, from at least 1521, on the ground that the facts sounded in debt, and that an action on the case did not lie where an action of debt lay.[93] But in 1532 the King's Bench made the final and momentous decision that a plaintiff could elect whether to bring debt (on the contract) or *assumpsit* (on the breach of promise to pay the debt). This did not infringe the nascent rule against double remedies because, according to Spelman J, 'the action of debt is founded on the *debet et detinet*, whereas this action is founded on another wrong, namely the breach of the promise'.[94] He thought *assumpsit* for unpaid money could not be distinguished from the nonfeasance cases in the year books, where a plaintiff could elect between covenant and *assumpsit*. The plaintiff here had alleged deceit, and consequential loss in his trade, to bolster his case; but the court laid no stress on these trimmings. It now seemed that there was a general remedy by action on the case for any breach of promise causing damage. The ability to sue debtors without the risk that they might wage law attracted creditors to the court in droves. From the

[87] *Orwell v. Mortoft* (1505) B. & M. 448 at 450, 451. Fitzjames CJ said in 1536 that judgment had been given for the plaintiff (Dyer 22), but no judgment is entered on the roll.

[88] Fyneux CJKB, surprisingly, had doubts. In a conversation on the way back from Westminster in 1505, he told the reporter that he did not think the action lay: B. & M. 452.

[89] Liability was here seen as resting on covenant rather than debt. For examples see *OHLE*, VI, pp. 855, 856 n. 100, 869; n. 94, post.

[90] *Cleymond v. Vincent* (1520) B. & M. 484; followed in *Norwood v. Norwood and Rede* (1557) ibid. 486. Cf. pp. 367–8, post.

[91] E.g. solus agreements, and agreements to pay pro rata for goods delivered over a period: *OHLE*, VI, p. 856 n. 101.

[92] *Blanke v. Spinula* (1520) KB 27/1036, m. 75 (£104 damages for breach of an undertaking to pay £150 in Flemish money); cited by Tanfield in *Slade's Case*, B. & M. 469.

[93] This was the losing argument in 1532 (next note). Two earlier demurrers appear in the KB plea rolls: *Cremour v. Sygeon* (1521–25) and *Haymond v. Lenthorp* (1528–31) *OHLE*, VI, p. 857; 94 SS *283* (in the 1528 case it was P who demurred to D's plea of Not Guilty). The long continuances suggest a continuing debate, but no reports are known.

[94] *Pykeryng v. Thurgoode* (1532) B. & M. 452; *OHLE*, VI, pp. 857–8. A fortiori, the action lay against sureties: *Squyer v. Barkeley* (1533) Spelman Rep. 7; *Holygrave v. Knyghtysbrygge* (or *Jordan's Case*) (1535) B. & M. 454. Only the 1535 case reached the year books. For the rule against double remedies see p. 355, ante.

mid-sixteenth century *assumpsit* for money was the principal action on the case; and the King's Bench, now open to litigation on charterparties, insurance contracts, partnerships, and bills of exchange, as well as simple contracts of sale, was starting to become a commercial court for the City of London.

As with the other forms of *assumpsit* for nonfeasance, it was necessary to show some consideration for the promise. Various pleading formulae had developed by Elizabethan times, some of which obviously rested on fictions introduced for the sake of a trespassory formula which did not fit the facts. If the jury found for the defendant, that was usually an end of the matter; if the jury found for the plaintiff, on the general issue *Non assumpsit*, it was impossible to go behind the verdict into the details. If there was a demurrer, the supposed facts could not be disputed at all. Therefore the records tell us only which formulae were acceptable, not whether they were true.

One way of framing the action, appropriate where tradesmen or merchants had entered into an account with each other or with customers, was to lay the *assumpsit* 'in consideration that the parties had accounted together (*insimul computassent*)' and that the sum was found owing.[95] Another formula was to allege a pre-existing debt and a subsequent promise to pay it (*indebitatus assumpsit*), omitting the details of the contract. Without more, both forms were open to the objection that the consideration was past, and that the promise was to do no more than the defendant could be compelled to do by a writ of account or of debt. These objections were met on a formal level by asserting that the account or the contract had been entered into at the request of the defendant, and also by alleging a consideration over and above the debt itself. For example, the plaintiff might allege a promise by the debtor in return for a forbearance to sue for a certain time. By Elizabeth I's time pleaders were alleging nominal forbearances of a day or so in order to put their cases into this form, and the King's Bench accepted this minimal consideration, though the Common Pleas did not. Another device was to show that the plaintiff paid for the promise; and here again pleaders unblushingly alleged, as common form, the payment of a few pence as consideration. A consequential loss served the same turn, such as a rise in the price of a commodity, or even supposed starvation as a result of the non-delivery of grain.[96] For good measure, deceit was alleged routinely: in the virtual reality of the pleader's mind every debtor was 'craftily scheming to defraud' his creditor.

The King's Bench invention did not commend itself to the Common Pleas judges.[97] Their chief objection was that *assumpsit* for money would deprive defendants of the right to wage law,[98] a right which was still seen at their end of Westminster Hall as serving the ends of justice.[99] Nor did they approve of using the action against executors for simple debts, since without written evidence executors might have no way of knowing whether a claim was genuine; this, as they said sixty years later, had been the reason

[95] See p. 392, post.

[96] *Norman v. Some* (1594) and *Anon.* (1596) B. & M. 458.

[97] See *Colman v. Grene* (1528) CP 40/1057, m. 338 (D bargained and sold grain to P for an agreed sum, and promised to deliver at Whitsun, but scheming to defraud P of the bargain did not do so; demurrer); *Baron v. Wilson* (1533) CP 40/1079, m. 344 (similar, but without the fraud clause; verdict for P; court takes advisement); *Bayly v. Davye* (1550) CP 40/1144A, m. 425 (promise to pay for goods; demurrer).

[98] *Anon.* (1543) B. & M. 456, per Shelley J. For this case see also *OHLE*, VI, p. 871.

[99] In *Turgys v. Becher* (1596) B. & M. 458 at 459, Owen J. defended it as a form of consumer protection.

why debt did not lie.[100] In 1535 Fitzherbert J told counsel to take out of their books the leading King's Bench authority as to executors, 'for without doubt it is not law'.[101] All the pleading devices were rejected by the Common Pleas if they smelt of fiction, albeit that theoretically the court did not know the real facts. It was not fraud, they said, if a debtor failed to pay simply for want of money.[102] Forbearance for a few hours was not consideration, they said, because one could not recover a debt by legal action in a few hours anyway. And was not the *assumpsit* itself often fictitious? There was usually only one transaction in reality, not (as the pleadings would have it) a debt-creating contract followed by a collateral promise to pay, given on the same day and in the same place, in return for a seemingly disingenuous separate consideration. Then again, quite apart from fiction, there was a serious objection to the 'general' *indebitatus assumpsit* formula, which did not set out the reason for the indebtedness;[103] it put defendants at an unfair disadvantage, since they did not know the nature of the alleged contract until the trial. And finally, even if a plaintiff overcame all these hurdles, he ought not even on the King's Bench theory to recover the debt as part of his damages in *assumpsit*, but only such further loss as could not be recovered by writ of debt.

Slade's Case

These differences between the two benches were intolerable for litigants. While the King's Bench welcomed *assumpsit* in lieu of debt, the Common Pleas strove to make its use almost impossible. The practical problem for the plaintiff was that he could not tell in advance what kind of judge would be assigned to try his case at nisi prius. A King's Bench judge would direct the jury simply to enquire into the debt, a Common Pleas judge would require proof of a genuine collateral promise and real consideration for it.[104] Since the judge's direction was not of record, there could be no subsequent redress in banc at this period. The matter came to a head when the statutory Exchequer Chamber started to reverse King's Bench judgments in *assumpsit* in the 1590s.[105] The Common Pleas judges sitting in the Exchequer Chamber treated the King's Bench doctrine with open contempt, refusing even to hear argument in support of it.[106] Popham CJKB reacted by convoking all the judges of England to try to end the dispute, in *Slade's Case*.[107]

[100] *Helhowse v. Grigges* (1595) BL MS Lansdowne 1084, fo. 115. In 1591 Glanvill sjt told Gerard MR that the CP judges had 'espied the inconvenience' of such actions, 'inasmuch as by those means a man might be drawn in question for everything done [by the testator] throughout his life…': BL MS. Lansdowne 1057, fo. 184v.

[101] *Anon.* (1535) ibid. 485 at 486, referring to *Cleymond v. Vincent* (1520) p. 364 n. 90, ante. The CP continued to oppose the action until the time of James I: B. & M. 488–90; pp. 367–8, post.

[102] See *Duppa v. Jones* (1602) B. & M. 459 at 460.

[103] It was approved by the KB in *Cowper v. Ashfield* (1583) Coke's notebooks (135 SS), no. 105; *Cottington v. Hulett* (1587) B. & M. 488; *Manwood v. Burston* (1587) 2 Leon. 203; *Hughes v. Robotham* (1593) Poph. 30. Cf. *Anon.* (1572) B. & M. 457, where Whiddon and Southcote JJ (in the absence of Catlin CJ) held a general *indebitatus* bad.

[104] *Anon.* (1559) B. & M. 456 (Dyer CJCP at the assizes); *Edwards v. Burre* (1573) ibid. 457 (trial at bar in KB).

[105] The court was established in 1585: p. 147, ante. Glanvill's remark (ante, n. 100) shows that the possibility of using it for *assumpsit* cases had been canvassed by 1591.

[106] *Turgys v. Becher* (1596) B. & M. 458 at 459.

[107] *Slade v. Morley* (1597–1602) B. & M. 460–79. For this case see *CPELH*, III, 1129–75; Ibbetson, 4 OJLS at 299–302.

Slade had bargained and sold a crop of wheat and rye to Morley, who (according to the declaration) undertook and then and there promised to pay £16 for it. Slade brought *assumpsit* for non-payment, Morley denied the promise, and the jury found a special verdict that the sale had taken place as alleged but that there was 'no promise or undertaking besides the bargain aforesaid'. One of the assize justices was the arch-conservative Walmsley J, the other was from the King's Bench, and the special verdict was no doubt directed by them in order to compel the court in banc – and ultimately the Exchequer Chamber – to address the controversial issue. Would case lie on the very same contract which generated the debt, or was a separate express promise needed? The King's Bench felt no difficulty about this, but if they gave judgment for Slade they would certainly be reversed. Popham CJ therefore decided to withhold judgment and refer the question to all the judges of England – the procedure used in *Doige's Case* – so that the King's Bench judges would have a voice and the Common Pleas would be morally obliged to accept the majority view. The case was argued by the best lawyers of the day, including Coke for the plaintiff and Bacon against him, on several occasions over a period of five years. No real agreement was ever reached, and it seems likely that Popham CJ went on postponing a decision until some of the opposing judges were dead. Finally, in 1602, the King's Bench entered judgment for the plaintiff on the strength of a narrow straw vote.[108] The Common Pleas judges were incensed that they were not allowed to deliver arguments, as was usual in such cases, especially since the majority was probably no better than six to five; but Popham CJ's tough policy ensured that the dispute was finally settled for practical purposes. No detailed reasons were given, even in the King's Bench, but it was stated that two points had been resolved. First, that actions on the case could be brought even where older actions were available; the duplication of remedies was not in itself an objection to a newer action. Second, that every executory contract 'imported' in itself an *assumpsit* to pay what was due under it; the man in the street could not be expected to use the precise words 'I assume' or 'I undertake' when making bargains, but the law would treat the bargain as including an undertaking. This rendered unnecessary a separate promise to pay, and so the special verdict entitled Slade to succeed. Coke sought to clarify the decision by publishing his own report in 1604; it set out his own arguments as the reasons adopted by the court, and more or less ignored Bacon's losing arguments.

Slade's Case thus established the right to recover simple debts by the action of *assumpsit*, and thereby put an end to wager of law. Any argument that the damages in *assumpsit* should not include the sum owed – a proposition which had been ignored by juries in practice[109] – was given up at the same time. A judgment in *assumpsit* would bar an action in debt on the same contract, and vice versa. One question which the judges expressly left open, since it was not in issue, was whether *assumpsit* would lie against executors to recover their testator's debts.[110] The Common Pleas judges had maintained

[108] See the recollections of Walmsley J in *Wright v. Swanton* (1604) B. & M. 479–81. The reason for his outburst was the recent publication of Coke's report of *Slade's Case*.

[109] At any rate, in the KB: Ibbetson, 'The Assessment of Contractual Damages', at 137–47.

[110] When Popham CJ announced the decision in *Slade's Case* he proposed to add that *assumpsit* would lie against executors, but Gawdy J checked him and said, 'Leave that alone until it comes to be argued': BL MS Lansdowne 1061, fo. 42v. Cf. Yelv. 20.

their unshakeable opposition to this, saying it was 'monstrous',[111] and in the 1590s used their influence in the Exchequer Chamber to reverse King's Bench judgments against executors as a matter of course..[112] Lord Keeper Egerton tried to change their attitude in 1602 by declaring that, if the Exchequer Chamber continued to reverse such judgments, the Chancery would grant relief.[113] Finally, in 1611, after Coke had become chief justice of the Common Pleas, the statutory Exchequer Chamber resolved more or less unanimously that *assumpsit* could be used after all.[114] Although the general rule for torts was that an action died with the person aggrieved (*actio personalis moritur cum persona*), the action of *assumpsit* was by 1611 sufficiently contractual in nature to constitute an exception to the rule.

Further Reading

Milsom, *HFCL*, pp. 314–60
Ibbetson, *HILO*, pp. 126–51
B. H. Putnam, *The Enforcement of the Statute of Labourers 1349–1359* (1908)
C. H. S. Fifoot, 'Consideration' (1949) in *HSCL*, pp. 395–424
A. W. B. Simpson, 'The Place of *Slade's Case* in the History of Contract' (1958) 74 LQR 381–96; *History of the Common Law of Contract: the Rise of the Action of Assumpsit* (1975)
H.K. Lücke, '*Slade's Case* and the Origin of the Common Counts' (1965–66) 81 LQR 422–45, 539–61; 82 LQR 81–96
J. L. Barton, The Early History of Consideration' (1969) 85 LQR 372–91
J. H. Baker, 'New Light on *Slade's Case*' [1971] CLJ 51–67, 213–36 (repr. in *CPELH*, III, pp. 1129–75); 'Origins of the "Doctrine" of Consideration' (1977) in *Laws and Customs*, pp. 336–58 (repr. in *CPELH*, III, pp.1176–201); '*Assumpsit* for Nonfeasance' [1483–1558] (2003) in *OHLE*, VI, pp. 839–74
W. M. McGovern, 'The Enforcement of Informal Contracts in the Later Middle Ages' (1971) 59 *California Law Rev*. 1145–93
S. J. Stoljar, *A History of Contract at Common Law* (1975)
D.J. Ibbetson, 'Assumpsit and Debt in the Early 16th Century: the Origins of the Indebitatus Count' (1982) 41 CLJ 142–61; '16th Century Contract Law: *Slade's Case* in Context' (1984) 4 OJLS 295–317; 'Consideration and the Theory of Contract in the 16th Century Common Law' (1990) in *Towards a General Law of Contract* (J. Barton ed., 8 CSC), pp. 67–124; 'The Assessment of Contractual Damages at Common Law in the Late 16th Century' (2013) in *Law and Legal Process*, pp. 126–47
R. C. Palmer, *English Law in the Age of the Black Death 1348–1381* (1993), part 3, section 2, and part 4, appendix, pp. 3–14

[111] *Anon*. (1591) BL MS. Add. 35948, fo. 95. Walmsley J added that the KB, 'being without controlment except by Parliament, did encroach this case against the reason of law'. When Wyndham J retorted that 'experience has overruled the reason of the old law', Anderson CJ responded that the 'reason of positive law' could never be overruled.

[112] The first case may have been *Yolland v. Yolland* (1593) Coke's notebook, BL MS Harley 6686A, fo. 135. There were numerous reversals in 1595–6: Baker, *CPELH*, III, p. 1171. The Exchequer barons usually sided with CP, but Clarke B irritated Anderson CJCP by dissenting forcefully ('totis viribus') in *Helwis v. Grigges* (1595) BL MS Harley 5745, fo. 160v, and *Stubbing v. Rotheram* (1596) MS Harley 4998, fo. 140.

[113] B. & M. 490. He presumably meant that the Chancery would order the executors to pay the debt. There was no jurisdiction to set aside proceedings in error.

[114] *Pynchon v. Legat* (1611) B. & M. 492. Coke CJCP said it was unanimous, but the name of Walmsley J is missing from his list of judges present. Walmsley J had resisted to the last: see the tetchy exchange in *Maine v. Peacher* (1610) ibid. 490.

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Contract: Some Later Developments

Slade's Case marked the final stage in the formal unification of the law of parol contracts through the action of *assumpsit*. The two old concepts of the covenant and the debt-creating bargain had been procedurally welded into one, that of the agreement with mutual consideration.[1] There were occasional protests from legal purists. In the 1670s Vaughan CJCP objected to the confusion of debt and covenant, and ventured to deny the authority of *Slade's Case*.[2] Nevertheless, the law of contract had become a single entity. Although the old forms of action remained in use, the principles of contract law were set free and could be sought indiscriminately in debt cases as well as *assumpsit*.[3] The year-book cases on *quid pro quo*, privity, and discharge, in the context of debt, were now treated as authorities on the substantive law of contract.

Although there was now one concept of contract, not all actions of *assumpsit* were the same in form. The historical differences lingered in the pleadings until the procedural reforms of the nineteenth century. *Assumpsit* for misfeasance continued to be conceived of as an action in tort, without the need for consideration in the contractual sense;[4] and to this day a negligent carrier or private surgeon may be sued in either tort or contract at the plaintiff's election. *Assumpsit* for breach of a parol covenant, for not performing an act as promised, varied from case to case and was therefore labelled 'special *assumpsit*'. In such actions the details of the promise and the consideration had to be proved exactly as pleaded. *Assumpsit* to recover money was more general in form, but separated out into several species; the principal type was *indebitatus assumpsit*, which was itself sub-divided into a number of standard forms known as the 'common counts'.[5]

The Common *Indebitatus* Counts

Reference has already been made to misgivings about the general *indebitatus* declaration.[6] The objections were not aired in *Slade's Case*, because it was not a case of *indebitatus assumpsit*; the transaction of sale was there set out in detail. Coke CJCP, though he had been counsel for Slade, agreed with the old Common Pleas thinking that

[1] There was one exception. Where a contract was made by deed, it was still necessary to use the action of debt on a bond or covenant, in which there was no need to show consideration. The later abolition of the forms of action left in place a substantive principle that a contract by deed does not require consideration.

[2] *Edgcomb v. Dee* (1670) Vaugh. 89 at 101; *Anon.* (1673) 1 Mod. Rep. 163. Hale CJKB also spoke out against *indebitatus assumpsit*, because it deprived defendants of wager of law: p. 371, post.

[3] Some assimilation had already begun: e.g. debt cases on the capacity of infants were cited in the *assumpsit* case of *Stone v. Withipole* (1589) B. & M. 533 at 534 n. 33, 535. See also I. Williams in *Judges and Judging*, at 55; D. Ibbetson in *Law and Legal Process*, at 147.

[4] See p. 421, post. [5] For some others see pp. 392–400, post. [6] See p. 366, ante.

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a general *indebitatus assumpsit* was a 'barbarous action', because the defendant did not know how to prepare for the trial.[7] Soon after he became chief justice the Exchequer Chamber ruled that a general statement of indebtedness was insufficient.[8] Yet it was so advantageous not to have to tie oneself, or give away too much in advance, that pleaders devised a compromise which was acceptable to the judges. The *indebitatus* formula would still be used, but adding just enough detail to indicate the nature of the contract and thereby avoid the risk of surprise. Thus, the seller of goods counted that the purchaser was indebted to him in £n 'for goods sold and delivered at his request', and being so indebted he, in consideration thereof, promised to pay the £n. He did not say what the goods were, or when and where he bought them, but the formula was accepted as putting the defendant sufficiently on notice as to the type of claim being made. By the mid-seventeenth century, these modified *indebitatus* formulae had become standard. There were seven main species, in use as common counts until 1852:[9] namely, for goods sold,[10] for work done, for money lent, for money paid (that is, laid out to the plaintiff's use at his request), for money had and received to the plaintiff's use,[11] for money due upon an account stated, and for the use and occupation of land.[12]

The subsequent promise on which these actions were founded was fictitious, in that there was no need to prove it. The consideration was almost equally fictitious, since it was in principle nugatory as an existing duty incurred in the past. None of this mattered.[13] No one was in any doubt that the courts had allowed the forms of action to be beneficially twisted so that all the transactions represented by the old common counts in debt could now be enforced without fear of the defendant waging his law. That had been the object of the decision in *Slade's Case.* But the means established were different from those considered in *Slade's Case*, and the effects of the fiction were to be more far-reaching. They enabled the action to be used not only to enforce contractual obligations to pay money but also non-contractual monetary obligations, including some which had never been enforceable in debt or in any other form of action.[14]

Parol Contracts and Perjury

The principal, and most immediate, consequence of *Slade's Case* was the complete replacement of wager of law by jury trial in contested actions to recover debts. Before long practitioners could not remember how law should be waged, and even if the

[7] *Andrews v. Webb* (1607) BL MS Lansdowne 1062, fo. 84v.

[8] *Woodford v. Deacon* (1608) B. & M. 499. Coke CJCP would have presided over the Exchequer Chamber.

[9] They were often used cumulatively, as alternative ways of framing the same claim: see T. Raym. 449. For illustrations see B. & M., ch. 18.

[10] The usual count was for goods sold and delivered, but there was a rarer version for goods bargained and sold (where the plaintiff had retained the goods pending payment). There was an analogous formula for the price of land sold, though land was rarely sold on credit.

[11] The action for money had and received was not confined to contractual claims: see p. 395, post.

[12] For this count see p. 397, post. *Assumpsit* could not be brought for rent, although it was a debt.

[13] See *Lord Grey's Case* (1567) B. & M. 528 (consideration not traversable); *Hodge v. Vavasour* (1616) ibid. 536 (consideration treated as continuing).

[14] See ch. 21, post. Holt CJ tried unsuccessfully to restrain the fictions within the ratio decidendi of *Slade's Case*: p. 396, post.

occasion arose no one could be found in the streets to act as oath-helpers.[15] Coke had made the outmoded nature of compurgation a positive argument in favour of Slade, 'for experience now proves that men's consciences grow so large that the respect of their private advantage rather induces men to perjury'.[16] Unfortunately, the jury, given the limitations of the seventeenth-century law of evidence, was not a perfect alternative. Wager of law, however arbitrary, had served to protect the innocent defendant from fraudulent claims by unscrupulous tradesmen in cases where there was no evidence of payment to leave to a jury. After 1602 there was no protection against such claims but the instincts of the jurymen. The parties themselves were excluded from the witness box until 1851.[17] If, therefore, the professional oath-taker changed his occupation from wagerman to witness, the jurors might have nothing to salve their own consciences but perjured evidence. However, the loss caused by perjury now fell on defendants rather than plaintiffs, and this bore harder on the consumer than the man of business. The perjury problem may have been exacerbated by the abolition of the Star Chamber in 1641.[18] It was certainly felt keenly in the Restoration period.[19] Hale CJ remarked in 1671 that two men could not safely talk together 'but one fellow or other who stands in a corner swears a promise'. The worst fears of the Elizabethan Common Pleas judges had been realized, and Coke's line of thinking was to blame: 'For the common law was a wise law, that men should wage their law in debt on a contract . . . that so things might be reduced to writing.' *Slade's Case*, in his view, had 'done more hurt than ever it did or will do good'.[20]

It was too late to undo the effects of *Slade's Case* except by legislation, and so it was to a legislative solution that Hale and his colleagues looked. Hale's original idea was to reintroduce wager of law, or to require some formality or ceremony to bind parties in the absence of writing. The resurrection of compurgation was thought by others to be a step too far, but a requirement of writing for certain types of contract seemed to provide a convenient compromise. It was almost as if the history of covenant was repeating itself, save that the writing did not need a seal and that the requirement did not extend to every class of contract. The first draft of the Statute of Frauds, believed to have been settled by Sir Heneage Finch (later Lord Nottingham) in 1674, adopted a simple solution. Its main object was to provide that transactions concerning land should be in writing, but it also provided that in actions upon parol contracts whereof there was no written memorandum no damages were to be recovered beyond a stated amount.[21] This policy of restricting the damages recoverable for breach of oral contracts was copied from earlier Continental legislation, which had been re-enacted in 1667 by Louis XIV of France.[22] Finch's preliminary draft was not concerned with debts and the problem left by *Slade's Case*, but with the wider problem of perjury in the proof of oral

[15] *Cristy v. Sparks* (1680) B. & M. 244; p. 81, ante. [16] B. & M. 479.

[17] See p. 99, ante.

[18] See D. Ibbetson, 4 OJLS at 313. The Star Chamber had actively punished perjury, both by witnesses and jurors.

[19] The taking away of wager of law on contracts is listed as one of the 'Abusions del Ley', ripe for reform, in D. Jenkins, *Rerum Judicatarum Centuriae Octo* (1661), sig. A2.

[20] *Buckeridge v. Sherly* (1671) and *Anon.* (1672) B. & M. 481–2, per Hale CJ.

[21] Holdsworth, *HEL*, VI, appendix I.

[22] See E. Rabel, 63 LQR 174; T. G. Youdan, 43 CLJ at 307 n. 7.

contracts. The bill was drastically altered by Sir Francis North, Sir Matthew Hale, and others, before it became law. In place of the limited damages principle, the new plan was to make certain classes of oral contract completely unenforceable without evidence in writing. These were: a promise by an executor to answer for damages out of his own estate, a 'promise to answer for the debt, default, or miscarriage of another' (a guarantee), an agreement in consideration of marriage, a contract for the sale of land or any interest therein, and any agreement which was not to be performed within one year. Such contracts did not have to be in a written document, and they were not rendered void, but no action was to be brought upon them unless there was some memorandum in writing signed by the party to be charged. It was also provided that no contract for the sale of goods for more than £10 should be good unless the buyer accepted part of the goods and actually received them, or gave something in earnest or in part payment, or there was writing. All this was duly enacted in the Statute of Frauds (1677).[23]

The career of the statute was not entirely successful. Strict enforcement of its terms could easily have protected more frauds than it was designed to prevent, and within a few years the Chancery had found a means of escape which evolved into the equitable doctrine of part performance.[24] Courts of law likewise took every opportunity of construing the statute in such a way as to promote the policy of inhibiting frauds;[25] but this policy led to refinements which only deepened the obscurity surrounding some of the provisions. The complex section dealing with sale of goods was an attempt to change the trading habits of the nation; yet, two hundred years after its enactment, it had made little difference to the habits of buyers and sellers and had become a dead letter, repudiated in practice by mercantile men.[26] Even so, it was incorporated into the Sale of Goods Act 1893 and survived until 1954.[27] The requirement as to contracts for the sale of land did prove generally desirable, and was reproduced in the property legislation of 1925;[28] but it remained the subject of an important equitable gloss which permitted an action to be brought – not on the contract, but on something like an equitable estoppel – where an oral contract had been partly performed. In 1989 Parliament introduced a far more radical reform: 'A contract for the sale or other disposition of an interest in land can only be made in writing.'[29] Under this enactment the formality of the written word is no longer a matter of evidence, as in the law of covenant, but of essential validity.

Elaboration of Contract Law

Even as late as 1800, the content of the law of contracts was slight by comparison with the bulky textbooks on the subject which were familiar by 1900. There were a good

[23] Stat. 29 Car. II, c. 3, ss. 4, 17 (B. & M. 482).

[24] This may be attributable to Lord Nottingham C (in 1681): see U.-I. A. Stramignoni, 18 JLH (part 2) 32.

[25] See *Simon v. Metivier* (1766) 1 Wm Bla. 599.

[26] So said J. F. Stephen, 1 LQR at 24 (1884).

[27] Sale of Goods Act 1893 (56 & 57 Vict., c. 71), s. 4; Law Reform (Enforcement of Contracts) Act 1954 (2 & 3 Eliz. II, c. 34).

[28] Law of Property Act 1925 (15 Geo. V, c. 20, s. 40).

[29] Law of Property (Miscellaneous Provisions) Act 1989 (c. 34), s. 2. The main object in making unwritten agreements for the sale of land void was to exclude the doctrine of part performance, which was only applicable to valid but unenforceable contracts.

many old cases on consideration, and a great deal on pleading: material enough for handbooks on nisi prius practice, but not for juristic analysis. Some principles relating to capacity and discharge had been developed, mostly in the context of debt. But nothing was yet heard in the common-law courts of offer and acceptance, mistake, or principles of remoteness of damage. They belonged either to the jury-room or to the Chancery.[30] The reason for the absence of legal rules was that in most *assumpsit* cases the defendant pleaded *Non assumpsit* and the merits were left to the jury as questions of fact.[31] This was true even in commercial litigation. The questions in mercantile cases could be sophisticated, but the use of special juries enabled them to be determined by merchants who knew the relevant usages without the need to turn them into law. This age-old system changed perceptibly under Lord Mansfield CJ, who responded positively to pressure from the City for the formulation of clear rules of mercantile law. The technique which he adopted was not wholly new. Hale CJ had consulted with merchants in the 1660s and 1670s, and Holt CJ once 'had all the merchants in London with me at my chamber at Serjeants' Inn in the long vacation' to clarify a point.[32] But Lord Mansfield developed co-operation with City juries into a continuous programme for settling questions of law in the King's Bench upon motions after trial.[33] In 1787 a judicial colleague recalled that, 'Within these thirty years . . . the commercial law of this country has taken a very different turn . . . Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind . . . Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding.'[34] Lord Mansfield not only consulted with the City merchants before reaching decisions; he was also anxious to secure a uniform commercial law throughout Europe. He therefore encouraged the citation of writings current on the Continent, the works of natural lawyers such as Grotius, Pufendorf, Heineccius, and Vattel, and the textbooks on mercantile law and practice. Bench and bar became imbued with a new European spirit. The new approach was seen as a helpful response to the need for certainty in commercial dealings; but the certainty came at a price. The drawback with creating a new corpus of commercial law was that, once the mercantile understanding of a particular age had been turned into legal doctrine, it could not be changed except by Parliament. The flexibility provided by juries was largely lost; it could survive only within the interstices of settled doctrine.

[30] Lord Nottingham C said in 1675 that offer and acceptance were requisite to an agreement: 73 SS 241. And mistake had long been a ground for rescission of contracts. The first coherent English treatise on contract was the first part of the *Treatise of Equity* attributed to Henry Ballow (1737) and later enlarged by John Fonblanque.

[31] The declaration in *assumpsit* did not mention an offer and acceptance. Mistake could not be specially pleaded but only given in evidence under *Non assumpsit*. Damages, also, were entirely for the jury.

[32] *Mitford v. Walcott* (1690s) Pengelly Rep., BL MS. Add. 6722, fo. 165.

[33] See pp. 58, 93, ante.

[34] *Lickbarrow v. Mason* (1787) 2 Term Rep. 63 at 73, per Buller J.

Attempts to Rationalize Consideration

The concept of consideration had grown into a legal doctrine in a haphazard way, but it could be seen as performing a single function: it was the vital element which caused parol promises to be legally binding. Without consideration, an agreement was but *nudum pactum*. Nevertheless, little effort was made to identify or express the underlying principle until the eighteenth century, and lawyers made do with the long lists of cases gathered on one side or the other in the abridgments. In an early (but unpublished) treatise on the law of contracts, Sir Jeffray Gilbert (1674–1726) connected it with the parties' intentions. He explained that English law had adopted the middle course between holding men to a rigid fidelity in all their promises, and only enforcing pacts supported by *quid pro quo* or recompense. If a party used the formality of a writing under seal, then his contract was taken to be binding without showing *quid pro quo*, for it would be 'downright madness to trifle with the solemnity of law and pretend after the sealing that there was nothing seriously designed'. Where, however, the contract was merely by parol it needed consideration to clothe it with binding force, 'otherwise a man might be drawn into an obligation without any real intention by random words and ludicrous expressions, and from thence there would be a manifest inlet to perjury, because nothing were more easy than to turn the kindness of expressions into the obligation of a real promise.'[35]

Lord Mansfield CJ sought to carry the serious-intention approach further in *Pillans v. Van Mierop*,[36] where he refused to accept the proposition that a parol written contract without consideration was *nudum pactum*, especially in a commercial case. Mercantile men expected written contracts to bind, and they did not routinely use seals. There could be no magic in a seal. 'I take it,' he said, 'that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, and so on, there was no objection to the want of consideration.' Wilmot J, concurring, said that the theory of consideration had been 'melting down into common sense of late times'. He thought the only purpose of consideration, in both the common law and the Civil law, was to guard against rash undertakings made without due reflection. Writing supplied that purpose as well as parchment and wax. However, when Lord Mansfield reiterated his point of view in 1774, the decision was reversed by the Exchequer Chamber. Common sense was not necessarily law. Counsel argued in the House of Lords that sealing was no more than a ceremony, and that a parol writing should displace the need for consideration in the way that a deed had always done. But Skynner CB delivered the unanimous opinion of the judges to the effect that, whatever the Civil law meant by the maxim *Ex nudo pacto nulla oritur actio*, the common law clearly meant that an action could only be founded on a parol promise if it was supported by consideration. There was no material difference in English law between written and oral contracts, only between deeds and parol contracts. The House

[35] *Of Contracts* (*c*. 1705) BL MS Hargrave 265, ff. 75–77. The theory that consideration was merely evidence of intention to be bound was probably derived from Thomas Hobbes's *Elements of Law* (*c*. 1640): Ibbetson, *HILO*, pp. 216, 237.

[36] *Pillans and Rose v. Van Mierop and Hopkins* (1765) 3 Burr. 1664; Oldham, *ECLM*, pp. 84–6; G. McMeel in *Landmark Cases in the Law of Contract*, pp. 23–58. Lord Mansfield did not restrict the principle to commercial cases: *Williamson v. Losh* (1775) *ECLM*, p. 85.

of Lords gave judgment affirming the Exchequer Chamber,[37] and the decision has been treated as law ever since. As most contracts which give rise to litigation are in writing, the decision practically ensured the survival into modern times of the Tudor doctrine of consideration. It also made it clear – perhaps for the first time – that consideration was something distinct from the 'intention to be bound', real or apparent, without which there could not be a binding contract.

Lord Mansfield developed at the same time the notion that a promise, express or implied, to perform a moral or equitable obligation was binding without any other consideration.[38] This bore lasting fruit in the law of restitution, albeit not without some dissent.[39]

The Nineteenth Century

In the first half of the nineteenth century the courts were given the opportunity to formulate for the first time a more detailed law of contract, as counsel increasingly took advantage of the procedures for raising questions of law in banc. The courts accepted the challenge and, following Lord Mansfield's example, sought guidance beyond the black-letter texts of the common law. The most influential sources of reasoned principle were the *Traité des Obligations* (1761) by the French jurist Robert Joseph Pothier (1699–1772), published in English in 1806, and the university textbook *Principles of Moral and Political Philosophy* (1785) by William Paley (1743–1805), archdeacon of Carlisle. Both works included discussions of elementary contractual ideas so long absent from the common law. In them we find the seeds of the English law of offer and acceptance, mistake, frustration, and damages.[40] Ironically, it was only in the year of Britain's admission to the European Economic Community, and the statutory reception of its law, that Pothier's authority was emphatically rejected.[41]

Privity

Contracts are often made for the benefit of others, and it is an important question whether they may be enforced by beneficiaries who were not parties to them. In actions on deeds, the position was clear. In the case of an indenture, only those named as parties to the deed could sue or be sued.[42] In the case of a bond, the condition might

[37] *Rann v. Hughes* (1774–78) 4 Bro. P.C. 27; 7 Term Rep. 350, n. The report does not say whether Lord Mansfield participated in the 'unanimous' opinion.

[38] *Hawkes v. Summers* (1782) 1 Cowp. 289; Fifoot, *Lord Mansfield*, pp. 139–41, 243–5; Oldham, *ECLM*, pp. 86–7. For Elizabethan antecedents see p. 376 n. 50, post.

[39] See p. 400, post. The promise in these cases was fictitious.

[40] See the citations in *Hadley v. Baxendale* (1854) 8 Exch. 341 (damages); *Offord v. Davies* (1862) 12 C.B.N.S. 748 (formation); *Taylor v. Caldwell* (1863) 3 B. & S. 826 (frustration); *Smith v. Hughes* (1871) L.R. 6 Q.B. 597 (cross purposes); *Phillips v. Brooks* [1919] 2 K.B. 243 (unilateral mistake). Another influence, at any rate on the Victorian legal writers, was the German jurist Friedrich Carl von Savigny (1779–1861).

[41] *Lewis v. Averay* [1972] 1 Q.B. 198 at 206, per Lord Denning MR.

[42] *Skydmore v. Vanden Steene* (1587) Coke's notebook (134 SS), no. 73 (debt on a charterparty containing a covenant to pay money); Co. Inst., II, p. 673; Cro. Eliz. 56. An indenture was a deed between two or more parties, as opposed to a 'deed poll' made unilaterally by a single party.

benefit a third party, but only the obligee could enforce it.[43] In debt on a contract, the notion of *quid pro quo* required some kind of privity between the parties, though it was not altogether clear what it was.[44] The chief qualification of it was that contracts could be made through agents, such as servants or wives.[45] The doctrine of consideration in *assumpsit* likewise seems to have included a notion of privity, since in most cases the plaintiff showed how he had himself furnished some consideration in return for the promise. But could a beneficiary who furnished consideration sue on an undertaking made to someone else? And could consideration be sufficient to support a promise if did not come from the plaintiff?

These questions most frequently arose in relation to marriage agreements, usually made between the spouses' parents, which included a promise by the bride's father to pay a sum of money to the bridegroom. It was a long-standing question whether such a promise was enforceable by the son, to whom the money was payable, or by the father, who was the contracting party but had no claim to the money and suffered no loss. At first it was decided that the son should bring the action, then that only the father could bring it, and finally that either (but not both) could sue.[46] One explanation for the son's right of action was that the father was acting as his agent;[47] another was that 'the promise was made to the son's use', so that it was analogous to a trust.[48] Either theory would have enabled actions to be brought by third-party beneficiaries outside the context of marriage agreements. However, although the concept of a promise coupled with a trust was being developed in Chancery,[49] it did not bear much fruit in the common law before the twentieth century,[50] and the courts showed no general inclination to imply agencies for third-party beneficiaries. The only clear cases of recovery by third parties involved family relationships, perhaps because a kind of natural agency could there be implied by law.[51] It was also arguable that a creditor could enforce an arrangement between his debtor and a third party to discharge or reduce the debt,[52] but this did not

[43] A bond was a deed poll, even though it acknowledged an indebtedness between two parties. At common law the obligee could recover the whole penalty as a debt, even if the actual loss was not his.

[44] *Anon.* (1458) B. & M. 263; p. 344, ante; *Lady Chandos v. Sympson* (1602) B. &. M. 273. See further A. W. B. Simpson, *The Rise of Assumpsit* (1975), pp. 153–60; Ibbetson, *HILO*, pp. 76–80.

[45] E.g. *Anon.* (1471) B. & M. 563. The terminology of 'agency' is not found before the 17th century, but some principles had been established in the context of servants making contracts for their masters, and monks for their houses: *CPELH*, III, pp. 1224–7. For wives see p. 526, post.

[46] *Bayfield v. Collard* (1646) B. & M. 543. A judgment for one would bar the other.

[47] *Levet v. Hawes* (1598) B. & M. 538, as reported in BL MS. Add. 35951, fo. 76v (citing the master and servant agency cases); *Evans v. French* (1645) Twisden Rep., BL MS. Add. 10169, fo. 6, per Rolle J; *Spratt v. Agar* (1658) B. & M. 550 n. 60, per Glynne CJ.

[48] *Levet v. Hawes* (1598) B. & M. 538 at 539, per Popham CJ.

[49] See N. G. Jones in *Ius Quaesitum Tertio* (2008), pp. 135–74; D. J. Ibbetson and W. Swain, ibid. 201–5.

[50] It gained some ground in the 1580s: *Megott v. Broughton* (1586) B. & M. 532, otherwise called *Megod's Case* (as to which see N. G. Jones, 56 CLJ 175), per Gawdy and Clench JJ ('There is a trust reposed in them, ergo it is a good consideration'); *Stone v. Withipole* (1588) Coke's notebook (134 SS), no. 143, per Egerton S.-G. ('A consideration in conscience is good to maintain an *assumpsit*). But cf. *Colston v. Carre* (1601) Coventry Rep., BL MS. Add. 25203, fo. 412, per Fenner J ('matter in conscience cannot beget a consideration in law').

[51] E.g. *Richard Rippon v. Norton* (1602) B. & M. 540 (promise that D's son would not be a nuisance to P's son; no action for father); *Walter Rippon v. Norton* (1602) ibid. (action by son allowed).

[52] *Oldham v. Bateman* (1637) B. & M. 542. The typical case was where a debtor agreed to pay the creditor's creditor rather than the creditor himself. If a debtor paid money to *X* to pay over to his creditor, *assumpsit* lay against *X* for 'money had and received': *Gilbert v. Ruddeard* (1607) B. & M. 541; p. 395, post.

gain general acceptance.[53] A 'mere stranger' could not enforce a promise made for his benefit, because the action ought properly to be brought by the person to whom the promise was made. A stranger had no vested right, in the absence of a trust, because the parties who made the contract (and furnished the consideration) were free to rescind or alter it – or just ignore it – and thereby lawfully deprive him of his expectation.

In the middle of the seventeenth century there were attempts to broaden the scope of *assumpsit* to accommodate third-party beneficiaries. In 1647 it was said that 'he for whose benefit a promise is made may have an action for breach of this promise although the promise was not made to him'.[54] Two years later the Exchequer Chamber confirmed that a creditor-beneficiary could enforce a promise of payment made by a third party (upon consideration) to his debtor. In that case, it was said, 'the consideration was good, there being a benefit to the defendant, and it is not material of whom the benefit comes if the defendant has it'.[55] Shortly after that, it was held by the Upper Bench after much debate that a payee could enforce a contract made for his benefit even though he was not the promisee's creditor, at any rate where the promisor had died and could no longer countermand the promise. According to Rolle CJ, 'There is a plain contract, because goods were given for the benefit of the plaintiff, though the contract be not between him and the defendant, and he may well have an action on the case, for here is a promise in law made to the plaintiff though there be not a promise in fact'.[56] The remark suggests that, if legal principle failed, resort could be had to fiction (a 'promise in law').[57] The fiction at least had a precedent, in that actions on promises made to agents were pleaded as having been made to the principal.[58] But the 'promise in law' did not gain ground, and the position remained far from clear for another thirty years.[59]

The countervailing arguments were fully explored in a leading case of 1678.[60] A father proposed to fell timber to raise portions for his younger children; his heir apparent persuaded him not to do so, promising to pay the portions himself; the father died, and an action was brought against the heir by his sister Grizil, claiming her promised portion. It was argued that the action should have been brought by the father's executors, since the promise was made to him and not to Grizil. Some of the judges agreed. But, after much vacillation, the King's Bench gave judgment for the plaintiff, 'for there is such a nearness of relation between the father and the child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned'. The decision was upheld in the Exchequer Chamber in 1680. Its precise scope was a matter of debate, though it seems from the reasoning to have been limited to cases where the beneficiary was a dependent or creditor of the promisee. The general rule seems to have been that

[53] See e.g. *Bourne v. Mason* (1669) B. & M. 549.

[54] *Anon.* (1647) noted in W. Style, *Practical Register* (1657), p. 31. Cf. *Provender v. Wood* (1627) Hetl. 30.

[55] *Disborne v. Donnaby* (1649) B. & M. 544.

[56] *Starky v. Milne* (1651) B. & M. 546. There was also a family relationship in this case.

[57] Cf. Rolle CJ's approval of fictions to achieve restitutionary remedies: p. 395, post.

[58] Regardless of agency, if a plaintiff pleaded a promise made to himself, even if in fact it was made to someone else, and the jury found in his favour, no legal problem about privity would arise: see *CPELH*, III, pp. 1226–7.

[59] See *Delabar and Delavall v. Gould* (1661) B. & M. 547; *Bourne v. Mason* (1669) ibid. 349.

[60] *Dutton v. Poole* (1678–80) B. & M. 551. Mrs Dutton's forename was an Anglicization of Griselda, Latinized in the plea roll as Grisilla.

either 'the party to whom the promise was made, or else the person from whom the meritorious consideration did arise' should bring the action.

It emerged from these decisions that privity either to the promise or to the consideration was sufficient to bring *assumpsit*.[61] It was not necessarily essential to show both, for 'although a man is not party to a consideration or *assumpsit*, yet if the meritorious act or ground of the consideration is to be done by him or his next of blood to whom the promise is made, it shall give an action in his own name'.[62] Nevertheless, the nineteenth-century King's Bench, perhaps influenced by Pothier, rejected the Exchequer Chamber decisions and established it as a rigid doctrine that to sue in contract the plaintiff must be privy to the promise as well as the consideration, even in family cases: the action must be brought by the promisee, and consideration must move from the promisee.[63] Even though the King's Bench was not competent to overrule the Exchequer Chamber, in 1884 it was said that recourse to the older learning would be 'an exercise in the merest pedantry', and the new orthodoxy was approved by the House of Lords in 1915.[64] The result was mischievous, since it followed that a contract upon good consideration made for the benefit of a third party, with the expressed intention that it should be enforced by the third party, might not be enforceable by anyone: the beneficiary was not privy, and the promisee could not recover damages for the failure to benefit the third party, because it was not his loss. Twentieth-century judges therefore tried to find inroads into the doctrine of privity, having recourse once more to trusts,[65] and agency,[66] and also to equitable remedies.[67] Lord Denning MR even tried to resurrect the Exchequer Chamber cases to undo the mischief, pointing out that they were still binding on the Court of Appeal.[68] But a more straightforward solution came eventually from Parliament. Since 1999 a third party may sue to enforce a contract if it expressly provides for him to do so or – in conferring a benefit on him – does so impliedly.[69]

Contractual Terms

We have seen, in the previous chapter, how the common law began in the late fourteenth century to remedy false warranties made by suppliers of animals or goods. The disgruntled buyer did not bring an action on the contract, which was valid and effective to pass the property, but an action on the case for deceiving him into making a bad

[61] *Corny and Curtis v. Collingwood* (1676) 3 Keb. 434 at 435, 1 Freem. 284, per Hale CJ. No action, of course, could be brought by a third-party beneficiary who was neither the promisee nor party to the consideration: *Crow v. Rogers* (1724) 1 Stra. 592.

[62] Sir Jeffray Gilbert's unpublished treatise *Of Contracts* (*c.* 1705) BL MS Hargrave 265, fo. 160.

[63] *Price v. Easton* (1833) 4 B. & Ad. 433; *Tweddle v. Atkinson* (1861) 1 B. & S. 393. The 4 published reports of the latter case all state the principle differently: D. Ibbetson in *Ius Quaesitum Tertio*, p. 211.

[64] *Gandy v. Gandy* (1884) 30 Ch.D. 58 at 69, per Bowen LJ; *Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd* [1915] A.C. 847.

[65] *Les Affréteurs Réunis S.A. v. Leopold Walford (London) Ltd* [1919] A.C. 801. However, if the parties to an agreement are free to rescind or alter it, there cannot be a trust.

[66] *The Eurymedon* (*New Zealand Shipping Co. v. Satterthwaite*) [1975] A.C. 154; *The New York Star* [1981] 1 WLR 138.

[67] *Beswick v. Beswick* [1968] A.C. 58 (specific performance).

[68] E.g. *Beswick v. Beswick* [1966] 3 All E.R. 1 at 6. See p. 211, ante. They had, however, been rejected by the House of Lords in 1915.

[69] Contracts (Rights of Third Parties) Act 1999 (c. 31).

bargain. Thus the warranty, though an integral part of the bargaining process,[70] was not thought to be a 'term of the contract' but something outside it, a collateral guarantee. The original reason for this related to the distinction between present fact and future obligation.[71] It was not within any seller's competence to promise that goods would last, or that seeds would grow, or even that red cloth was blue, for if they were inherently defective or indisputably different no effort spent on his part would enable him to keep his word. Such an assertion was at most a factual statement as to the present quality of the goods, not a promise.

In the eighteenth century, pleaders nevertheless began to treat warranties on a sale as promises or contracts that the facts stated were true. The objection that such a contract was impossible ab initio was somehow laid aside,[72] not for juristic reasons but in order to achieve a practical end. The motive was to enable the joinder of actions on warranties with common money-counts. An action for deceit, being a tort, could not be joined with *assumpsit*. But if an action on a warranty could be framed in *assumpsit*, it could be joined with an alternative count in 'money had and received' to recover the price for a total failure of consideration. The change occurred largely without challenge in the courts. When, in 1778, it was argued that a promise could only relate to future performance, and not to past or present facts, the practice of using *assumpsit* for breach of warranty was too well established to change. As Grose J remarked eleven years later, 'All the cases of deceit for misinformation may be turned into actions of *assumpsit*'.[73]

One consequence of the change of practice was that the tort of deceit grew more distinct from contract, and was held to rest on fraudulent misrepresentation.[74] Deceit then came to be predicated on the deceiver's state of mind rather than the mind of the person deceived. At the same time, the word 'warranty' lost its strict meaning and was applied both to representations of fact (affirmative warranties) and to promises (promissory warranties). Two significant consequences followed. The bifurcation of the action for deceit left a gap once the forms of action were abolished, since it meant that no action for damages would lie on a misrepresentation unless it was made fraudulently, or was embodied in the contract, or could be construed as a collateral contract.[75] Another consequence was that contracts ceased to be regarded as single and indivisible exchanges, and came to be seen as bundles of stipulations on both sides: the terms of the contract. Some terms were so fundamental to the contract that if they were broken the other party could repudiate his own obligations; these were conditional promises,

[70] The writ said *warrantizando vendidit*, because the warranty had to be contemporaneous with the contract to induce reliance. Deceit would not lie on a subsequent warranty (*Andrew v. Boughey* (1552) Dyer 76) or on pre-contractual discussions (*Lopus v. Chandler* (1606) B. & M. at 572, per Tanfield J).

[71] See p. 353, ante.

[72] It had been rejected by 2 judges in *Kinge v. Braine* (1596) B. & M. 569.

[73] *Stuart v. Wilkins* (1778) 1 Doug. 18 at 20; *Pasley v. Freeman* (1789) 3 Term Rep. 51 at 54. Lord Mansfield CJ's doubts about this development were dispelled on learning that *assumpsit* had been so used 'for several years': Oldham, *ECLM*, pp. 95–6; and see *Eden v. Parkison* (1781) 2 Dougl. 732 at 735 ('there is no doubt but you may warrant a future event').

[74] *Pasley v. Freeman* (1789) 3 Term Rep. 51; *Derry v. Peek* (1889) 14 App. Cas. 337. Until the pleading reforms, an action on a warranty of goods could still be framed in deceit without proof of fraud: e.g. *Jones v. Bright* (1829) 5 Bing. 533.

[75] *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30. Pleaders thereafter sometimes alleged fictitious collateral contracts, until the gap was filled by the Misrepresentation Act 1967 (c. 7), s. 2(1).

or conditions, because their fulfilment was a condition of the other party's liability.[76] For breach of a warranty which did not amount to a condition, the other party was entitled to sue for damages, but not to escape from his own obligations.[77] Some lawyers in the nineteenth century thought there was a conceptual neatness in regarding all contractual terms as being either conditions or warranties, even though in origin the two legal concepts had operated in different planes. A breach of condition entitled a party to rescind, provided he acted promptly and did not affirm the contract, whereas a warranty was a less important term which sounded only in damages.[78] But this dichotomy proved unsound, because a condition might be broken in a trivial way, a subsidiary term might be broken in a catastrophic way, or a series of terms minor in themselves might all be broken at once. It made more sense to focus on the effects of the breach in question rather than an artificial characterization of the terms at the time of contracting.[79]

Implied Terms

Generally speaking, the common law did not impose liability on a supplier of goods, in the absence of a warranty, if his wares turned out to be of poor quality. Since in such a case there was no deceit, the rule was *caveat emptor.* By the fifteenth century, the law admitted an apparent exception in the case of a seller of food and drink, since he was bound by law to provide wholesome victuals.[80] But some casual dicta in the year books were turned by Frowyk CJ into a new theory that any seller was liable, even in the absence of a warranty, if he knew that what he was selling was not what it seemed; the deceitful concealment was thought to override the usual notion that the buyer should have asked for a warranty.[81] The remark remained in manuscript until 1602, when it was printed in 'Keilwey', and this bibliographical accident seems to account for a leading case a year later.

Geronimo Lopez ('Lopus'), a Portuguese merchant, had given a diamond ring worth £100 to a London goldsmith in exchange for a stone falsely asserted (but not warranted) to be a 'bezoar stone', an oriental rarity believed to have special magical or medicinal properties and therefore highly valued. Everyone knew about bezoars, but few would have been able to distinguish the real thing from an imitation. The transaction was in 1597, but five years later Lopez brought an action in the King's Bench and obtained a judgment, only for it to be reversed in the Exchequer Chamber (in 1603) on the ground that a mere assertion (or 'affirmation') was not actionable without a warranty. He then sued in the Common Pleas, alleging that the goldsmith was an expert in precious stones, on whose knowledge he relied, and knew that the stone was not genuine; this

[76] For an early example see *Houton v. Bosele* (1376) *CPMR 1364–81,* p. 220 (sale of horse to be void if horse unsound).

[77] See the counsel's opinion of Sir Thomas Parker (1706) in *Law's Two Bodies,* p. 176.

[78] See e.g. *Bettini v. Gye* (1876) 1 Q.B.D. 183 at 187, per Blackburn J; Sale of Goods Act 1893, p. 382, post.

[79] *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26; D. Nolan in *Landmark Cases in the Law of Contract*, pp. 269–97.

[80] See p. 357, ante. This should be regarded as statutory liability: Ibbetson, *HILO*, p. 85.

[81] *Note* (*c*. 1505) Keil. 91 (= Caryll Rep., B. & M. 567), per Frowyk CJ. Cf. *Caunt's Case* (1430) B. & M. 561 at 562, per Godered sjt; *Shipton v. Dogge* (1442) ibid. 434 at 437, per Paston J.

resulted in an undetermined demurrer. Undaunted, he then commenced a second action in the King's Bench, following the same formula, and relied on Frowyk's newly published opinion; but again there was an undetermined demurrer. Popham CJ 'thought it good that it should be considered by all the justices of England; for if it were found in favour of the plaintiff it would affect all the contracts in England, which would be dangerous'. No trace of a final decision has been found, and so the first decision stood as the only authority transmitted to posterity in print.[82] It was agreed that no warranty was necessary on a sale of victuals, and also that there was an implied warranty of title on a sale of goods; in those cases knowledge of falseness was probably not necessary either.[83] But no general doctrine of implied warranties emerged from the indecision in Lopez's case. It left *caveat emptor* in place as the basic principle, subject to a growing mass of exceptions.

The reason why the history of the implied warranty is difficult to pursue from this point is not that there was any legal doubt whether warranties could be implied, but that a plaintiff had to plead an implied warranty as if it were express. Even in actions against victuallers, an express warranty was alleged.[84] If the jury found for the plaintiff, no question as to implication could come before the court in banc until the development of the special case and new trial procedures. The working of implied terms was therefore chiefly a matter of nisi prius practice, and crept into the books only when reports of circuit cases began to appear at the turn of the nineteenth century. However, a study of commercial practice and the work of City courts has suggested that implied warranties of merchantability and fitness for purpose were widely recognized by the mercantile community at least by the end of the seventeenth century,[85] and a study of Lord Mansfield's notebooks has shown that they were familiar in trial practice before the printed reports begin.[86]

The nisi prius reports confirm what may only be guessed with respect to the previous four centuries, that the knowledge laid in a deceit declaration was sometimes fictitious.[87] And we learn that formulations by pleaders of what appear to be express undertakings were in truth often intended to support implied terms. The practice was inconvenient, for it cast upon the pleader the necessity of framing in alternative counts all the possible forms which an implication might take, in the hope that one of them would be upheld on the evidence; if there was no suitable formulation on the record before the trial, there was no way a term could be implied.[88] Reports of trials also reveal that, although *caveat emptor* remained the default rule,[89] it was frequently displaced by common

[82] *Chandelor v. Lopus (No. 1)* (1603) B. & M. 569 (misdated 1604); *Lopus v. Chandler (No. 2)* (1606) ibid. 570; *CPELH*, III, pp. 1325–30.

[83] The implied warranty of title was controversial: *Dale's Case* (1585) Cro. Eliz. 44 (court divided). Knowledge needed: *Sprigwell v. Allen* (1648) Aleyn 91. Not needed: *Cross v. Gardner* (1689) Comb. 142, 3 Mod. Rep. 261, 1 Show. K.B. 68, Carth. 90.

[84] For the 15th century see Milsom, 77 LQR at 279.

[85] E. Anderson, unpublished thesis cited by Oldham, *ECLM*, pp. 98–101.

[86] E.g. *Harding v. Enkell* (1781) p. 382 n. 92, post (sale: fitness of goods for purpose); *Schoolbred v. Nutt* (1782) *ECLM*, pp. 97, 133 (insurance: seaworthiness); cf. ibid. 137 (insurance: non-deviation from voyage).

[87] *Williamson v. Allison* (1802) 2 East 446 (motion for new trial).

[88] See *Gray v. Cox* (1825) 4 B. & C. 108.

[89] *Parkinson v. Lee* (1802) 2 East 314 (no implied warranty where goods equal to sample); *La Neuville v. Nourse* (1813) 3 Camp. 351 (no implied warranty where good Burgundy deteriorated).

implication. For instance, it was not applied where a buyer of goods had no opportunity to inspect them. In such a case the seller was deemed to undertake, at the least, that the goods were of merchantable quality.[90] And if goods were sold by description, there was an implied warranty that the goods answered that description.[91] Best CJ explained in 1829 that the doctrine *caveat emptor* had been convenient in relation to horses, for 'no prudence can guard against latent defects in a horse', and so in the absence of fraudulent concealment no more is promised on the sale of a horse than that the creature sold is a horse. But that was not the position in other cases. A manufacturer, for instance, bore some responsibility for the condition of articles which he had brought into being; and so he was taken to contract not only that his goods were merchantable but also, if he knew the purpose for which they were intended, that they were fit for that purpose.[92] The principle was, 'If a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose'.[93] The same implication was later extended to vendors other than manufacturers, the deciding factor being the vendor's knowledge of the buyer's purpose.[94]

These implied terms were not merely warranties, but 'conditions precedent' to the buyer's obligation to accept and pay for the goods. The buyer was therefore usually able to reject the goods if they were not of the quality impliedly contracted for. When the law relating to the sale of goods was codified in 1893, the draftsman, Judge Chalmers, classified terms in a contract of sale as being either conditions, breach of which usually entitled the buyer to reject, or warranties, which did not; and he framed the implied terms as to merchantability and fitness for purpose as conditions.[95] Under the 1893 Act, as at common law, implications could always be excluded by explicit language. In the twentieth century, however, Parliament pursued a policy of imposing certain 'implied terms' which could not be excluded, in order to ensure minimum standards in certain kinds of contract. Of course, unexcludable terms are potentially fictitious. The object of implying them was to protect classes of persons deemed incapable for economic reasons of protecting themselves through the bargaining process. Such protection was extended first to leasehold tenants, then to employees, and then to consumers of goods and services. The result is that many important transactions entered into by non-commercial parties are not governed wholly by the individual bargain but also by the statutory law of landlord and tenant, labour law, or consumer law. There has in that respect been a partial movement away from the common law of contract to statutory regimes based on status.

[90] *Gardiner v. Gray* (1815) 4 Camp. 144; *Laing v. Fidgeon* (1815) 4 Camp. 169 (nisi prius), 6 Taunt. 108 (in banc).

[91] *Bridge v. Wain* (1816) 1 Stark. 504.

[92] See e.g. *Harding v. Enkell* (1781) *Mansfield MSS,* I, p. 356; *ECLM*, pp. 97–8 (implied condition on sale of beer by brewer to tavern-keeper that it should be drinkable, i.e. at least minimally palatable and not merely non-toxic).

[93] *Gray v. Cox* (1824–25) 1 C. & P. 184 (at nisi prius), 4 B. & C. 108 (KB in banc); *Jones v. Bright* (1829) 5 Bing. 533 (CP).

[94] *Brown v. Edgington* (1841) 2 M. & G. 279.

[95] Sale of Goods Act 1893 (56 & 57 Vict., c. 71), ss. 11–14. The distinction was finally abandoned when these provisions were revised and rearranged in the Consumer Rights Act 2015 (c. 15), part 1.

Standard-Form Contracts and Exclusion Clauses

The growth of large-scale manufacturing, trading, and public utility companies after the Industrial Revolution inevitably brought changes in contract-making practices. It was convenient and time-saving for a business which dealt with the public to make the same form of contract with all its customers. The terms were contained in a standard-form notice or printed document, on which the company had had the benefit of legal and business advice; there was no room for individual negotiation. The choice offered was 'take it or leave it'. But, as more and more everyday commodities and services came to be available only from large organizations, consumers found themselves under considerable economic pressure to submit to such standard-form contracts, however one-sided. It is true that the person who submits to a standard form is not under legal duress, and must be taken to have assented to the terms as a free bargain. Everyone is equal before the law, and equally free to reject proffered contracts, be he a pauper or an international business organization. Could the common law nevertheless take notice of strong economic pressures, or should the matter be left to the discretion of Parliament?

The aspect of standard-form contracts which gave the most difficulty to the courts was the use of clauses excluding or limiting liability. General attempts to cut down or negative liability seem to have been made in the first place by carriers. Since the law imposed on them a strict liability for the goods in their keeping, they took to giving notice that they did not accept liability for specified kinds of valuables, or goods over a certain value, unless the consignor paid an additional sum to cover insurance. The courts regarded such notices as reasonable, although there was some doubt in the early nineteenth century whether they could exclude liability for negligence;[96] at any rate they did not protect a carrier who was grossly negligent or who went outside the terms of the bailment.[97] This practice was given statutory force by the Carriers Act 1830, under which carriers were generally exempted from liability for certain kinds of valuables worth more than £10 unless the consignor paid at a higher rate, and this exemption was held to cover negligence.[98] Exclusion and limitation clauses came further into prominence with the expansion of the railways in the 1840s. By 1850 the railway companies were using a clause which exempted them from responsibility for 'any damage, however caused,' in respect of goods, and this was intended to exclude liability for negligence in tort as well as for breach of contract. The Victorian courts were sympathetic to these clauses, because the invention of the railway had conferred new benefits on the public and so it was thought that the proprietors who exploited the invention were entitled to protect themselves against the unprecedented risks inherent in rail transport.[99] The clauses were not so welcome to the public, who rapidly came to regard transport by rail as a natural right. When the Railway and Canal Traffic Bill was passing through Parliament in 1854, the subject of exclusion clauses was fully debated in the House of Lords, and strong criticisms of the law were advanced from opposite political

[96] The first reported case is *Gibbon v. Paynton* (1769) 4 Burr. 2298. For the 19th-century cases see J. N. Adams, 7 *Anglo-American Law Rev.* at 140–3.

[97] *Lyon v. Mells* (1804) 5 East 428.

[98] Stat. 11 Geo. IV & 1 Will. IV, c. 68; *Hinton v. Dibbin* (1842) 2 Q.B. 646.

[99] See *Carr v. Lancashire and Yorkshire Rly Co.* (1852) 7 Ex. 707; *Peek v. North Staffordshire Rly Co.* (1863) 10 H.L.C. 473 at 556, per Cockburn CJ.

sides by Lords Lyndhurst and Brougham. The latter said that the railway exemption clauses ought in justice to be void for duress, since the public had no freedom of choice; either they agreed to the terms or they could not use the railways. A person's undoubted freedom to refrain from using railways was no longer considered realistic. A clause was therefore added to the bill to impose liability for negligence in respect of goods consigned by rail, notwithstanding any condition limiting or excluding common-law liability, unless the condition was held by the trial judge to be 'just and reasonable'.[100] This became law. The reform attempted to strike a convenient balance between the functions of the legislature and those of the judiciary. The courts were to enforce reasonable contracts to the letter, but had a power to review exclusion and limitation clauses in railway cases if freedom of contract was missing in reality. In practice the principle of reasonableness proved difficult to apply, and it was not adopted in subsequent legislation.

As exclusion clauses spread to other kinds of contract, the courts themselves endeavoured to reduce their effects. They were construed *contra proferentem* and given the narrowest effect consistent with the words used. Unless inescapably clear, a clause would not protect a party who acted outside or deviated from the terms of the contract, and, if the contract as a whole manifested an intention that a party be legally bound, a clause purporting to exclude all liability could be rejected as repugnant. From these general principles of construction, some of the common-law judges of the 1950s, notably Lords Devlin and Denning, attempted to extract a rule of law that a party who committed a 'fundamental breach' of contract could not retreat behind the shelter of an exclusion clause. In 1966, however, the House of Lords decided that there was no such rule of law; and a confusing rearguard action by the Court of Appeal was defeated by a further decision of the Lords in 1980. The courts would lean against construing a clause to cover a serious breach if at all possible, but there was no principle of construction which could prevent parties from making a contract in whatever terms they chose if they did so in clear terms.[101] The remedy in the end came from Parliament, and – like equitable forms of relief in earlier centuries – it was achieved by breaking with traditional principles of contract. Some liabilities cannot be limited or excluded at all; some limitation or exclusion clauses are subjected to judicial review to establish their 'reasonableness'; and it is even possible to have, and to enforce, a 'reasonable expectation' which is contrary to the express terms of a contract.[102]

Further Reading

Cornish & Clark, pp. 197–226
Ibbetson, *HILO*, pp. 202–61
M. Lobban, 'Contract' (2010) in *OHLE*, XII, pp. 297–562
W. Friedmann, *Law and Social Change* (1951), pp. 34–72

[100] *Parliamentary Debates* (H.C.), vol. 133 (3rd ser.); Railway and Canal Traffic Act 1854 (17 & 18 Vict., c. 31), s. 7. There were statutory upper limits on compulsory liability.

[101] *Suisse Atlantique Société D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] A.C. 361; R. Brownsword in *Landmark Cases in the Law of Contract*, pp. 299–320; *Photo Production Ltd v. Securicor Transport Ltd* [1980] A.C. 827.

[102] Unfair Contract Terms Act 1977 (c. 50); Consumer Rights Act 2015 (c. 15), part 2.

M. Horwitz, 'The Historical Foundations of Modern Contract Law' (1974) 87 HLR 917–56 (cf. Simpson, post)
A. W. B. Simpson, 'Innovation in 19th Century Contract Law' (1975) 91 LQR 247–78 (repr. in *Legal Theory and Legal History*, pp. 171–202); 'The Horwitz Thesis and the History of Contracts' (1979) 46 *Univ. Chicago Law Rev.* 533–601 (repr. in *LTLH*, 203–71)
J. W. Carter and C. Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1976) 8 *Sydney Law Rev*. 31–67
P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979)
J. H. Baker, 'From Sanctity of Contract to Reasonable Expectation?' (1979) 32 *Current Legal Problems* 17–39; 'Deceit' [1483–1558] (2003) in *OHLE*, VI, pp. 769–73; 'Bezoar-Stones, Gall-Stones, and Gem-Stones: The Action on the Case for Deceit' (2006) repr. in *CPELH*, III, pp. 1317–34
J. Oldham, 'Reinterpretations of 18th Century English Contract Theory' (1988) 76 *Georgetown Law Jo.* 1949–91; 'Contract and Quasi-Contract' (1992) in *Mansfield MSS*, I, pp. 213–400 (abridged in *ECLM*, ch. 3)
J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991)
S. Waddams, 'What *were* the Principles of Nineteenth-Century Contract Law?' (2007) in *Law in the City*, pp. 305–18
C. Mitchell and P. Mitchell ed., *Landmark Cases in the Law of Contract* (2008)
S. Thomas, 'The Development of the Implied Terms on Quantity in the Law of Sale of Goods' (2014) 35 JLH 281–318
W. Swain, *The Law of Contract 1670–1870* (2015)

Privity

V. V. Palmer, *The Paths to Privity: A History of Third Party Beneficiary Contracts at English Law* (1992)
N. G. Jones, 'Uses, Trusts and a Path to Privity' (1997) 56 CLJ 175–200; 'Aspects of Privity in England: Equity to 1680' (2008) in *Ius Quaesitum Tertio* (E. J. H. Schrage ed., 26 CSC), pp. 135–74
J. Baker, 'Privity of Contract in the Common Law before 1680' (2008) in Ius Quaesitum Tertio (ante), pp. 35–60 (repr. in *CPELH*, III, pp. 1202–27)
D. J. Ibbetson and W. Swain, 'Third Party Beneficiaries in English Law: From *Dutton v. Poole* to *Tweddle v. Atkinson*' (2008) in *Ius Quaesitum Tertio* (ante), pp. 191–213

21

Quasi-Contract

There are various situations in which, independently of any contract, a person receiving money may be obliged in justice or in good faith to pay it over to another. The beneficiary of such an obligation has no proprietary claim,[1] and yet there is an interest akin to that enjoyed under a trust; the legal right is in one person, but in equity the benefit belongs to another. We have seen that fiduciary obligations in relation to land were in practice enforced in Chancery. Although it was possible to conceive of an action of *assumpsit* to enforce a use of land,[2] *assumpsit* gave only damages, whereas Chancery could decree possession. In the case of money claims, however, the common law gave an effective remedy, and so analogous obligations with respect to money came to be enforced principally by means of a fictitious extension of *indebitatus assumpsit*. Since fiduciary obligations are not based on contract, the fiction here was no bare formality; not only the tortious dressing but the promise itself had to become a figment of the legal imagination. The fiction affected legal analysis as well as pleading practice; for such was the dominance of the forms of action that the obligations came to be thought of as arising from 'contracts implied by law', or 'quasi-contract', and therefore as belonging in an appendix to the law of contract rather than to the law of trusts. Perhaps there is a weak analogy between quasi-contract and the real thing, in so far as one of the justifications for allowing *assumpsit* against a genuine promisee had been that his receipt of a benefit obliged him to give recompense. But in fiduciary money claims *indebitatus assumpsit* became independent of either bargain or reliance. Their object was not the performance of an agreement, or the recovery of a *quid pro quo*, but the restitution of benefits received without any moral right to keep them. Their history affords another example of the way in which the common law could be developed, whatever the formal restraints and however devious the subterfuges needed to evade them, in order to achieve equity in its broader sense.

The Action of Account

The quasi-contractual possibilities of *assumpsit* were not explored until the Tudor period, but a medieval foundation for the later developments was laid in the action of account. An accounting between two parties, either before auditors or by mutual reckoning (later called 'account stated'), was itself a cause of action in debt and enabled the

[1] A sum of money (as opposed to coin or notes) may be owed but not owned: p. 342, ante.

[2] *OHLE*, VI, p. 879; *Megott v. Broughton* (*Megod's Case*) (1586) B. & M. 532; p. 376 n. 50, ante. Cf., concerning a legacy, *Butler v. Butler* (1657) BL MS Hargrave 48, fo. 101, per Rolle CJ ('a breach of trust is a proper ground of the action on the case; and…this court and the Chancery have concurrent jurisdiction'). But see Hales' reading (1532) B. & M. 387 at 389, contra.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

party in surplus to recover the sum found to be outstanding.[3] The action of account was different. It was not primarily concerned with the obligation to pay money, which sounded in debt, but with the antecedent obligation to enter into an account in order to discover what, if anything, was owing. The writ was coeval with debt and covenant and was likewise in the *praecipe* form: 'command the defendant that he render a reasonable[4] account' (*praecipe quod reddat rationabilem compotum*) of moneys received.[5] If the court decided that he should account, the defendant was committed to prison, and auditors – often clerks of the court – were assigned to hear the account. If the auditors decided that the defendant owed money to the plaintiff, a final judgment was given that he should pay, and he was remanded to prison until he settled the debt.

Of course, no one could compel a mere stranger to enter into an account; some kind of privity was required. At first the only recognized duty to account arose where the parties enjoyed a relationship akin to what we now call agency. The early actions were all brought against bailiffs of land (estate managers).[6] At the end of the thirteenth century, perhaps as a result of legislation of 1285,[7] the duty was extended to commercial relationships.[8] This resulted in writs and counts against agents who had received money on the plaintiff's behalf, either directly from the plaintiff 'to trade with' or from third parties to whom goods were sold on behalf of the plaintiff.[9] The count against a receiver of money (*receptor denariorum*) suggested that the duty to account arose from the receipt, and this opened up the possibility that account would lie even where there was no agency or other privity between the parties. For instance, if *A* paid money to *B* for the benefit of *C*, *B* fitted the description of a 'receptor denariorum' even if *C* did not employ or know *B*. The courts at first denied that *C* could bring account against *B* unless *B* commonly acted as his receiver, so that his status was openly known.[10] But in 1320 this restriction was abandoned, and the action was allowed against a trustee of money who had received it to invest for an infant plaintiff's use.[11] After 1320, therefore, *B* was obliged to pay over money to *C* even though he was not in any prior relationship

[3] For debt *sur insimul computaverunt* see S. F. C. Milsom, 82 LQR 534 (*SHCL*, p. 133). The count was that D accounted with P and was found in arrears. In *Humberstone v. Hertfeld* (1389) Y.B. Trin. 13 Ric. II, p. 20, pl. 7, it was argued unsuccessfully that this made P a judge in his own cause. See also *Ralph Baker's Case* (1410) B. & M. 258.

[4] A commentator in 1302 expounded this as meaning that 'equity' should be done to both parties: BL MS. Add. 31826, fo. 131, cited in Brand, 'Equity of the Common Law Courts', p. 52.

[5] For a specimen writ against a receiver see p. 582, post.

[6] A statutory action of account was available from 1267 against guardians in socage, who were in a similar position to bailiffs: see p. 261, ante. In early Tudor times the common-law action was extended to bailiffs of goods, which meant something different from bailees: *OHLE*, VI, p. 877.

[7] In *Anon.* (1311) 26 SS 3, the action against a receiver was attributed to some passing words in Stat. Westminster II (1285), c. 11 ('…receivers who are bound to render an account').

[8] In some early cases the action was said to be brought under the law merchant: see *Clerk v. Winterbourne* (1289) B. & M. 326 at 327; *Anon.* (1305) Y.B. 32 & 33 Edw. I (RS), p. 377. The writ of account *secundum legem mercatoriam* lay only between mercantile partners.

[9] *Clerk v. Winterbourne* (1289) B. & M. 326. Some thought the receiver should be called a bailiff (19 SS 34), and so managers of shops and taverns, and even masters of boats, were for a time sued as 'bailiffs': Brand, 'Equity of the Common Law', pp. 46–7. But the general 'receiver' count stuck: *Perton v. Tumby* (1317) B. & M. 327 (cf. 41 SS 59); *Euges v. Spyk* (1317) 54 SS 138.

[10] *Anon.* (1318) B. & M. 328. Cf. *Reppes v. Reppes* (1315) 45 SS 71, Fifoot, *HSCL*, p. 282, where the point was not taken.

[11] *Taillour v. Medwe* (1320) B. & M. 328, identifiable as the case in *Novae Narrationes,* 80 SS 293, no. C266B. See also *Anon.* (1367) B. & M. 329; *Hastynges v. Beverley* (1379) ibid. 333. There are examples back to

with him; in such cases *C* would allege merely that *B* had received the money to his use in an accountable way (*ad compotum reddendum*). Account would also lie where *A* paid money to *B* to perform a contract, and *B* failed to perform, provided the payment could be regarded as conditional. By this means a party to a failed transaction could recover back a deposit or pre-payment, and thus obtain rescission for failure of consideration; but this could also be seen as a debt.[12] Much later, in the 1590s, it was decided that account would lie where *A* paid *B* by mistake; *B* was not in that case a debtor, but he could be said to have received the money to the use of *A* since *A* had not parted with the beneficial interest.[13] The action was never extended, however, to tortfeasors. If a disseisor of land took the profits, or a stranger took someone else's crops, or a bailee wrongfully sold the bailor's goods and appropriated the purchase money, there could not in such cases be said to be a taking to the use of the owner because the wrongdoer had received and converted the money to his own use;[14] the remedy was therefore novel disseisin or trespass on the case.[15]

These developments split the cause of action in account into two species. Account against a bailiff, guardian, rent-collector, factor, or other agent, was intended primarily to secure an enquiry by way of audit into a series of transactions over a period; some of the individual transactions might have been contracts between the parties to the account, others not; and there might be set-offs and allowances. All the individual items merged in the finding of the auditors, who were supposed to follow equity as much as law. Account for money received to the plaintiff's use usually worked differently. It lay against the receiver of some specific sum of money which could not be recovered in debt; there was no dispute as to the amount, which was stated in the count, and no question of claiming allowances or adjusting mutual claims. It is this latter species which may be called quasi-contractual. But the development from this point was not continuous. By the sixteenth century it was becoming apparent that the action of account was not the best way of achieving either of the objects, and especially not the second.

Decline of Account

In the middle of the fourteenth century account was one of the most frequently used personal actions, more common (according to some estimates) than debt.[16] A century later it was far less common, and was beginning a gradual decline into oblivion. The reason usually given is that plaintiffs did not like to risk the defendant waging his law. But this was not the major obstacle that it was in debt and detinue. Wager of law was

the 1290s of account being brought in respect of single sums of money: Brand, 'Equity of the Common Law Courts', pp. 48–9.

[12] Account: *Anon.* (1367) B. & M. 329. Debt: p. 389, post.

[13] *Framson v. Delamere* (1595) Cro. Eliz. 458; *Hewer v. Bartholomew* (1598) Cro. Eliz. 614.

[14] *Tottenham v. Bedingfield* (1572) B. & M. 336.

[15] For the assize see p. 66, ante; for the action for conversion see pp. 422–5, post.

[16] An analysis of 3 rolls for 1342–43 showed 159 actions of account, 46 of debt, and 31 of covenant: L. O. Pike (ed.), Y.B. 20 Edw. III (RS), part II, p. xxxix. But it was an untypical year, since many suits arose from the bankruptcy of the Florentine banking house of Peruzzi. One investor, claiming £3,000 (£4M in today's money), went by the suggestive surname of Coupegorge.

not permitted where the defendant received money from a third party to the use of the plaintiff,[17] and most later actions of account were of this kind. By 1600 wager of law had also been denied to the bailiff.[18] The real problem arose from the accounting procedure, which required the imprisonment of the accountant and a hearing of the account before auditors who had no powers to compel discovery and (according to some writers) could not take evidence from either party. In an embarrassing case of the 1520s, a defendant was incarcerated for five years without an account being taken.[19] Parties faced with a cumbersome procedure might just as well submit voluntarily to an accounting, provided they were both willing to cooperate, and this may explain why debt on an account stated became more common as the action of account declined. A voluntary accounting barred the action of account.

In the quasi-contractual kind of case, it is difficult to see what possible function the auditors could have had. The count alleged the receipt of a specific sum or sums by the hands of a named person or persons, and the defendant could plead before the judges that the sum was received for a specific purpose and not *ad compotum reddendum*.[20] The judgment 'that the defendant do account' ended the suit, and yet it brought about only the appointment of auditors, not payment. The successful plaintiff might still be thwarted, because an unexpected defence might be offered at the audit. If the defendant admitted accountability but wished to show that he had dealt with the money as instructed, or that it had been stolen from him, such defences could not be pleaded in bar of the action but had to await the hearing before the auditors; if any of them then resulted in a demurrer, the case had to be returned to the court.[21] Given such tedious and dilatory procedures, there must have been a strong temptation to bring debt instead,[22] even at risk of law being waged.

It had been accepted since the later thirteenth century that if *A* paid *B* money for a purpose which was not carried out, *A* could bring debt to recover it back.[23] Accordingly, in a leading case of 1536, it was held that where a grocer had paid money to be invested overseas in prunes, and the payee died before buying any prunes, debt could be brought against his administrator. The decision confirmed that, wherever money was paid on trust, and the trust was not observed, the payer could elect to bring debt or account.[24] It was also arguable that where *A* paid money to *B* to pay to *C*, *C* could bring debt

[17] *Perton v. Tumby* (1317) B. & M. 327; *Huntley v. Fraunsham* (1560) Dyer 183; Coke's *Entries*, fo. 47v.

[18] *Shyfield v. Barnfield* (1600) Cro. Eliz. 790.

[19] *Earl of Northumberland v. Wedell* (1523–27) Spelman Rep. 9; Y.B. Mich. 18 Hen. VIII, fo. 2, pl. 13. Wedell had been the earl's auditor for 23 years, while his master's fortunes were being dissipated, but his books were now in the hands of the earl's present auditor.

[20] Y.B. Mich. 19 Hen. VI, fo. 5, pl. 10, per Newton CJ; *Clerk v. More* (1452) Y.B. Trin. 30 Hen. VI, fo. 5, pl. 4 (money received to obtain a patent, not to trade with and account); *Earl of Worcester v. Bodringan* (1469) CP 40/830, m. 403 (money received to pay over to a shipmaster for victualling, not to trade with and account).

[21] See the cases in B. & M. 330–1, 335–6; *OHLE*, VI, p. 876.

[22] The Chancery was another possibility. For 15th-century remedies there see Ibbetson, *HILO*, p. 268; 'Unjust Enrichment in England', pp. 130–1.

[23] *Fransseys' Case* (1294) B. & M. 250; *Orwell v. Mortoft* (1505) ibid. 448 at 450, 451, per Frowyk CJ; *Bretton v. Barnet* (1599) Owen 86. Such suits were commonplace in medieval local courts: Ibbetson in 'Unjust Enrichment in England', pp. 128–9.

[24] *Core v. May* (1536) B. & M. 270. (There was a deed, and so the inability of administrators to wage law was irrelevant.) Cf. detinue to achieve rescission of a void contract: *Millington v. Burges* (1587) ibid. 242.

against *B* if the money was not paid over.[25] There was therefore little room for the quasi-contractual use of account. The action continued to be used until the seventeenth century for its older purpose, where debt was precluded because of uncertainty as to the balance between the parties, but from the middle of that century it collapsed in the face of the more efficient Chancery procedure for taking accounts. The action of account thus became otiose.

Actions on the Case

The substitution of debt for account was not a lasting solution to the problems of quasi-contract. Debt, as was seen in the previous chapter, had too many shortcomings of its own. Therefore, just as debt on a contract was replaced by *assumpsit*, so debt in lieu of account was replaced by various actions on the case.

The first possibility which occurred to lawyers was to treat the failure to account for money as a conversion. In actions of conversion against bailees it had become the practice to allege a conversion not of the goods but of the proceeds of their sale, and an action could be framed by analogy against an agent who converted the proceeds of sale of goods he had been entrusted to sell.[26] Thus, in a case of 1530, a plaintiff (*P*) showed that he had bought pieces of cloth from *X*, that at his request the defendant (*D*) had received them from *X* to resell at a higher price and pay *P* the proceeds, and that *D* undertook to do this, but *D* instead converted the proceeds to his own use. *P* recovered in damages somewhat more than the price paid to *X*, presumably the higher sum he expected from the resale.[27] The difficulty with the conversion approach, however, was that the money so received was not specific property and so the agent who appropriated money was not converting property belonging to the plaintiff.[28] In 1600 the Exchequer Chamber put a temporary stop to the idea of using trover and conversion for money claims. The King's Bench had given judgment against a factor alleged to have converted the proceeds of corn sold on behalf of the plaintiff; but the judgment was reversed, firstly, because the purchase money did not belong to the plaintiff *in specie*; and, secondly, because the plaintiff had alleged (albeit fictitiously) a loss of the money, and thereby in law admitted that he could not trace the property in any identifiable coins.[29] The coins themselves belonged to the factor, whose obligation was to account for the sum received and not to set the coins aside as a bailee.

According to the Exchequer Chamber in this last case, the proper remedy was account. But there remained the alternative of *assumpsit*. The objections to a trover

[25] *Esyngwold v. Nowers* (1458) Y.B. 36 Hen. VI, fo. 8, pl. 5, at fo. 9, per Wangford sjt; *Shaw v. Norwood* (1600) Moo. K.B. 667. The proposition is denied in Spelman Rep. 132; Bro. Abr., *Dette*, pl. 129; *Brigs Case* (1623) Palm. 364.

[26] *OHLE*, VI, p. 879.

[27] *Miller v. Dymok* (1530) KB 27/1077, m. 72A; 94 SS *250* n. 4. It will be noted that an *assumpsit* was alleged as well as a conversion.

[28] See *Orwell v. Mortoft* (1505) B. & M. 448 at 450, per Kingsmill J. A recipient of money, unless in a sealed bag, acquired property in the coins.

[29] *Halliday v. Higges* (1600) B. & M. 592. The second reason was overruled, in the case of specific coin, in *Kynaston v. Moore* (1627) ibid. 598. But little more was heard of trover against agents. In *Orton v. Butler* (1822) 5 B. & Ald. 652, an attempt to bring trover for money had and received to the plaintiff's use was rejected with scorn.

count could not apply to an *assumpsit* count. The plaintiff in the 1530 case had indeed alleged an undertaking, but at that date there was no formal doctrine of consideration. When it became necessary to show consideration, this proved straightforward in the case of a factor. In 1553 a London mercer sued a person whom he had taken into his household (at his own 'insatiable' request) as his servant and factor, and who in consideration of his education and preferment there had promised to account for all moneys received to the plaintiff's use; during three years in Danzig he had sold large quantities of cloth for the plaintiff but had not accounted for the proceeds. The jury awarded £852, and the judgment was upheld on a writ of error.[30] The availability of this form of action against a mere receiver was considered in 1591. A person who had been paid money by the plaintiff to pay over to the plaintiff's creditor, and had undertaken to do so, had allegedly not done so. The defendant argued that the proper action was account, and that *assumpsit* did not lie because there was no benefit to the defendant; but the court held that the action lay, since the damages were not recoverable in account, and that there was sufficient consideration in the defendant's having the money temporarily in his hands.[31] We shall see that in such situations a further development would enable the receiver to be sued on a fictitious undertaking. The action on a genuine *assumpsit* then remained of use only in situations where there was a contractual nexus between the parties, a true agency. But this was precisely the kind of case where auditors were often needed to go over the items of account, and Hale CJ is known to have rejected the use of *assumpsit* for this purpose because of the inconvenience of unravelling accounts before common juries. Nevertheless, it was later accepted that *assumpsit* could always be used as an alternative to account against an agent, because, by acting as an agent, a receiver of money was understood to promise an account.[32] Around the same time, however, the availability of a better remedy in Chancery effectively removed any incentive to seek such a remedy at law.

Implied and Fictitious Undertakings to Pay

Slade's Case decided, amongst other things, that a promise to pay could be implied in any contractual debt. Such an implication was not a fiction, but a recognition that a contract requiring the payment of money amounted to an undertaking to pay it, even though the words 'I promise to pay' were not used.[33] The promise was too obvious to be expressed. This may have set lawyers wondering whether similar implied promises could be read into contracts which did not create debts, or into debts which did not arise from contracts. One could safely allege an *assumpsit* in pleading if the trial judge could be relied upon to tell the jury that in certain situations they could imply or presume an undertaking from the circumstances. Since proceedings at nisi prius were seldom reported, it is difficult for the historian to trace the steps by which this came about,

[30] *Saxcy v. Hudson* (1553) KB 27/1167, m. 145; *OHLE*, VI, p. 879. The damages were laid in the count as £4,000 (£1M in today's money).

[31] *Retchford v. Spurlinge* (1591) B. & M. 535; KB 27/1317, m. 351. For earlier precedents, one resulting in a demurrer in 1540, see *OHLE*, VI, p. 879.

[32] *Wilkins v. Wilkins* (1689) Comb. 149; Carth. 89; 1 Salk. 9.

[33] *Slade's Case* (1602) ante, p. 367.

either with genuine implications or pure fiction.[34] But there were two common cases in which the process seems to have occurred soon after *Slade's Case*, and it is likely that these paved the way for bolder extensions later in the century.

The first was the *quantum meruit* count. If a person ordered goods or services without fixing the sum to be paid for them, there was no debt, but he could be sued upon an *assumpsit* to pay what the goods were worth (*quantum valebant*) or what the party deserved for performing the services (*quantum meruit*).[35] Doubtless there were real cases of an express promise to pay whatever was deserved, but it seems unlikely to have been common.[36] When we see a *quantum meruit* count it is a fair guess that the undertaking was implied from the circumstances. This was openly stated to be so in 1610, and in 1632 it was held that 'If one bid me do work for him, and do not promise anything for it, in this case the law supplieth the promise'.[37] But such an action is not quasi-contractual.[38] If there is an obvious understanding that the party is to be remunerated, there is a true contract, and if no sum is agreed the most sensible implication is that it should be reasonable.

The second case was the *insimul computassent* count, the direct successor to debt on *insimul computaverunt*. The form was to recite that the parties had accounted together and that the defendant had been found in debt to the plaintiff in a specific amount, and then to allege that in consideration thereof the defendant undertook to pay the sum found owing. Actions of this type were in use by the 1530s.[39] In Elizabethan times they met the stumbling block of consideration, but the King's Bench was untroubled by this. It was held in 1587 that a deferment of payment for a short while was sufficient consideration for the promise to pay the outstanding balance, and in 1605 that the debt itself was sufficient consideration.[40] By the latter date, at least, both the promise and the consideration had become legal fictions; being found in arrear upon an account raised an undertaking in law to pay the debt. This ensured the survival into modern law of the concept of the 'account stated' as a cause of action sui generis, independent of contract. The enduring importance of this concept grew from the use of *insimul computassent* in Georgian times to recover money due under contracts rendered unenforceable by the Statute of Limitations or the Statute of Frauds. An acknowledgment of the existence of a debt was recognized to be a cause of action separate from the contract because, even though arising from a single transaction, it was tantamount to an accounting together.[41]

[34] Cf. p. 381, ante.

[35] See *Shepherd v. Edwards* (1615) B. & M. 498 (declaration upheld despite uncertainty).

[36] It was another matter if some means of ascertainment was specified, e.g. a promise to pay a future market rate or the value of foreign currency at a future exchange rate. For 16th-century examples of this see *OHLE*, VI, p. 859. See also p. 364, ante.

[37] *The Six Carpenters' Case* (1610) 8 Co. Rep. 146 at 147 ('the law implies it'); *Anon.* (1632) Sheppard Abr., I, p. 86. This would now be considered a promise implied in fact rather than in law.

[38] The quasi-contractual use of *quantum meruit* came later: e.g. *Planché v. Colburn* (1831) 8 Bing. 14 (where D stopped P from completing performance, and P recovered what he deserved for the partial performance). See P. Winfield, *Province of the Law of Tort* (1931), pp. 157–60.

[39] *OHLE*, VI, p. 861.

[40] *Whorwood v. Gybbons* (1587) Goulds. 48; *Egles v. Vale* (1605) Cro. Jac. 69; Yelv. 70.

[41] E.g. *Knowles v. Michel* (1811) 13 East 249. The doctrine survived the abolition of fictions: *Camillo Tank S.S. Co. Ltd v. Alexandria Engineering Works* (1921) 38 T.L.R. 134.

Indebitatus Assumpsit

The action of *indebitatus assumpsit*[42] underwent more drastic extensions than these. In its seventeenth-century forms it always rested on an imaginary promise, because whenever one person was indebted to another the law implied a promise, in consideration of the indebtedness, to pay off the debt. Where the debt arose from a contract, the imaginary promise was close to reality. In *Slade's Case* the promise to pay was implied in the contract itself, and is what modern lawyers call a promise implied in fact. In the *indebitatus assumpsit* formula, on the other hand, the implication was a fiction, because the promise as pleaded was separate from the contract and did not have to be proved. In either case the intended result was the recovery of a genuine contractual debt. However, the fictitious subsequent promise let in an extension of *indebitatus assumpsit* to encompass debts beyond the realm of contract: first to indebtedness arising by custom or operation of law, and then to the kind of equitable indebtedness or accountability arising from the receipt of money which belonged beneficially to someone else.

Non-Contractual Debts

Assumpsit was never allowed to take over the work of debt on an obligation or debt on a record,[43] because it was not thought convenient to allow jury trial on the general issue where there was a deed or record; but from the later seventeenth century the fiction of *indebitatus assumpsit* was extended to allow the enforcement of judgments given by courts not of record,[44] such as foreign courts.[45]

The action of debt had also lain in a number of situations where the duty to pay arose from local custom, and *assumpsit* could take over this function if there was a promise to pay. If the promise was implied here, however, it was pure fiction since there was no contract. There are cases beginning in 1588 which raise a suspicion of fiction,[46] but the first clear decision that the law would raise such a promise regardless of the facts occurred in a case of 1676. The City of London brought *indebitatus assumpsit* to recover a customary import duty (called 'scavage') owed by a silk importer, and the jury found a special verdict that, although the money was due by the custom, there was no 'actual' promise to pay it. The King's Bench held that the City could recover. No actual promise was needed. The indebtedness alone was sufficient to ground an *indebitatus assumpsit*, and the allegation of a promise in such cases was mere form.[47] This rapidly became accepted doctrine, and *assumpsit* was used to recover a wide range of customary duties.

[42] The *quantum meruit* count was a species of *assumpsit* but not of *indebitatus assumpsit*. The *insimul computassent* count was a hybrid.

[43] Since the 14th century debt had lain to enforce a money judgment in a court of record, even though there was no contract or covenant. Borough court: *Josse v. Inggeman* (1367) CP 40/438, m. 158. Royal court: *Prior of Holy Cross, London v. Whetele* (1369) Y.B. Hil. 43 Edw. III, fo. 2, pl. 5. See Palmer, *ELABD*, pp. 89–90.

[44] E.g. *Devon v. Norfolke* (1671) Girdler's manuscript entries, CUL MS. Add. 9430, unfol. (decree of the Fire Court set up after the Great Fire of London).

[45] *Bowles v. Bradshaw* (1748) and *Crawford v. Whittal* (1773) 1 Doug. K.B. 4. Lord Mansfield doubted the propriety of the remedy, but the objection was not pressed: *Van Uxen v. Plaistow* (1777) Mansfield Notebooks, no. 480, p. 210.

[46] *Lord North's Case* (1588) 2 Leon. 179 (fee for a final concord); *Ayton v. Van Santen* (1665) Brown's *Vade Mecum*, p. 50 (fees as Black Rod); *City of London v. Gould* (1667) 2 Keb. 295 (custom called water-bailage).

[47] *City of London v. Goray* (1676) B. & M. 515.

In a leading case of 1688, when it was allowed in respect of a manorial fine payable by a tenant on the lord's death, the objection that *assumpsit* would not lie for freehold property was brushed aside with the response that when a fine fell due it was like a 'fruit fallen', or severed crops, and was to be treated as personalty.[48]

'Onerabilis' Assumpsit on Bills of Exchange

An early and fruitful extension of *assumpsit* to enforce customary obligations to pay was that which permitted the enforcement of bills of exchange. The doctrine of consideration, and the related notion of privity of contract, made it problematic for anyone other than the original parties to sue on bills of exchange; but during the sixteenth century pleaders began to experiment with forms of *assumpsit* expressly founded on customs of merchants regulating the liabilities of acceptors, indorsers, and drawers.[49] These were not varieties of *indebitatus assumpsit*, because the customary obligation to pay was not in law a debt;[50] but the formula adopted was closely analogous, alleging that the defendant was 'chargeable' (*onerabilis*) under the custom, rather than indebted. The appropriate custom was usually pleaded in the early seventeenth century as a custom of London merchants,[51] but later in the century it was often a bilocal custom operating among merchants trading between two named cities.[52] These formulae in strictness availed only merchants. That would have been an inconvenient restriction, since bills of exchange were by the 1660s in wide use among non-merchants, either for foreign travel or as a substitute for currency. If the law did not extend liability to non-merchants, the use of such paper might have been frustrated. In 1689 the King's Bench overcame the difficulty by holding that anyone who drew or negotiated a bill became a constructive merchant for the purpose of the custom.[53] But the court's indulgence was limited to bills of exchange. When in 1702 the court was confronted with a supposed custom of merchants applicable to promissory notes, Holt CJ expressed some indignation: 'it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street – which attempted in these matters of bills of exchange to give laws to Westminster Hall'.[54] In this case the extension was effected by Parliament two years later, when notes were made negotiable and actionable in the same manner as bills.[55] Later in the eighteenth century bank notes payable to bearer came into general circulation as the equivalent of cash.[56]

[48] *Shuttleworth v. Garnett* (1688) B. & M. 516. For Holt CJ's dissent (ibid. 518) see p. 396, post.

[49] In *Maynard v. Dyce* (1542) KB 27/1125, m. 110 (the first known instance of *assumpsit* against a drawer), the custom of merchants was pleaded by way of replication. In *Knappe v. Hedley* (1600) KB 27/1359, m. 621, the Exchequer Chamber upheld an *assumpsit* on the acceptance of a bill 'according to the usage and custom of merchants'. For these cases see *CPELH*, III, pp. 1250–2.

[50] *Milton's Case* (1668) B. & M. 275 (Exchequer); approved in *Browne v. London* (1668) ibid. 494 (KB).

[51] *Oaste v. Taylor* (1612) Cro. Jac. 306; *Woodford v. Wyatt* (1626) B. & M. 494.

[52] E.g. *CPELH*, III, p. 1258 n. 94 (1660s); Lutw. 885 (1685). The reason was that customs such as usance (the time allowed for payment of bills) varied according to the place.

[53] *Sarsfield v. Witherley* (1689) B. & M. 495.

[54] *Clerke v. Martin* (1702) B. & M. 497. Cf. *Johnson v. Farloe* (1700) Pengelly Rep., BL MS. Add. 6724, fo. 12, where he held that a goldsmith's note was evidence of money lent but could not give rise to liability on the custom of merchants; it was said to be otherwise in CP.

[55] Stat. 3 & 4 Ann., c. 8/9.

[56] *Miller v. Race* (1758) 1 Burr. 452 at 457, per Lord Mansfield CJ; Rogers, *Early History of the Law of Bills and Notes*, pp. 173–88. The first printed note (£10) was issued by the Bank of England in 1759. Notes (for £5 and above) became legal tender in 1833. £1 notes were legal tender only between 1928 and 1988.

Money Had and Received

The doctrine that *indebitatus assumpsit* lay for any simple debt enabled the action on the case also to be used in place of those forms of debt which had themselves supplanted account. By 1616 the form of the remedy was established as the count for 'money had and received to the use of the plaintiff', a formula borrowed from the action of account against a receiver. The action had earlier been used for money received from the plaintiff himself,[57] but now it could be used in respect of receipts from third parties. It was no objection that an action of account lay on the facts, because debt was already an alternative to account; nor was it necessary in *assumpsit* to specify from whom the money had been received.[58] Soon it could be brought in all the quasi-contractual situations where account had lain: for instance, where *A* paid money to *B* to pay over to *C*, or where *C* paid *B* by mistake or under a void contract. In such cases *B*, being indebted to *C* for money had and received to *C*'s use, was fictitiously presumed to have promised – in consideration of that indebtedness – to pay *C*.

Indebitatus assumpsit was not allowed to rest there. The common count alleged a receipt of money 'to the use of' the plaintiff, and in the action of account this wording had been held not to extend to wrongful receipts. But the old cases were either overlooked or ignored in the context of *assumpsit*. A precedent was set in about 1650 when Rolle CJ brought *assumpsit* in his own court to recover moneys taken as rent from his land after he was dispossessed by the king's forces during the Civil War, and it was held that he could sue for the intercepted rent as money had and received to his use.[59] Account would not have lain in such a case, because there was a tortious taking to the tortfeasors' own use. The new remedy was confirmed shortly afterwards in an action to recover profits received as judge of the Sheriffs' Court, London, by a supposed usurper.[60] This precedent was followed, without serious opposition, in a trio of cases in the 1670s concerning the profits of other contested offices. The first was a dispute over the office of clerk of the papers in the King's Bench; it was resolved to try the title by bringing *indebitatus* in respect of £10 received in fees by the officer in possession, which the claimant represented as having been received to his use; the arguments were confined to the question of title, and the form of action was not challenged. In the second case, the Court of Exchequer allowed a similar action, despite the objection that a usurpation of office was a tort for which the proper remedy was an assize or an action on the case for a disturbance.[61] The only reason given was that account lay for the profits of an office, and that *indebitatus* lay wherever account lay. This reasoning was mistaken, because account would not lie against a disseisor who received income to his own use.

[57] See p. 389, ante. For an intermediate case, where money was paid by P to X, and it came into the hands of D, see *Sir William Cordell's Case* (1573) B. & M. 500. This was analogous to the *devenit ad manus* count for chattels, which preceded trover: p. 418, post.

[58] *Beckingham and Lambert v. Vaughan* (1616) B. & M. 501. The extension was resisted by Walmsley J: *Howlet v. Osbourn* (1595) ibid. Cf. *Gilbert v. Ruddeard* (1607) ibid. 541 (special count, but *assumpsit* implied).

[59] *Rolle v. Cofferer* (*c.* 1650) Twisden Rep., B. & M. 506 n. 32. Cf. *Barnes's Case* (temp. Rolle CJ), cited by Winnington S.-G. in *Arris v. Stukeley* (1677) IT MS Barrington 5, p. 313.

[60] *Bradshaw v. Proctor*, cited in B. & M. 516 (1676); cf. 2 Lev. 245 ('Bradshaw and Porter, of Gray's Inn'). The regicide John Bradshaw, also of Gray's Inn, was Judge of the Sheriff's Court 1643–59.

[61] For these remedies see pp. 460–1, post.

But in the third case the court agreed that, although the extension had not been legally sound, the remedy was convenient and too well settled to alter.[62] Thus it crept into practice by professional consent. However thin its foundations, this development suggested further and wider possibilities: if *assumpsit* lay for the profits of a usurped freehold office, could it now be brought whenever money was taken or detained tortiously, or whenever the profits of freehold property were tortiously intercepted? If so, it might displace not only account but trespass, trover, and ejectment as well.

Scope of the Money Counts: Subsidiarity

Sir John Holt, chief justice of the King's Bench from 1689 to 1710, answered these questions with an emphatic 'No'. He was strongly critical of the two extensions already mentioned, because they involved an undesirable distortion of the forms of action which could bear hard on defendants; if someone was sued in contract, he was not adequately prepared to face an action in tort or a claim of title to property. While it had been justifiable to allow overlapping remedies to avoid wager of law, it was not necessary to allow the indiscriminate substitution of one action for another. He dissented from the decision in *Shuttleworth v. Garnett*, saying it was not axiomatic that *indebitatus* was coextensive with debt: 'where wager of law doth not lie, there an *indebitatus* don't lie, and it is mischievous to extend it further than *Slade's Case*; for an *indebitatus assumpsit* is laid generally, and the defendant can't tell how to make his defence'.[63] He also thought the office cases had been wrongly decided. Again and again he attacked the fictitious use of *indebitatus* and promised to stop its spread: 'By my consent it shall go as far as it has gone, but not a step further.'[64] There was no reason to allow it to be brought in place of special *assumpsit*, or actions in tort, or actions of debt where wager of law was unavailable. Had Holt CJ not called a halt, there is no telling where the action might have gone. Certainly it bid fair to overtake, at one time or another, most of the other forms of action; but it was a subsidiary remedy, not a universal substitute.

1. Real property

The intercepted fee cases showed that *indebitatus* could be used to try the title to freehold offices, even though an assize was available for the purpose. If that was so, why should it not be used for land? The logical conclusion had been conceded in Rolle CJ's case, when it was admitted that *assumpsit* for money had and received could be brought by the true owner of land against someone who had received rent without title from tenants who had attorned to him.[65] The case may not have been widely known, since it was not reported in print, and it has not been ascertained whether *assumpsit* ever did jostle

[62] *Woodward v. Aston* (1676) B. & M. 510 n. 45; *Arris v. Stewkly* (1677) ibid. 503; *Howard v. Wood* (1680) ibid. 504. In 1705 it was said that counsel had advised against using *indebitatus* in the 1676 case: ibid. 510.

[63] Comb. 151. Cf. B. & M. 517. One case which Holt CJ accepted as a fait accompli was that of overpayment by mistake: *Anon.* (1697) ibid. 508; *Lamine v. Dorrell* (1705) ibid. 509 at 510.

[64] *Hussey v. Fiddall* (1698) B. & M. 509.

[65] *Rolle v. Cofferer* (*c.* 1650) p. 395 n. 59, ante; and see *Arris v. Stewkly* (1677) 2 Mod. Rep. 262, per curiam; *Hussey v. Fiddall* (1699) B. & M. 470, per Northey. Cf. *Howard v. Wood* (1680) ibid. 504 at 505, per Bigland. An example of such an action is *Hasser v. Wallis* (1708) 1 Salk. 28.

seriously with ejectment. An obvious attraction would have been that it lay against personal representatives and other persons against whom ejectment would not lie. But opinion in the eighteenth century hardened against allowing *assumpsit* to be brought for accepting rent where adverse title was claimed. In such a case the proper remedy was ejectment, which was brought against the usurper's tenant.[66] A remedy was nevertheless needed for the 'mesne profits'[67] of land which was no longer adversely possessed.

It was settled that a lessor could not bring *assumpsit* for rent reserved on a lease, both because it 'savoured of the realty'[68] and because there was no wager of law to be avoided. However, in the rush to replace debt by *assumpsit* two ways of bypassing this rule had been found. The landlord could bring *assumpsit* on a collateral promise to pay the rent;[69] or he could omit all mention of a lease or rent and declare that, in consideration that he had permitted the defendant to use and occupy the premises, the defendant had promised to pay a sum of money.[70] The 'use and occupation' count was in origin a form of special *assumpsit* rather than *indebitatus*, though it could be joined with *quantum meruit*.[71] It was said in 1683 that the promise to pay had to be an express promise,[72] and that would have limited its use. But in 1737 Parliament clarified the position by enacting that *quantum meruit* for the use and occupation of land could be brought wherever there was a parol lease.[73] If the tenant was thereby made to pay the rent a second time, it was for him to sue the ousted landlord to recover back the rent he had paid to him, as money had and received to his use.[74] This circuity could not be avoided on the strength of the office cases, which were considered distinguishable: fees paid to a de facto officer discharged the payer, so that the de jure officer could only sue the usurper, whereas payment of rent to a disseisor of land required attornment by the tenant and was no discharge as against the disseisee.

A creative attempt was once made to use *indebitatus* instead of replevin, where the plaintiff had paid the defendant to release his cattle from distress, even though he intended at the time to challenge the defendant's right to distrain. Again convenience triumphed over logic. The court said that it would be prejudicial to the defendant to allow title to be put in issue in such a roundabout way.[75]

2. Contract

In the count for money had and received, there was no need to set out the circumstances in which the money was received. This gave the plaintiff a considerable

[66] The tenant could informally vouch his lessor to come and defend his freehold title: see p. 321, ante.

[67] I.e. the income received by the usurper during the adverse occupation.

[68] *Neck v. Gubb* (1617) and later cases in Rolle Abr., I, pp. 7–8.

[69] *Carter's Case* (1586) 1 Leon. 43; *Hunt v. Sone* (1587) Cro. Eliz. 118; *Slack v. Bowsal* (1623) Cro. Jac. 668; *Brett v. Read* (1634) Cro. Car. 343; *Acton v. Symon* (1634) ibid. 414.

[70] This was approved in *Dartnal v. Morgan* (1620) Cro. Jac. 598 ('it is not any rent, but merely a promise in consideration of the occupying'). See also *Lewis v. Wallace* (1752) B. & M. 518.

[71] *How v. Norton* (1666) 1 Lev. 179 (*quantum meruit*); *Johnson v. May* (1683) 3 Lev. 150 (express promise coupled with *quantum meruit*).

[72] *Johnson v. May* (1683) 3 Lev. 150.

[73] Stat. 11 Geo. II, c. 19. The statute provided that the rent should be taken as evidence of the *quantum*.

[74] *Birch v. Wright* (1786) 1 Term Rep. 378 at 386; *Cunningham v. Laurents* (1788) Bacon Abr., I (7th edn), p. 344; *Newsome v. Grahame* (1829) 1 B. & C. 234. For the contrary view see 1 Freem. 479n.

[75] *Lindon v. Hooper* (1776) 1 Cowp. 414.

procedural advantage compared with special *assumpsit*, in which all material details had to be shown. Attempts were therefore made to use the former instead of the latter, if the facts were such that the plaintiff could throw over the contract and claim his money back. Holt CJ opposed this where there had merely been a breach of contract, not the failure of a condition. In a case where the plaintiff paid money to the defendant for his good offices, which did not materialize, he exclaimed: 'Away with your *indebitatus*, 'tis but a bargain.'[76] Neither would he allow *indebitatus* for the purpose of recovering back money where a party had been led into a contract by a false warranty.[77] He accepted, however, that the count was appropriate where the money was paid under a void contract or where there was a total failure of consideration.[78] By 1780 the distinction had become one of substantive law: a contract could not be rescinded for mere breach of warranty, but only for a breach going to the root of the contract followed by prompt repudiation, or for frustration, or where the contract was void *ab initio*.[79] The principles governing the discharge of contracts, conditions and warranties, and illegality were for this reason mostly worked out in actions for money had and received (which achieved rescission) and not in actions for breach of contract (which lay only for damages).

3. *Tort*

The office cases went beyond the old law of account in that they allowed the recovery of money appropriated by wrong, and thereby raised the possibility that *indebitatus* might be used for any tortious appropriation of money. In such a case the plaintiff was said to 'waive the tort'. But in so doing he was not giving up his rights, or engaging in charity. By suing on a contract, albeit a fictitious one, the plaintiff gained advantages in pleading, a more favourable limitation period, and a remedy against executors. For these reasons, waiving the tort became a common practice in the eighteenth century and was indulged by the courts. Even Holt CJ grudgingly accepted that, if personal property was converted by a tortious sale, the person wronged could waive the tort by affirming the sale and bring *indebitatus* for the proceeds.[80] This was the most frequent case of waiver, and it was extended in one case to the unexplained disappearance of a masquerade ticket for which value could be presumed to have been given.[81] But there was no equivalent count for goods received, and so if goods were converted without being exchanged for money the proper remedy was still trover.[82] Although it became possible to waive other torts, such as trespass or deceit, where money was obtained by force or

[76] *Anon.* (1695) B. & M. 508. There was seemingly a total failure of consideration. But the payment here was effectively a bribe, and illegality may have underlain the decision.

[77] *Anon.* (1697) ibid.

[78] *Martin v. Sitwell* (1691) B. & M. 507; *Holmes v. Hall* (1704) 6 Mod. Rep. 161. See also *Dutch v. Warren* (1720) 1 Stra. 406; King Rep. (130 SS), p. 229 at 230 ('These actions have of late years been much extended beyond the rule of the ancient law, and the extending of them depends upon the notion of fraud').

[79] *Stuart v. Wilkins* (1778) 1 Dougl. 18; *Weston v. Dowes* (1778) ibid. 24; *Fielder v. Starkin* (1778) 1 H. Bla. 17; *Power v. Wells* (1778) Cowp. 818; *Towers v. Barrett* (1786) 1 Term Rep. 133; and see S. Stoljar, 75 LQR 53–76.

[80] *Lamine v. Dorrell* (1705) B. & M. 509. The action on the case for conversion lay only for unliquidated damages.

[81] *Longchamp v. Kenny* (1779) 1 Doug. K.B. 137. Here the sale was another fiction.

[82] For trover and conversion see pp. 423–5, post.

dishonesty, the concept was not appropriate to torts such as negligence or slander, where no money changed hands.

The notion of waiving the tort was stretched still further in the early nineteenth century, when some of the other *indebitatus* counts were used fictitiously.[83] Thus, where *B* tortiously lured away *A*'s apprentice, *A* could waive the tort and recover the profits of his labour against *B* in a count for work done.[84] Here the fiction was to suppose that *B* had requested *A* to supply the services of his apprentice. And in the case where *B* obtained *A*'s goods by fraud, and converted them without selling them, *A* might be allowed to waive the tort and sue for *quantum valebant* in an action for goods sold and delivered to *B*.[85] Here the contract of sale was fictitious. On the same principle, it was later held that where a trespasser travelled on a railway with intent to avoid paying the fare, he could be sued on an 'implied promise' to pay. Here there was a fictitious contract of carriage but no waiver of tort.[86]

Money Laid Out

There was another common count which did not rest on contract. Where the plaintiff had paid (or 'laid out') money on behalf of the defendant and to his use, he could bring *indebitatus assumpsit* to obtain reimbursement. Already by 1626 it was accepted that the promise to reimburse might be 'implicative', or fictitious.[87] Nevertheless, since English law was not willing to allow one person to foist good works upon another without his consent, reimbursement could only be demanded if the expenditure was authorized in advance by the defendant. It was therefore necessary to allege that the money was laid out 'at the special instance and request' of the defendant. However, if money was laid out under some legal compulsion, the courts were willing – at any rate, by the second half of the eighteenth century – to imply the request as well as the promise to repay, and by means of this double fiction created another form of quasi-contractual obligation. There were only two clear cases of this.

The first case concerned the doctrine of contribution between co-sureties and joint contractors. If several persons stood surety for a debt, or broke a joint contract, and an action was sued to execution against one of them alone, that one could sue the others for a contribution. This principle of contribution had first been established in Chancery, but the common law came to accommodate it by presuming (or tolerating the fiction) that the money recovered in the first action had been laid out by the one at the request of the others.[88] The element of legal compulsion overcame the objection that a person

[83] I.e. with a double fiction, since the promise to pay the money was also fictitious.

[84] *Lightly v. Clouston* (1808) 1 Taunt. 112. For the tort of enticing away a servant see pp. 488–91, post.

[85] *Hill v. Perrott* (1810) 3 Taunt. 274; *Russell v. Bell* (1842) 10 M. & W. 340.

[86] *London & Brighton Rly Co. v. Watson* (1879) 4 C.P.D. 118. The trespass to land was a distinct wrong, which was not waived; but any damages in trespass would presumably have been nominal.

[87] *Anon.* (1626) W. Sheppard, *Marrow of the Law* (1653), p. 124. For a pleading precedent see *Widdrington v. Goddard* (1664) B. & M. 511 at 512 (money laid out by Cambridge tutor).

[88] *Decker v. Pope* (1757) W. Selwyn, *Nisi Prius* (1812 edn), I, p. 71 n. 27, per Lord Mansfield CJ; *Turner v. Davies* (1796) 2 Esp. 159; *Cole v. Saxby* (1800) 3 Esp. 159. Cf. *Cowell v. Edwards* (1800) 2 Bos. & P. 268, where Lord Eldon CJ thought relief should still be sought in a court of equity. The older common law had been content with prevention rather than cure: *Harbart's Case* (1584) 3 Co. Rep. 11.

could not spend another's money without authority. But the common law stopped short of giving the same remedy to joint tortfeasors, a reform accomplished by legislation in 1935.[89] The second case was where the plaintiff's property was lawfully distrained for the defendant's debt, so that the plaintiff had to pay off the debt to redeem his own property. Here again, because of the legal compulsion, the law implied a request to pay off the debt and a promise to indemnify.[90]

The furthest reach of the fiction was to the case where the plaintiff undertook to bury the defendant's spouse or dependent relative in his absence. Here there was no legal compulsion on the plaintiff, but the burial was necessary and was a discharge of the defendant's own natural duty, and so a request was implied here also.[91]

A General Principle

In the eighteenth and nineteenth centuries the count for money had and received became one of the most extensively used actions in the law. The reasons for its popularity, as was suggested above, were partly procedural. The object of keeping the defendant in the dark as to the true cause of action, as Holt CJ had recognized, was not a worthy one. On the positive side, however, the action had proved to be a flexible means of plugging gaps which had appeared in other actions, and Blackstone praised it as 'a very extensive and beneficial remedy, applicable to almost every case where a person has received money which *ex aequo et bono* he ought to refund'.[92] Having survived the buffets dealt it by Holt CJ at the beginning of the century, the remedy was carefully cultivated by Lord Mansfield CJ in the second half. Lord Mansfield favoured 'a liberal extension of the action for money had and received; because the charge and defence in this kind of action are both governed by the true equity and conscience of the case'.[93] Given the lack of particulars in the plaintiff's count, the defendant was permitted to raise at the trial every legal and equitable defence or allowance open to him, without having pleaded it, because the only issue for the jury was whether *ex aequo et bono* the money ought to be deemed to belong to the plaintiff. By establishing that the basis of this common-law action *quasi ex contractu* was an obligation to refund money arising from 'the ties of natural justice' and equity,[94] Lord Mansfield began to free the underlying principles from procedural technicalities. At the end of the following century, jurists at Harvard took up Lord Mansfield's approach and began to explore what they identified as an equitable principle that a man should not unjustly enrich himself at the expense

[89] *Merryweather v. Nixan* (1799) 8 Term Rep. 186; Law Reform (Married Women and Tortfeasors) Act 1935 (25 & 26 Geo. V, c. 30), s. 6.

[90] *Exall v. Partridge* (1799) 8 Term Rep. 308. P had left his carriage on D's land to be repaired, and D's landlord distrained it for arrears of his rent.

[91] *Jenkins v. Tucker* (1788) 1 H. Bla. 90 (burial of wife while husband in Jamaica). Cf. the inconclusive discussion in *Bespiche v. Coghill* (1628) Palm. 559; *CPELH*, III, p. 1298.

[92] Bl. Comm., III, p. 163, paraphrasing Lord Mansfield in *Moses v. Macferlan* (post).

[93] *Longchamp v. Kenny* (1779) 1 Doug. K.B. 137 at 138. He went on to caution that it should 'not be carried too far, nor used by way of surprize': Serjeant Hill's report, *ECLM*, p. 91. Cf. *Clarke v. Shee and Johnson* (1774) 1 Cowp. 197 at 199 ('a liberal action in the nature of a bill in equity').

[94] *Moses v. Macferlan* (1760) 2 Burr. 1005 at 1010; *Mansfield MSS*, I, p. 258; *ECLM*, pp. 87–91. Mansfield may have been influenced by a Scottish work, Lord Kames's *Principles of Equity* (1760), which the author claimed to have written to please him.

of another.[95] The principle was not peculiar to *indebitatus assumpsit*, but was also found in the *condictiones* of Roman law,[96] the principle of 'baet-trecking' (*baattrekking*) which the Dutch jurist Hugo Grotius (1583–1645) derived from Roman and natural law, and the concept of *enrichissement illégitime* (unjust enrichment) in French law.[97]

Lord Mansfield's underlying principle did not thrive so vigorously in England, where it was first forgotten and then dismissed as 'well meaning sloppiness of thought'.[98] Even after *indebitatus assumpsit* and its entourage of legal fictions were exterminated in 1852, the fictitious promise seemed to be immortal. Though it was unconnected with the substantive law of contract, legal writers did not know where else to put this branch of the law. Lawyers continued to speak of implied promises and waiving the tort; but as they lost familiarity with the forms in which those ideas had been clothed, and with the operation of fictions, it was easy for misconceptions to flourish. For instance, it was held that by waiving the tort a plaintiff had actually abandoned any claim in tort;[99] and that a quasi-contractual action would not lie against a party who lacked capacity to make a real contract.[100] In 1904 it was even held that money paid under a contract could not be recovered back if the contract was subsequently frustrated, because the contract had been in force at the time when the money was paid and frustration only discharged future obligations. When the House of Lords unanimously overruled that decision in 1943, Viscount Simon said the Court of Appeal had overlooked the distinction between *indebitatus assumpsit* for money had and received and express *assumpsit*. The action to recover back money on a failure of consideration was of the former kind, and was not brought on the contract but on the equitable obligation to restore the money. Lord Wright attributed that obligation to the principle of unjust enrichment, which was neither contract nor tort but a third category (sometimes called quasi-contract) which rested on an equitable foundation. Lord Mansfield's thinking was thus reinstated as English law.[101] Since that time, English writers have attempted to identify the various applications of this principle without reference to the forms of action, which had tied it unnecessarily to money claims, and have found parallels both in equitable doctrines as developed in Chancery[102] and in the salvage law of the Admiralty. American lawyers had already suggested the wider heading 'restitution' for the whole

[95] See J. B. Ames, 2 HLR 66 (1888); W. A. Keener, *The Law of Quasi-Contracts* (1893). For the influence of Sir Henry Maine see Ibbetson, *HILO*, pp. 284–5.

[96] In *Clarke v. Johnson* (1774) Lofft 756 at 758, Lord Mansfield CJ referred to money had and received as a *condictio indebiti*.

[97] Unjust enrichment is in some respects narrower than quasi-contract. E.g. in *Planché v. Colburn* (1831) p. 392 n. 38, ante, D received no 'enrichment' because he had prevented P from conferring it.

[98] *Holt v. Markham* [1913] 1 KB 504 at 513, per Scrutton LJ.

[99] When the fallacy was exposed in *United Australia Ltd v. Barclays Bank Ltd* [1941] A.C. 1, Lord Atkin referred (p. 29) to the forms of action as 'ghosts of the past ... clanking their medieval chains' (cf. p. 76, ante).

[100] *Sinclair v. Brougham* [1914] A.C. 398; overruled on this point by *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669.

[101] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32. The overruled case was *Chandler v. Webster* [1904] 1 K.B. 493.

[102] Constructive trusts were established in the Restoration period, but they were seldom if ever used to achieve restitutionary remedies until more recent times; usually there was some kind of fraud, or misconduct by a trustee. More relevant to the story was the equitable account against a wrongdoer: e.g. *Bishop of Winchester v. Knight* (1717) 1 P. Wms 406; *Jesus College v. Bloom* (1745) Amb. 54.

class of obligations of this nature,[103] but it was only from the 1960s that restitution in this new sense began to be firmly established in England as a discrete body of principles wholly independent of contract, and no longer tied to the 'quasi-contract' of the old money counts.[104] Attempts to find a more precise abstract theory have, nevertheless, led to much academic and judicial controversy.

Further Reading

Ibbetson, *HILO*, pp. 263–93

R. M. Jackson, *The History of Quasi-Contract in English Law* (1936)

S. J. Stoljar, 'The Doctrine of Failure of Consideration' (1959) 75 LQR 53–76; *The Law of Quasi-Contract* (1964); 'The Transformations of Account' (1964) 80 LQR 203–24; *A History of Contract at Common Law* (1975), pp. 105–17, 181–7; 'The Account Cases' (1989) 104 SS xi–xiv

A. W. B. Simpson, *A History of the Common Law of Contract* (1975), pp. 489–505

J. H. Baker, 'Onerabilis Assumpsit' (1979) repr. in *CPELH*, III, pp. 1253–60; 'The Use of Assumpsit for Restitutionary Money Claims 1600–1800' (1995) in *Unjust Enrichment* (15 CSC), pp. 31–57 (repr. in *CPELH*, III, pp. 1285–316); 'Accountability and Quasi-Contract' [1483–1558] (2003) in *OHLE*, VI, pp. 875–80

P. Birks, 'English and Roman Learning in *Moses v. Macferlan*' [1984] *Current Legal Problems* 1–28; P. Birks and G. McLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone' (1986) 6 OJLS 46–85; 'Restitution for Wrongs' (1995) in *Unjust Enrichment* (15 CSC), pp. 171–95

G. E. Palmer, 'History of Restitution in Anglo-American Law' in *International Encyclopaedia of Comparative Law*, X (P. Schechtriens ed., 1989), ch. 3

D. Ibbetson, 'Unjust Enrichment in England before 1600' (1995) in *Unjust Enrichment* (15 CSC), pp. 121–48

G. H. Jones, 'The Role of Equity in the English Law of Restitution' (1995) in *Unjust Enrichment* (15 CSC), pp. 149–69

J. S. Rogers, *The Early History of the Law of Bills and Notes: a Study of the Origins of Anglo-American Commercial Law* (1995)

J. Oldham, 'Quasi-Contract and Unjust Enrichment' (2004) in *ECLM*, pp. 87–106

P. Brand, 'The Equity of the Common Law Courts' in *Law and Equity: Approaches in Roman Law and Common Law* (E. Koops and W. J. Zwalve ed., 2014), pp. 31–54 at 45–52 (on the action of account); 'Merchants and their Use of the Action of Account in 13th Century and early 14th Century England' in *Medieval Merchants and Money* (M. Allen and M. Davies ed., 2016), pp. 293–303

[103] Restitution had once had the different meaning of restoring something claimed by legal right, e.g. the writ of restitution of land after a forcible entry, or the writ of restitution to an office (later called *mandamus*). Serjeant Sheppard said it meant 'the yielding up again of any thing unlawfully taken from another': *Grand Abridgment* (1675), III, p. 257.

[104] The turning point was the publication of R. Goff and G. H. Jones, *The Law of Restitution* (1st edn, 1966). But note also P. Winfield, *The Province of the Law of Tort* (1931), pp. 116–89.

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Property in Chattels Personal

The common law relating to movable property was altogether distinct from that relating to real property. The reason is not that movables were formerly of minimal importance: 'Not even in the feudal age', jested Maitland, 'did men eat or drink land.'[1] There was, nevertheless, a marked difference in permanence and intrinsic value between land, which was a capital asset producing a continuous livelihood or income, and most ordinary chattels, such as grain or cattle, which were consumable. Until the Industrial Revolution, land was the chief source of wealth, and litigation about landed property was one of the principal concerns of the royal courts. Every piece of land was geographically a parcel of the realm, the subject of tenure, a source of authority, immovable, indestructible, and recoverable *in specie* by real action. Chattels, in contrast, could be passed around by hand, damaged, consumed, lost. The live chattel was mortal, provisions were perishable, and many commodities such as grain and raw wool were fungibles with no individual characteristics; recovery *in specie* was never guaranteed, and rarely of concern, since money would usually do as well. To such things the notions of feudal tenure and estates were wholly foreign, and for many of them the solemn processes of litigation in the early royal courts were inappropriate. While the medieval common law was developing its complex law of real actions, most disputes about chattels were heard in local courts.

The learning of real property dominated the readings and moots in the inns of court. There were few statutes dealing with movable property as such, and no book comparable with Littleton was written about chattels. Lacking the degree of concentrated attention bestowed on the land law, the law of personal property was less sophisticated. Sometimes property seems to have been synonymous with possession, though it was obvious that the two might be separated, as by theft or bailment. If issue was joined in a personal action on the 'property' in chattels, it was a question for the jury rather than the judges.[2] Substantive principles of property are therefore difficult to extract from the sources, and historical change is less clearly visible. But it would be wrong to deduce that this branch of the law has no history worth telling. As with contract, the hardening of the forms of action meant that much of the relevant law was procedural, law governing the choice of remedies to protect chattels. And yet there had to be a law of movable property, however rudimentary, distinct from the forms of action. For one thing, an owner had the right to seize his property extrajudicially without recourse to any action; and questions of property could arise in less direct ways than through actions for interference

[1] Pollock & Maitland, II, p. 149. Cf. *Marmyon v. Baldwyn* (1527) 120 SS 21 at 26, per Fitzherbert J ('common law and common reason consider goods, chattels, and money as highly as land').

[2] *OHLE*, VI, p. 727.

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or withholding.[3] What is more, it appears that abstract principles of movable property were occasionally discussed at learning exercises in the inns of court. The principles were basic, and more or less static between *Bracton* and the mid-fifteenth century. They were less contingent on social changes than those affecting real property.[4] But the story had best begin with some underlying assumptions before turning to the actions.

Personal Property, Chattels, and Things

We have already noticed that the distinction between real and personal property is less than straightforward for historical purposes.[5] It is not the same as the physical distinction between land and movable objects. Some interests in land were not subject to tenure or the rules of inheritance and were classed after the fifteenth century as chattels real. On the other hand, some movables passed with land and were in that sense real property. The key was eventually found in the legal remedies for claiming them. Real property was that which could be recovered *in specie* by means of a real action, and any other kind of property was 'personal'. It was limited by its nature to land and intangible forms of inheritable property to which the concept of seisin was applicable. Chattel interests were protected by a number of different actions, particularly detinue, trespass, and replevin. One of them (detinue) led to judgment for the recovery of the thing or its value, but since it could not guarantee recovery of the specific thing (the *res*), the property which it protected remained personal.[6]

A convenient term used by common lawyers for personal property was 'chattels' (Latinized as *catalla*), a French word having the same root as 'capital'. The English equivalent 'cattle' came to be confined (after about 1500) to animals; but the legal chattel included all movable property, and also chattels real such as a term of years or a wardship severed from the seignory. 'Goods' (*bona*) was a synonym for tangible chattels, but it did not normally include chattels real,[7] and it did not always include livestock. Goods and chattels were in turn usually distinguished from 'choses' (things) in action, which came to be regarded as a species of personal property but were 'things' only in an esoteric legal sense.[8] Choses in action were rights of action, as opposed to things in possession, and originally had few of the characteristics of property. A right to bring an action was personal and could not be sold or passed on like a horse. Indeed, the hallmark of a chose in action at common law was that it could not be assigned to others.[9] It was a diverse category, including debts,[10] trusts,[11] and intellectual property, and it came also

[3] For a plea justifying battery in defence of chattels, in 1500, see *OHLE*, VI, p. 728 n. 7. The defence was denied in the inns of court: 121 SS 385; 132 SS 306. As to recaption of chattels see *OHLE*, VI, pp. 731–2.

[4] Most of the principles mentioned in the 16th century are also in *Bracton*, II, pp. 42–8, taken in turn from Roman law.

[5] See p. 317, ante.

[6] Likewise replevin could not guarantee that distrained chattels would be recovered *in specie*, since they might be eloigned: p. 257 n. 78, ante.

[7] 105 SS 261. In Roman law and its derivatives, *bona* could include immovables.

[8] The terminology is first found in the 15th century. The earlier reports assembled in Bro. Abr., *Chose in action*, did not in fact contain the phrase. The French words 'cause' and 'chose' both derive from the Latin *causa*, and so 'chose in action' has a linguistic connection with 'cause of action'.

[9] *Peddington v. Otteworth* (1406) 88 SS 166 at 173.

[10] I.e. money owed, as opposed to coins (which were chattels).

[11] See pp. 328–9, ante.

to include the instruments creating or evidencing rights of action,[12] such as bonds, bills of exchange, notes, shares in companies, bills of lading, and insurance policies. Most of these in due course became assignable by various means,[13] but in other respects, even if they were sometimes treated like chattels, it was only by loose analogy.

The distinction between land and chattels did not depend simply on movability. Title-deeds, door-keys, and uncollected loose minerals and windfalls, were all considered part of (or at least annexed to) the realty. They passed on a grant of the freehold, and they went on death to the heir rather than the executors. Animals and fixtures raised more complex questions. Domesticated animals were personal property, whereas unreclaimed wild animals and birds passed (as a kind of 'special property') with the land on which they lived. Things affixed to the realty might sometimes be regarded as chattels for the purposes of succession; for instance, certain classes of fixture placed by a tenant could be removed by executors. Even a building might not be part of the land, if it stood on pattens and was removable.[14] It was once thought that an upper room in a house could not be a freehold, because it did not adjoin the soil;[15] but it could hardly be a chattel, unless it was leased for years, and by 1500 'flying freeholds' were recognized.[16] The key to the distinction between land and chattels annexed to land lay in the purpose and degree of annexation. The mill-stone of a mill was regarded as part of the mill even while it was away being mended, whereas ploughs and ploughshares used to till the land were personal property. According to all the judges of England in 1647, dung spread on the ground was part of the realty whereas a heap of dung was a chattel.[17] However, to say that something was part of the realty for the purpose of succession or transferring title was not to say that a real action lay for the thing independently of the land. There was no writ of right for muck or loose pebbles, independently of the land, though recovery of the land in a writ of right carried such things with it. But the same things when reduced into manual possession became chattels, could be recovered by the action of detinue, and could be the subject of larceny.

The common law did not generally recognize heirlooms, that is, chattels destined for heirs; on death, chattels went to the executors or administrators. But ensigns of honour, such as the armour of a knight, the robes and coronet of a peer, or the crown jewels, were said to pass by law to heirs.[18] Another kind of heirloom was the right often given to the heir by local custom to take the best utensils of the deceased;[19] but this was analogous in nature to the lord's right to take heriot, in that it was a claim against the

[12] *Calye's Case* (1584) 8 Co. Rep. 32 at 33; *Ford and Sheldon's Case* (1606) 12 Co. Rep. 1 (recognizances). It was decided in the 14th century that the value of the underlying interest could not be recovered in detinue for a document: Palmer, *ELABD*, pp. 99–102.

[13] Negotiability was achieved by pleading mercantile customs: p. 394, ante. Bonds became assignable by giving the assignee a power of attorney to sue in the name of the obligee.

[14] 105 SS 119. [15] Ibid.; Pas. 3 Hen. VI, Fitz. Abr., *Pleynt*, pl. 1.

[16] If someone granted a house in fee simple, reserving an upper room, the room was not a chattel but remained a tenement in fee simple. Thus two tenants could be seised of different properties on the same soil: *Case of Gonville Hall, Cambridge* (1469) Y.B. Mich. 9 Edw. IV, fo. 38, pl. 17 (upper chamber in college); Y.B. Mich. 5 Hen. VII, fo. 9, pl. 20 (a *praecipe* lies); Co. Litt. 48.

[17] *Yearworth v. Pierce* (1647) Aleyn 31; sub nom. *Carver v. Pierce*, Style 66 at 73.

[18] For the general rule see p. 411, post. Armour: 62 SS 291. Crown jewels: *Re King Henry IV's will* (1413) Mich. 1 Hen. V, Fitz. Abr., *Executours*, pl. 108. Cf. the testamentary heirloom: p. 415, post.

[19] 21 SS 138–44.

estate rather than a hereditary interest in a specific chattel,[20] and it depended on proof of an immemorial custom.

How Personal Property Arises

All the land in England must belong to someone, for if no tenant can be identified the land must be part of the demesne of the Crown. But it is not necessary to suppose that anyone owns the birds of the air, the air itself, or the rain, the water running in streams and rivers, or other movables in their natural state. Such things, according to *Bracton* and its Roman sources, are outside our dominion (*extra patrimonium nostrum*) and common to all mankind. Ownership of them arises, in the first place, by 'occupation'. Whoever first reduces a wild thing into his possession is its owner, though only so long as he retains it in his possession.[21] A person therefore owns rainwater in a butt, birds in a cage, or fish on the dinner plate. Those are obvious cases. The distinction between the limited property of the freeholder in unreclaimed wild animals or things on his land, and the interest of the occupant or captor, was reconciled in the medieval period as follows. Birds flying in the air belonged to no one, birds nesting in trees (and their eggs) belonged to the owner of the trees, and birds in a cage or in the oven were chattels personal. Likewise, fish in a river belonged to no one, fish in a pond belonged to the owner of the pond, and fish in a net or in a fishmonger's trunk were chattels personal.[22] A difficult problem arose when a bird or beast was reduced into possession by an intruder or poacher on another man's soil; eventually, after centuries of disagreement, the courts decided that it belonged to the tenant of the land.[23]

The common law prohibited the occupation of certain classes of natural resources by private subjects because they belonged to the Crown by virtue of the royal prerogative: namely, beasts of venison in a royal forest,[24] and certain great fish,[25] to which were later added 'mines royal' (gold and silver ore)[26] and 'fowl royal' (unmarked swans).[27] These natural 'flowers of the Crown' could be acquired by subjects only by royal grant or prescription.

Another way in which property could arise was by the creation or manufacture of a new thing. When a new thing was made by human industry – *specificatio* in the language of Roman law – it generally belonged to the maker; but a problem arose if he used materials belonging to another person. In the time of Edward IV it was held that

[20] It was therefore enforced by writ of debt in the *detinet*: *Anon.* (1356) Y.B. Hil. 30 Edw. III, fo. 2. Cf. *Anon.* (1365) Y.B. Hil. 39 Edw. III, fo. 6 ('detinue').

[21] *Bracton*, II, p. 42; *Fyloll v. Assheleygh* (1520) Y.B. Trin. 12 Hen. VIII, fo. 4, pl. 3 (119 SS 15).

[22] See the discussions in the inns of court: 93 SS 64; 94 SS *214*, *218*, *317–22*; 105 SS 83–4; *OHLE*, VI, p. 730.

[23] *Blades v. Higgs* (1862) 12 C.B.N.S. 501, reviewing the earlier cases.

[24] M. Hale, *Prerogatives of the King*, 92 SS 230 (a 'kind of property', even though they were *ferae naturae*). Vermin such as squirrels and wild cats were not venison. The prerogative was abolished by the Wild Creatures and Forest Laws Act 1971 (c. 47).

[25] I.e. whales and sturgeon: *Dialogue of the Exchequer*, ii. 7 (p. 135); *Bracton*, II, p. 339; Prerogativa Regis, c. 11. Later authorities add porpoises and dolphins.

[26] *Case of Mines, A.-G. v. Earl of Northumberland* (1567) 1 Plowd. 313. A contrary opinion had been given in 1555: 109 SS 14. For claims made by the Crown to newly discovered minerals (e.g. calamine) and saltpetre see Baker, *Magna Carta*, pp. 193–4.

[27] *Case of Swans, R. v. Yong* (1592) 7 Co. Rep. 15; cf. BL MS Lansdowne 1084, fo. 102v (not turkeys or peacocks). It was held the previous year that private persons could take unmarked cygnets: *Barber v. Colefax* (1591) BL MS Hargrave 26, fo. 31v.

the property vested in the maker if the new product was so different from the materials from which it was made that it could no longer be demanded by an action of detinue as being the same thing.[28] But the fact that goods could not be demanded in detinue did not necessarily mean that they could not be reclaimed at all, for instance by legitimate self-help. If goods were taken wrongfully and made into something new, the owner of the materials was entitled to seize the new article without bringing any legal action. However, property was changed by *specificatio* in two cases. First, if the materials were no longer identifiable; for instance, if corn was made into bread, or barley into ale, or silver was melted down and cast in a new shape. Although the reason usually given was the practical one about seizure, there may also have been a more philosophical objection to treating a thing as continuing to exist when its nature had been transformed.[29] The second case was where a thing was made to accede to the freehold, in which case there was neither a right of seizure nor a writ of detinue. This would be the situation if materials were built into a house.[30]

There was an analogous problem where things belonging to two persons were combined. Obviously, if a tailor added his own thread to a customer's gown, the gown (including the new stitches) belonged to the customer. This was originally explained on the *de minimis* principle: the lesser acceded to the greater. But it apparently became a general principle that where *A* mixed his own property with *B's* – as, by adding his sheep to *B*'s flock, or mixing his hay with *B*'s – the property passed to *B*.[31] It could be regarded as a kind of gift.

A different problem arose when things became chattels personal by severance from the realty, as when fruit and crops were harvested by someone without title. If a tenant of land had an estate of uncertain duration, such as a life estate, which ended before the produce was ripe, the law made a fair division: crops which were the product of human industry (*emblements*)[32] belonged to the tenant who had sown them, or his executors, whereas natural fruits and produce belonged to the reversioner. The like concession was not made to a tenant for years, who knew exactly when his term would end;[33] but it was a moot point whether a disseisor was entitled to emblements sown before the disseisee re-entered.[34]

The progeny and produce of animals belonged to the owner of the animals. A young bird or beast born in captivity was said to belong to the owner of the mother, though

[28] See *Calwodelegh v. John* (1479) B. & M. 578; p. 422, post; *Anon.* (1596) Sheppard Abr., I, p. 273 (B. & M. 361 n. 44).

[29] *Sir William Hody's Case* (1490) Caryll Rep. 45; Y.B. Hil. 5 Hen. VII, fo. 18, pl. 11 (timber made into boards); *Vanellesbury v. Stern* (1490) Y.B. Hil. 5 Hen. VII, fo. 15, pl. 6; Caryll Rep. 31; B. & M. 586 n. 36 (leather made into shoes); *Anon.* (1560) ibid. 360. See also *OHLE*, VI, pp. 731–3.

[30] E.g. *Phylpot v. Frenche* (1480) CP 40/872, m. 429 (demurrer as to leaded glass in a window); *Henry's Case* (1505–06) 94 SS *216* n. 4; probably the same as *Bodon v. Vampage* (1507) Caryll Rep. 540 (demurrer as to an oven cemented to the floor). See also *OHLE*, VI, pp. 733–8.

[31] *Anon.* (1591) Yale Law Sch. MS. G.R29.7, p. 444; *Smoote v. Futball* (1593) CUL MS. Dd.10.51, fo. 7v; Poph. 33, pl. 2.

[32] From the law French *emblayer*, to sow.

[33] The point was debatable temp. Edw. II: BL MS. Add. 35116, fo. 244. The reporter asked several people, but only Shardelow thought the termor should 'in equity' have one crop; Miggele denied this, because (tr.) 'agreement overrides law'.

[34] *Pope v. See* (1534) Spelman Rep. 215; Port 22. See also *OHLE*, VI, pp. 733–5.

the rule may have been different if the father was known.[35] Wool and milk belonged to the owner of the animals from which they were taken, and if a stranger took such things wrongfully trespass would lie.[36] In the case of both animal and vegetable produce, the vicar of the parish in which they accrued was usually entitled to a tenth share, called a tithe; but it was an unspecified tenth, and so the vicar had no property capable of seizure or legal protection until his allocation had been set aside by the parishioner.[37]

Modes of Transfer

Another mode of acquiring personal property was by transfer from another person. There were three principal modes of transferring property in chattels, two by consent of the previous owner and one by operation of law on the death of the owner. It was sometimes said in the old books that property could also be acquired by trespass.[38] But this must be understood in a modified sense. A wrongful taker acquired a possession which would be protected against all but the person from whom he took, but the victim retained property as against the taker and was entitled to take the thing back or recover it by appeal of larceny.[39] If, however, the victim elected to bring an action of trespass and recovered damages, he barred himself from those remedies and thereby effectively waived the property so that it vested in the wrongdoer by estoppel.[40] The property was not acquired, therefore, by the trespass as such, but by the previous owner's waiver.

Gift

Chattels have always been transferable by manual delivery. But delivery did not itself pass the property, because it might simply separate the property from the possession, as in the case of bailment, or from mere physical custody, as where a master entrusted his silver to a servant. Property therefore passed upon delivery only if there was the intention to give or sell it to the recipient. In the case of gift, delivery was at first the only acceptable method of transfer. There is an analogy with the insistence on livery of seisin for the conveyance of freehold, and the consequence was similar. If a person out of possession made a gift of goods, it was no more effective than the transfer of a right to land by someone without seisin; nothing could pass. This analogy with land was sometimes drawn by medieval lawyers,[41] and between the thirteenth and early fifteenth centuries there are numerous

[35] Y.B. Mich. 18 Edw. III (RS), p. 232; 102 SS 24 (piglets); *Male v. Hole* (1472) Y.B. Pas. 12 Edw. IV, fo. 4, pl. 10; CP 40/842, m. 303 (cygnets); *OHLE*, VI, p. 730. Where animals are leased, the young belong to the lessee of the mother: *Wood v. Ash* (1586) Godb. 112; followed in *Tucker v. Farm and General Investment Trust Ltd* [1966] 2 Q.B. 421 (hire-purchase of flock of sheep).

[36] *Anon.* (1560) B. & M. 360.

[37] The vicar could maintain trespass after the setting aside – which the year books call 'separation from the nine parts'. See also p. 139 n. 26, ante.

[38] E.g. *Power v. Gates* (1382) Y.B. Trin. 6 Ric. II, p. 46, pl. 33, per Holt sjt.

[39] See *Broker's Case* (1490) Y.B. Mich. 6 Hen. VII, fo. 8, pl. 4, per Vavasour J (tr. 'even if someone takes the possession from me, yet may he not take my property from me'); *Haydon v. Raggelond* (1510) B. & M. 581; *Anon.* (1560) ibid. 360; and, for the appeal, p. 415, post.

[40] Y.B. Pas. 19 Hen. VI, fo. 65, pl. 5, per Newton CJ; Mich. 6 Hen. VII, fo. 8, pl. 4, per Kebell sjt.

[41] See Y.B. Mich. 6 Hen. VII, fo. 9, pl. 4, per Bryan CJ; *Anon.* (1492) Y.B. Trin. 10 Hen. VII, fo. 27, pl. 13 (misdated in print); Port 151.

references to 'seisin' of chattels.[42] But the analogy was never pressed too far, and by the end of the fourteenth century a gift of chattels could be effected by deed.[43]

Sale

The Anglo-Saxon laws show that sale, the exchange of property for money, is as old as English history. It does not follow that a contract of sale necessarily passed any property to the buyer independently of delivery. Indeed, at first it did not do so. A sale might explain why a subsequent delivery passed property, rather than just possession, but the property did not pass by the contract alone. By the late twelfth century, however, it was accepted that property could pass by contract provided some payment was made. According to *Glanvill*, a sale was perfected not only by delivery but also where the parties agreed on a price which was paid, in whole or in part, or where 'earnest' (*arra*) was paid.[44] But this was misleading. Earnest money was a token payment, often of a silver penny ('God's penny'), intended to seal the bargain provisionally; but it was not as effective as full payment, or delivery, because the buyer who gave earnest could retract before delivery, forfeiting the earnest.[45] Moreover, in all these cases, the risk of loss or damage remained with the seller until delivery. Mercantile usage, as noticed by the courts in the fourteenth century, treated the property as passing on an executory sale not only in the cases mentioned in *Glanvill* but also where a date was set for payment, since this was as effective as earnest in showing that the bargain was concluded and binding.[46] This was held by all the judges of England in 1494 to be the common law.[47] However, the judges of the next generation concluded that it was simply a matter of ascertaining the parties' intentions.[48]

The buyer's remedy was the action of detinue, though originally that would only lie where the possession could be traced from the plaintiff to the defendant.[49] The pleader therefore had to treat the seller as a constructive bailee. The buyer would allege that there had been a momentary delivery to him at the time of the sale, and that he had then bailed the goods back to the seller for safekeeping pending removal.[50] This was not

[42] See F. W. Maitland, 1 LQR 324; Ames, 3 HLR 23 (repr. in *Lectures*, p. 172). Cf. Litt., s. 324, who says that 'seisin' is only used of land, and 'possession' of chattels.

[43] See *Pynchoun v. Geldeford* (1385) Y.B. Hil. 8 Ric. II, p. 215, pl. 17. Here a person had transferred all his goods and chattels to his executors by deed *inter vivos*, but retained possession and the right to use them for the rest of his life.

[44] *Glanvill*, x. 14 (p. 129). The contract might permit the buyer to take the goods without delivery: *Bakere v. Londeneys* (1384) Y.B. Mich. 8 Ric. II, p. 144, pl. 31.

[45] The seller also could retract. *Glanvill* was uncertain what the penalty should be, but *Bracton* (II, p. 182) said he should pay double the earnest.

[46] *Staughton v. Love* (1397) 100 SS 177; *Veer v. York* (1470) Y.B. Mich. 49 Hen. VI, fo. 18, pl. 23, per Bryan sjt. See Ibbetson, 107 LQR at 490–6.

[47] *A.-G. v. Capel* (1494) Y.B. Mich. 10 Hen. VII, fo. 7, pl. 14. Unless a date was fixed, it remained law that title could not pass before payment: Y.B. Pas. 17 Edw. IV, fo. 1, pl. 2; Fifoot, *HSCL*, p. 252; Adgore's reading (*c.* 1490) B. & M. 519 at 520.

[48] *Anon.* (1506) Y.B. Hil. 21 Hen. VII, fo. 6, pl. 4; *Southwall v. Huddelston* (1523) Y.B. Hil. 14 Hen. VIII, fo. 22, pl. 6 (119 SS 150); Pollard Rep., 121 SS 252; Port 110; *Anon.* (1537) Dyer 29. See also *OHLE*, VI, pp. 740–4. The parties could agree to a cooling-off period ('a power to mislike'): *Anon.* (1554) Dyer 99.

[49] See pp. 418–19, post.

[50] Milsom, 77 LQR 274. Milsom suggested that the formula also removed any doubt whether property had passed.

self-evidently untruthful, since many buyers would have handled the goods at the time of the sale and then handed them back, but the reliance on bailment disguised the true nature of the action. The ending of the subterfuge may be attributable to the similarity between debt and detinue. Where fungible goods were sold, the appropriate action for the buyer was debt in the *detinet*, which was the exact counterpart of the seller's action of debt for the price. Since debt did not depend on property, no bailment was alleged in the count. But neither in the writ nor in the count was debt in the *detinet* clearly distinguishable from detinue.[51] The same formula could therefore be used for specific goods, and that had become the practice by around 1500.[52]

The distinction between contract and property was of little significance as far as the buyer's remedy was concerned. It could be of practical importance, however, if the chattel was destroyed or stolen between contract and delivery. And there was also the question of the seller's title. It was axiomatic that a sale could not pass more than the seller had: *nemo dat quod non habet*. Sale by a non-owner could not create property. Yet it was desirable that the claim of an owner out of possession should sometimes give way to the demands of commerce. By the fifteenth century the law had come to protect honest sales which took place openly in a market or fair, to the extent that a bona fide purchaser thereby acquired a good title against any previous owner.[53] Only if the goods had been stolen could the sale be upset, and then only if the thief had been successfully appealed of larceny or (after 1529) convicted on indictment.[54] To have the effect of divesting the property from the original owner, the sale had to take place in 'market overt': that is, openly in a market or fair established by royal grant or prescription. The rationale was that an owner whose goods disappeared could go to the market and see if they were on display. A sale in a secret place, in or out of the market, would deprive him of this protection.[55] For the same reason, a sale in a shop did not count, because the true owner had no right to enter the shop in search of his goods without the shopkeeper's consent. But the City of London asserted a custom that there was a market every day and that every shop within the city was a market for the purpose of the rule.[56] Similar privileges were claimed for other cities, but liberal extension was refused because of the hardship to owners. Another way of dealing with the problem of sales by non-owners was to require registration of title to certain kinds of goods. A statute of

[51] See p. 416, post. A count for a quantity of barley sold might represent debt for fungibles or detinue for specific barley set aside (though this could be clarified by saying it was in sacks).

[52] E.g. *Rede v. Labeffe* (1502) KB 27/962, m. 60 (count on a bargain and sale of 10 pieces of cloth to be delivered at a certain date, and payment of the price; verdict and judgment for P; it seems likely that the pieces of cloth were specific chattels).

[53] Justification in trespass: Y.B. Mich. 9 Hen. VI, fo. 45, pl. 6, per Paston J (1430); *Rande v. Bothe* (1451) CP 40/762, m. 148; *Prior of Llanthony v. Courteyne* (1472) Y.B. Pas. 12 Edw. IV, fo. 1, pl. 3, and fo. 8, pl. 22; CP 40/842, m. 401; later cases in *OHLE*, VI, p. 738 n. 82. See also *Anon.* (1471) B. & M. 563, per Fairfax sjt. Cf., to the contrary, *Britton*, I, p. 59 (*c.* 1290).

[54] Revesting after conviction: Stat. 21 Hen. VIII, c. 11. This was abolished in 1827; but restitution orders were reintroduced under the Theft Act 1968 (c. 60), s. 28. Property would not pass if the buyer was privy to the wrongful taking: *Case of Thorns* (1466) B. & M. 369 at 371, per Danby CJ.

[55] *Sir Gervase Clifton's Case* (1600) Coventry Rep., BL MS. Add. 25203, ff. 63v, 279.

[56] *Abbot of St Osyth v. Hayford* (1447) CP 40/746, m. 323; Y.B. Hil. 33 Hen. VI, fo. 5, pl. 15; *Lord Mounteagle v. Countess of Worcester* (1555) B. & M. 585 at 586, per Dyer sjt; *Palmer v. Wolley* (1595) Cro. Eliz. 454; *Case of Market Overt* (1596) 5 Co. Rep. 83. Cf. *Prior of Llanthony v. Courteyne* (1472) n. 53, ante (alleged custom that every *street* is a common market for all wares every day).

1555 introduced compulsory registration of title on the sale of horses, but it was practically unsuccessful.[57] The law of market overt continued with little change until it was abolished in 1994;[58] but the principle of protecting those who deal in good faith with non-owners in the open market has received some statutory extension.[59]

Succession on Death

There were several ways in which the ownership of chattels could pass on death.[60] Before the Norman conquest, English customs of succession were generally designed to provide for the whole family of the deceased by dividing his estate – movable and immovable – into aliquot parts or shares, usually halves or thirds. Under the influence of Christianity, or perhaps rather of religious institutions which stood to gain from it, the deceased was also given a share to dispose of by testament for the good of his soul; the remaining two parts went, according to custom, to the widow and children. This system of 'parts' survived Norman feudalism in the case of movable property,[61] and survives in Scotland (as 'legitim') to the present day. Under the early common law there was a writ, similar to debt, called *de rationabili parte bonorum*, whereby the widow and unpromoted children could claim their reasonable shares. In the thirteenth century, however, the spiritual jurisdiction won control of testate and intestate succession to movable estates. Thereafter questions about testaments and distribution on intestacy usually fell to the Church courts.

The Church encouraged people to make wills, even to the extent of disposing of all their movables and thereby overriding the guaranteed shares of wives and children. As a result of this policy, the fixed parts of the widow and children could be claimed only if the deceased died wholly or partly intestate, or if a local custom preserved the older principle restricting testation to the deceased's part.[62] Before 1600 the province of Canterbury (excepting Wales and London) had come to permit the whole personal estate to be disposed of by will, whereas the province of York adhered to the old system of parts until 1692. Freedom of testation became universal in England in 1724, when it was extended to the city of London.[63] Probate of wills, and litigation related thereto, belonged to the Church courts until 1857.[64]

The administration of intestates' estates also belonged to the ecclesiastical authorities,[65] and in 1357 it was enacted that bishops were to commit their responsibilities

[57] Sale of Horses Act 1555 (2 & 3 Ph. & Mar., c. 7); *Fry's Case* (1584) B. & M. 303. The statute was repealed in 1968.

[58] Sale of Goods (Amendment) Act 1994 (c. 32).

[59] Beginning with the Factors Act 1823 (4 Geo. IV, c. 83).

[60] There were other ways besides those mentioned below: e.g. on the death of a pawnor before redemption, the property passed absolutely to the pawnee.

[61] *Glanvill*, vii. 5 (p. 80) (the heir alone said to have one third); *Bracton*, II, p. 180 (children). Magna Carta (1225), c. 18, referred to the 'reasonable parts' of the widow and children.

[62] In the latter case *de rationabili parte* remained available in CP. It was usually founded on a county or city custom. Similar writs were occasionally brought on the custom of the realm, in the belief that Magna Carta (previous note) confirmed a universal right: Palmer, *ELABD*, p. 93; Baker, *CPELH*, III, pp. 1368–70. But this was later held to be mistaken: Co. Litt. 176v; Co. Inst., II, p. 32.

[63] See H. Horwitz, 2 LHR 223.

[64] See pp. 138, 143, ante.

[65] *Glanvill*, vii. 16 (p. 89), said that an intestate's chattels went to the lord. This was the Continental custom, but it was contrary to Henry I's Coronation Edict (1100) and is denied in *Bracton*, II, p. 179. According

in this connection to administrators, who were enabled to sue and be sued in the same way as executors.[66] They were usually the next of kin. In the course of time, partly through inefficiency and partly through interference from the lay courts, the Church courts lost effective control over administrators, who usually divided the property among themselves once they had paid off any debts. After a particularly scandalous case of 1666 brought the matter to the king's personal notice, a statute was passed in 1670 to end this anarchic situation by laying down a definite scheme of distribution which administrators were obliged to observe.[67] The widow's third was incorporated into this scheme, but the dead man's part was abolished, leaving two thirds for the children or next of kin. The rules for distribution have since been adjusted by other statutes, though any rules are of necessity arbitrary. One of the most important later reforms was the reintroduction of provision for close members of the deceased's family who had been cut out by will. The extension of free testation had led to the harsh result that widows and children could be completely cut off by their husband or father making a will in favour of someone else. It was over two centuries before the remedy was found.[68]

Termination of Private Property in Chattels

Since chattels do not necessarily have an owner, property in them may in some circumstances come to an end.

Return to Natural State

Animals which are wild by nature (*ferae naturae*) belong to humans only so long as they are in human control. If they are set free, or escape, and have no inclination to return to their captor, property in them ceases and they become no one's (*res nullius*). The same principle applies to water, combustion, and the like. But it does not follow that the person who causes or allows such an escape is free from liability in tort for any damage which follows.

Deodand

An ancient notion which survived into the common law required the forfeiture to the king of any object which was the instrument of a man's death. By the time the common lawyers were dealing with it, rational explanation was beyond reach; it was simply an unquestionable royal prerogative, enforced by the coroner. As befitted an irrational rule, its application could at times defy reason. If guilt came into it, it was a primitive kind of guilt without moral blame; if causation was required,[69] it was only in the loosest of senses.[70] Maitland quipped that 'many horses and boats bore the guilt which should

to Magna Carta (1215), c. 27, and *Bracton*, an intestate's chattels were to be distributed by the Church; though omitted from the 1225 charter, this was accepted as law.

[66] Stat. 31 Edw. III, sess. i, c. 11. [67] Statute of Distribution 1670 (22 & 23 Car. II, c. 10).

[68] Inheritance (Family Provision) Act 1938 (1 & 2 Geo. VI, c. 45).

[69] *Britton*, I, p. 39, speaks of the 'causes of deaths'. *Bracton*, II, p. 384, distinguishes cause from occasion.

[70] For apparent inconsistencies see e.g. *The Eyre of Northamptonshire 1329–30*, I (97 SS), pp. 173 and 197 (carts and contents forfeited, but not the horses), 185 (horses forfeited, though they did not move), 211 (cart

have been ascribed to beer'.[71] Chattels seized as 'deodand' were 'given for God', and were supposed to be appropriated to charitable purposes by the king's justices or the king's almoner. At its most equitable, the system provided a haphazard form of insurance for the dependents of those killed by mischance;[72] but in many cases the right to deodand was acquired by private franchise-owners, and then the loss of offending horses and vehicles to people who had no connection with the deceased, and no inclination to charity, seemed even more arbitrary and unjust to those who had innocently forfeited them. The doctrine was not finally abrogated until 1846, after a general awareness of its absurdity had been aroused by its application to homicidal railway carriages.[73]

Abandonment and Loss

The common law has never clearly decided whether a person can divest himself of property by waiver or abandonment. *Bracton*, following Roman law, allowed the possibility; others denied it.[74] The question is of no practical importance, because the first finder of a derelict chattel may be regarded as a donee acquiring by constructive delivery, while the last owner is obviously at liberty to retake it before anyone else takes it up. A mere accidental loss, without intention to derelinquish, certainly cannot alter property: this principle was the basis of the 'trover' count in detinue.[75] Even a deliberate waiver of all enjoyment of a thing, as by burying it in a grave, does not divest the property.[76] Property can only be relinquished by vesting it in someone else, or destroying it, or (where appropriate) returning it to the wild. But the finder of lost goods did acquire a property against all the world except the loser, because the courts would not, in an action between two parties, pronounce upon the absolute title but only upon the relative rights of the parties.[77]

Certain categories of lost property belonged to the Crown by immemorial royal prerogative, and these could only be taken by private owners if they were granted a franchise. Of these it is said in *Bracton* that, although by natural law the property should go to the finder, by the *jus gentium* it went to the ruler.[78] The best known instance is treasure trove. Gold and silver artefacts, coin, or bullion, if hidden by a person unknown but not abandoned, belonged to the Crown unless and until the true owner made good his claim; and they could be seized into the king's hands by a coroner.[79] Wreck of sea belonged to the Crown unless the owner claimed the goods within a year and a day.[80]

and horses forfeited, but not the contents). The Crown also claimed any weapon used in a homicide (the 'bane'): ibid. 184. See also T. Sutton, 18 JLH 44.

[71] Pollock & Maitland, II, p. 474 n. 4.

[72] For instances in 1221 see 59 SS 342, 536 (widows). In later times forfeiture of the chattel was commuted to a monetary fine assessed by a coroner's jury.

[73] See S. and B. Webb, *English Local Government* (1924), I, p. 75 n. 3; H. Smith, 11 AJLH 389; E. Cawthon, 33 AJLH 137. It was enacted at the same time that the deceased's estate could sue in tort for causing the death: p. 445–6, post.

[74] *Bracton*, II, pp. 41, 338; contra, St German, *Doctor and Student* (91 SS), p. 292.

[75] See p. 419, post.

[76] *Haynes' Case* (1613) 12 Co. Rep. 113 (winding sheet).

[77] *Armory v. Delamirie* (1722) B. & M. 599; p. 425, post. For the invention of 'larceny by finding' in the 19th century see p. 577, post.

[78] *Bracton*, II, p. 339.

[79] The definition of treasure was widened by the Treasure Act 1996 (c. 24).

[80] Stat. Westminster I (1275), c. 4; Prerogativa Regis, c. 11; readings in 113 SS 26–42.

The right was older than the common law and not peculiarly English, but Elizabethan lawyers invented the explanation that it compensated the queen for her expensive naval obligations.[81] Estrays, which are lost cattle or other valuable domestic beasts, belonged to the Crown if proclamations were made in public places and the owner did not claim them within a year and a day. Waifs – goods waived by a thief in flight – could likewise be seized by the Crown.[82] The right of 'waif and estray' was often claimed as a manorial franchise.

Interests in Chattels

Movable wealth could not in medieval times be settled on a succession of owners, because the common law did not allow future estates to be created in chattels. A gift of goods for an hour was a gift for ever.[83] But a lesser kind of interest could be conferred by the contract of hire, as on a lease of sheep or implements. There was an analogy here with the lease of land, which conferred possession but not freehold or seisin; and later lawyers explained it in similar terms as a separation of ownership from possession. But the distinction was less than clear in medieval times. To some extent ownership and possession coincided in the medieval concept of 'property' (*proprietas*), a word which for a time was used only in connection with movables.[84] Property arose from occupation and was generally transferred by delivery; it went hand in hand with possession. There was no such thing as an absolute ownership or right against all the world. The most a person out of possession could claim was a better right to possession than the person in possession. Thus, if *A* lent his horse to *B* for a week, *A* retained a property which he could assert against *B* and against anyone who took the horse from *B*; but *B* also had property, which enabled him to maintain an action against anyone other than *A*. In this example, *A*'s position is higher than *B*'s, and if the crude terminology of 'property' needed an element of relativity it could be modified by saying that *B* had a 'special property'.[85]

The relationship between property and mere possession was seen most clearly where there was some dealing between two parties. There is an obvious distinction between handing over a thing with the intention that all the property should pass to the recipient (gift or sale), and handing it over with the intention that the recipient should have only the temporary use or profits of the thing (loan or hire) or should hold it passively as a pawn or deposit. These latter were all species of 'bailment', the common-law name for a transaction whereby a thing is handed over (*baillé*) on the footing that the bailor retains the property. But a similar separation of property and possession could occur without a bailment; for instance, where goods were stolen, or where they were lost and

[81] *Constable v. Gamble* (1601) 5 Co. Rep. 106.

[82] *Foxley v. Annesley* (1601) 5 Co. Rep. 109, Cro. Eliz. 693. Property did not pass before seizure: Port 129–30.

[83] So said Serjeant Broke in 1519: 113 SS 161. The same aphorism was applied to chattels real in *Anon.* (1548) B. & M. 206.

[84] See p. 241 n. 3, ante. In 1495 Bryan CJ spoke of 'the true owner' ('le veray owner') and 'the rightful owner' ('le owner in droit') as against a trespasser: Y.B. Trin. 10 Hen. VII, fo. 27, pl. 13.

[85] Y.B. Hil. 21 Hen. VII, fo. 15, pl. 23, per Fyneux CJ.

then found by a stranger. Even in these cases, however, the terms 'property' and 'possession' could describe no more than the relative position of the people involved.

Two refinements to this simple dichotomy were made in the Tudor period. First it was decided, shortly before 1500, that the physical custody of a chattel could be entrusted to another without giving up possession. The purpose and effect of this new doctrine was to ensure that a servant or personal attendant having control of his master's goods could be convicted of stealing them.[86] The second refinement, which apparently derived from the interpretation put upon an inconclusive case of 1459, was that the special character of wills enabled a testator to separate the property in a chattel from its 'use and occupation'. Whereas the property could not be divided temporally, the use of a chattel could be limited by will to a succession of persons, and such a settlement would bind the executors of the settlor. The analogy with the use of the land is obvious, the executors being in effect the trustees.

The new doctrine enabled movables to be entailed by will as heirlooms, notwithstanding that the 'property' went on death to the executors.[87] Lawyers may have been the first to try this out in practice. Two successive prothonotaries of the Common Pleas, in 1490 and 1518, devised chattels (including law books) in tail male, and a King's Bench clerk in 1502 devised silver to his son for life, remainder in tail, with a clause forbidding its sale.[88] The judges followed their lead, and in 1538 Fitzjames CJ devised a book of statutes to 'remain' in his house 'as an implement to the said house', a bequest which occasioned a lawsuit a quarter of a century later.[89] Around this time it began to be argued that similar settlements of the use and occupation of chattels could be achieved independently of a last will.[90] But the device had one practical limitation. No one could prevent the possessor of a chattel from destroying or selling it, and thereby extinguishing any future expectations under a settlement of the use.

Early Restitutionary Proceedings

We may now turn from the basic principles of property in personal chattels to the legal means of protecting it. The earliest remedy for the person who found his goods inexplicably in the hands of another was the appeal of theft. Although this was a criminal proceeding, in the sense that trial was by battle and a convicted defendant was liable to be hanged, it also had the effect of restoring the stolen goods to the appellor. The claimant was supposed to make an initial demand for his goods without alleging felony; then, if the possessor refused to give them up, he was proceeded against as a felon.[91] The appellee would be arrested, together with the goods in question, and could either show that the goods had always been his or could say how he acquired them. If he could

[86] See p. 576, post. It was also held in the mid-16th century that a distrainor of chattels had only custody, not possession: *OHLE*, VI, p. 745.

[87] *Anon.* (1572) B. & M. 207, per Dyer CJ, citing *Glover and Brown v. Forden* (1459) ibid. n. 29 (devise of a service-book called a grail). For the application of the principle to chattels real see pp. 322–3, ante.

[88] *OHLE,* VI, p. 747.

[89] *Nicholas Fitzjames's Case* (1565) Owen 33. The original will was sold at auction in 1997: 19 JLH 76.

[90] *Anon.* (*c.* 1530) Pollard Rep., 121 SS 272; *Anon.* (1559) B. & M. 206. Both cases were concerned with terms of years, though in the first one the case of 1459 was cited.

[91] For the following see *Glanvill*, x. 15 (pp. 130–1); *Bracton*, II, pp. 425–6.

prove that he bought them in open market, he would be acquitted and the goods restored to the prosecutor.[92] If he alleged that he bought them privately from *X*, *X* was vouched to warranty and called upon to take over the defence. If *X* did take over, the appellee was discharged; but if *X* declined to accept the warranty, by denying the sale, the proceedings turned into an appeal by the appellee against *X* and the obligation to warrant could be tried by battle. *Glanvill* was not sure whether the vouchee who accepted the warranty could himself vouch to warranty, asking where it might then stop; but that was irrationally harsh, and *Bracton* saw no difficulty in allowing him to defend himself.

Where goods were taken by way of distress, without any assertion of property, the proper remedy was not the appeal but the action of replevin. The effect of bringing replevin was to have the goods restored pending trial of the right to distrain.[93] There might in other cases be reasons for not wishing to proceed criminally, not least of which was the danger of trial by battle and the possibility of losing the goods to the Crown if the appeal failed. The claimant could therefore omit the words of felony and proceed civilly. There is mention in the thirteenth century of a civil claim for a lost chattel (*de re adirata*), which seems to have been a suit in a local court (or perhaps in eyre) in the nature of trespass.[94] But no proceeding of that description could be brought in the central courts by writ, and so the claim for a lost chattel was temporarily shut out from the common law.

Detinue

The remedy ordained in the register of writs for the recovery of chattels was the writ of debt or detinue. There was no distinction in the wording of the writ between debt and detinue for goods: the writ commanded the sheriff to order the defendant to yield up to the plaintiff the chattels which he unjustly detained from him (*praecipe D quod reddat P [catalla]*[95] *quae injuste detinet*). The distinction between owing and owning only mattered if the defendant sought to excuse himself because of some mishap. If a debtor lost his money, he continued to owe the sum because he could not identify any specific coins as representing the debt; the debt itself, unlike coins, could not be lost or stolen. The same was true of someone who 'owed' fungibles; if the vendor of unspecified wheat had his entire crop destroyed, his obligation remained, because any other wheat would do as well. On the other hand, if a borrowed horse dropped dead, ran away, or was stolen, there was some reason for the bailee – if not at fault – to claim to be discharged; he was not in fact detaining the bailor's property. Such distinctions emerged only as and when the defences were pleaded.[96] Even when detinue came to be thought of as a distinct legal entity, its technical name for some formal purposes continued to be a 'plea of

[92] *Bracton*, II, p. 427; *Britton*, I, p. 59. Restitution in an appeal thus displaced the rule that property was changed by sale in market overt: p. 410, ante.

[93] See p. 257, ante. [94] *Britton*, I, pp. 57 ('simple trespass'), 68 ('action ... in form of trespass').

[95] The actual chattels were specified.

[96] See *Bydeford v. Aunfrey* (1291) B. & M. 290 (flood); *Bowdon v. Peleter* (1315) ibid. 292 (theft); *Anon.* (1339) ibid. 294 (accidental destruction); *Anon.* (1355) ibid. 304 n. 18 (theft); Palmer, *ELABD*, p. 94 (death of oxen from illness). Cf. *Britton*, I, p. 157 (bailee excused by accident or theft, unless he was at fault).

debt'.[97] The writ itself did not indicate why the plaintiff claimed the goods, nor even whether his claim was contractual or proprietary: the same formula encompassed both kinds of claim. But detinue was not meant to do the work of the action *de re adirata* and was initially constrained in its operation through the fellowship with debt. According to fourteenth-century lawyers, it was necessary for the plaintiff in detinue – as in debt – to show in his count a 'privity' between himself and the defendant. The clearest case was where the plaintiff had bailed the goods directly to the defendant.[98]

Detinue on a Bailment

The claim in detinue on a bailment might seem to be based both on agreement and on property, since the bailment was a transaction between two parties but the detinue itself was a contractually neutral withholding of a thing.[99] The distinction would matter in deciding whether it was the bailor or the bailee who bore the risk of loss or theft. There is less discussion of this than might be expected from the commonness of the situation, because in most cases the law was obscured behind the general plea 'He does not detain' (*Non detinet*). We have noticed that fourteenth-century pleaders assumed a defence of accidental loss or destruction, perhaps thinking in terms of fault rather than of property or contract.[100] In the fifteenth century a stricter theory gained ground, tending towards a contractual analysis, that a bailee was only excused if the loss was caused by act of God or the king's enemies.[101] The reason was that the bailee in other cases of despoliation had the right (and perhaps the duty) to sue the wrongdoer in trespass; and, since it would have been unjust to allow him to keep the damages himself, he ought to be liable in turn to his bailor. Following this principle, it was argued that theft might excuse the bailee if the identity of the thief was unknown, or if the thief had been hanged and his property forfeited, because then the bailee's right of action would be useless. But the better opinion was that even those circumstances provided no defence, because there was a remedy in law if not in fact. The bailee could only excuse himself in detinue by reason of theft if the bailment had been made on terms which excused him: for instance, if the bailment was to keep the goods at the bailor's risk,[102] or with the same care as he would bestow on his own.[103]

The bailee's liability thus became so stringent in theory that further encouragement was given to the general issue and wager of law. In cases of theft or loss, the plea of *Non detinet* was disingenuous but literally truthful. Even the bailee who drank up or gave away a barrel of wine committed to his safe-keeping could truthfully, if perhaps at some

[97] Warrants of attorney were so entered: Milsom, 77 LQR at 273; and see 105 SS 86.

[98] Detinue by the buyer of goods was also at first based on a supposed bailment: p. 409, ante.

[99] See the discussion in *Mortimer v. Mortimer* (1292) B. & M. 290.

[100] See p. 416 n. 96, ante. This accorded with *Bracton*, but *Glanvill* said liability was strict (as in debt): Milsom, *HFCL*, pp. 267–8.

[101] Cf. the gaoler's liability for the escape of debtors: *The Case of the Marshalsea* (1455) B. & M. 261 at 262. Commentators assumed that the same reasoning applied to bailment, but the question was avoided in practice by wager of law. The real change was in giving up the special pleas and always pleading *Non detinet*.

[102] *Anon*. (1488) B. & M. 301, where Bryan CJ calls this a 'special' bailment.

[103] See *Southcote v. Bennet* (1601) B. & M. 303. Holt CJ later condemned Coke's report of this case (ibid. 417), but it is borne out by the MSS.

danger to his soul, say that he no longer detained it.[104] It is unlikely that judges had sufficient control over the consciences of bailees to prevent them waging their law in such cases. Justice might have suggested a doctrine of constructive detaining, so as to treat an unjustified non-return as tantamount to an unjust withholding; but there was no procedure whereby this could be raised as a point of law. Since the defendant could not be stopped from waging law, it could only be a matter of exhortation before taking the oath.[105] On any view, detinue would not lie against a bailee who had actually returned the goods, but in a damaged condition. Where the damage was irrecoverable in detinue, or where a bailee had wrongfully put himself beyond the reach of detinue, the remedy would have to be sought in trespass.

Detinue Against a Third Hand

The first extensions of detinue to reach defendants other than bailees or sellers were to the executors of bailees; and at the beginning of the fourteenth century this was the furthest reach of the action on a bailment, since the courts still required the plaintiff to show some 'privity'.[106] Executors took on the privity of their testator. But it was conceded that detinue could be brought against a stranger in possession of title-deeds, since the plaintiff's right followed the real property to which the deeds related; and it was suggested as early as 1312 that it might lie against a mere finder of the deeds as well as against a disseisee of the land.[107] There was nothing in the writ itself about privity, just *injuste detinet*. And if neither bailment nor privity was essential to the cause of action, it ought to have been enough merely to show that the chattels had been in the plaintiff's possession and set out how they had come into the hands (*devenerunt ad manus*) of the defendant. This conclusion was accepted in the fourteenth century and brought in a wider class of claims, though not without difficulty. Some thought that there still had to be some privity, not directly between the parties but between each intermediate possessor in the chain of transmission.[108] If this meant that any of the links alleged in the *devenerunt ad manus* count could be challenged, it would have been a perilous mode of pleading, since the plaintiff was not often in a position to know exactly what had happened to goods after they left his possession. That danger was averted by a decision of 1355. The defendant there was the bailee's executrix, but it was held unnecessary to say so; all the plaintiff had to show in his count was that he bailed the goods to someone who died, and that they afterwards came into the keeping of the defendant.[109] The details were not traversable; if the defendant had somehow acquired title, as by a purchase in market overt, it was for him to plead it. Still the action did not

[104] *Anon.* (1442) Y.B. Hil. 20 Hen. VI, fo. 16, pl. 2, per Brown (tr. 'If you bail to me a tun of wine, and perchance I drink it up with other good fellows, you cannot have detinue for it because it is not in being').

[105] The earliest reported examples of this are late: *Fry's Case* (1584) and *Anon.* (1595) B. & M. 303.

[106] Y.B. Trin. 16 Edw. II (1678 edn), p. 490. Cf. *Anon.* (1339) B. & M. 294 (bailment by P's father as her guardian).

[107] *Lyndeseye v. Suth* (1312) 34 SS 167 (Fifoot, *HSCL*, p. 37), per Scrope sjt (but denied in the headnote); *Anon.* (1328) Y.B. Hil. 2 Edw. III, fo. 2, pl. 5, per Scrope J.

[108] Palmer, *ELABD*, p. 94.

[109] *Wagworth v. Halyday* (1355) B. & M. 294. P did not want to mention the executorship, since that might require proof of probate.

depend on abstract ownership. It was enough that the thing had come to the defendant without her acquiring a better right than the plaintiff. But the new count did not depend on privity either, and this pointed the way to a simpler and less vulnerable manner of pleading.

Detinue *Sur Trover*

If the physical history of the chattels did not need to be set out, and the steps were not traversable, the plaintiff could simply allege that he had lost them, and that the defendant had found and unjustly detained them.[110] No mere finder could resist a claim by the loser; and it was not too disingenuous to speak of finding (*trover*) even where the whole truth was more complicated.[111] The trover count perhaps consciously resurrected the claim for lost goods, *res adiratae*, which had in earlier times been made in inferior courts. At any rate, it rested on property rather than privity, and the courts would not allow the defendant to traverse the loss and finding.[112] The result was that the trover could safely be fictitious, and it became the usual form of count in detinue against anyone who was not a bailee. It was a completely different kind of claim from that based on a bailment, and yet it fitted the wording of the writ just as well.[113] But liability in detinue *sur trover* was necessarily less stringent than in detinue on a bailment, because there was no contract or privity to impose a strict obligation on the finder. Accidental loss of the chattels by the defendant would be a genuine defence, since the only obligation which could be imposed on a finder arose from his having possession; as soon as he lost possession, for whatever reason, the nexus between the parties dissolved away.[114]

Shortcomings of Detinue

We have seen how a central theme in the history of contract was the supplementation, and then the replacement, of *praecipe* actions by actions on the case. The history of personal property provides a close parallel, because detinue suffered from equivalent shortcomings and a similar fate. In detinue, damages could not be awarded if the goods were no longer detained. The bailee who starved a horse to death, or who rode it further than agreed, or who returned the goods in a damaged state,[115] was arguably not liable for the damage. Nor could the plaintiff in detinue count on a bailment or loss of the thing demanded if it was no longer the same thing as he had bailed or lost, as where it

[110] *Anon.* (1389) Y.B. Mich. 13 Ric. II, p. 56, pl. 11. Cf. detinue for stray animals found by D: *Halle v. Smyth* (1367) CP 40/427, m. 377d; *Charnele v. Ferrers* (1370) Y.B. Pas. 44 Edw. III, fo. 14, pl. 30; CP 40/438, m. 205; Palmer, *ELABD*, pp. 95–6.

[111] E.g. executors could be said to 'find' the goods which had belonged to their testator: *Thornhill's Case* (1344) Y.B. 17 & 18 Edw. III (RS), p. 510, per Gaynesford sjt.

[112] *Carles v. Malpas* (1455) B. & M. 298 (title-deeds which came into D's hands by finding). Littleton J told the reporter, enigmatically, that the trover declaration was 'a newfound Halyday': ibid. 300.

[113] Cf. Milsom, *Historical Foundations*, p. 269 ('Detinue provides the clearest warning against the assumption that writs represent juridical entities'); *NHCL*, pp. 29–31.

[114] *Anon.* (1535) B. & M. 302. Dyer CJ later said this was only true of a finder who lost the thing again, not of a finder who bailed it to a person from whom it was subsequently stolen: ibid. 303.

[115] E.g. *Gamel v. Adam* (1344) Y.B. 17 & 18 Edw. III (RS), p. 1; CP 40/340, m. 357; Palmer, *ELABD*, pp. 100–1 (deed burned by bailee).

had been made part of something else or fashioned into something new. A fortiori, he could not allege a detaining of something which no longer existed at all, as where wine had been consumed. Then again, if the plaintiff misdescribed the thing in his count, the defendant could truthfully – in the purely literal sense – deny that he detained it.[116] In all these cases, as in debt, the availability of the general issue and wager of law[117] meant that legal questions were in effect decided by the defendant acting as his own judge. The suppression of legal development was in itself of no concern to contemporaries; but potential plaintiffs were discouraged by the practical pitfalls and impelled to seek better remedies.

Trespass and Case for Chattels

The best solution, as in the law of contract, was found by turning to the law of wrongs. Trespass for taking away goods (*de bonis asportatis*) was the civil counterpart of larceny, and although it gave damages rather than specific restitution the difference was not likely to matter in most cases. The action was well known in the thirteenth century, and there were variant formulae for destroying or damaging goods. But such writs could at first be obtained from the Chancery only if the interference with the chattels could be described as *vi et armis.* Merely detaining goods was not a forcible trespass.[118] The bailee who wrongly kept goods bailed to him could not be said to commit a trespass with force and arms, because he had been given possession of the goods by the bailor and had appropriated them without force.[119] Neither could a finder, unless he damaged the thing found, or knew the identity of the owner at the time of the 'finding' and took it nevertheless. In the fourteenth century, such wrongs as these may have been remedied in trespass by the expedient of bringing a *vi et armis* writ and hoping that the defendant would not take the point. But the need for fiction was ended in the 1350s, when it was decided that writs of trespass might be brought 'on the case' without alleging force and arms.

The special case on which a plaintiff relied in complaining of a wrong to chattels might incorporate any number of tortious concepts, such as deceit, negligence, breach of an undertaking, or conversion. Later history was to separate these out as distinct actions, according to the element which predominated as the gist of the action. When the separation occurred, in the sixteenth century, the rules of law concerning personal property were distributed between the law of contract and what came to be called the torts of conversion and negligence.

Undertakings to Keep or Carry Safely

The commonest of the earlier actions on the case against bailees were of the kind typified by the *Humber Ferry Case*.[120] A bailor would count that he had delivered the goods

[116] *Prior of Bermondsey v. Harding* (1481) B. & M. 300.
[117] Wager of law was denied in some cases: e.g. *Anon.* (*c.* 1310) B. & M. 291; *London v. Garton* (1321) ibid. 292.
[118] *Knoston v. Bassyngburn* (1329) B. & M. 344.
[119] *Taumbes v. Skegness* (1312) ibid. 339; *Toteshalle v. Orfevre* (1321) ibid. 342.
[120] *Bukton v. Tounesende* (1348) ante, p. 351.

to the defendant to look after ('keep safely'), or to carry or repair, and that the defendant so neglected or misused them that they perished, sustained damage, or were lost or squandered. Sometimes the pleadings alleged an undertaking (*assumpsit*) as well, but this was not essential in the case of bailees.[121] In this context the word *assumpsit* signified the assumption of physical custody, rather than an express promise, and a bailment amounted to the same thing. When, however, the action of *assumpsit* came to be thought of as contractual, some confusion emerged as to the nature of the action against bailees. At the beginning of the sixteenth century, the courts clearly laid down that the undertaking was not the gist of the action and could not be traversed.[122] But when the doctrine of consideration was settled in the Elizabethan period, some thought a bailee could only be charged in *assumpsit* if consideration had been given for his undertaking. In order to avoid this objection, some plaintiffs tried relying on the delivery of the goods as being in itself a consideration; but this was inadequate under contractual theory, if the defendant derived no benefit from the custody. The promise to give up the goods on demand was *nudum pactum* because it was no more than the law required anyway.[123] On this view, a deposit of goods was different from a loan of goods or money, for in the case of a loan the use of the goods or money would be a benefit to the borrower and therefore good consideration for an undertaking to return or repay.

This intrusion of the principles of contract forced lawyers to distinguish bailees for reward from gratuitous bailees. The former were liable in contract, and were therefore strictly liable unless the contract was to take no more than reasonable care. The latter were liable only for negligence; and in an action for negligence, even if the word *assumpsit* was used, there was no need to show consideration.[124] The position of the gratuitous bailee was fully explained by Holt CJ in *Coggs v. Barnard* in 1703.[125] The defendant, William Barnard, had undertaken without reward to move some casks of brandy from a cellar in one building to a cellar in another, and in performing this task he set them down so negligently that one of the casks was staved and 150 gallons of brandy spilt. It was objected that no consideration was shown for the undertaking and so *assumpsit* did not lie. The King's Bench, after a full debate, dismissed this argument. The negligence was itself actionable since it was a deceit to the plaintiff, who had trusted the defendant to be careful. In any case, the word *assumpsit* did not in this type of case denote a future promise, but 'an actual entry upon the thing, and taking the trust upon himself'. Holt CJ took the opportunity in his judgment to restate the law of bailment in Romanist terms, borrowed from *Bracton*, as a way of escaping from the effects of formalism. The exercise, as he said, stirred up many new points 'which wiser heads in time may settle'. Above all, it established that bailment was a transaction sui generis, not dependent on the general rules of either contract or tort.[126]

[121] For actions of negligence against bailees, without an *assumpsit,* see p. 433, post.

[122] *Bourgchier v. Cheseman* (1504) B. & M. 579; *Rycroft v. Gamme* (1523) Spelman Rep. 3; *Warton v. Ashepole* (1524) B. & M. 582.

[123] *Riches v. Bridges* (1602) Cro. Eliz. 883; Yelv. 4; *Pickas v. Guile* (1608) Yelv. 128.

[124] *Powtney v. Walton* (1597) B. & M. 414.

[125] B. & M. 415 at 419. Lord Raymond spelt the name 'Bernard', but it is Barnard in the record.

[126] The subject was later explored in some detail by William Jones in his *Essay on the Law of Bailments* [1781] (D. Ibbetson ed., 2007).

Conversion by a Bailee

The actions on the case just mentioned lay for negligence, but there were other cases where liability was founded on deliberate wrongdoing. If the bailee of a deed tore off the seal, so as to invalidate it, or the bailee of a horse rode it so hard that it died, or the bailee of cloth cut it into pieces, the special case was adjusted accordingly.[127] It was in actions of this nature that allegations of 'conversion' first made their appearance. The bailee of coins who spent them, or the bailee of goods who sold them and spent the proceeds, was liable not because he had 'so negligently kept the goods that they were lost' but because he had wrongly taken them and, 'scheming to defraud the plaintiff, converted them to his own use'.

The actions against bailees for damaging goods filled a gap in the old action of detinue and did not overlap with it. Their justification, indeed, was that they lay for damage which could not be recovered in the *praecipe* action. The same was true of acts of conversion which barred detinue. In 1453 trespass on the case was brought against the bailee of a sealed box of silver for breaking open the box, taking out some money, and converting it to his own use;[128] the money had gone into circulation and could not be identified. Likewise, if a bailee completely destroyed the thing bailed by converting it to his own use – as by drinking a barrel of wine – he was liable in trespass precisely because detinue was unavailable. In 1472 a sub-bailee of gold cloth and rich embroideries cut some of them up, to make them into clothes, and was sued by the bailor's executor both in detinue *sur trover* and in an action on the case for damaging the cloth; both actions stood undecided for three years, but the nature of the legal difficulty may be gathered from a later reference. It was apparently argued that, by cutting up the material and making it into clothes, the defendant had altered the property by *specificatio* and thereby prevented a claim in detinue; but this justified allowing an action on the case for the conversion.[129] Shortly afterwards, in 1479, case was brought against a sub-bailee of silver cups who had broken them up and made them into silver vessels of a different shape and converted them to his own use. Again it was argued that case lay because detinue was unavailable, and the case of gold cloth was cited. Choke J accepted the plaintiff's argument; but Bryan CJ held that detinue was still appropriate, and that it was improper to use case in order to oust wager of law.[130] There was no question that the defendant was liable if the facts as pleaded were true; the real issue was whether this could be tried by jury, in an action on the case, or should be left to the defendant's conscience in detinue. No judgment was entered.

The reports then fall silent on this undetermined question until the sixteenth century. The plea rolls, by contrast, show that in the early years of that century the action on the case against a bailee for conversion was becoming as firmly established as

[127] Early examples, shading into negligence, are *Billyng v. Bullok* (1359) Palmer, *ELABD*, p. 359 (fuller who cut and tore cloths in his keeping); *Hunnesdon v. Burdy* (1364) ibid. 356 (borrower of a horse who rode it so violently that it died).

[128] *Anon.* (1453) Y.B. Mich. 32 Hen. VI, HLS MS. 156, fo. 51. If a non-bailee broke bulk he could be said to act *vi et armis*: *Bourgchier v. Cheseman* (1504) B. & M. 579.

[129] *Rilston v. Holbek* (1472) B. & M. 576. The year book reports the detinue suit; the action on the case appears in the citation in 1479 (next note).

[130] *Calwodelegh v. John* (1479) B. & M. 578.

assumpsit, at any rate in the King's Bench.[131] The conversion, often aggravated by an allegation of deceit, was treated as a tort distinct from the mere detention of goods. Since the conversion was the basis of liability, it was conceded in due course that the bailee was excused in this action by theft, or by doing something necessary in an emergency, or even by his own carelessness, all of which were inconsistent with conversion.[132] The new species of action was therefore not co-extensive with detinue. But it provided a general remedy which could in most cases displace the older action.[133]

Trover and Conversion

The earliest actions on the case for conversion were brought against bailees, and there was no thought at first that they might be brought against casual finders.[134] Indeed, there was a line of opinion that a finder who misappropriated goods was liable in trespass *vi et armis*.[135] But the history of detinue was set to repeat itself in trespass. It is too much to suppose a coincidence: there was a conscious transfer of pleading formulae from one form of action to the other. In 1519 a plaintiff brought conversion in the King's Bench against a person into whose hands his goods had come. The *devenerunt ad manus* count caused six years of advisement, and we may guess that the difficulty was one of those which had occurred earlier with detinue.[136] The like solution was not long in emerging: conversion, like detinue, would be brought on a finding or *trover*. In 1531 the classical trover declaration was approved in the King's Bench, in a case where the plaintiff alleged that he had lost a purse, that it came to the defendant's hands by finding, and that the defendant had not only refused to hand it over but – 'scheming to defraud the plaintiff'- had taken out the contents, sold them, and converted the proceeds.[137] It is surely no coincidence that this was only a year before the critical King's Bench decision allowing *assumpsit* in lieu of debt.[138]

In the earlier precedents the conversion alleged was not of the goods but of the money obtained from their sale, and in the 1540s variant trover counts are found alleging other kinds of misconduct, such as squandering things or wearing them out.[139] By the end of the century, however, all was brought within the scope of conversion on the footing that goods could themselves be converted to the defendant's own use, and

[131] *OHLE*, VI, pp. 802–4. See also *Haydon v. Raggelond* (1510) B. & M. 581 (case against a bailee who sold the goods to a stranger).

[132] Theft: *George v. Wiburn* (1638) Rolle Abr., I, p. 6 (L4) (carrier excused in trover, but not if sued on the custom of the realm: p. 435, post). Emergency: *Case of the Gravesend Barge* (1606/13) cited in 2 Buls. 280, per Coke CJ (goods thrown overboard in storm). Want of care: *Mulgrave v. Ogden* (1590–91) B. & M. 624.

[133] A pleader in 1522 described it as detinue upon the case: KB 27/1042, m. 32d. This acknowledged its function, though case was always a species of trespass.

[134] See Port's question about lost money in 102 SS 80.

[135] *Stok v. Palfreyman* (1369) Palmer, *ELABD*, p. 357; *Wellys v. Robynson* (1484) B. & M. 583, per Donington (trespass or detinue); Sutton's reading (1494) ibid. 583.

[136] *Audelet v. Latton* (No. 1, 1519) and (No. 2, 1520–26) *OHLE*, VI, pp. 805–6. Cf. *Bourgchier v. Cheseman* (1504) B. & M. 579 (hybrid *devenerunt ad manus*, *assumpsit*, and conversion, with *vi et armis*); *Astley v. Fereby* (1510) ibid. 581 n. 15 (conversion by receiver of stolen silver). For the corresponding count in detinue see p. 419, ante.

[137] *Wysse v. Andrewe* (1531) B. & M. 584 (record only); the sale was alleged to be felonious, but this was immaterial and was dropped in later cases.

[138] See p. 364, ante.

[139] *OHLE*, VI, p. 806.

so the allegation of sale could be dropped. It was also held in the mid-sixteenth century that, as in detinue, the trover was mere form and was non-traversable. In consequence it became in most cases fictitious or constructive: blatant examples are where we find the formula used for a printer's stock in trade,[140] or for long lists of furniture and utensils which are evidently the contents of houses.[141] The generality of the formula was attractive to plaintiffs, since it did not tie them to any details other than a description of the goods. It came to be used even against bailees, so that bailments did not need to be alleged or proved. Indeed, it was so comprehensive that in 1600 it was decided that a defendant who had taken goods with force and arms could be sued as a 'finder': an early instance of case overtaking trespass *vi et armis*.[142]

The Common Pleas might well have been expected to object to such a development, and there was indeed a reported challenge in 1555. The declaration reeked of fiction: a countess had 'found' a gold chain in London, sold it, and converted the proceeds.[143] Serjeant Dyer argued that the plaintiff should have brought detinue, or else alleged a sale in market overt (which would have barred detinue); but some of the judges approved the action.[144] There were no serious doubts about the trover and conversion formula. The question, which continued to cause friction into Elizabethan times, was whether it could properly be used where detinue would lie. The plain motive was to avoid wager of law; and so, for the same reason which occasioned the falling out over the use of *assumpsit* in lieu of debt, the Common Pleas also joined battle with the King's Bench over the use of conversion in lieu of detinue.

The King's Bench had sometimes taken the extreme position that in an action for trover and conversion neither the trover nor the conversion were traversable; it therefore lay for a mere refusal to deliver, a detinue. The Common Pleas, not surprisingly, refused to allow this: 'although other courts do the opposite, they themselves were not willing to pervert actions from their natural gist'.[145] A test case was arranged in the King's Bench in 1595 by taking a special verdict, analogous to (but a year earlier than) that in *Slade's Case*. The jury found that the defendant had come to the goods by finding but refused to hand them over and still withheld them, leaving it to the court whether this 'denial and detinue' was in law a conversion. The majority of the judges favoured an election between detinue and case, and judgment was given accordingly.[146] But it was not challenged by writ of error, and so the question did not reach the Exchequer

[140] E.g. *Coffyn v. Gropall* (1551) KB 27/1160, m. 65 (judgment in trover for a long list of priced books, found in London; P and D were stationers in Exeter, and some of the books were published for P). Gropall brought a successful cross-action in *assumpsit*: KB 27/1162, m. 135.

[141] Probably administration disputes: *OHLE*, VI, p. 807 n. 41.

[142] *Bysshoppe v. Viscountess Mountague* (1600) B. & M. 593. Note also *Berry v. Heard* (1622) Cro. Car. 242 (sale of timber by lessee; here the overlap was with waste).

[143] The real facts do not appear on the record. In 1534 the duke of Suffolk gave some jewellery to his daughter Mary (who died in the 1540s) and her husband Lord Mounteagle, including a chain in the keeping of the countess of Worcester: BL Harl. Chart. 47 A.48. The countess was then a lady-in-waiting to Anne Boleyn.

[144] *Lord Mounteagle v. Countess of Worcester* (1555–58) B. & M. 585 (no judgment recorded). The report was not printed till 1586.

[145] *Anon.* (1579) B. & M. 587 (KB); *Anon.* (1582) ibid. 588 (CP). For earlier hints of divergence see *Anon.* (*c.* 1575) ibid. 587 (Dyer CJCP at nisi prius); *Anon.* (1576) ibid. 582. The CP reaction had begun with Bryan CJ: p. 52, ante.

[146] *Eason v. Newman* (1596) B. & M. 590 (Popham CJKB dissenting).

Chamber. The Common Pleas nevertheless persisted in their misgivings.[147] They also insisted that the action would not lie for cash, since the proper remedy for money (not being specific property) was account.[148]

The sweeping King's Bench position that every detainer could be a conversion proved to be untenable, and in 1614 the court accepted that it had to be qualified. A mere refusal to deliver up goods was equivocal, because it might be justifiable if there was no denial of title; for instance, if the goods were hired for a term, or held as a pawn or lien, or if a finder simply wished to verify the claimant's identity. It was only in the absence of such a justification that a refusal to deliver goods on demand was itself a conversion, and then it was proper for the jury to find for the plaintiff even though there was no evidence of misfeasance.[149] With this compromise the law rested.

The result of this decision was that the tortious nature of the action for conversion faded into the background, and the action came to be regarded by the eighteenth century as a proprietary action used in place of detinue. The gist of the action was no longer wrongdoing, but a denial of title. Without a denial of title there was no conversion.[150] On the other hand, dealing in good faith with the goods of another could constitute a conversion.[151] It could then be said that 'trover is merely a substitute of the old action of detinue… [it] is not now an action *ex maleficio*, though it is so in form; but it is founded on property'.[152] The title which the action protected was not absolute but relative, so that a finder could himself bring trover against anyone but the loser.[153] Trover was a curious form of proprietary remedy in another respect. It lay not merely against the person who had the chattels when the action was commenced, but against any intermediate possessor who could be said to have converted them (however innocently) by dealing with them as if he were owner.[154] And it did not enable specific recovery of the chattel;[155] for that, in the case of something of special individual value, the plaintiff needed to have recourse to equity.[156]

[147] E.g. *Anon.* (1599) BL MS Lansdowne 1074, fo. 325 (refusal to hand over goods not a conversion).

[148] This did reach the Exchequer Chamber: *Halliday v. Higges* (1600) B. & M. 592 (conversion of income by a factor); overruled in *Kynaston v. Moore* (1627) ibid. 598. The KB did not even require the money to be in a bag, because the action only lay for damages: Rolle Abr., I, p. 5 (K1).

[149] *Isaack v. Clarke* (1614) B. & M. 594. See *Agar v. Lisle* (1614) Hob. 187, per Hobart CJCP, to the same effect.

[150] See *Fouldes v. Willoughby* (1841) 8 M. & W. 540 (turning horses loose). Rolfe B said conversion involved 'the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession'.

[151] *Hartop v. Hoare* (1743) B. & M. 600; *Cooper v. Chitty* (1756) ibid. 601. See also *Hollins v. Fowler* (1875) L.R. 7 H.L. 757. For earlier vacillation see *Gallyard v. Archer* (1589) B. & M. 589; *Vandrink v. Archer* (1590) 1 Leon. 221 (perhaps the same case), also sub nom. *Pilgrim van Drunklers v. Archer*, BL MS. Add. 35944, fo. 65; *Gybson v. Garbyn* (1596) Cro. Eliz. 480.

[152] *Hambly v. Trott* (1776) 1 Cowp. 371 at 374, per Lord Mansfield CJ.

[153] *Armory v. Delamirie* (1722) B. & M. 599 (where a chimney-sweep found a jewel and took it to a goldsmith for valuation, but the goldsmith's apprentice refused to return it); followed in *Parker v. British Airways Board* [1982] 1 All E.R. 834.

[154] *Tindal v. Jolliffe* (1660) Com. Dig. (4th edn), I, p. 313; *Hollins v. Fowler* (1874) L.R. 7 H.L. 757. For the difficulties caused by this approach see Lobban, *OHLE*, XII, pp. 1119–22.

[155] It was attempted in *Knight v. Browne* (1588) Cro. Eliz. 116 (judgment reversed). As to the effect of bringing the chattel into court see B. & M. 587 n. 39.

[156] E.g. *Pusey v. Pusey* (1684) Vern. 272 (horn supposedly given by King Canute, now in the Victoria and Albert Museum).

Revival and Abolition of Detinue

The abolition of wager of law in 1833, and the reform of common-law procedure, had the effect of reviving detinue as a viable remedy. From then until 1978 the common law permitted two distinct causes of action for personal property to exist side by side. The precise historical differences were not revived as well, and detinue was often regarded in modern times – save by purists – as a tort.[157] Yet the choice of action remained of practical importance. In detinue there was no need to prove an act of conversion. And since the action of detinue lay to recover the goods or their value, the value was assessed at the date of the judgment, whereas in conversion the damages were based on the value of the goods at the moment of conversion. The plaintiff could therefore elect between the actions according to whether the goods had appreciated or depreciated since the date of conversion.[158]

On 1 June 1978 detinue was 'abolished'. The precise meaning, if any, of this terse enactment is unclear. The writ of detinue had been abolished long before. The fact of detinue cannot be abolished, because people will continue wrongfully to detain other people's goods. The legal consequences of detaining (as opposed to converting) goods could certainly be abolished; but Parliament went to some trouble to preserve them. The court was given the discretion to order the return of the goods, or their value, or the payment of damages.[159] All that was abolished, it seems, was the word.

Further Reading

Pollock & Maitland, II, pp. 149–82
Holdsworth, *HEL*, III, pp. 318–60, 534–95
Fifoot, *HSCL*, pp. 24–43, 102–25
Milsom, *HFCL*, pp. 262–75, 366–79
Ibbetson, *HILO*, pp. 107–12
J. B. Ames, 'History of Trover' (1897) 11 HLR 277–89, 374–86 (repr. in *Essays AALH*, III, pp. 416–45); *Lectures on Legal History* (1913), pp. 47–87, 172–209
P. Bordwell, 'Property in Chattels' (1916) 29 HLR 374–94, 501–20, 731–51
S. Stoljar, 'The Early History of Bailment' (1957) 1 AJLH 5–34
C. H. S. Fifoot, 'Possession' in *Judge and Jurist in the Reign of Victoria* (1959), pp. 85–110
A. W. B. Simpson, 'Introduction of the Action on the Case for Conversion' (1959) 75 LQR 364–80 (repr. in *Legal Theory and Legal History*, pp. 93–109)
S. F. C. Milsom, 'Sale of Goods in the 15th Century' (1961) 77 LQR 257–84 (repr. in *SHCL*, pp. 105–32)
J. M. Kaye, '*Res Addiratae* and Recovery of Stolen Goods' (1970) 86 LQR 379–403
J. L. Barton, 'Remedies for Chattels' (1983) in *Law, Litigants and the Legal Profession*, pp. 30–8
D. Ibbetson, 'Sale of Goods in the 14th Century' (1991) 107 LQR 480–99; 'From Property to Contract: the Transformation of Sale in the Middle Ages' (1992) 13 JLH 1–22; introduction to *An Essay on the Law of Bailments by William Jones* (2007)
J. Oldham, 'Trover' (1992) in *Mansfield MSS*, II, ch. 20; 'Trespass and Trover' (2004) in *ECLM*, pp. 292–391
D. Seipp, 'The Concept of Property in the Early Common Law' (1994) 12 LHR 29–91
J. H. Baker, 'Property in Chattels' [1483–1558] (2003) in *OHLE*, VI, pp. 727–48; 'Conversion and Detinue', ibid. 801–8; 'Dower of Personalty 1250–1450' (2013) in *CPELH*, III, pp. 1361–79
M. Lobban, 'Wrongs to Chattels' (2010) in *OHLE*, XII, pp. 1114–24

[157] It was held to be a 'tort' for the purposes of the County Courts Act 1846: *Bryant v. Herbert* (1878) 3 C.P.D. 389.

[158] *Rosenthal v. Alderton & Sons Ltd* [1946] 1 K.B. 374.

[159] Torts (Interference with Goods) Act 1977 (c. 32), s. 2(1); S.I. 1978 No. 627.

23

Negligence

The law of torts, or civil wrongs, is extensive and its boundaries are not fixed by any unifying general principle. The very word 'tort', which has long been appropriated by lawyers, was far from technical in origin. The nearest medieval equivalent was 'trespass', whereas the old French word *tort* (*injuria* in Latin) denoted any kind of legal injury and is best translated as 'wrong'.[1] Until the sixteenth century both words overlapped in meaning. In the preceding chapters we followed the development of trespass in the areas of contract and property law, and noticed that in the early sixteenth century there was nothing incongruous about describing a breach of contract as a tort or trespass. But when the action of *assumpsit* became a truly contractual remedy, based on a promise in return for consideration, breaches of contract came to be seen as legally different in a number of ways from other kinds of trespass. One distinction, which was being drawn soon after 1600,[2] was that actions for breach of contract (even in trespassory form) could be brought against personal representatives, whereas actions for other wrongs could not: 'the most horrible trespass in the world is wiped out by the death of the wrongdoer'.[3] Another distinction was that the rules concerning joint and several liability were different in contract and tort.[4] By the middle of the seventeenth century, contract and tort were seen as being so different that claims in tort and contract could not be joined in the same action. Thus, when an action was brought in 1665 against the hirer of a horse for misusing the animal and for not paying the hire, counsel argued that the joinder of the two causes of action was erroneous because one sounded in tort and the other in 'breach of promise only'. In another case the same year, counsel treated contract and tort as mutually exclusive: 'tort can never be done where there is a special agreement, unless there be duty by statute or common law incumbent'. This is near the modern understanding of the word, and Twisden J in the same case considered that 'tort' encompassed malice, fraud, or negligence.[5] Already by the same period legal indexes were classifying 'tort' in the modern sense, as a sub-heading under actions on the case.[6]

[1] Even in debt and covenant, a plea began *defendit vim el injuriam* (denies the force and tort). For breach of covenant as *tort* see *Berenger v. Barton* (1309) 19 SS 84 at 85, per Westcote sjt.

[2] *Pynchon v. Legat* (1611) B. & M. 492 at 493; *Fossett v. Carter* (1623) Palmer 329 at 330, per Jones J.

[3] *Martell's Case* (1382) Y.B. Mich. 6 Ric. II (Ames Fdn), p. 142, pl. 33, per Belknap CJ. The restriction was removed in 1934, as a consequence of ever more frequent motoring accidents in which the negligent party was killed: Law Reform (Miscellaneous Provisions) Act 1934 (24 & 25 Geo. V, c. 41). Actions of trespass could be brought *by* executors after 1330: Stat. 4 Edw. III, c. 7.

[4] *Boson v. Sandford* (1689) 1 Show. K.B. 101.

[5] *Golding v. Goteer* (1665) 1 Keb. 847; *Matthews v. Hopping* (1665) ibid. 870. Twisden J omitted to mention conversion, but cf. 1 Sid. 244 (conversion founded on 'tort').

[6] E.g. *An Exact Table to the Three Parts of Reports of Mr William Leonard* (1663), sig. Rrlv; G. Townesend, *Tables to most of the Printed Presidents of Pleadings* (1667), p. 27.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

As different kinds of trespass action acquired separate characteristics in the sixteenth and seventeenth centuries, further subdivisions of the law of torts were made, some of which survived the abolition of the writ system itself. Since the eighteenth century, however, the law of torts has undergone a gradual rearrangement as a result of the rapid expansion of the tort of negligence. Liability for negligence alone – that is, without reference to other factors such as contract – was rarely imposed before 1700, and even at the beginning of the twentieth century Sir John Salmond was denying the existence of a separate tort of negligence. In the practitioners' book, *Clerk and Lindsell on Torts*, negligence did not achieve the status of a separate chapter until as late as 1947. It would be easy to conclude from this that negligence has a short history; but this would be misleading. The negligence approach of the modern law determines liability by focusing on the quality of the defendant's act rather than on the kind of harm done to the plaintiff. The reordering of so much of the modern law of tort around the concept of negligence is a consequence of that shift of focus,[7] which was partly a result of abolishing the forms of action.[8] But there is nothing modern about the concept of negligence in itself; what has changed is its primacy. Negligence and fault have always been familiar ideas, and for at least four centuries before 1700 they played a role in law and legal terminology, but their role was subsidiary. A plaintiff might allege negligence alongside other factors, to reinforce liability, or a defendant might rely on the absence of negligence to show that he was not at fault. The concept was not tied to a particular form of action.[9] It was not even confined to actions in tort, in the modern sense of the term, because most actions on the case for negligence before 1700 were for contractual negligence. But purely tortious negligence is the most convenient place to begin.

Trespass *Vi et Armis* and Negligence

If negligent conduct caused direct physical harm, the usual remedy was an action of trespass alleging force and arms. Such an action was not based on doing something negligently which would have been lawful if done carefully, but on doing something which there was no right to do at all: for example, striking the defendant, or damaging his goods. So long as there was a forcible act causing harm, the defendant's state of mind did not affect his liability to pay damages.[10] The inattentive archer who shot a passer-by unawares, or the careless driver who ran him down, was just as guilty of battery as those who caused injury deliberately. Negligence in the sense of inadvertence was irrelevant to the classification of the wrong.

[7] The only comparable concepts are intention, malice, and deceit; torts of strict liability are a residuary group in which no such element is required.

[8] So said F. Pollock, *The Law of Torts* (1887), p. vii. Pollock's was the first analytical treatment of the subject, inspired by his work on a draft code of tort law for India. He was influenced by the American Judge Oliver Wendell Holmes's *The Common Law* (1881): Lobban, *OHLE*, XII, pp. 890–4, 941–4.

[9] Note e.g. *Peperell v. Wyllyam* (1488) CP 40/905, m. 448, an action for negligently tying an impounded horse with a running knot so that it strangled itself; issue was joined on D's 'fault' (*defectus*), but the form of action was replevin, and negligence was first mentioned in the replication.

[10] Some 14th-century dicta suggest that intention was necessary in trespass, but it was probably relevant only to the fine payable to the king: p. 429 n. 14, post.

A wide range of accidents qualified as battery, but the circumstances were obscured from view by the sameness of the writs and counts. Whatever the real facts, defendants in battery were almost always made to 'assault, beat, and wound' the plaintiff 'with force and arms, to wit with swords and staves' (or some equally fictional implements) 'so that his life was despaired of'. No further particulars were routinely given,[11] let alone any mention of negligence. The kind of fault required to make the defendant liable would therefore only become relevant if he tried to make it so by excusing himself on grounds of accident. Yet, if he did this, he would not usually plead the accident specially, but would plead the general issue Not Guilty – meaning literally 'Not culpable' (*Non est culpabilis*) – and explain the circumstances in evidence to the jury. The reason was that, in the logic of common-law pleading, the absence of negligence was not a justification or reason for doing the act complained of, and therefore could not be raised by confession and avoidance; nor was there anything in the count to traverse specially. The only course was to deny guilt generally. To forbid a special plea was not to deny the defence, but only to keep it off the record. As a result, the role of accident and fault was left entirely to juries. The archer whose arm slipped, and the driver whose horse bolted, might well have been able to satisfy juries that they were not guilty; but since the details of their defences were not set down in writing, their cases posed no legal questions for the court in banc and set no precedents for the future. For that reason, it is a vain question whether in law there was a defence of accident. The matter was relegated to the realms of fact. Legal questions of culpability presented themselves on the face of the record in one or two exceptional cases where – usually through a tactical misjudgment – accident was raised by a special plea. After 1400 such pleas were regularly rejected, but never on the ground that fault was irrelevant.

There are, it is true, a number of fourteenth-century cases in which accident was successfully raised as a defence in trespass. Many of them were cases where the chain of causation was broken by a force outside the defendant's control: for instance, the forces of combustion and wind (in fire cases), the perversity of animals, or the plaintiff's own action (by moving in front of a horse, a moving dagger, or an arrow).[12] But even where the defendant himself had caused the harm, it seems he could excuse himself on the ground that he was not to blame. That might mean that he was not negligent, but in some cases from the time of Richard II it meant that he did not intend the harm.[13] Lack of intention was a more sweeping defence than lack of negligence, and it was probably a sign of the criminal past of trespass actions; a defendant convicted of trespass was in theory liable to pay a fine to the king. However, the defence did not survive the fourteenth century, except (for a time) in the case of infants.[14] In 1466 intention was decisively ruled to be immaterial, though it is clear from the discussion that the absence

[11] There are occasional exceptions: e.g. *Hall v. Hall* (1374) 100 SS 16 (running over with a plough drawn by horses; but the knocking down was alleged 'with force and arms, namely staves and forks').

[12] For these cases (from 14th-century rolls) see 100 SS 16–17, 18–19, 21–2, 30; 103 SS 405. Actions on the case were introduced to deal with the first two situations: pp. 434–5, post.

[13] *Jankyn's Case* (1378) B. & M. 364 (stones dropped in building work); *Berden v. Burton* (1382) Y.B. Trin. 6 Ric. II, p. 21, pl. 9, per Belknap CJ (house burned by accident); *Bridlington v. Middleton* (1388) B. & M. 364–5 (child injured in play). In each case D relied on the lack of malice, or 'will', rather than lack of fault.

[14] See *Anon.* (1456) B. & M. 368 (child of 4 'has no discretion to commit a trespass, and does not know any malice'); *Coke v. Rendelsham* (1531) CP 40/1071, m. 313; *OHLE*, VI, p. 767 (D pleads that the accident

of fault still afforded a defence in principle. Such questions seem so fundamental now that it is a wonder they could remain in the dark for so long. But by the fifteenth century the question of culpability was invariably a question for the jury, upon the general issue, and jurors could give effect to prevailing attitudes without settling big principles and creating precedents.

The question of law nevertheless arose in 1466, because of an unusual plea in the *Case of Thorns*.[15] A man was sued for trespassing on his neighbour's land, and as to part of the land he pleaded that he entered to remove thorns which had fallen against his will (*ipso invito*) while he was clipping a hedge on their common boundary. The plea was held bad on demurrer. Intention was relevant in felony, but not in an action for damages.[16] The archer whose hand swerved might not be guilty of felony, but he should still compensate the victim. The decision occasioned some historical controversy in relation to fault, chiefly because of uncertainty as to what was actually pleaded. All speculation as to the form of the plea has now been laid to rest by the discovery of the record.[17] The plea as pleaded went only to the defendant's will or intention,[18] and the remarks of the judges in rejecting it do not assume strict liability. Choke J said, 'If he wants to make a good plea out of this, he should show what he did to prevent the thorns from falling, so that we can judge whether he did enough to excuse himself.' Of course, it is not easy to think of an excuse in such circumstances. Even before Newton, it was obvious that things fell when dropped. The only likely excuse would be a sudden gust of wind, and that was indeed the example Choke J gave of a possible defence. Since the clipping was a deliberate act, breaking the chain of causation was the only means of escape. The case is notable mainly because such special pleading was rare. But the fact that there were only two cases per century can hardly be attributed to the rarity of accidents. Good pleaders knew that attempts to frame special pleas were misguided, and took care to keep the record free of detail by pleading the general issue and submitting to the good sense of the jury.

The question resurfaced in a few cases arising out of shooting accidents. One was in 1534, and is known only from the plea roll.[19] The defendant pleaded that he was shooting at a target and, after he had loosed an arrow, the plaintiff through his own negligence ran into its path. The plaintiff denied this, adding for good measure that the battery was not *ipso invito*. The defendant's state of mind was thus introduced by a double negative in the plaintiff's reply. The pleading is of interest as showing how the facts might have been presented at the trial, but it was unorthodox. Perhaps the experimentation was attributable to both parties being law students; but the defendant

happened 22 years earlier when she was 7 and 'lacking the use of reason'). Both were accidents with bows and arrows. For the ultimate solution see *Holbrooke v. Dogley* (1611) Cro. Jac. 274 (damages but no fine).

[15] *Hulle v. Orynge* (1466) B. & M. 369.

[16] Still less was motive relevant: *Cuny v. Brugewode* (1506) B. & M. 359 (act done with good intentions).

[17] Its purpose, however, is obscure. Hulle admitted the boundary by demurring, and on winning the point of law he waived his damages.

[18] Even that was qualified. D admitted that he entered P's close deliberately, but it was assumed that his entry was justifiable (to mitigate the trespass by the thorns) if the thorns had fallen without his fault. That did not become the law, but it has to be taken for granted to understand the decision. Cf. B. & M. 356 n. 35.

[19] *Ustwayt v. Alyngton* (1534) B. & M. 373. P was a member of Clement's Inn, D another law student, and the accident happened in a field behind the inn.

did not risk a demurrer, and so there was no recorded decision. In the better known case of *Weaver v. Ward* (1616) the defendant, who had shot the plaintiff while they were both taking part in military exercises, pleaded that the wounding was accidental and against his will.[20] Again the plea was held bad, because it referred to lack of intention rather than lack of fault, and in any case it should have been simply Not Guilty. The reason for framing a special plea here may have been that Ward thought he had some kind of justification, as a member of a London trained band, since he was acting as a good citizen under orders ultimately derived from the Privy Council; but he could not both justify an act and deny it. Although the case was decided on pleading grounds, the court intimated in passing that liability in trespass was not strict: the defendant could excuse himself if he showed that the plaintiff ran across the musket when it was discharging, or that the injury was 'inevitable and that the defendant had committed no negligence'. The advice was adopted in 1682 by a tax-collector who pleaded that, as he was discharging his pistol – no one being in sight – the plaintiff accidentally wandered into the line of fire and was shot, against the defendant's will, and that this was 'inevitable'. Yet even here the plea was held bad, 'for in trespass the defendant shall not be excused without unavoidable necessity, which is not shown here'.[21] The record shows that the defendant had not adequately explained why he was shooting, or what precautions he had taken; even if all the facts in the plea were true, the defendant might still have been negligent.

These reported decisions were sometimes interpreted in subsequent generations as importing strict liability, but if properly understood they were by no means as sweeping as some of the language suggests. The court could consider only what was pleaded, and none of the pleas had put the defendant's fault in issue. It was not enough to say that the damage was accidental (*per infortunium*), or against the will of the defendant (*ipso invito*), for intention as to consequences had been irrelevant since 1466 at the latest. What the judges needed to know was whether the defendant could have taken steps to avoid the accident. That is what they meant by 'inevitable' – not that it was somehow predestined, but that there was no reasonable opportunity of avoidance. Merely to assert that an injury was 'inevitable', as in the 1682 case, was not sufficient for the purpose: the court had to be shown facts which showed how avoidable it was. The pleader's options were straightforward. A man who had caused harm could not offer as a defence that he had not meant it. If he had some justification for acting as he did, as when a sheriff arrested someone, he could plead it by way of confession and avoidance. If, however, he had taken appropriate measures to avoid causing injury, then his proper course was to plead Not Guilty and tell his story to the jury. This was finally made clear in 1695, when a defendant showed how he had taken reasonable precautions to warn passers by that his runaway horse was out of control, but lost simply because he had pleaded the facts specially. The defence was sound in substance, since it showed that he was not at fault, but it could only be raised under the general issue.[22] In the early nineteenth century this pleading rule was to be restricted to cases of interrupted causation, with

[20] *Weaver v. Ward* (1616) B. & M. 375; Moo. K.B. 864.

[21] *Dickinson v. Watson* (1682) B. & M. 377 at 378.

[22] *Gibbon v. Pepper* (1695) B. & M. 378. The judges thought a jury might have acquitted (ibid. 380 n. 83), but according to James Wright's report (BL MS. Add. 22609, fo. 13) they declined to mitigate the £20

equally harsh consequences; but the substantive principles of liability apparently remained the same.[23] 'Unavoidable accident' remained a defence; and it was still treated at the beginning of Queen Victoria's reign as meaning that a defendant was not at fault, and was not liable, if he had taken proper precautions.

It seems from these occasional discussions that, although negligence played no overt role in the action of trespass *vi et armis*, a person was only considered guilty of a trespass if he was to blame for it, in the sense that he had caused the damage and with due care could have averted it. There is no reason to suppose that the standard of liability was any different in trespass on the case, since in either action it was left to the jury to decide according to current notions of culpability. Plaintiffs would hardly have switched to actions on the case for negligence[24] if it was a harder case to prove. The peculiarity of trespass was that, unlike most of the other actions which continued in use, the wording of the plaintiff's declaration almost totally suppressed the real facts and left questions of fault to be raised by the defendant. This formal distinction between trespass and case was engraved on the heart of the pleader, and it was not until 1959 that a plaintiff complaining of a direct trespass was held obliged to allege negligence as part of his own case.[25]

Actions on the Case for Negligence

Undertakings and Negligence

Negligence first appeared in writs adverbially. The word *negligenter* (negligently), normally indicating careless conduct, was the antithesis of *vi et armis* ('with force and arms'). If damage was done in the course of performing carelessly a task undertaken at the plaintiff's behest, it could not be described as having been done *vi et armis*. It was precisely for this reason that the writ needed a special case explaining why the negligence was wrongful. In most of the early cases where negligence was made part of the special case in the writ, there was a pre-existing relationship between the parties which precluded the allegation of force against the peace.[26] Such a relationship arose either from a bailment or from some undertaking which brought the defendant into physical contact with the plaintiff or the plaintiff's property; since the plaintiff had consented to this contact, the gist of his complaint was not the coming into contact but the carelessness.

The earliest cases have already been examined in reviewing the history of contract and bailment.[27] Actions on the case for negligence were brought against bailees

damages assessed on the writ of inquiry, despite affidavits that D could not govern the horse and gave proper warning, because P had been wounded in 6 places and lost an eye.

[23] See *Milman v. Dolwell* (1810) 2 Camp. 378; *Knapp v. Salisbury* (1810) 2 Camp. 500 (inevitable accident a defence, but not under the general issue); *Wakeman v. Robinson* (1823) 1 Bing. 213; *Goodman v. Taylor* (1832) 5 C. & P. 407 (reasonable care must be pleaded); *Pearcy v. Walter* (1834) 6 C. & P. 232 (negligence or inevitable accident must be pleaded); *Cotterill v. Starkey* (1839) 8 C. & P. 691 (lack of negligence must be pleaded); *Hall v. Fearnley* (1842) 3 Q.B. 919 (unavoidable accident must be pleaded). The matter was settled by *Stanley v. Powell* [1891] 1 Q.B. 86.

[24] As they did: pp. 437–8, post. [25] *Fowler v. Lanning* [1959] 1 Q.B. 426. [26] See p. 69, ante.

[27] See pp. 350–2, 420–1, ante.

(including carriers), surgeons, workmen, and tradesmen. They all had a common form: the defendant was alleged to have undertaken to perform some specific task, and then to have done it so carelessly that some specified harm resulted. Since the alleged undertaking was usually only to do the work, not to use skill or care,[28] the obligation to use care was (on a literal interpretation) imposed by law rather than by contract. Nothing was made of this at the time; but a contract was certainly unnecessary, and in some of the actions against bailees no *assumpsit* was alleged either. It was the physical relationship, not a contract, which made an action on the case appropriate.[29] The nature of the negligence relied on in these *assumpsit* actions never clearly emerged in the cases, because – as in trespass *vi et armis* – the defendant usually pleaded the general issue and the question of fault was left to the jury alone to decide.[30]

In the misfeasance cases, the imputation of negligence found expression in a range of negative adverbs, such as 'negligently' (*negligenter*), 'improvidently' (*improvide*), 'unduly' (*indebite*), 'in an unworkmanlike manner' (*inartificialiter*), governing verbs of positive action. The implication is that a person who embarked upon a requested service which brought him into contact with the person or property of another was liable if he performed the service with want of care or skill and damage resulted. But anachronistic conclusions should not be drawn from the choice of words. In some cases, negligence translates better as 'neglect', and since the fulfilment of some kinds of duty could be neglected without being careless, or even behaving unreasonably, it clearly cannot be understood in the modern sense.[31] In practice, liability depended on the express or implied terms of the engagement: whether the defendant made an absolute promise to perform the task effectively, or only to do the best he could,[32] or the best that could reasonably be expected, or (at lowest) to use the same care as he would in his own affairs. The appearance of unparticularized allegations of negligence in a plaintiff's declaration therefore tells us no more about standards of liability than the imaginary swords and staves of trespass *vi et armis*. The words import a falling below some standard. But the standards were settled ad hoc by juries, not by the court in banc.

The pleadings remained in the same form long after the word *assumpsit* became associated with contractual undertakings. This caused some analytical confusion, because where the action was genuinely founded on tort there was no need to show

[28] *OHLE*, VI, p. 757. Cf. a precedent in the books of entries of an undertaking to shave a customer in a competent and workmanlike manner, and then negligently using a dirty razor which caused a skin complaint: *Bartilmewe v. Shragger* (1498) B. & M. 410.

[29] E.g. 74 LQR 563, 569 (examples from 1367); *Gardiner v. Burgh* (1382) 103 SS 418; *Abbot of Forde v. Blyke* (1387) ibid. 419; *Bluet v. Bouland* (1472) B. & M. 617; *Haydon v. Raggelond* (1510) ibid. 581. See also p. 584, post (case against a farrier).

[30] For exceptional pleas see *Rogerstun v. Northcotes* (1366) 103 SS 423 (storm); *Abbot of Roche v. Dukmanton* (1450) CP 40/758, m. 240d (sudden wind); *Terry v. White* (1528) B. & M. 411 (contributory negligence and transfer of risk). In later times, *assumpsit* for negligence required proof of fault as well as causation: *Aston v. Heaven* (1797) 2 Esp. 533 (passenger v. carrier); *Searle v. Prentice* (1807) 8 East 348 (patient v. surgeon).

[31] For strict liability in cases of 'negligent' custody see *Herbert v. Pagett* (1662) 1 Lev. 64; *Mors v. Slue* (1672–73) B. & M. 627; *Lane v. Cotton* (1700) 1 Salk. 18; 22 CSC 48–9.

[32] Medical and veterinary practitioners sometimes pleaded that they had undertaken only to give treatment according to the best of their ability: *Swanton v. Smyth* (1378) B. & M. 404; *Roggers v. Walssh* (1532) ibid. 413 at 414; *OHLE*, VI, p. 759 n. 19.

consideration for the undertaking.[33] The *assumpsit* in such cases referred to the assumption of a task rather than a promise.[34] The dual sense of 'undertaking' has survived in the English language to the present day, and in the law it outlived the forms of action: contract and tort still overlap in cases of carriers, surgeons, and others whose duties to be careful arise both by reason of their physical nexus with the plaintiff or his property and by reason of their dealings with him.[35] The standard of care may be the same on both analyses, but the causes of action are fundamentally different. When there is a contract, the answer to the question whether a party is liable only for fault – and (if so) what level of fault is required – ought in every case to depend on the express or implied terms of the agreement. The contract may simply be to act reasonably; but a party can just as well undertake to achieve a specified result come what may. Either party may agree to assume the risk of things going unforeseeably awry. Implications and usages may clarify the position if the contract is silent, but they can always be overridden by express agreement. When there is no contract, however, liability can only rest on the law, and it is for the law alone to direct what manner of liability it is. In the earlier cases of undertakings the distinction is not so sharp; liability was not based on contract, but it could be modified by agreement on the footing that whatever a plaintiff had agreed to could not be a tort.

Negligence in the Absence of an Undertaking

A different kind of accident is that which occurs out of the blue, where there is neither contract nor undertaking. Such accidents were also the subject of actions on the case, beginning in the fourteenth century. The new remedy was needed because of the limitations of trespass *vi et armis*. An accidental injury was not a forcible breach of the king's peace if it was caused by the forces of nature or by third parties. For instance, in trespass *vi et armis* for burning a house it was a defence that the fire was accidental and not forcible.[36] That was all very well, but non-arsonous fire-damage might still be the result of negligence, in which case it would be right to give compensation. It looks as though this was first achieved by pretending arson.[37] But by the fifteenth century plaintiffs were framing such complaints in writs on the case, sometimes with simple allegations of negligence, but sometimes (apparently following precedents from the City of London) alleging a 'custom of the realm' which required everyone to keep his fire safely so that it did not injure his neighbour.[38]

[33] See p. 421, ante.

[34] This is explicit in the unusual participial wording in *Etton v. Royston* (1365) B. & M. 616 (*assumpta custodia*, 'the custody having been undertaken').

[35] Where there was no physical nexus – e.g. between lawyer and client – it was generally thought until the late 20th century that an action for negligence lay only in contract. (Cf. *Mansfield MSS*, II, p. 1111.) But there was, in the 19th century, a brief flirtation with 'torts founded on contract' or quasi-torts: Ibbetson, *HILO*, p. 171 n. 18.

[36] *Anon.* (1368) B. & M. 363; *Anon.* (1374) B. & M. 345; *Elys v. Angieyn* (1390) 103 SS 405. For earlier examples see 74 LQR 582–3.

[37] The veil slips in trial reports: *Anon.* (1368) B. & M. 363; *Anon.* (1374) ibid. 345.

[38] *Cok v. Durant* (1377) *CPMR 1364–81*, p. 235 (custom of London); *Beaulieu v. Finglam* (1401) B. & M. 610 (custom of the realm). For liability in case without alleging a custom see *Durham v. Ede* (1371) ibid.

The first mention of 'custom of the realm' in this context was in a writ devised to make innkeepers answerable for the loss of goods brought in by guests, through their fault, a formula approved by the king's council in the 1360s.[39] Innkeepers were not bailees of goods kept in guests' rooms, or stables, and any other kind of action against them might well have failed if the loss was caused by unknown intruders.[40] A common innkeeper was bound by law to accept travellers, and the effect of the custom was to prevent him escaping from his legal duty to provide a secure lodging.[41] In the fire cases the custom restrained the defendant from relying on unforeseen forces of nature.[42] In both cases, then, although the writs mentioned negligence or fault, the purpose of the alleged custom was actually to impose a special kind of strict liability.[43] The custom of the realm did not develop much further, because the concept made no legal sense: a common custom throughout the realm was common law, and therefore did not need to be pleaded.[44] Nevertheless, when one more custom of the realm was belatedly added to the list in the seventeenth century (on the analogy of innkeepers) – the duty of common carriers to look after goods so that they were not lost or damaged through their 'fault' – the purpose was once again to impose a stricter liability than would otherwise attach.[45] There is probably a similar explanation for the *scienter* action, the action for knowingly keeping animals with dangerous propensities, such as dogs accustomed to worry sheep;[46] the defendant's knowledge of the abnormal propensity fixed him with a strict liability for any damage which the animal caused, damage for which he would not otherwise be liable.[47]

The wording in these earliest actions on the case for negligence or fault is therefore no better guide to the standard of tortious liability than that in the actions of trespass *vi et armis* or *assumpsit*. The standard may well have varied in fact from one type of case to another. Fire was particularly feared in a world of timber-framed buildings, and may have required a stricter standard of control than a horse or a dog. There is certainly no need to suppose uniformity across such a miscellaneous group of actions. But the paucity of situations mentioned in actions on the case for negligence led some legal

609 (alleges previous warning by neighbours); *Berden v. Burton* (1382) Y.B. Trin. 6 Ric. II, p. 22, pl. 9, per Belknap CJ; *Eskhevyd v. Coldale* (1395) 103 SS 414 (lessor v. lessee).

[39] See *Navenby v. Lascelles* (1368) B. & M. 603 at 604, per Knyvet CJ. Cf. *York v. Coulynge* (1368) 103 SS 437.

[40] E.g. *Luffenham v. Gardyner* (1395) 103 SS 433 (plea allowed in *assumpsit* against a boarding-house keeper for loss of a horse).

[41] See *Waldegrave v. Thomas of Fleet-street* (1382) 103 SS 443 (demurrer to attempt to negative fault). For later exceptions see B. & M. 607–8, endnote; *Thomas v. Sampson* (1384) ibid. 604.

[42] See e.g. *Anon.* (1584) B. & M. 611 (gust of wind carrying sparks 10 yards: not a defence).

[43] See the later fire cases in B. & M. 611–13. In innkeeper cases the law allowed a defence that P had been given a key and assumed the risk: ibid. 607–8; *OHLE*, VI, p. 763.

[44] *Beaulieu v. Finglam* (1401) B. & M. 610. Cf. *Horslow's Case* (1442) ibid. 606, per Newton CJ: 'What is the custom of the realm but the law of the land?'

[45] *Rich v. Kneeland* (1613) B. & M. 614 (hoyman); *Symons v. Darknoll* (1628) ibid. 615 (lighterman). The analogy with innkeepers was that both had a duty to accept customers and were strictly liable for loss of their goods (acts of God and the king's enemies excepted).

[46] The first known *scienter* precedent is from 1367 (74 LQR 218). Most actions were for dogs, but cf. *Whitlok v. Wherewell* (1398) 103 SS 413 (rider of hired horse not liable without *scienter*); *Anon.* (1482) B. & M. 358 (no liability for cattle out of control).

[47] For the relevance of *scienter* in actions for trespass by dogs see 74 LQR 216–17 (1365); Palmer, *ELABD*, pp. 229–38. For a simple negligence action against a dog-owner, in London, see *Baldeswell v. Pulter* (1366) *CPMR 1364–81*, p. 68. For doubts as to liability for dogs see *Anon.* (1369) Y.B. Hil. 43 Edw. III, fo. 8, pl. 23; *Hampton v. Doyly* (1443) B. & M. 368 (hounds breaking leash to chase deer; demurrer); *OHLE*, VI, p. 765.

historians in the past to conclude that negligence could not have been actionable per se; there had to be either an undertaking or a custom of the realm to impose a duty of care. A similar conclusion was drawn by an Elizabethan judge who said, 'I have never known an action to lie for negligence save where one is retained to do something for someone and does it negligently; and the reason why it lies in that case is because he has undertaken to do it.'[48] In fact there cannot have been many lacunae between the actions already described. A physical injury caused by the defendant was covered by trespass *vi et armis* unless it was non-forcible. It might be non-forcible either because of the prior relationship of the parties, in which case *assumpsit* was available, or because of the indirectness of the accident. An indirect accident usually occurred through a dangerous force getting out of control; and the usual dangerous forces were fire and animals, which were covered by standard forms of case. The only outstanding cases, therefore, were other kinds of indirect accident caused by negligence. The situations most likely to pose the problem were negligently releasing dangerous forces in ways not covered by the actions mentioned, as by failing to control water,[49] or allowing a fire to begin through negligence,[50] or permitting a dangerous hazard to casual passers by.[51] Although such cases were infrequent, there was no logical reason why actions on the case should not lie.[52] Certainly such actions were brought, and they are not known ever to have been challenged on the ground that negligence by itself was no tort. Indeed, there was no obvious reason to deny an action on the case even for neglect of a non-contractual duty resulting in non-physical damage, though few such duties were recognized in medieval times.[53] It was the infrequency of instances, rather than any explicit legal theory, which led some later lawyers to believe that negligence was not a tort by itself. This was mistaken; but it accurately reflected the de facto dearth of actions in which a plaintiff explicitly alleged non-contractual negligence.

The Tort of Negligence

We now know that the distinction between trespass and case was not a result of juristic analysis but came about through a jurisdictional accident: the royal courts entertained complaints of forcible breaches of the peace before they let in other wrongs.[54] There

[48] *Bradshaw v. Nicholson* (1601) Inner Temple MS. Barrington 6, fo. 127v, per Walmsley J. He was, as usual, dissenting: B. & M. 667.

[49] *OHLE*, VI, p. 766. Since the water usually invaded adjacent land, this would now be labelled nuisance; but the standard actions rested on negligence.

[50] E.g. *Critoft v. Emson* (1506) B. & M. 619 n. 41 (mill set alight by negligent lessee); *Clerk v. Terrell* (1507) KB 27/985, m. 42d (eye injured by spark from gun); *Anon.* (1582) B. & M. 624 (thatch set alight by spark from gun). The custom of the realm applied only to fires lit deliberately but not adequately controlled.

[51] E.g. *Loghton v. Calys* (1473) B. & M. 621 (pile of logs collapsing into road); *Frankessh v. Bokenham* (1490) ibid. 622 (mill-stone falling into road). Cf. the cases of pits and ditches: ibid. 625–6; 22 CSC 62.

[52] In the absence of occupiers' liability (p. 445, post), actionable injuries of the residuary kind would occur either in a public place or on P's own land, and would later be classified as public or private nuisance. But they were framed as actions for negligence.

[53] E.g. prescriptive duties: *Anon.* (1395) Trin. 19 Ric. II, Fitz. Abr., *Action sur le case*, pl. 51 (neglecting to provide a hundred beadle with 3 gallons of best ale); *Broke v. Abbot of Woburn* (1444) Y.B. Hil. 22 Hen. VI, fo. 46, pl. 36 (neglecting to find a chaplain to sing). Such cases were classified in Comyns' *Digest* under 'Action upon the Case for Negligence'.

[54] See pp. 67–71, ante.

ought, therefore, to have been no substantive gaps between the two. Any wrong which was not forcible ought to have been remediable in case. Causing harm by carelessness was on the face of it a legal wrong, and as we have seen there was no rule denying the possibility of a duty of care without an undertaking; it was just that between trespass and *assumpsit*, augmented by customs of the realm and *scienter* liability, most accidents were provided for. The question whether there was a tort of negligence was therefore never asked in such terms. The only legal questions for the courts concerned the boundaries of the available formulae. In retrospect it appeared that a significant step in the recognition of a new tort was taken in Restoration England; but this seems (as we shall see) to have been another procedural illusion brought about by the separation between trespass and case.

The first signs of this supposedly new tort, encompassing direct as well as indirect injuries arising from negligence, are found in a series of running-down cases. If a man negligently drove his horse and cart, or ship, into another man or his property, that was seemingly a trespass with force.[55] The lack of intention, as we have seen, was irrelevant. But there could be disadvantages in bringing a general trespass action.[56] For one thing, the accident might have been caused by the horse, or of the wind, and then the jury might find the defendant not guilty of the trespass. A declaration in case, on the other hand, could focus the jury's attention on the fault rather than the immediate cause: that is, on the defendant's failing to anticipate or deal with the extrinsic force which caused the accident. Moreover, the plaintiff would often wish to sue the driver's master, and the imposition of vicarious liability might require a special declaration in case. Until the seventeenth century there had been no concept of vicarious liability; even a husband was not vicariously liable for his wife's torts.[57] A master was liable for a servant's acts only if he commanded them, for then they were considered his own acts. But before the end of the seventeenth century he could be made vicariously liable for acts which he did not command, provided that they were for his benefit and in the course of employment.[58] An act which the master commanded might well be deemed a forcible trespass by the master, on the analogy of an accessory to crime; but true vicarious liability did not look forcible. Then there was the practical danger that recovery of nominal damages in trespass *vi et armis* carried only nominal costs,[59] unless the judge could be persuaded to certify that the trespass was both wilful and malicious.[60] In trespass there was also a shorter limitation period than in case.[61]

[55] See *Colan v. West* (1367) B. & M. 345.

[56] See also *Angell v. Satterton* (1663) ibid. 376, where a jury gave lower damages for a battery because it was unintentional.

[57] See p. 527, post.

[58] *Anon.* (York assizes, 1664) BL MS. Lansdowne 1064, fo. 46 ('in evidence for trespass against the master it was proved that the servants did the act which was the trespass, but the master paid them their wages, and it was held a trespass in the master'); *Turbervile v. Stamp* (1697) B. & M. 611 at 612, per Holt CJ; *Jones v. Hart* (1699) 2 Salk. 441. Cf. *Kingston v. Booth* (1685) Skin. 228 (vicarious liability not recognized). See also Ibbetson, *HILO*, pp. 69–70.

[59] Duties on Law Proceedings Act 1670 (22 & 23 Car. II, c. 9), s. 9 [s. 136 in *Statutes at Large*]. The connection between the statute and the preference for case was made by Lord Kenyon CJ in *Savignac v. Roome* (1794) 6 Term Rep. 125 at 129. But a similar statute of 1601 applied to all personal actions except battery and cases concerning freehold: Stat. 43 Eliz. I, c. 6.

[60] Stat. 8 & 9 Will. III, c. 11. This operated as an exception to the previous legislation.

[61] Limitation Act 1624 (21 Jac. I, c. 16), s. 3 (4 years in trespass for battery, 6 years in case).

For some or all of these reasons pleaders began to switch their allegiance, where possible, from trespass to case. One seventeenth-century pleader thought the best solution was to invent a new custom of the realm to deal with negligent driving.[62] The experiment may indicate continuing doubts as to how an action should be framed for negligence per se, but it led nowhere. To later generations the breakthrough appeared to have been made in 1676. But it was only a significant step to later eyes. *Mitchell v. Allestry* was an action against a master and servant who had begun to break in untamed horses in Little Lincoln's Inn Fields, where many people were walking about, including Mrs Mitchell, who was kicked and injured.[63] It could not be framed as a *scienter* action, because the horses had no abnormally vicious characteristics; and it was not an action for negligent control of the horses, because the evidence showed that the servant had done all he reasonably could to prevent the accident.[64] The essence of the wrong was in bringing the horses into a London square for breaking in, 'improvidently, rashly, and without due consideration of the unsuitability of the place'. It was a public nuisance. The plaintiff's case on the merits was undeniably strong: the defendants could hardly deny their awareness that the horses needed taming, because they had engaged in taming them, and it was obvious that they had chosen the wrong place to attempt it. Some forlorn arguments were advanced in arrest of judgment; but no one thought of arguing that negligence was only actionable if there was an undertaking or custom of the realm.[65] The reports show that the judges in 1676 were conscious only of making a slight enlargement of the *scienter* principle, in the context of a public nuisance, and of vicarious liability,[66] not that they were sanctioning an alternative to battery. Yet, by 1700, lawyers were beginning to perceive a new, broad, general principle in the law of tort: that a man was 'answerable for all mischief proceeding from his neglect or his actions, unless they were of unavoidable necessity'.[67]

How rapidly practice changed after 1670 has not yet been ascertained, though the precedent-books of the early eighteenth century certainly began to offer declarations in case for new situations involving negligence, and also for the kinds of negligence which had formerly been actionable as trespass.[68] Subsequent writers attributed to *Mitchell v. Allestry* the opening up of this new category of actions on the case, for want of any explicit decision in point; and in about 1750 a writer on circuit practice cobbled together an innovatory chapter, 'Of injuries arising from negligence or folly', to accommodate it.[69] The means were now in place for the development of a distinct tort of negligence; but it did not happen suddenly.

[62] *E.R. v. J.P.* (*c.* 1675) B. & M. 616. Much earlier precedents, unpublished and unknown, were *Colan v. West* (1367) ibid. 345 (negligent driving *vi et armis); Whitlok v. Wherewell* (1398) ibid. 365 (negligent control of horse).

[63] (1676) ibid. 630.

[64] This came out in a previous trial between the parties: ibid. 633 (where Hale CJ, the trial judge, directed a new action).

[65] The same is true of *Mustard v. Hamden* (1680) T. Raym. 390 (negligent control of ship).

[66] The master was fictitiously alleged to have been present, in order to make him vicariously liable. Cf. 2 Lev. 172 (tr. 'it shall be presumed that the master sent the servant to train the horses').

[67] *Mason v. Keeling* (1700) 1 Ld Raym. 606 at 607.

[68] B. & M. 633–4; 22 CSC 220–7. See also *Mansfield MSS*, II, pp. 1120–1.

[69] *An Institute of the Law relative to Trials at Nisi Prius* [*c.* 1750] (1767), p. 35; B. & M. 637–8. For this work and its authorship see p. 441, post.

By modern standards there seems to have been remarkably little accident litigation. One reason may be that serious accidents were often fatal, given the state of medical treatment, and until 1846 death barred an action for damages.[70] Even when they were not fatal, no one thought of claiming damages for loss of prospects or the cost of long-term care. The victims were often employees of low status and simply became a charge on the poor law. A high proportion of the earlier collision cases involved accidents on water.[71] Ships, boats, and cargoes were valuable property, and litigation was commercially worthwhile. By the close of the eighteenth century numerous problems raised by running-down injuries on roads were also vexing the courts, to be followed in the next century by a flood of railway cases. The apparent rise in the number of negligence cases in the later part of George III's reign is in part an illusion caused by the beginning of nisi prius reporting in the 1790s.[72] Nevertheless, there do appear to have been more cases, and two reasons may be suggested for this. First, there was a surge in the number of driving accidents as a consequence of the improvement of road surfaces, which had encouraged an increase in both the volume of traffic and its speed. By 1775 there were estimated to be 17,000 four-wheeled carriages in England, including 400 stage-coaches.[73] Coaches, often driven by men undistinguished for their sobriety, competed for the fastest journeys; and during such races they not infrequently overturned, collided with other vehicles, or went out of control. It is at this period that we first hear of the rule of the road,[74] though no doubt country roads allowed little space for overtaking. The second reason is that the riskier activities associated with modern improvements – including long-distance road transport – were typically carried on by entrepreneurs with capital, who were worth suing and could pass the loss on to their other customers as part of their overheads. The establishment of vicarious liability in the later seventeenth century had made it legally possible to pursue the employer rather than the impecunious servant who caused the accident.

The litigation arising from these accidents was at first beset by legal wrangling over the proper boundary between trespass and case. There was no serious challenge to the principle of liability, but a defendant who failed on the merits might fall back on an age-old tradition of the common law and attack the choice of writ. The test which the courts produced was that 'in trespass the plaintiff complains of an immediate wrong, and in case of a wrong that is the consequence of another act'.[75] The metaphysics of directness then became a constant trouble to courts and practitioners, with Blackstone resorting

[70] *Higgins v. Butcher* (1607) Yelv. 89. Cf. W. Sheppard, *Englands Balme* (1657), p. 148 ('it is an hard law that no recompense is given to a man's wife or children for killing of him, whereas for the beating or wounding of him while he was alive, he should have had recompense'). For the legislative reversal of this rule see pp. 445–6, post.

[71] Collisions in navigable rivers had been a significant part of Admiralty jurisdiction until the 17th century, but plaintiffs disliked the Admiralty practice of splitting the loss between the parties. See G. F. Steckley, 21 LHR 41.

[72] The first reports were those of Thomas Peake (1790–95) and Isaac Espinasse (1793–1810). Cf. 92 LQR at 440–1 (cases in the 1760s and 1770s).

[73] *Ann. Reg. 1775*, p. 191.

[74] Failing to drive on the left was treated as evidence of negligence in *Vernon v. Wilson* (1778) *Mansfield MSS*, II, p. 1132; *Tayler's Case* (1780) *Ann. Reg. 1780*, p. 199.

[75] *Reynolds v. Clarke* (1725) B. & M. 395 at 396 n. 54, per Fortescue J. For the unjust consequences of applying it to running-down accidents see e.g. *Day v. Edwards* (1794) 5 Term Rep. 648; *Leame v. Bray* (1803) 3 East 593; Ibbetson, *HILO*, pp. 162–3.

to Newtonian physics in his search for a scientific answer.[76] A practical solution was found in 1833, when it was laid down that the plaintiff who suffered a direct injury had an election. He could waive the force and sue in case, provided the injury complained of was not wilful.[77]

The effect of this decision was that trespass changed its meaning and became associated with wilful injuries.[78] By 1850 few if any lawyers would still classify a road accident as an assault and battery. Accident litigation then became the exclusive province of the newly discovered tort of negligence, and it enjoyed a further boom when the Industrial Revolution and the development of the railway contributed a new range of serious accidents, followed at the end of the century by the homicidal motor car. Already by the beginning of Victoria's reign, actions for negligence were sufficiently numerous for some writers on the law to put them into a separate compartment. The first collection of cases arranged in this way appeared in the supplement to Mr Serjeant Petersdorff's *Abridgment* in 1843. Thirty years later, in 1871, the subject acquired its first student textbooks;[79] and in the following decade a practitioners' book, Thomas Beven's *Principles of the Law of Negligence* (1889), a thick tome which – despite its promising title – provided little more than a catalogue raisonné of duties of care, many of them contractual.[80]

The Nature of Tortious Negligence

Negligence is the failure to exercise care, and the failure to do something is only a legal wrong if the law imposes a duty to do it. Even in factual situations involving apparently positive misconduct, 'negligence' could still be regarded as a wrong of nonfeasance, not taking care. It all depends on whether it is the misconduct or the neglect of some duty which is regarded as the core of the complaint. It is a fine point, and may seem a semantic quibble, whether the driver of a vehicle which runs over a pedestrian is liable for misfeasance in running him down or for nonfeasance in failing to apply the brake or turn the wheel. The distinction no longer matters, since the negligence amounts in either case to a breach of the duty to take care;[81] but until the nineteenth century it could affect the choice of the writ and the classification of the wrong.

Sir John Comyns (d. 1740), in his *Digest of the Laws of England* (published in 1762), juxtaposed the two headings 'Action upon the Case for Misfeasance' and 'Action upon

[76] *Scott v. Shepherd* (1773) 2 Wm Bla. 892 (firework thrown on twice before exploding). Blackstone J was dissenting: N. Swerdlow, 'Blackstone's "Newtonian Dissent" ' in *The Natural Sciences and the Social Sciences* (J. B. Cohen ed., 1994), pp. 205–34. Cf. *Slater v. Baker* (1767) 2 Wils. 359; Ibbetson, *HILO*, pp 160–1.

[77] *Williams v. Holland* (1833) 10 Bing. 112, per Tindal CJCP. The KB took the same view: *Moreton v. Hardern* (1825) 4 B. & C. 225.

[78] For this association see *Turner v. Hawkins* (1796) 1 B. & P. 472. Cf. the statute of 1697 concerning costs, which distinguished wilful trespasses from other trespasses *vi et armis*: p. 437 n. 59, ante. See further Lobban, *OHLE*, XII, pp. 905–7.

[79] T. W. Saunders, *A Treatise upon the Law applicable to Negligence* (1871); R. Campbell, *The Law of Negligence* (1871).

[80] The earlier writer C. G. Addison dealt with negligence in his book on contracts (1845–47) rather than in his book on torts (1860). The American treatise by F. Wharton, *A Treatise on the Law of Negligence* (1874), put contract and tort in separate parts.

[81] E.g. *Kelly v. Metropolitan Rly Co.* [1895] 1 Q.B. 944 (failure to shut off steam).

the Case for Negligence'. The former category covered damage caused by 'misadventure', whether remediable in trespass or case, whereas the latter included the neglect of miscellaneous duties imposed by customs of the realm, local customs, or statutes, and the duties imposed by undertakings. Of the two, the former seems closer to the modern concept of negligence than the latter. In the language of today, Comyns' 'misfeasance' might be described as negligent acts, his 'negligence' as neglectful omissions. But the later tort of negligence was to focus attention on the breach of a duty to take care, rather than upon the miscellaneous consequences of not taking care.

Duties to take care cannot be imposed on everyone in every situation. At the beginning of the eighteenth century no one, it seems, could see any pattern emerging; the kinds of case were 'almost infinite, daily increasing, and continually receiving new forms'.[82] By the middle of the century, however, a general answer had been formulated in an influential treatise, printed in 1767 from a manuscript supposedly written two or three decades earlier by Lord Bathurst (1714–94), which became a standard practitioners' manual in its subsequent editions by Buller and Onslow.[83] The author suggested for the first time a principle which is now familiar to every English law student: 'Every man ought to take reasonable care that he does not injure his neighbour; therefore, wherever a man receives hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover damages for the injury so sustained . . . However, it is proper in such cases to prove that the injury was such as would probably follow from the act done.'[84]

The phrase 'reasonable care' pointed to the normal standard which would become the basis of the later tort of negligence. We have seen that some of the early actions for negligent acts or omissions were designed to impose a stricter duty than this,[85] and English law sometimes experimented with differing degrees of negligence, such as 'gross negligence'.[86] By 1781, however, it was found more convenient to identify a single standard, expressed in terms which the cross-section of reasonable men on the jury would readily understand, that of the 'generality of rational men',[87] or, more pithily, that of 'the prudent man' or 'the reasonable man'.[88] The hypothetical reasonable man, as representing the 'anthropomorphic conception of justice',[89] made it easier to define the

[82] T. Wood, *An Institute of the Laws of England* (1720), II, pp. 939–40.

[83] It is commonly known as Buller's *Nisi Prius*, though Francis Buller acknowledged in 1772 that it was based on Bathurst's notes. Henry Bathurst (LC 1771–78) was called to the bar in 1736.

[84] *An Institute of the Law relative to Trials at Nisi Prius* (1767), pp. 35–6; B. & M. 637. The principle is known today, not from this passage, but from Lord Atkin's reformulation in 1932 (p. 442, post).

[85] See p. 435, ante.

[86] E.g. *Coggs v. Bernard* (1703) B. & M. 415, where Holt CJ identified 6 species of bailments, each with differently formulated standards of care, including 'utmost care' and 'strictest care'.

[87] W. Jones, *Treatise on the Law of Bailments* (1781), p. 6. Jones tried to simplify Holt CJ's spectrum of standards for bailees, but he still wrote of gross and slight negligence in particular circumstances. His formulation may have been influenced by writers on Natural Law, and perhaps ultimately by the Roman concept of the *diligens paterfamilias*: Ibbetson, *HILO*, pp. 166–7.

[88] *Jones v. Bird* (1822) 5 B. & Ald. 837 at 845–6; *Wiggins v. Boddington* (1828) 3 C. & P. 544 at 549, per Best CJ; *Doorman v. Jenkins* (1834) 2 Ad. & E. 256. In *Vaughan v. Menlove* (1837) 3 Bing. N.C. 468, the trial judge referred to the 'prudent and careful man', and Tindal CJ to the 'man of ordinary prudence'. By around 1900 he was sometimes characterized as 'the man on the Clapham omnibus'.

[89] *Davis Contractors Ltd v. Fareham U.D.C.* [1956] A.C. 696 at 728, per Lord Radcliffe, who pointed out that the spokesman for the reasonable man is the court itself.

tort: 'Negligence is the omission to do something which a reasonable man . . . would do, or doing something which a prudent and reasonable man would not do.'[90] No doubt more care was required of reasonable people in some situations than others; but the test of reasonableness enabled a single standard to be expressed compendiously. And the standard was for the courts to define.[91] Moreover, the courts did not (at any rate by the nineteenth century) expect plaintiffs to bear the burden of proving unreasonableness if the facts were necessarily beyond their ken, as in the case of railway passengers or purchasers of defective products; the doctrine of *res ipsa loquitur* enabled negligence to be presumed where it seemed appropriate to cast the burden of explanation on to the defendant.[92]

The 'neighbour' figure – first used literally for occupiers of neighbouring premises, in actions for fire damage[93] and nuisance[94] – had been given a wider meaning by Bathurst[95] and came regularly to be used for all persons within range of a duty to take care. But who, in this metaphysical sense, *is* a neighbour? A general answer was offered in the twentieth century by Lord Atkin, in his classic speech in *Donoghue v. Stevenson*:[96] in the law of negligence, neighbours are 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'. This generalization is not, of course, universally valid.[97] A man may know that his neighbour is in distress, and that he can rescue him, but he is not in law bound to go and help him.[98] Someone who has an opportunity of saving his neighbour's goods from destruction is not only under no duty to do so but may be nominally liable in trespass if he does.[99] The Atkin principle is not always true even with respect to positive conduct. One may open a shop which is calculated to (and does) ruin the livelihood of a neighbouring shopkeeper, and yet it is no legal wrong.[100] The definition in advance of

[90] *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781 at 784, per Alderson B. This dictum was the starting point of both textbooks which appeared in 1871 (p. 440, ante).

[91] Reasonableness is not a fact to be proved by the evidence of real 'passengers on the Clapham omnibus': *Healthcare at Home Ltd v. The Common Services Agency* [2014] UKSC 49, p. 2, per Lord Reed.

[92] *Christie v. Griggs* (1809) 2 Camp. 79 (an *assumpsit* case); *Carpue v. London & Brighton Rly Co.* (1844) 5 Q.B. 747; *Skinner v. London, Brighton & South Coast Rly Co.* (1850) 5 Ex. 787; *Byrne v. Boadle* (1863) 2 H. & C. 722. The same policy had underlain the strict liability of common carriers: *Lane v. Cotton* (1701) 1 Ld Raym. 646 at 652, per Holt CJ; *Coggs v. Barnard* (1703) B. & M. 415 at 419, per Holt CJ.

[93] The wording of the custom of the realm was that everyone should keep their fires so that no damage befell their neighbours.

[94] *Edwards v. Holmedon* (1594) Coke's notebook, BL MS. Harley 6686A, fo. 92 (tr. 'he must be vigilant to foresee that no damage shall accrue to his neighbour by his act'); cf. B. & M. 664 at 667 ('he ought to have taken good care').

[95] Cf. Holt CJ in *Turbervile v. Stamp* (1697) Pengelly Rep., BL MS. Add. 6722, fo. 78 ('A man must always use his own so as to do no harm to his neighbour'); *Tenant v. Goldwin* (1704) 2 Ld Raym. 1089 at 1093 ('every man must take care to do his neighbour no damage').

[96] [1932] A.C. 562 at 578. See also *Langridge v. Levy* (1837) 2 M. & W. 519; *Heaven v. Pender* (1883) 11 Q.B.D. 503.

[97] The judiciary did not even treat the decision as establishing a general principle until the next generation: R. F. V. Heuston, 20 MLR 1. See further p. 446, post.

[98] *Home Office v. Dorset Yacht Co.* [1970] A.C. 1004 at 1027, per Lord Reid. Even the police do not owe a general duty to protect persons from attack: *Michael v. Chief Constable of South Wales* [2015] A.C. 1732.

[99] *Cuny v. Brugewode* (1506) B. & M. 359; 116 SS 542. And see, as to finders of goods, *Walgrave v. Ogden* (1591) B. & M. 624.

[100] See pp. 479–80, post.

all the situations in which a duty of care is owed to one's neighbour is impossible, though attempts have sometimes been made to formulate a general rule. In practice, a policy decision has to be made whenever new cases arise. Indeed, over the course of time some very different outer limits have been set to the notion of actionable wrong in the context of negligence. Although the 'neighbour' principle was voiced three centuries ago in words which might still be accepted today, in practice far fewer kinds of injury were then under its ambit.

Extensions of the Duty of Care

Until well into the nineteenth century Bathurst's statement was regarded only as pigeonholing the types of case already recognized, not as a basis for potentially wider claims. The principal forms of non-contractual negligence[101] which had become actionable by the early nineteenth century were: careless collisions on road and water; dangerous activities, such as breaking in horses or handling firearms; passive dangers to the public, such as unguarded holes in or adjoining the highway; and 'negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling'.[102] The vast majority of cases were of physical damage resulting directly from some action of the defendant (or his servant) in person, or from some situation under his immediate control.

When the courts were invited in early Victorian times to develop the tort of negligence beyond this stage, the invitation was greeted with little enthusiasm. The judges' reluctance was connected with the extensive scope given to the notion of implied consent (*volenti non fit injuria*), which counterbalanced the general principle of liability and explained – in a manner consonant with the individualist attitudes of the age – why so many kinds of injury caused by negligence had never lent themselves to redress. In everyday situations, people were supposed to accept the world as they found it and to look out for themselves. Thus it was held in 1837 that an employee could not sue his master for an injury at work, where he was in a position to know the dangers as well as his master, because he could have declined to take any unacceptable risks.[103] It was the first time an employee had ever sued a master in respect of an accident at work, and Lord Abinger CB drew attention to the 'alarming' prospect that if a master owed a duty of care to his servants, he might become vicariously liable to servants for the conduct of fellow servants.[104] In 1850 the warning was heeded, and it was held that a servant

[101] Aside from those attributed to customs of the realm, which were essentially strict. In the case of domestic fires, strict liability was ended by the Act preventing Mischiefs from Fire 1707 (6 Ann., c. 58 [c. 31 in *Statutes at Large*]).

[102] These last no longer required an *assumpsit*: see e.g. Wentworth, VIII, p. 416 (negligence by a male midwife, 1777). For notes of a trial in such an action in 1738 see B. & M. 635. Actions against attorneys are found in the 18th century: Oldham, *ECLM*, pp. 279–80.

[103] *Priestley v. Fowler* (1837) 3 M. & W. 1 (overturning a jury verdict for £100); M. A. Stein, 44 *Boston College Law Rev.* 689; Simpson, *Leading Cases*, pp. 100–34. See also *Skipp v. Eastern Counties Rly Co.* (1853) 9 Ex. 223; *Senior v. Ward* (1859) 1 E. & E. 385. In some of these cases P might have been regarded as contributorily negligent.

[104] He also feared that the master might become liable for the negligence of a harness-maker or (like Fowler) the family butcher. (His paradigm was the family with servants rather than an industrial setting.) In the event, vicarious liability for independent contractors did not follow until the 21st century: p. 448 n. 135, post.

could not sue the master in respect of the negligence of a fellow employee, even though the master would have been vicariously liable to third parties for the same negligence, because by entering the employment the servant had impliedly consented to the risk of being injured by fellow employees.[105] Since most accidents in the work-place were attributable to the acts or omissions of employees, this set up an effective bar to any liability in the employer. Never mind that risky employment was preferable to starvation; the judges in this period assumed a robust individuality. If a particular task was dangerous, the employee could refuse to perform it; if the work itself was inherently risky, the cautious employee's remedy was to find another job; if he did neither, he was taken to have accepted the risk in return for his pay.

On a similar ground, occupiers of property were not liable for injuries to visitors resulting from the state of the premises, unless there was a known and serious danger of which they failed to give notice. A non-paying visitor was deemed to be in the same position as the family and servants of the occupier: 'he must take his chance with the rest',[106] and would have been regarded as discourteous if he complained of injury. Liability for damage caused in the defendant's absence by chattels (other than animals) was similarly confined to unusual and concealed dangers.[107] A second notion underlying some of these cases was that one could only be liable for behaviour, not for things or situations which were not of one's own making.[108] Many of the early cases on occupiers' liability were therefore argued solely in terms of vicarious liability for the acts of those who created the danger. In relation to premises there was yet a third problem, that of causation, and especially contributory negligence. For instance, if a railway passenger was injured by tripping over something in a dimly lit station, he might be regarded by the light of cold logic as the author of his own misfortune. As Bramwell LJ reportedly put it, 'If it was too dark for the man to see, he had no business to go there. If it was light enough for him to see, he had no business to tumble over the obstacle.'[109] The principle was not limited to occupiers' liability. A plaintiff was completely barred from any claim, even where he could prove negligence, if he had contributed to the accident by his own negligence.[110]

[105] *Hutchinson v. York, Newcastle & Berwick Rly Co.* (1850) 5 Ex. 343. For this 'doctrine of common employment', sometimes mistakenly attributed to *Priestley v. Fowler*, see Lobban, *OHLE*, XII, pp. 1002–06. In later times its effect could be avoided by the doctrine of the non-delegable duty of care: see *Wilsons & Clyde Coal Co. Ltd v. English* [1938] A.C. 57.

[106] *Southcote v. Stanley* (1856) 1 H. & N. 247 (hotel not liable to a visitor, as opposed to a paying guest). In this case, Pollock CB expressly drew an analogy with *Priestley v. Fowler.*

[107] Compare *McCarthy v. Younge* (1861) 6 H. & N. 329 (lender of unsafe scaffolding not liable to borrower) with *Farrant v. Barnes* (1862) 11 C.B.N.S. 553 (consignor of acid liable when container burst in transit). See also *Langridge v. Levy* (1837) 2 M. & W. 519 (defective gun), and the older cases there cited. Unattended horses and carts were another matter: *Illidge v. Goodwin* (1831) 5 C. & P. 190.

[108] Hence Lord Abinger CB's suggestion in *Priestley v. Fowler* (ante) that to make a master liable for an accident caused by a defective van would be to make him vicariously liable for the coach-builder and harness-maker.

[109] 'Lord Justice Bramwell on Actions of Negligence' (1880) 24 *Solicitors Jo.* 305. By 1880 Bramwell's approach was regarded as extremely conservative, and there was an element of parody in the attributed quotation. See also P. S. Atiyah, *Rise and Fall of Freedom of Contract* (1979), pp. 377–9.

[110] *Butterfield v. Forrester* (1809) 11 East 60; *Flower v. Adam* (1810) 2 Taunt. 314; Lobban, *OHLE*, XII, p. 908. The idea was not new: see *Terry v. White* (1528) B. & M. 411. It required legislation to permit damage to be apportioned: Law Reform (Contributory Negligence) Act 1945 (8 & 9 Geo VI, c. 28).

Another restrictive principle flowed from the long-standing association of many forms of negligence with *assumpsit*: where someone was contractually bound to take care, it was thought that he could not be concurrently liable for breach of the same duty to someone who was not party to the contract. Thus in 1842 a negligent manufacturer was held to be free from liability to anyone except those who bought directly from him.[111] Though attributed by some modern lawyers to a 'privity of contract fallacy', the decision was less concerned with the logic of privity than with preserving the status quo; actions had not in fact previously been brought for defective products, except in *assumpsit*, and it was thought that a change might bring a flood of unwelcome litigation. Where there was a contract, liability could be reduced or excluded by agreement, since the common law allowed a party to limit or contract out of liability for negligence.[112] It would therefore have seemed anomalous to recognize a higher degree of liability to a mere stranger than to a customer who had furnished consideration, at any rate in respect of something not inherently dangerous. The failure of 1842 is clear only in retrospect; it lay, not in overlooking a fallacy, but in waiving the opportunity to create a new duty of care.

Despite these initial retarding factors, the Victorian period witnessed a significant expansion of the tort of negligence. A wider liability for defective premises was opened up by *Indermaur v. Dames*,[113] in which the Exchequer Chamber held that an occupier owed a duty of care to visitors, such as customers and their servants, who were expressly or impliedly invited on to the premises. The earlier decisions were not overturned, but distinguished as denying an action only to 'bare licensees' (as opposed to invitees), a difficult distinction which led to many subtleties over the next century. The *volenti non fit injuria* principle was watered down in personal injury cases in late Victorian times as a result of changing attitudes towards workmen's compensation,[114] and in 1880 the common-employment barrier was removed – though only in the case of workmen – by legislation.[115] The recovery of compensation for accidents was further assisted by the mass of regulatory legislation passed in the nineteenth century, which was held to generate new causes of action where the courts thought civil liability would advance the legislative purpose,[116] and also by the statute of 1846 which (following the abolition of deodands[117]) enabled dependents to recover compensation for causing a person's

[111] *Winterbottom v. Wright* (1842) 10 M. & W. 109; V. Palmer, 27 AJLH 85. This was distinguished, and effectively reversed, in *George v. Skivington* (1869) L.R. 5 Ex. 1 (liability for noxious shampoo sold to P's husband); and see *Donoghue v. Stevenson*, p. 446, post.

[112] See p. 383, ante.

[113] (1866) L.R. 1 C.P. 274, L.R. 2 C.P. 318. The way was prepared by *Pickard v. Smith* (1861) 10 C.B.N.S. 470.

[114] See e.g. *Clarke v. Holmes* (1862) 7 H. & N. 937 (awareness of risk no bar to an action against an employer for negligence in respect of dangerous machinery); *Smith v. Charles Baker & Sons Ltd* [1891] A.C. 325 (knowledge of risk distinguished from consent to risk).

[115] Employers' Liability Act 1880 (43 & 44 Vict., c. 42). The final vestiges of the common-employment doctrine did not disappear until the Law Reform (Personal Injuries) Act 1948 (11 & 12 Geo. VI, c. 41), s. 1. See further H. Smith, 2 JLH 258; P. W. J. Bartrip and S. Burman, *Wounded Soldiers of Industry* (1983), pp. 126–57.

[116] E.g. *Couch v. Steel* (1854) 3 E. & B. 402, which proved controversial but was eventually accepted; *Groves v. Lord Wimborne* [1898] 2 Q.B. 402 (unfenced machinery).

[117] See p. 413, ante.

death.[118] Developments in medical science enabled claims to be based on more sophisticated forms of harm, such as nervous shock. These began to appear in the 1850s,[119] but jurors were not always easily persuaded: in 1881 a jury gave only a farthing damages for neuralgia and hysteria caused by Americans letting off fireworks on 4 July.[120]

A question which proved difficult was whether a defendant found guilty of negligence was answerable for all the harm that followed, or whether the damage actually suffered could sometimes be too remote from normal contemplation to be recoverable. Bathurst's formulation had limited recovery to such injuries 'as would probably follow from the act done', and – assuming 'probably' to mean 'likely' – this could be seen as including two propositions. One was that the plaintiff could only sue for an injury which was likely to follow from the negligence, and the other was that his damages should be limited to those which were likely to follow from such an injury. But this disaggregation was not immediately made, and the second part of the proposition was ignored. At first, therefore, the courts took the view that once negligence and causation were proved, the defendant was liable for all the consequences, however remote or unforeseeable. Foreseeability of injury went to the existence of liability, not to the extent of the damages. That was the rule chosen by the Exchequer Chamber in 1870.[121] Notwithstanding the authority of this decision, however, the opinion soon gained ground in the courts that the defendant should be liable only for the 'natural and probable (or ordinary) consequences' of his conduct.[122] That approach, though dutifully rejected by the Court of Appeal in 1921, was finally approved by the House of Lords in 1961.[123]

A considerable enlargement of the scope of the tort of negligence was made in 1932, when the House of Lords reversed the 1842 decision and held that a negligent manufacturer of goods could be liable in tort for injury to the ultimate consumer.[124] Behind this extension there was no doubt the consideration that manufacturers were better able to avert such accidents than consumers, who could know nothing of the manufacturing process and could not practicably be expected to test goods for safety. But the decision had far-reaching consequences. The new duty of care was subsequently extended to repairers, assemblers, and all kinds of supplier; and the action was made available not only to purchasers but also to users and other persons injured by defective products. Eventually the subject-matter was extended from chattels to buildings, the furthest point of development being that a builder might be liable not only for damage resulting

[118] Lord Campbell's Act 1846 (9 & 10 Vict., c. 93); R. Kidner, 50 *N. Ireland Legal Qly* 318. The action lay only where the deceased himself could have sued, had he survived, and it had to be brought by his personal representatives on behalf of the dependents.

[119] W. Ballantine, *Reminiscences* (1882), pp. 134–8 (referring to railway cases before Lord Campbell CJ). Serjeant Ballantine was scathing about some of the medical evidence he had heard.

[120] *Coombe v. Coombe* (1881) 71 L.T. 181 (before Bowen J). Cf. *Wilkinson v. Downton* [1897] 2 Q.B. 57, where a woman recovered £100 for nervous shock suffered on being told, as a practical joke, that her husband had been seriously injured.

[121] *Smith v. London & South Western Rly Co.* (1870) L.R. 5 C.P. 98.

[122] *Sharp v. Powell* (1872) L.R. 7 C.P. 253; *Clark v. Chambers* (1878) 3 Q.B.D. 327. The rule in tort may have been influenced by the rule laid down for contract cases in *Hadley v. Baxendale* (1854) 9 Ex. 341 ('according to the usual mode of things').

[123] *Re Polemis & Furness Withy & Co.* [1921] 3 K.B. 560; *The Wagon Mound* [1961] A.C. 388.

[124] *Donoghue v. Stevenson* [1932] A.C. 562 (snail in opaque ginger-beer bottle). This was a Scots appeal, but the law of negligence was the same as in England.

from a dangerous building but for the expense of repairing a building to prevent future physical damage.[125] Most of these extensions were the work of the judiciary, though in 1957 Parliament extended occupiers' liability by laying down a 'common duty of care' owed to all lawful visitors.[126] In 1984 this duty was extended towards trespassers as well, if their presence was known to the occupier;[127] but the legislation caused misgivings, since it seemed to necessitate the closure of public amenities which could not practicably be policed.[128]

Further large extensions were made by the judges in the second half of the twentieth century in the spheres of economic loss and negligent words. After actions on the case for words had been channelled into two distinct actions for defamation and deceit, the view had emerged, and was regarded as clear law from 1893 until 1963, that there was no liability for negligent misstatements causing economic or purely pecuniary loss.[129] Generally speaking, the older law allowed economic loss to be recovered in negligence only as an adjunct to physical damage; for instance, a person injured in a road accident had been able to recover his medical expenses. There were only a few instances of recovery for pure economic loss, as when sheriffs and court officers were sued for negligently causing the loss of a lawsuit or legal advantage, or in rare cases of non-contractual undertakings.[130] But the floodgates were opened in 1963, when the House of Lords decided that an action lay for a negligent misstatement causing economic loss, a principle soon extended to negligent advice or conduct causing economic loss.[131] A merger of this new-found principle of liability for economic loss with the *Donoghue v. Stevenson* 'persons in contemplation' principle made it possible, by the 1980s, for third parties to sue for economic loss resulting from their reliance on negligent misstatements made to others,[132] or from careless work done for others and on which they placed no reliance,[133] or even (in the most controversial extension) from the manufacture of an unusable, though safe, product.[134] These last extensions were doubtless conceived of as further examples of release from the so-called 'privity of contract fallacy', but they threatened to destroy the difference between contract and tort altogether by making a

[125] *Batty v. Metropolitan Pty Realisations Ltd* [1978] Q.B. 554; *Anns v. Merton London Borough Council* [1978] A.C. 728. Cf. *D & F Estates Ltd v. Church Commrs* [1988] 2 All E.R. 992 (HL).

[126] Occupiers' Liability Act 1957 (5 & 6 Eliz. II, c. 31). The statutory duty did not extend to trespassers.

[127] Occupiers' Liability Act 1984 (c. 3). Trespassers had been owed a much narrower duty at common law, the 'duty of common humanity'. But since the 1880s children could be treated as constructive licensees if they were enticed into trespassing by an 'allurement': Lobban, *OHLE*, XII, pp. 980–4.

[128] *Tomlinson v. Congleton Borough Council* [2004] 1 A.C. 46; but see the Compensation Act 2006 (p. 450, post).

[129] *Derry v. Peek* (1889) 14 App. Cas. 337 (see p. 379, ante), as interpreted in *Le Lievre v. Gould* [1893] 1 Q.B. 491.

[130] E.g. *Wilkinson v. Coverdale* (1793) 1 Esp. 75 (gratuitous undertaking to take out an insurance policy).

[131] *Hedley, Byrne & Co. v. Heller & Partners Ltd* [1964] A.C. 465. This was extended to providing incorrect information or failing to provide important information: *South Australia Asset Management Corp. v. York Montague Ltd* [1997] A.C. 191; *Hughes-Holland v. BPE Solicitors* [2017] UKSC 21.

[132] E.g. *Yianni v. Edwin Evans & Sons* [1982] Q.B. 438 (building society's surveyor liable to purchaser).

[133] *Ross v. Caunters* [1980] Ch. 297 (testator's solicitor liable to an intended beneficiary deprived of a bequest through negligent draftsmanship); upheld in *White v. Jones* [1995] A.C. 207. (It had previously been thought that the sole liability of solicitors was in contract: *Groom v. Crocker* [1939] 1 K.B. 194.) The HL subsequently came to require both an 'assumption of responsibility' and reliance: e.g. *Williams v. Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830.

[134] *Junior Books v. Veitchi Co. Ltd* [1983] 1 A.C. 520.

defendant liable for failing to confer a benefit on someone who had not been promised it, had given no consideration for it, and had no legal right to it.

Much of the growth in personal injury litigation was connected with the proliferating dangers to life and limb in a machine age; but an increase in litigation does not in itself determine whether or how the law will change in dealing with it. The pressure to extend the scope of liability for negligence can be attributed to newer forms of industrial and commercial organization. In choosing a defendant likely to be able to meet his claim, a plaintiff now had to look beyond the party with whom he came into personal contact. And a principal reason for acceding to the pressure for change has been the general view that those who create risks in the course of their business ought to pay for any adverse consequences. No doubt this is the explanation for the introduction, and subsequent extension, of employers' vicarious liability in the seventeenth century, occupiers' liability in the nineteenth, manufacturers' liability in the twentieth, and new forms of vicarious liability in the twenty-first.[135] A business which depends on using potentially hazardous machinery or processes, be it a railway company or a factory, or which delegates its activities to employees, or which distributes its wares far and wide, should expect to compensate those who may be injured, and to provide for such liabilities by insurance, thereby spreading the cost among all its customers. At first this attitude may have been more prevalent among juries than among judges: as was observed in 1880, 'Things that no one would dream of treating as negligence in the case of ordinary individuals are treated as negligence in the case of companies'.[136] It took somewhat longer for this spirit to move the judiciary and legislature as well. As late as 1959 it was said to be improper for a court to base liability on its knowledge that a particular litigant was insured;[137] and yet, after the introduction of liability-insurance in the last quarter of the nineteenth century,[138] most negligence actions were in reality defended by insurance companies, and the assumption that a prudent business should be fully insured may well have influenced courts tacitly in extending business liability.[139] The use of insurance also explains the tendency to escalate the sums recoverable in personal injury cases far beyond anything which an uninsured individual could hope to pay.

The notion that those who create risks should be treated as insurers might suggest that a regime of strict liability, in some contexts, would be preferable to one based on

[135] For the last see *Cox v. Ministry of Justice* [2016] A.C. 660; *Armes v. Nottinghamshire County Council* [2017] UKSC 60 (extended to contractors over whom D had a significant degree of control). In these cases D's means and the probability of insurance were treated as relevant factors. Liability for negligent contractors may also by imposed through the concept of non-delegable duties of care, which has 19th-century origins.

[136] 24 *Solicitors Jo.* 305 ('It is no use ordering new trials when the jury is sure to find the same way, and so the whole standard of what constitutes negligence gradually becomes warped').

[137] *Davie v. New Merton Board Mills* [1959] A.C. 604 at 626–7, per Viscount Simon. Before liability insurance became compulsory for motorists in 1930, it was unprofessional conduct (and a ground for a new trial) if counsel told a jury that D was insured: Lord Denning, *What's Next in the Law* (1982), p. 91.

[138] See Cornish & Clark, pp. 512–14. Liability insurance was at first resisted, even by reformers, as likely to reduce any incentive to take care: ibid. 524.

[139] It was an explicit factor in allowing carriers to exclude liability for valuables without extra payment: p. 383, ante. Lord Denning MR admitted openly that it was a factor in other cases: e.g. *Post Office v. Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363 at 375. In considering the reasonableness of a limitation clause, the court is now bound take into account the availability of insurance: Unfair Contract Terms Act 1977 (c. 50), s. 11(4)b.

fault. Such notions were not wholly foreign to nineteenth-century thought.[140] They were adopted by Parliament in 1897 in relation to factory and railway workers,[141] and the Victorian judges themselves developed new areas of strict liability in relation to public nuisance, the dangerous and non-natural user of property,[142] and breach of statutory duty.[143] Strict liability seemed for a while to be the appropriate regime for motor-vehicles, which were inherently dangerous,[144] but that approach gave way in the face of their growing normality; by 1913 around 14,000 were manufactured every year in England. Legislation to introduce a no-fault compensation regime was recommended in relation to all personal injuries by a royal commission in 1978,[145] and a European agreement led to a step in that direction in relation to defective products.[146] But the idea has still not generally displaced the tort of negligence.

The ever-increasing number and variety of negligence cases led to suggestions in the later twentieth century of a further change of approach to delimiting the duty of care. The earlier twentieth-century treatises, like the abridgments of the eighteenth century and Beven's treatise of 1889, had done little more than arrange lists of apparently unrelated cases in which duties had been recognized. Beven identified no fewer than fifty-seven varieties of duty, and the list was ever expanding. However, in the 1970s the House of Lords declared that the general 'neighbour' principle should be understood as imposing a duty of care in all cases, unless there was some reason of policy why it should not.[147] Indeed, some went further and said that the courts should always follow the broad principle, even if they foresaw undesirable consequences in a given case, and leave it to Parliament to redraw the lines.[148] That proposition marked the apotheosis of negligence as a basis for liability in tort. But it proved to be too sweeping, and it was followed by a return to the incremental approach more characteristic of the common law.[149] There has also been a reaction in the present century, from both the judges and the legislature, against a perceived 'compensation culture'. The 'deterrent effect of potential liability' may make activities and services which are desirable, and were once generally acceptable, too financially risky to be continued, or too expensive (by reason of the

[140] For Edwin Chadwick's proposals in the 1830s and 1840s see Cornish & Clark, p. 515.

[141] Workmen's Compensation Acts 1897 (60 & 61 Vict., c. 87) and 1906 (6 Edw. VII, c. 58).

[142] *Rylands v. Fletcher* (1866), p. 462, post. The judges were at first willing to include railway engines under this head (*Jones v. Festiniog Rly Co.* (1868) L.R. 3 Q.B. 733), though most railways could shelter under a statutory authority to use steam-engines.

[143] See p. 445, ante.

[144] Using traction engines and motors on roads could be deemed both dangerous and non-natural, and there was an element of public nuisance as well: *Watkins v. Reddin* (1861) 2 F. & F. 629; *Galer v. Rawson* (1889) 6 T.L.R. 17; *Gibbons v. Vanguard Motorbus Co.* (1908) 25 T.L.R. 14; J. R. Spencer, 42 CLJ 65.

[145] Report of the Royal Commission on Civil Liability and Compensation for Personal Injury [Pearson Report] (1978) Cmnd 7054. The case was strongly supported by Lord Denning: *What's Next in the Law* (1982), pp. 126–32. But the proposals were shelved.

[146] Consumer Protection Act 1987 (c. 43).

[147] *Home Office v. Dorset Yacht Co.* [1970] A.C. 1004 at 1026, per Lord Reid; *Anns v. Merton London Borough Council* [1978] A.C. 728 at 751–2, per Lord Wilberforce.

[148] *McLoughlin v. O'Brian* [1983] 1 A.C. 410 at 430–1, per Lord Scarman.

[149] See *Peabody Donation Fund (Governors) v. Sir Lindsay Parkinson & Co.* [1985] A.C. 210, esp. at 240; *D & F Estates Ltd v. Church Commrs* [1988] 1 All E.R. 992; *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605; *Murphy v. Brentwood District Council* [1991] 1 A.C. 398. In more recent cases there has been a tendency to elide the duty of care with causation and remoteness, treating them all as questions of foreseeability: J. Goudkamp, 76 CLJ 480.

need to insure) to be undertaken by public authorities.[150] It was therefore enacted in 2006 that, in considering a claim in negligence, a court may have regard to whether taking steps to meet a standard of care might prevent a desirable activity being undertaken or might discourage persons from undertaking functions 'in connection with a desirable activity',[151] and in 2015 that it *must* have regard to whether the defendant was 'acting for the benefit of society or any of its members'.[152] Whether these principles of social good represent a departure from common-law notions of reasonableness remains to be seen.

Further Reading

Milsom, *HFCL*, pp. 305–13, 392–400
Manchester, *MLH*, pp. 281–97
Cornish & Clark, pp. 486–541
Ibbetson, *HILO*, pp. 57–70, 155–201
P. H. Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 LQR 184–201
C. H. S. Fifoot, *Judge and Jurist in the Reign of Victoria* (1959), pp. 31–56
M. J. Prichard, 'Trespass, Case and the Rule in Williams v. Holland' (1964) 22 CLJ 234–53; *Scott v. Shepherd (1773) and the Emergence of the Tort of Negligence* (SS Lecture, 1976)
M. S. Arnold, 'Accident, Mistake and Rules of Liability in the 14th Century Law of Torts' (1979) 128 *Univ. Pennsylvania Law Rev.* 361–78; 'Towards an Ideology of the Early English Law of Obligations' (1987) 5 LHR 505–21; *Select Cases of Trespass from the King's Courts 1307–99* (100 SS, 1985; 103 SS, 1987)
J. L. Barton, 'Liability for Things in the 19th Century' (1984) in *Law and Social Change*, pp. 145–55
D. Kretzmer, 'Transformation of Tort Liability in the 19th Century' (1984) 4 OJLS 46–87
J. Oldham, 'Negligence' (1992) in *Mansfield MSS*, II, ch. 18; 'Negligence' (2004) in *ECLM*, pp. 276–91
S. G. Gilles, 'Inevitable Accident in Classical English Tort Law' (1994) 93 *Emory Law Jo.* 575–646
J. H. Baker, 'Trespass, Case and the Common Law of Negligence 1500–1700' (2001) in *Negligence* (22 CSC), pp. 47–71 (repr. in *CPELH*, III, pp. 1335–60); 'Trespass and Case' and 'Negligence and Fault' [1483–1558] (2003) in *OHLE*, VI, pp. 751–67
P. Birks, 'Negligence in the 18th Century Common Law' (2001) in *Negligence* (22 CSC), pp. 173–227
D. J. Ibbetson, 'The Tort of Negligence in the Common Law in the 19th and 20th Centuries' (2001) in Negligence (22 CSC) pp. 229–71
M. A. Stein, '*Priestley v. Fowler* (1837) and the Emerging Tort of Negligence' (2003) 44 *Boston College Law Rev.* 689–731
M. Lobban, 'The Structure of Tort Law', 'Negligence', 'Personal Injuries', and 'Workplace Injuries' [1820–1914] (2010) *OHLE*, XII, pp. 879–1032
P. Mitchell, *A History of Tort Law 1900–1950* (2015)

[150] *Tomlinson v. Congleton Borough Council* [2004] 1 A.C. 46. Cf. *Whitehouse v. Jordan* [1980] 1 All E.R. 650 at 658, per Lord Denning MR (as to medical cases).

[151] Compensation Act 2006 (c. 29). Section 1 is headed `Deterrent effect of potential liability', though this phrase is sometimes used in a positive sense, in arguing against no-fault compensation regimes, to denote its restraint on negligent behaviour.

[152] Social Action, Responsibility and Heroism Act 2015 (c. 3).

24

Nuisance

If 'trespass' proved a useful word to lawyers because it was capable of describing a wide variety of wrongs, so to a lesser extent did 'nuisance'.[1] Both began life as ordinary words with no inherent technical significance. Nuisance means annoyance, and for legal purposes it comprises a range of unlawful disturbances. It could be regarded as a species of trespass, a word of even wider ambit, but it could not in its usual sense be trespass *vi et armis*. When, in the mid-fourteenth century, the central courts began to entertain actions of trespass on the case, nuisance was indeed brought within the scope of trespassory remedies; but it had already enjoyed a separate legal existence, both in local courts and in a number of older actions in the central courts, and it was from these earlier forms of action that the original legal character of nuisance derived. It was a wrongful disturbance of the enjoyment of real property, or of its appurtenances, or of rights over real property (such as easements), falling short of a forcible trespass or ouster.

Remedies for Nuisance

The earliest common-law remedies for nuisance were devised to supplement the real actions in two types of case. The first was an interference with a right to partial enjoyment of another's land – the kind of right which *Bracton*, following Roman law, called a servitude – such as a right of way or pasture. It was not a right to seisin of the servient land itself, and so, instead of the writ of right to recover the land, the owner of the servitude was given an analogous *praecipe* writ to recover the right over the land. Such a writ instructed the sheriff to order the defendant that he permit (*quod permittat*) the plaintiff to have his pasture, or right of way, or whatever. A variant of the writ *quod permittat* lay to permit the plaintiff to abate a nuisance: for instance, to knock down a wall built across his right of way (*quod permittat prosternere murum*), or to restore a diverted watercourse. The second situation needing a supplementary remedy was an interference by indirect means with enjoyment of the land itself. For instance, if a neighbour stopped up a watercourse on his own land so that the plaintiff's land was flooded, or left his land unfenced so that cattle strayed onto the plaintiff's land, this could not be called a disseisin of the plaintiff, or a trespass upon his land, since it was merely the indirect consequence of something done on the wrongdoer's own property. In these cases too the injured freeholder could obtain a remedy by *quod permittat,* or something analogous. The writ *de curia claudenda,* for instance, lay to compel the defendant to enclose or fence his land,[2]

[1] The Latin root of 'nuisance' (*nocumentum*) is the imprecise verb *nocere* (to hurt or harm), from which come also 'annoyance' and 'noise' and the adjectives 'noisome' and 'noxious'.

[2] The word *curia* meant a courtyard, but the action came to lie in respect of any neighbouring land or 'close'. Cf. p. 453 n. 11, post.

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'which is open, to the nuisance of the free tenement' of the plaintiff; and the writ of *reparari facias* lay to compel the repair of seawalls or ditches.

The Assize of Nuisance

The lost legislation which established the assize of novel disseisin in the reign of Henry II is thought to have contained a reference to acts done to the nuisance of a free tenement. At any rate, there was from about that time a species of the assize, later called the assize of nuisance, which lay to abate a nuisance. Like the assize for land, it may have originated as a remedy against lords, in this case for refusing pasture to tenants entitled to have it.[3] But it soon became divorced from the feudal context, and the interests protected by it were to some extent assimilated to property rights. The party aggrieved by a nuisance had a limited right of self-help analogous to the disseisee's right of re-entry. He could enter the servient tenement and abate the nuisance, or (if practicable) continue to exercise his servitude notwithstanding the obstruction. After the limitation period had expired, the right of self-help by means of abatement was converted into a bare right of action, the appropriate action being a *quod permittat*. But the de facto enjoyment of what was being obstructed could be restored, in the same way as seisin of the land could be restored, by an assize. The plaintiff in the assize of nuisance complained that he had been disseised of his common of pasture, or right of way, or whatever, or that the defendant had done some act to the nuisance of his free tenement. Recognitors were then summoned to view the tenement and to enquire whether there had been a disseisin or nuisance as alleged. If they found for the plaintiff, the defendant had to abate the nuisance and pay damages. The assize lay not only for nuisances to land, but also for disturbing a franchise such as a market, or rights of common, and by a statute of 1285 it was extended to other profits *à prendre*, tolls, and offices.[4] But the assize availed only freeholders; it lay only against freeholders; and some species of nuisance to land were arbitrarily excluded. A wider range of nuisances was protected by *quod permittat*,[5] and by viscontiel writs to initiate suits in the county court which were then removable into the Common Pleas by *pone*.

Just as the assize of novel disseisin gained popularity at the expense of the writ of right and *praecipe*, so the assize of nuisance replaced the *quod permittat* for most purposes;[6] the latter remained in use only where the nuisance was no longer novel, or where one of the original parties had died, or where the subject-matter was not within the assize. By the later fifteenth century, however, both actions were almost completely out of use. They had gone the way of all the older actions and were being replaced by trespass.

Nuisance and Trespass

The assize and *quod permittat* were not conceived of as comprehensive remedies for nuisance. When they were first introduced, minor differences between neighbours

[3] S. F. C. Milsom, introduction to Pollock & Maitland, I, pp. xlii–xliii.

[4] Stat. Westminster II 1285, c. 25. As to offices see further p. 460, post.

[5] E.g. damage by fumes from a limekiln: *Dalby v. Berch* (1330) Y.B. Trin. 4 Edw. III, fo. 36, pl. 26.

[6] In 1382 it was made an alternative to the viscontiel writ of nuisance: Stat. 6 Ric. II, sess. i, c. 3. The assize put the cost of abating the nuisance on the defendant: *Rikhill's Case* (1400) B. & M. 640 at 642, per Skrene sjt; Richard Sutton's reading (1494) 102 SS 118.

were meant to go to local courts: to the county, the hundred, the borough, or the manorial court. The king's justices were not to be bothered with smelly privies and the like.[7] When attempts were made in the fifteenth century to explain the restricted scope of the common-law remedies, mere 'nuisance to the person' was distinguished from nuisance to land; smell and noise were in the former category.[8] Actions for causing personal discomfort, as is shown by the *audies* form of the viscontiel writ of nuisance, were seen as complaints of wrongs rather than demands; in other words, they were actions of 'trespass' in the broadest sense of the term. It was not the kind of trespass for which the general *vi et armis* writ was available, unless the defendant forcibly impeded the plaintiff or actually invaded his close; but a series of fourteenth-century writs alleging forcible nuisances to watercourses may well conceal a stretching of remedies to fill gaps.[9] Once the necessity to allege force and arms was dispensed with, the action on the case for nuisance provided a less underhand remedy.

In 1342 an action on the case was brought to recover damages for flooding suffered as a result of failure to repair a sea-wall. The nonfeasance was a legal wrong because it was in breach of a customary duty attaching to certain tenements near the sea, and despite the objection that the proper remedy was *reparari facias* the plaintiff succeeded in recovering not only damages but also an order to repair.[10] The order of specific performance was challenged unsuccessfully by a writ of error; but doubtless it was irregular in trespass, and that aspect of the precedent was not followed. Damages would usually suffice, and if further damage was incurred a new action could be brought. Forty years later case was allowed instead of *curia claudenda* for failing to repair a hedge in the open country.[11] Actions on the case for failing to repair roads, bridges, and fences, and for failing to clean out ditches and watercourses, abound in the plea-rolls and year books after this period. Other early actions on the case covered a range of situations where the assize did not lie; for instance, where the nuisance was perpetrated by someone other than the freeholder, or where the plaintiff was a lessee for years, or where the nuisance was over and done with before the action was brought, or where the nuisance was of a 'personal' nature, such as noise or smell.[12]

The initial role of actions on the case in this area, as in others, was to fill gaps in the existing common-law remedies, thereby bringing cases to Westminster which formerly had gone to local courts. Therefore the argument that case could not be brought where there was already a remedy by *praecipe* – the argument which, as we have seen, was deployed against the use of case instead of debt, detinue, and covenant – was also raised

[7] *Novae Narrationes* (80 SS), p. xcviii, and p. 202, no. C107. Examples in London: *Luter v. Ware* (1341) *London Assize*, p. 88, pl. 364; *Asshecombe v. Accon* (1400) ibid. 174, pl. 645. See also *Yonge v. Chadenesfeld* (1378) ibid. 160, pl. 617 (vibrations and smoke from an armourer's forge).

[8] Case at Richard Sutton's reading (1494) B. & M. 644; 102 SS 117; 105 SS 291–2.

[9] E.g. *Lowth v. Abbot of Lesnes* (1317) 103 SS 348 (diverting and polluting water); *Abbot of Louth Park v. Parson of Somercotes* (1329) ibid. 351 (villagers filling in dike and diverting water); *Prior of Hatfield Peverel v. Willynghale* (1364) ibid. 352 (diverting water from mill). See also M. S. Arnold, 100 SS lxxxvii–lxxxviii.

[10] *Bernardeston v. Heighlynge* (1342–44) B. & M. 381; 32 SS 309; 103 SS 457.

[11] *Newynton v. Legh* (1388) Y.B. Hil. 11 Ric. II, p. 140, pl. 6. It was argued that *curia claudenda* itself lay only for hedges between houses and their courtyards.

[12] E.g. the case of the dunghill in Cheapside, cited in an Inner Temple reading temp. Edw. IV: B. & M. 644.

as an objection when plaintiffs sought to use it in place of the assize of nuisance.[13] As in the sphere of contract, the practical impact of this objection remains uncertain, because the plea-rolls of the fifteenth and sixteenth centuries contain numerous undetermined actions which appear to defy the theory. The cautious pleader often bolstered his case by alleging consequential loss of profit, and even deceit,[14] and by such means the use of trespass on the case became commonplace. It was settled by the end of the fifteenth century, in both benches, that case would lie for diverting watercourses from water-mills.[15] That was the commonest case of nuisance in the rolls, and a case where loss of profit would be obvious.

As in other contexts, a reaction against the spread of the new remedy began in the early Tudor period,[16] and in the second half of the century the now familiar story of disagreement between the Common Pleas and the King's Bench enveloped nuisance as well. In 1566 the Common Pleas made a definite stand in a clear case: an action on the case could not be used instead of the assize where a freeholder completely blocked the right of way of another freeholder.[17] In a stream of pronouncements beginning soon afterwards the King's Bench, predictably, rejected that view and gave the plaintiff an election between case and the assize.[18] The arguments which were advanced in the course of the controversy closely resemble those over the expansion of *assumpsit* and *trover*. The King's Bench was content with formal propriety, ensured by the allegations of deceit and special loss, which were non-traversable. The common-form allegation that a defendant who committed a nuisance did so 'craftily scheming to defraud' the plaintiff of the use, enjoyment, or profit of his land, has a fictional flavour when constantly repeated, though it might more often have resembled the truth in nuisance than in *assumpsit*. The Common Pleas did concede that special loss would justify an action on the case, since it could not be recovered in the assize, and here again genuine special loss (such as the miller's lost profit) was likely to be present in the commonest cases. The dispute about overlapping remedies was therefore at its flimsiest in the context of nuisance, and that is doubtless why it was in this context resolved the soonest. Although the Exchequer Chamber took to reversing King's Bench judgments in the 1590s, it decided in 1601 – with only two judicial grumbles – that case would lie for enclosing a common.[19] This seems, in effect, to have put an end to the assize of nuisance.

[13] See e.g. *Rikhill's Case* (1400) B. & M. 640; *Right's Case* (1455) ibid. 642. In the former case Rikhill and Brencheley JJ abstained, being plaintiffs (as feoffees to uses), and their colleagues decided against them.

[14] For examples see *OHLE*, VI, p. 776.

[15] *Prior of Christ Church, Canterbury v. Hore* (1493) B. & M. 644; *Lord de Grey's Case* (1505) ibid. 646, and endnote; *Anon.* (1546) Harpur Rep. (124 SS), p. xxxiii, pl. 4. These were CP cases. For the KB see *OHLE*, VI, p. 776.

[16] *Orwell v. Mortoft* (1505) B. & M. 448 at 451, per Kingsmill J; *Anon.* (1522) ibid. 646. In *Dod v. Nedeham* (1525) CP 40/1048A, m. 408, the court took advisement for 4 terms after verdict and no judgment was entered.

[17] *Yevance v. Holcombe* (1566) B. & M. 648; *Beswick v. Cunden (No. 2)* (1596) Cro. Eliz. 520. Dyer CJCP may have been responsible for sharpening the hostility to actions on the case: 109 SS xxvi.

[18] *Russell v. Handford* (1583) 1 Leon. 273; *Anon.* (1587) B. & M. 648, and endnote; *Alston v. Pamphyn* (or *Pamfield*) (1596) Cro. Eliz. 466*; BL MS. Harley 4998, fo. 172 (where Popham CJ said he had known 100 such cases).

[19] *Cantrell v. Churche* (1601) B. & M. 649; Cro. Eliz. 845; Noy 37. The grumblers were the arch-conservatives Walmsley J and Peryam CB, but even they 'did not dissent strongly' (B. & M. at 651).

A finer point of disagreement between the courts concerned the old subject of nonfeasance, presented here in a new guise: whether a landowner was liable in case for passively continuing – that is, not putting an end to – a nuisance already existing on his land when he came into possession. In 1572 the Common Pleas accepted that an action would lie if there was any act of adoption,[20] but that was the limit of their tolerance. No action, in their opinion, would lie for a passive continuance.[21] Their main reason was the general one, that case could never be used where there was an existing writ in the register,[22] and in this case the plaintiff could use *quod permittat*.[23] But the King's Bench in 1582 took the contrary view that a passive continuance was actionable in case,[24] and this was confirmed by the Exchequer Chamber in 1594.[25] The liability was confined, however, to continuing a man-made nuisance. An occupier was not considered liable for nuisances arising solely from natural causes until 1967.[26]

The Nature of Nuisance

Once actions on the case had not only supplemented but supplanted the assize, the proprietary and the personal aspects of nuisance both came together under the same legal heading. In fact the word 'nuisance' was rarely used in the pleadings in actions on the case, but the frequency of such actions raised the need for some general principle governing disputes about good neighbourliness. It was found in the maxim, adapted from the Roman jurist Ulpian, that a man should so use his own property as not to injure that of others: *Sic utere tuo ut alienum non laedas*. But the application of so broad a principle could be a matter of serious uncertainty, since it suggested a balancing of interests rather than the identification of rights which could be owned. A man might build on his own land according to the dictates of his own taste. But might he build so as to block his neighbour's light and air, to spy on his private life, or to obstruct his view? When did a bad neighbour become a legal nuisance? A convenient way of solving such problems of policy was to divide the interests protected by actions for nuisance into those classifiable as property rights, acquired by grant or prescription, and those which were the natural incidents of land ownership in general.

[20] *Moore v. Browne* (1572) Dyer 319 (Browne JCP diverted P's water with a pipe, and his widow was held liable because she had continued to use it after his death).

[21] *Beswick v. Cunden (No. 2)* (1596) Cro. Eliz. 520; Moo. K.B. 353.

[22] This was also the main argument in *Slade's Case*, which began in 1595: p. 366, ante.

[23] P had already brought *quod permittat*, but it had failed on technical grounds: Noy 68. The assize would not lie for nonfeasance: Sutton's reading, 102 SS 117.

[24] *Rolfe v. Rolfe* (1582) Coke's autograph notebook (135 SS), no. 54; 4 Co. Rep. 101. Cf. *Beswick v. Cunden (No. 1)* (1595) Cro. Eliz. 420 (nuisance caused by D in time of P's predecessor in title).

[25] *Edwards v. Holmedon* (1594) Coke's notebook, BL MS. Harley 6686A, fo. 92 (in error from the Exchequer); sub nom. *Edwards v. Halinder*, B. & M. 664 (rotten floor in warehouse demised to D as safe, though D had acted by placing heavy stores on it). See also *Rippon v. Bowles* (1615) 1 Rolle Rep. 221; Cro. Jac. 373 (Coke CJ dissenting); *Brent v. Haddon* (1619) Cro. Jac. 555. These were all actions against lessees, who had no authority to remove nuisances inseparable from the freehold.

[26] *Goldman v. Hargrave* [1967] 1 A.C. 645; *Leakey v. National Trust* [1980] Q.B. 522. In *Boulston v. Hardy* (1597) 5 Co. Rep. 104, it was even held that a landowner was not liable for damage done by rabbits from the burrows he had made on his own land, the rabbits being wild animals which could be killed by the neighbour.

Acquired Rights: Easements and Profits

The words 'easement' and 'profit' began as ordinary words describing the various advantages which might be enjoyed by an owner of property vis-à-vis neighbouring land, whether arising by grant, by prescription, or by operation of law. A plaintiff in trespass on the case for nuisance commonly alleged a loss of *proficuum* (profit), *commodum* (advantage), and *aisiamentum* (easement), at first making no obvious distinction between them; and the same words could just as well be used in a contract case to denote the profit and advantage of a bargain.[27] But the word 'easement' came to be confined to such rights as were distinct property rights in themselves, and not merely universal incidents to the ownership or occupation of land. Easements were then distinguished from profits *à prendre*, servitudes which included a right to take something from the servient tenement: for instance, a common of pasture or fishery. Examples of easements in the narrow sense are rights of way, rights to light, and rights to receive a flow of water or air. These are not profits, for nothing is taken from another person; nor are they natural rights belonging to landowners in general, for they must be acquired by grant or prescription. And, unlike profits, they were not regarded as freehold rights for which the assize lay.[28]

The enumeration of interests which could subsist only as easements or profits was predicated upon an identification of the natural rights belonging to all landowners. Profits were never natural rights. Nor were rights of way, even if a piece of land would otherwise be inaccessible. The receipt of daylight to illuminate a house may once have been regarded as a natural right, acquired by building a house with unobstructed windows, and sunlight for a garden may have been similarly treated.[29] There is a precedent in 1521 of an action on the case for blocking lights by building, without showing any title to the flow of light.[30] But it was not until 1569 that a debate about rights to light was reported in full. A Londoner sued his neighbour for erecting a building which blocked the side windows of his house, and the defendant pleaded a custom of London to build so as to stop side windows. Counsel for the plaintiff said that 'when this light and air are taken from him, his house remaineth as a dungeon', and that the alleged custom was unreasonable since it would deprive the plaintiff of a necessity of life. Counsel for the defendant said that light and air received only through side windows were not necessaries; that the side windows in themselves infringed the defendant's privacy; and that new building was in the public interest, since the more populous London became the more honourable it would be.[31] The plaintiff succeeded.[32] The alleged City custom to allow

[27] *Makeley v. Ferrant* (1511) 94 SS *234* n. 8.

[28] *Anon.* (1360) Y.B. 34 Edw. III, Lib. Ass., pl. 13 (right of way). In this report easements and profits are already treated as distinct legal concepts.

[29] Y.B. Trin. 19 Edw. II, p. 679 (not enough light to work by); *Novae Narrationes* (80 SS), pp. xcviii and 203, no. C108 (no light). These were viscontiel actions. See also *Hulle v. Orynge* (1466) B. & M. 369 at 371, per Danby CJ (grass and crops deprived of sunlight by building); and the readings cited in *OHLE*, VI, p. 777 n. 14.

[30] *Dean and Chapter of Exeter v. Hamlyn* (1521) B. & M. 646 (record only). The count mentions the plaintiff's 'profit, commodity, and easement', but no grant or prescription is alleged.

[31] In a slightly later period, unrestrained building in the metropolis was seen as a threat to the quality of life and not merely as a sign of progress: see T. G. Barnes, 58 *California Law Rev.* 1332.

[32] *Hales' Case* (1569) B. & M. 652.

building which obstructed lights was obviously designed to facilitate building in cities, where almost all buildings would to some extent affect a neighbour's light. But the courts declined to allow such customs, except in relation to rebuilding on an existing foundation, for 'a man may build upon an old foundation by such a custom, and stop up the lights of his neighbour which are adjoining unto him; and if he make new windows higher, the other may build up his house higher to destroy those new windows: but a man cannot build a house upon a place where there was none before, as in a yard, and so stop his neighbour's lights'.[33] It followed that increasing the height of a building could not be prevented merely by a few years' priority in building nearby. Nor could a wholly new building be prevented by a neighbour who happened to have built first, unless he could prescribe for the lights since time immemorial. The successful plaintiff in 1569 did rely on the immemorial enjoyment of light through specified windows, and it soon became established that (failing a grant) a prescriptive claim to 'ancient lights' was necessary to support an action.[34] Light enjoyed through windows was no longer, therefore, a natural right belonging to anyone who built first. Similarly, the right to have support for a building, originally considered a natural right, could exist in later law only as an easement.[35] Some interests, however, even if they materially affected the value of property, were neither natural rights nor capable of being acquired as easements. Thus it was stated in 1587 that, although an action would lie for obstructing ancient lights, no action lay for 'a matter of pleasure only', such as a pleasant view, however long it had existed.[36]

When an easement or profit was obstructed, an action on the case lay as a matter of course. In later times an injunction could be obtained from the Chancery as well.[37] There was no need to balance the interests of the parties, or to introduce questions of policy, because there was in effect an interference with property.[38] Such a nuisance was therefore different in kind from interferences with the personal enjoyment of the incidents of occupying the land.

Natural Rights

The occupier of land was protected against forcible invasions of his close by the writs of trespass and forcible entry, and he was protected up to a point by nuisance actions

[33] *Hughes v. Keene* (1611) Godb. 183; also in Yelv. 215; 1 Buls. 115; E. Coke, *Entries* (1614), fo. 120 (P prescribes for ancient lights and alleges D's building to be upon a new site). See also *Bland v. Moseley* (1587) B. & M. 657 (custom of York held bad); *Hammond v. Alsey* (1592) cit. 1 Buls. 116 (custom to build on old foundation good). The London custom was abrogated by statute in 1832: *OHLE*, XII, p. 1072.

[34] *Bowry v. Pope* (1588) 1 Leon. 168; Cro. Eliz. 118 (window only 30 years old). Cf. *Cox v. Matthews* (1672) B. & M. 664 (unnecessary for P to allege that lights were ancient; but some title to be shown in evidence). Under the Prescription Act 1832 an indefeasible right to light could be acquired after 20 years: *Tapling v. Jones* (1862) 12 C.B.N.S. 826. For the later law see Lobban, *OHLE*, XII, pp. 1071–9.

[35] *Palmer v. Fletcher* (1663) 1 Lev. 122; 1 Sid. 167. The right to support for the land itself remained a natural right.

[36] *Bland v. Moseley* (1587) B. & M. 657 at 658, per Wray CJ. The custom of London had always permitted a view to be blocked by building: *London Assize*, p. xxv.

[37] Lobban, *OHLE*, XII, pp. 1071, 1074, 1106–11.

[38] The right to light became a partial exception, because building in towns would be impossible if slight infringements were tortious: *A.-G. v. Nichol* (1809) 16 Ves. 338; McLaren, 3 OJLS at 184. The test came to be whether sufficient light was left according to the ordinary notions of mankind: *Kelk v. Pearson* (1871) L.R. 6 Ch. App. 809. But this raised doubts as to whether the right to light was indeed a property right.

against the indirect disturbance of his environment. Where noxious matter came onto the plaintiff's land indirectly by reason of the dilapidated state of the defendant's premises, the collapse or putrefaction of something placed near the boundary, the flow of water, force of wind, or permeation of damp and mould, this was not a trespass *vi et armis*; but, if damage resulted, a remedy might be sought by an action on the case.

Several such cases are to be found in the plea rolls from the later fourteenth century onwards. Defendants built so near the edge of their land that water dripped onto the plaintiff's house and caused damage, or put filth in a stream and polluted the plaintiff's water supply, or dumped putrid refuse so near the boundary that the plaintiff's house was infected or rendered uninhabitable. The action on the case for pollution became a common form of nuisance suit, and was the chief defence against the hazards of infection caused by noxious trades when there were minimal public health regulations and the standards of hygiene were low. It was brought against butchers who did not adequately dispose of blood, offal, and carrion. It was brought against tanners and glovers whose limekilns emitted poisonous fumes which destroyed pasture and fruit and spoiled drinking water, and against dyers for corrupting the air and water with their chemicals. It was also brought against private householders for keeping leaky or ramshackle latrines in inconvenient places.[39] It seems that a nuisance might even be committed by failing to remove noxious matter from the plaintiff's property, where there was a legal duty to do so; for instance, where tithes of milk and butter were set aside and the rector did not collect them until they were rancid and mouldy. To this further species of nuisance by nonfeasance belongs, perhaps, a novel tort envisaged in 1569: 'if one who has a horrible sickness be in my house, and will not depart, an action will lie against him; and yet he taketh not any air from me, but infecteth that which I have'.[40] The remaining on the land was a trespass, but the infection of the air was a nuisance.

The 'personal' nuisances remedied by the action on the case included noise and vibrations (typically from a smith's forge) and smell, which raised the fear of infection; these were recognized from the beginning, because they had earlier been remedied in local courts. But there was room for speculation about the precise extent of liability for nuisances affecting the senses. Not every inconvenience could be the subject of legal redress. The law had to strike a balance between the freedom to do as one liked with and upon one's own property, and the duty not to injure one's neighbour's interests. Noise was considered in an early Elizabethan case where a barrister brought an action against a nearby schoolmaster because the 'jabbering of the boys' (*le jabber de boys*) disturbed the quiet of his study. The action failed, however, on the ground that it was lawful to set up school anywhere; and the lawyer had to move his study to another side of the house.[41] Protection against noise was thus not absolute: the utility of the defendant's conduct, and the means of avoiding damage, were relevant factors. In the case of smell, pleaders did well to emphasize the danger of infection as well as distastefulness

[39] E.g. *Roberth v. Lynche* (1505) KB 27/976, m. 93 (filth and urine projected *vi et armis* onto P's land); *Broune v. Franceys* (1521) CP 40/1031, m. 108 (blocked vent in privy, causing odours which drove customers away from P's inn); *Dean and Chapter of Exeter v. Hamlyn* (1521) B. & M. 647.

[40] *Hales' Case* (1569) B. & M. 652 at 653, per Mounson. The mouldy cheese problem was discussed in *Wiseman v. Denham* (1623) Palm. 341; Ley 69.

[41] *Jeffrey's Case* (*c.* 1560) B. & M. 652. John Jeffrey was later chief baron of the Exchequer.

to the senses; fresh air was a matter of health as well as mere comfort or pleasure. In a leading case of 1610, the defendant had erected a pig-sty so near the plaintiff's land that 'a fetid and unwholesome stink' flowed into his house and rendered it uninhabitable without risk of infection. Counsel argued that pigs were necessary as food, and that a man should not be 'so tender-nosed' as to object to their smell. But it was held that the action lay, not for interfering with comfort, but for infecting the air. Here again the plaintiff's interest was not absolute: as Warburton J hinted, the smell of stables might be treated differently.[42] Some interests were excluded altogether. There was, for instance, no right of privacy within one's home and garden at common law,[43] or to a pleasing view from one's windows.[44]

In all these cases weight was given to the utility or necessity of the defendant's conduct. Someone had to keep pigs, and schoolboys. The trades of brewer, butcher, dyer, and tanner were necessary to the common wealth, notwithstanding their unpleasant side-effects. It was unthinkable to ban such activities completely; yet a line had to be drawn where the damage was intolerable. The problem was fully discussed in 1629, in a case where a brewhouse was erected within six feet of the office of a bishop's registrar, and the fumes from burning sea-coal not only threatened the health of the inhabitants but allegedly corroded the registrar's papers and utensils. The court considered that it was not inherently unlawful to burn sea-coal, 'though it is not as sweet as wood', and that if a neighbour was too tender-nosed to endure the smoke he ought to leave.[45] Argument was consciously addressed to policy issues, such as the scarceness of timber for fuel. The action was allowed, nevertheless, because the fumes in this case were excessive by reason of their continuous emission and the damage they had caused to chattels.[46] From this point it became clear that if an activity amounted to a nuisance causing damage, it would be actionable regardless of its utility; and this has remained law until the present. Noxious activities must be carried out in such places and in such manner that they do not hurt individual landowners. But this required some consideration of pre-existing local conditions, for – as Jones J remarked in the 1629 case – a butcher's shop might be acceptable in Newgate shambles but not in Cheapside.[47] Those who came to live near a nuisance could not complain of the status quo.

Whether an activity amounted to an actionable nuisance was thus resolved into a question whether those affected by it ought reasonably to be expected to put up with it,

[42] *Aldred v. Benton* (1610) B. & M. 658 (1d. damages, with £9 19s. 11d. costs). Infectious smells had been considered in *R. v. Rockett* (1607) Exeter College MS. 93, fo. 62v.

[43] Rights to privacy were asserted under local customs: *Rutton v. Forbizor* (1302) Y.B. Mich. 30 Edw. I (RS), p. 23; 80 SS 85 (custom of Ludlow against opening side windows so as to see neighbour's 'privetez'); *Worthstede v. Bisshop* (1348) *London Assize*, p. 100, pl. 407 (similar custom in London); reading in Gray's Inn (1512) 93 SS 17, per Fyneux CJ (London). In London, windows over 16 feet above ground were permitted: *London Assize*, pp. xxv–xxvi.

[44] This could not be claimed even by immemorial usage: p. 457, ante.

[45] It was otherwise if the activity was unnecessary. In 1630 the judges and serjeants of Serjeants' Inn, Fleet Street, had the owner of The Dolphin prosecuted for annoying them with 'the stench and smell of their tobacco': E. B. Chancellor, *The Annals of Fleet Street* (1912), p. 278.

[46] *Jones v. Powell* (1629) B. & M. 660. Cf. *Poynton v. Gill* (1639) Rolle Abr., I, p. 89 (grass damaged by smoke from lead smelting). Sea-coal was no new problem: see *London Assize,* p. 617 (1378).

[47] B. & M. at 662, per Jones J. The shambles were back streets used for slaughtering cattle. Cf. *St Helens Smelting Co. v. Tipping* (1865) 11 H.L.C. 642 (fumes from smelting operations in Merseyside); Simpson, *Leading Cases*, ch. 7.

and this depended on the locality. The standard of reasonableness was, moreover, ever shifting. In Georgian and Victorian times it was held at a low level in thwarting attempts to check the unpleasant industrial processes considered vital to the nation's economy. But the problem of pollution in an industrial age was too large to be resolved by the accidents of private litigation, especially since industrial pollution was usually a public nuisance.[48] The most effective weapon proved to be public-health legislation, such as the statute which abolished London smog overnight.[49]

Disturbances

After the action on the case had replaced the assize for easements and profits, it was found convenient to use it also to replace the assize for franchises and offices. These latter seem remote from nuisance in the usual technical sense of the word, but the remedies were analogous and legally indistinguishable. Franchises, being mostly economic rights acquired by royal grant or prescription – such as markets and fairs – had been protected by a number of different writs. The form finally established for use against someone who set up a rival market was *quare levavit mercatum*: 'to show why *D* set up a market to the nuisance of *P*'s market'.[50] From an early date, however, trespass actions had also been used to protect market rights against interference falling short of setting up in competition.[51] Other kinds of monopoly, such as the manorial right of mill-suit, came to be protected by other forms of trespass.[52]

An office of profit, granted for life or in fee, was a freehold interest protected after 1285 by the assize.[53] The statute of 1285 said it was to be novel disseisin, treating an office as a kind of incorporeal property like a common of pasture, and (by analogy with commons) as a servitude over the place where it was performed. An office for this purpose was not the same as a mere contractual employment, since it had to be granted with words of limitation indicating that it was a freehold or inheritance. Most freehold offices were of a public character, though it was possible to bring the assize for a private office provided that it involved taking profits from land.[54] In 1555 an officer of the Common Pleas was allowed to bring the assize against an interloper, on the footing that his duties were exercised in a certain part of Westminster Hall and that seisin could be made out through the taking of fees in the place where he sat in court.[55] The assize for an office survived into the seventeenth century: for instance, in 1608 an assize was brought by the master of the king's tennis games, and the judgment was that he recover

[48] For the hurdle which this raised for individual plaintiffs see pp. 463–4, post.

[49] Clean Air Act 1968 (c. 62).

[50] E.g. *R. v. Commonalty of Shrewsbury* (1314) 100 SS 108. Cf. 80 SS c–cii.

[51] See p. 481, post. [52] See p. 480, post.

[53] Stat. Westminster II (1285), c. 25. For the tort of interfering with a public office see also P. H. Winfield, 56 LQR 463.

[54] *Cut v. Preston* (1329) 97 SS 343 (park-keeper); *Wood v. FitzRichard* (1356) Y.B. 30 Edw. III, Lib. Ass. pl. 4 (manorial bailiff and hayward). Appointing a shepherd for life did not confer freehold, because it related only to chattels: Inner Temple moot (1492) 102 SS 104; 105 SS 257.

[55] *Vaus v. Jefferne* (1555) CP 40/1162, m. 955; Dyer 114. Vaus, a filazer, had a specific place to sit next to the post at the upper end of the court, and the jury viewed it; but it turned out he had been dismissed for absence. The precedent was followed by Richard Brownlow, chief prothonotary, in a case of 1615: Baker, *Magna Carta*, p. 422.

his seisin in the tennis courts (*in spheristiis*).[56] But where there was no complete usurpation of an office, or where the claimant had no prior seisin, or where there was no location in which seisin could be laid, an action on the case was appropriate; and, as in other contexts, case came to be regarded as a more convenient remedy even where the assize did lie. Case for disturbance in an office, modelled on case for nuisance, nevertheless enjoyed but a short life. A better and less restricted remedy was soon found in the form of a quasi-contractual claim for the intercepted fees, the count in *assumpsit* for money had and received.[57]

The disappearance of freehold offices made actions concerning title to office obsolete. But the action on the case was not confined to the kinds of disturbance covered by the assize. It could be brought for disturbing miscellaneous interests which would otherwise go unprotected: for instance, the right to sit in a particular pew in a church, which was a kind of easement over the parson's freehold.[58] The development of this innominate class of actions for disturbances reached a high point in the constitutional case of *Ashby v. White*, which settled the right of a parliamentary elector to sue a returning officer who wrongfully refused to receive his vote. The pleadings show an affinity with more conventional nuisance and disturbance actions, but the right to vote was not strictly a property right[59] and the majority of King's Bench judges thought the action would not lie because it was unprecedented. Holt CJ, in a stirring opinion which was later upheld by the House of Lords, dissented on the grounds that 'if the plaintiff has a right he must of necessity have the means to vindicate it, and a remedy if he is injured in the enjoyment or exercise of it'.[60] *Ubi jus ibi remedium*. Even so, the action for disturbance would not avail a plaintiff who could not assert some legal right. Purely economic nuisance, in the absence of a franchise, custom, or prescriptive privilege, was not actionable.[61]

Isolated Occurrences

Since the essence of nuisance was an interference with the enjoyment of property, it was usually a continuing wrong. The plaintiff's inconvenience and damage were increased by the duration of the nuisance, and the older remedies depended on its continuance until the action was brought, because their object was abatement. In the action on the case, however, it was irrelevant whether the act complained of was spent or continuing, since the object was compensation. Each time rain dripped from the defendant's eaves onto the plaintiff's house there was a new nuisance, for which an action would lie.[62] It ought, therefore, to have been possible to bring an action on the case for a single unrepeated catastrophe constituting a substantial nuisance.

[56] *Webbe v. Knivet* (1608) 8 Co. Rep. 45. [57] See pp. 395–6, ante.

[58] *Harvey v. Percivall* (1606) Coke's *Entries*, fo. 8, pl. 7; *Dawney v. Dee* (1620) Cro. Jac. 605; 2 Rolle Rep. 139; Palmer 46.

[59] Although confined at that date to landowners, by virtue of the property qualification, it did not attach to specific pieces of land.

[60] *Ashby v. White* (1703) 2 Ld Raym. 938 at 953. Cf. *Paty's Case* (1705) p. 510, post (imprisonment by the Commons for bringing such an action).

[61] See pp. 479–81, post.

[62] *Rippon v. Bowles* (1615) Cro. Jac. 373 ('the falling of every shower of rain is a new nuisance').

The possibility was realized in 1704. A householder had failed to repair the wall of his privy, and when the wall collapsed the filth flowed into the plaintiff's cellar and contaminated his beer and coal stores. Holt CJ applied the *alienum non laedere* principle, and allowed the action.[63] It could have been regarded as a trespass to the plaintiff's land, as in the *Case of Thorns* (which was cited), because the defendant had not shown that he had taken care to avoid the incursion. Yet there was no deliberate or direct act comparable to clipping thorns; it was really an action for negligence. Although there was no suggestion of strict liability,[64] it was later seen as a precedent for a distinct kind of liability for escapes. In *Rylands v. Fletcher* in 1866 the House of Lords applied to this category the strict liability previously established for the escape of fire and animals, enlarging it into a general rule of strict liability for damage caused by the escape of something brought onto adjoining land which is liable to do mischief.[65] Since that decision, escapes have constituted a separate category in the law of torts. Liability is imposed without proof of negligence, and the plaintiff need not be an occupier of land; moreover, since liability flows from the escape rather than from negligent conduct, the defendant may be answerable for the acts of an independent contractor. Liability for 'escapes' was extended far beyond the traditional scope of nuisance to include damage caused by sparks from a railway engine, electrical currents, and the collapse of a flag-pole in Hyde Park, though an attempt to apply it to skidding motor-vehicles failed.[66] But then there came a reaction against imposing liability without fault. The judges declared their unwillingness to extend the tort of strict liability to escapes arising from the 'natural' use of land, or to calamities which did not involve matter escaping from premises.[67]

Common or Public Nuisances

The word 'nuisance' was also used in the criminal law, where it described the wide class of misdemeanours said to be committed 'to the common nuisance of the king's liege subjects'.[68] The scope of common nuisance was wider than that of private injury to land, although there were close parallels. The rights of the general public to use the highway and the navigable river were analogous to easements, in that to pollute, obstruct, or encroach upon them was an indictable nuisance.[69] And many forms of private nuisance became public when committed in a city or town; for example, piling rubbish in public places so as to increase the risk of plague, setting up butcher's stalls in the street and

[63] *Tenant v. Goldwin* (1704) 2 Ld Raym. 1089, 3 Ld Raym. 324; 6 Mod. Rep. 311. P seems to have been an innkeeper.

[64] The declaration alleged a 'want of due care', and Holt CJ said that 'every man must take care to do his neighbour no damage'.

[65] *Fletcher v. Rylands* (1866) L.R. 1 Exch. 265; affd sub nom. *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 (bursting reservoir); Simpson, *Leading Cases*, pp. 195–226; Manchester, *MLH*, pp. 297–301.

[66] See J. R. Spencer, 42 CLJ 65.

[67] See *Rickards v. Lothian* [1913] A.C. 263 (escape of water from lavatory cistern: natural user); *Read v. J. Lyons & Co. Ltd* [1947] A.C. 156, [1946] 2 All E.R. 471 (explosion in a munitions factory causing injury on the premises: no escape).

[68] A nuisance merely to 'divers of the king's liege subjects' was not indictable: *R. v. Hayward* (1589) Cro. Eliz. 148.

[69] A partial obstruction, e.g. inserting a gate across a right of way, could also be a public nuisance: *Anon.* (*c.* 1535) 121 SS 327.

leaving entrails in the gutters, or generating industrial fumes.[70] The health hazards in a large city like London were enormous.[71] But the law of common nuisance could hardly be more advanced than the age which it served. Public awareness of hygiene was limited. The streets were full of horse manure, and even in the seventeenth century it was necessary to dissuade visitors to St Paul's cathedral from urinating in the doorways and aisles. Such unseemly conduct in public places – there being no public lavatories – was complained of as late as the 1730s.[72] The growth of industry filled the air of many towns with sulphur and soot, so that already by 1750 large industrial towns such as Sheffield were blackened with grime. These problems were not resolved by criminal prosecutions any more than by civil suits, though attempts were made from time to time.[73]

The law of public nuisance was not limited to health hazards. It could be used to control aspects of the environment not recognized in private law, as in the early seventeenth-century attempt to impose planning controls on London building.[74] Common nuisance comprehended such diverse wrongs as keeping a dovecote, using amplified sound at night,[75] beating feathers in the street,[76] damaging the highway with an excessively large goods vehicle,[77] and being a common scold. Bawdy houses and other places of ill repute[78] were indictable nuisances, and even decent inns and alehouses could be illegal if they exceeded reasonable local requirements. In 1671 a celebrity tightrope-dancer in the Strand, whom the judges had espied on their way to Westminster, was convicted of creating a public nuisance: apart from blocking the highway, he had inveigled apprentices from their shops and encouraged idle persons to stand and gape.[79] The manufacturing processes associated with the Industrial Revolution caused the same problems as those arising in private suits, and the same questions were raised about the utility of the enterprise and how to balance public and private interests.

The relevance of these miscellaneous criminal misdemeanours to the law of tort was that no private action could be brought to recover damages for a nuisance which was common to the whole locality. If it were otherwise, a wrongdoer might be subject to hundreds of actions for the same offence. The proper course was for an indictment to be preferred against the offender,[80] or – from the mid-eighteenth century – a 'relator action' in Chancery by the attorney-general to secure an injunction.[81] It was nevertheless conceded that a private action could be brought for any extraordinary damage which

[70] See e.g. B. & M. 661 n. 69, 663.

[71] For frequent litigation about latrines and sewers see Chew and Kellaway (ed.), *London Assize of Nuisance.*

[72] J. Weever, *Funeral Monuments* (1767 edn), p. 163; *An Essay on Decorations and Embellishments for the City of London* (1734).

[73] See e.g. *R. v. White* (1757) 1 Burr. 333; and similar cases discussed by Oldham, *ECLM*, pp. 252–9.

[74] Regulations were made by proclamation, but prosecutions (chiefly in Star Chamber) were for common nuisance: T. G. Barnes, 58 *California Law Rev.* 1332. In *A.-G. v. Ward, Barnes, and Smith* (1628) Hyde Rep., BL MS. Hargrave 27, fo. 112v, erecting new buildings in Drury Lane to the nuisance of the 'city' was adjudged a common-law offence, and the houses were ordered to be pulled down.

[75] *R. v. Smith* (1726) Stra. 704 ('speaking trumpet').

[76] *Anon.* (1770) *Ann. Reg. 1770*, p. 74 (conviction of a featherbed-maker).

[77] *R. v. Edgerley* (1641) March 135.

[78] E.g. a place for boxing and cock-fighting: *R. v. Higginson* (1761) *Ann. Reg. 1761*, p. 123.

[79] *R. v. Hall* (1671) 1 Vent. 169.

[80] *Note* (1465) Y.B. Pas. 5 Edw. IV, fo. 2, pl. 4, per Heydon.

[81] The attorney-general, as trustee of the public interest, brought such proceedings on the 'relation' of persons affected. For the rise of the relator action as an alternative to prosecution see J. R. Spencer, 42 CLJ at 66–73.

an individual suffered over and above that suffered by everyone else. In 1535 a plaintiff complained that the highway had been obstructed so that he had been prevented from reaching his close, which adjoined the highway. Baldwin CJ thought no action would lie, and recommended an indictment for public nuisance. But Fitzherbert J said that if a particular person suffered more harm or inconvenience than the generality he could maintain an action. For example, if someone fell into a ditch which had been dug across the highway, he should be allowed to sue the malefactor in respect of his special loss.[82] Fitzherbert's view prevailed; but the old reasoning continued to deny a private action to someone who had suffered no special damage.[83]

A conceptual confusion arose from calling these private actions 'nuisance'. The coincidence of language raised the implication, now clearly law, that any criminal nuisance which causes special damage is actionable in tort. But this implication is by no means to be read into the earlier cases,[84] which seem rather to belong to the genus of negligence actions.[85] The fact that the defendant had committed a criminal misdemeanour was not in itself an element in any cause of action. The only relevance of public nuisance to the law of tort was that it barred a private suit for negligence or nuisance in the absence of special damage.

Further Reading

Ibbetson, *HILO*, pp. 98–106
W. S. Holdsworth, 'The Servitudes of English Law' (1925) in *HEL*, VII, pp. 318–42
F. H. Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480–90
A. K. R. Kiralfy, *The Action on the Case* (1951), pp. 55–72
S. F. C. Milsom, 'Nuisances' (1963) in *Novae Narrationes* (80 SS), pp. xcvi–civ
H. M. Chew and W. Kellaway (ed.), *The London Assize of Nuisance* (1973)
J. F. Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3 *Jo. Legal Studies* 403–33
J. Loengard, 'The Assize of Nuisance' (1978) 37 CLJ 144–66
J. P. S. McLaren, 'Nuisance Law and the Industrial Revolution' (1983) 3 OJLS 155–221
J. Oldham, 'Nuisance' (1992) in *Mansfield MSS*, II, ch. 15; 'Nuisance' (2004) in *ECLM*, pp. 248–59
J. Baker, 'Nuisance' [1483–1558] (2003) in *OHLE*, VI, pp. 775–9
J. Getzler, *A History of Water Rights at Common Law* (2004)
M. Lobban, 'Nuisance' [1820–1914] (2010) in *OHLE*, XII, pp. 1068–111

[82] Y.B. Mich. 27 Hen. VIII, fo. 27, pl. 10; Fifoot, *HSCL*, p. 98, per Fitzherbert J. The case is perhaps *Hikkys v. More*, CP 40/1085(2), m. 442. Kiralfy, *Action on the Case*, p. 211, identified it as *Sowthall v. Dagger* (actually *Bagger*), but there the nuisance was caused by a butcher's carrion.

[83] *Serjeant Bendlowes v. Kemp* (before 1584) cited in Cro. Eliz. 664; *Fineux v. Hovenden* (1599) Cro. Eliz. 664; *Iveson v. Moore* (1699) 1 Ld Raym. 486. Cf. *Blyth v. Topham* (1607) B. & M. 625.

[84] In a reading of 1533 William Saunders said that a common nuisance was not a trespass to anyone: *OHLE*, VI, p. 779 n. 24.

[85] See e.g. *Mitchell v. Allestry*, ante, p. 438.

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Defamation

Words can be more harmful than deeds, and in some circles honour may be valued more than personal safety. Yet the common law has always been more reluctant to provide remedies for harmful words than for deeds. It was centuries before mere words were considered capable of constituting an assault or imprisonment, and only in the later twentieth century that words causing economic loss were brought within the scope of liability for negligence. A more specific explanation which is usually given for the lack of a common-law remedy for defamation before 1500 is that it was a 'spiritual' matter more properly within the sphere of the Church courts. But this is better regarded as a description of the situation than as a reason for it.

Although it was not a universal feature of the Church's jurisdiction throughout Europe, the English ecclesiastical courts exercised an extensive defamation jurisdiction from the thirteenth century until the nineteenth.[1] It was founded on the constitution *Auctoritate Dei Patris* enacted by the Council of Oxford in 1222 to deter malicious imputations of crime (*crimen*), a concept which the Church courts stretched as far as they could. The ecclesiastical *causa diffamationis* was in form a criminal proceeding to punish defamatory words, and could lead to a sentence of penance, including a retraction and a request for forgiveness. In earlier medieval times there were also remedies to be had in some local courts, but these were less pervasive and in many places died out in the fourteenth century. How far the exclusion of actions for words from the secular courts was based on a jurisdictional settlement, and how far on the common law's unwillingness to attach legal significance to mere words, is largely a matter for speculation. But it seems likely that it was influenced by the policy which delayed remedies on parol agreements,[2] and perhaps there was a prescient fear of the excessive litigation which ill words might generate. It was certainly wrong to tell lies about people, but it could be treated as a form of immorality best left to be punished by the Church. It was also wrong to provoke disorder by spreading false rumours, but that was for the criminal law. The Star Chamber occasionally entertained defamation suits in the later medieval period, but these were essentially proceedings of a public or criminal nature.[3] Harsh words might hurt feelings, sometimes deeply, but the law had little regard for subjective feelings; the only perceptible damage caused by words was of the indirect kind resulting from their effect on third parties.[4] Such evanescent or indirect harm was beneath

[1] Helmholz, *Select Cases on Defamation to 1600*, 101 SS xiv–xlvii; *OHLE*, I, pp. 565–98. By the 17th century defamation dominated the work of the consistory courts. See also p. 139 n. 29, ante.

[2] See pp. 339–41, ante; Helmholz, 101 SS lxii; *Chaplain v. Shepherd* (1315) 101 SS 33 (plea in a manorial court that no action lies for 'wind' without an act done); cf. 101 SS lxiii n. 5.

[3] E.g. *Robert Danvers' Case* (1433) 94 SS *236*; Baldwin, *The King's Council*, p. 525 (counsel accused of forgery). Note also *Ravensworth's Case* (1339) 76 SS 83; Co. Inst., III, p. 174 (indictment for criminal libel).

[4] Cf. the 'economic torts' in the next chapter.

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the notice of the early king's courts. According to the late-medieval common law, defamation, like breach of a parol promise, or a bare threat to do something unlawful, was *damnum absque injuria* – a kind of damage, certainly, but not a tort.

Despite these reservations, the exclusion from the secular courts of actions for defamatory words was never absolute. From the beginning of the fourteenth century there were occasional actions by judges[5] and litigants[6] maliciously slandered in open court, a kind of civil action for contempt. In 1382 a married man recovered damages for a false statement that he had precontracted marriage with another woman, which he presented as an act of forgery designed to separate him from his wife and ruin him. Since the defendant was a notary retained to arrange a divorce for the wife, this was doubtless a complaint about documents prepared in legal proceedings, though there was no plea of professional privilege.[7] A different kind of remedy which appeared in the fourteenth century was the special action of trespass *vi et armis* for 'lying in wait' and threatening to seize a man as a villein. Although ostensibly founded on threatened violence, the object of these increasingly common actions was to challenge a claim of villeinage;[8] and in 1483, after long debate, it was held that such an action lay even if no physical threats had been made.[9] By that time several actions had also been brought on the 1378 statute of *scandalum magnatum* by peers, ecclesiastical dignitaries, and judges, who had been defamed.[10] The policy behind the legislation (passed three years before the Peasants' Revolt) was to prevent discord between classes, and the plaintiff was supposed to prove that the words tended to provoke discord,[11] but the real purpose of 'scan. mag.' was to vindicate the magnate's name with an award of damages. There may have been still more cases where, as with villein claims, wrongs essentially defamatory in nature were coloured by allegations of real or pretended violence.[12] An element of defamation was also present in actions of conspiracy, brought in respect of agreements to indict innocent people of crime.[13] None of these miscellaneous actions, however, could be said to represent the beginnings of a tort of defamation.

[5] Seton JCP recovered 100 marks from his former wife for calling him a traitor in the Exchequer: *Seton v. Cokeside* (1358) Y.B. 30 Edw. III, Lib. Ass. pl. 19 (misdated); 58 SS cxxxvi (record). For other examples see 86 SS 228 n. 5; 94 SS *236* n. 5.

[6] E.g. *Gisors v. Rys* (1321) 86 SS 227 (absent party defamed as a convicted traitor, in contempt of court; punishment but no damages awarded). For local courts see 101 SS lxiv.

[7] *Roshale v. Thorne* (1382) B. & M. 686 (200 marks recovered). Note also 94 SS *236* (CP official accused of tampering with a record).

[8] If D pleaded as a justification that P was a villein, issue would be joined on the status. See pp. 505–6, post.

[9] *Haukyns v. Broune* (1477–83) B. & M. 691 (error from CP). Broune was a London mercer and recovered £110 damages.

[10] *OHLE*, VI, pp. 781–2; Lassiter, 22 AJLH 216. Earlier precedents: *Duke of Gloucester v. Clere* (1442) CP 40/727, m. 586d; *Duke of Exeter v. Smyth* (1456) CP 40/781, m. 450d.

[11] *Lord Beauchamp v. Croft* (1497) Caryll Rep. 349.

[12] E.g. *Prior of Canterbury's Case* (1383) Y.B. Mich. 7 Ric. II, p. 70, pl. 8 (trespass *sur soun cas* for assaulting P's steward *vi et armis* and hindering him from holding court; D pleads he merely accused P of deciding a case contrary to law). Note also *Kegworth v. Shaldeford* (1356) KB 27/385, m. 113 ('horrible words' spoken of the king's attorney, coupled with assault).

[13] See p. 493, post. The action did not lie against the grand jurors who approved the indictment.

Actions on the Case for Words

The common-law courts began to permit a general action on the case for defamatory words in the first two decades of the sixteenth century. The first writ discovered is on the plea rolls for 1507, and the first judgments in 1517.[14] A sudden burst of cases in 1517 more or less coincided with an attempt by Wolsey C to stop what he mistook to be a recent encroachment on ecclesiastical jurisdiction.[15] It was certainly an innovation, but there is no reported case in which it was resisted in argument,[16] and so the reason behind it can only be guessed at. Although several of the early examples arose from villein-claims, or the slander of lawyers and officials, the new action was not a direct development from medieval precedents but a deliberate new departure. The wording of the declarations owed as much to ecclesiastical as to common-law precedents, and it seems probable that the main reason was the inadequacy of the spiritual remedy following common-law interference in the later fifteenth century. The Church courts had never been able to award damages, and it was disputed in 1497 whether they could even award costs.[17] They had been forbidden since 1327 to hear defamation suits against those preferring indictments in sheriffs' tourns;[18] and since at least the 1470s their jurisdiction over other accusations of temporal crime had come under attack by prohibition.[19] Accusations of villeinage were likewise temporal matters, both because it was not a 'crime' and because the status – if it came in issue – was triable only at common law.[20] This reining in of the spiritual jurisdiction had created a glaring gap in the law. While such minor matters as false imputations of gluttony could be punished with penance, untruths which threatened a man's life or livelihood seemed not to be remediable anywhere.

The early sixteenth century was, of course, a period of legal innovation. Actions on the case for not paying debts, for converting goods, and for breach of promise, were all sanctioned by the King's Bench in the same thirty-year period. It was therefore an opportune time to introduce an action for words. The essence of the new action, as it seems from the bare records, was not the opprobrium itself but the effect the words had on others in causing quantifiable temporal loss.

[14] *Owughan v. Baker* (1507) 101 SS 42 (CP); *Sparowe v. Heygrene* (1508) B. & M. 694 (KB); *Lyncolne v. Hendy* (1517) 101 SS 43. As late as 1497 Fyneux CJKB had said that defamation was 'a wholly spiritual offence': B. & M. 687.

[15] *OHLE*, VI, pp. 784, 789. Wolsey decreed that, for slander of common persons (i.e. not *magnati*), 'the party aggrieved should have his remedy…by the order of the spiritual law and not by any temporal action or process at the common law': *Stone v. Swytall* (1518/29) C1/577/43 (citing an earlier decree).

[16] There was a recorded demurrer in *Walker v. Robynson* (1512) KB 27/1004, m. 77 (allegation of theft without quoting the words).

[17] *Anon.* (1497) B. & M. 686 (held they could, in spiritual cases).

[18] Stat. 1 Edw. III, c. 11.

[19] *Tanner v. Cornyssh* (1472) CP 40/845, m. 340 (theft); *Abbot of St Albans' Case* (1482) Y.B. Trin. 22 Edw. IV, fo. 20, pl. 47, per Bryan CJ (robbery); *Note* (1498) Caryll Rep. 382 (felony). By 1501 actions on the statute of *praemunire* were also being used: *OHLE*, VI, p. 782 n. 11.

[20] *Prior of Launde v. Lee* (1527) Spelman Rep. 186; C. St German, *Doctor and Student* (91 SS), p. 330.

Words Endangering Life or Liberty

The earliest actions on the case for slander were brought for accusations of theft. In the first thirty years, over one hundred such allegations were made the basis of King's Bench actions, besides a few accusations of murder and other temporal offences, and also some villein-claims made without threats or lying in wait. The common factor in all these cases was an accusation which endangered the life or liberty of the plaintiff, by arrest and trial for felony, or seizure by the lord; and in some cases an actual imprisonment was mentioned by way of aggravation. These were matters clearly falling outside the spiritual jurisdiction. A smaller class of cases involved accusations of misdemeanours, such as perjury or forgery, which exposed the plaintiff to the danger of fine or imprisonment. There was perhaps a perceived analogy with the canon law's insistence on accusation of a 'crime'; but in order to justify a suit at common law plaintiffs usually added formal allegations of deceit, and of special damage through loss of credit with persons who used to deal with them before the scandal.

Words Alleging Occupational Unfitness

The next situation where economic loss regularly gave rise to actions on the case for words was where the slander endangered the plaintiff's income from his profession or calling. Thus, a lawyer could show that he had lost clients and fees, or a merchant his customers and their trade,[21] as a result of allegations of dishonesty or incompetence. Plaintiffs sometimes mentioned their occupation merely as a way of demonstrating special damage, where the accusation was of a criminal offence;[22] but in some cases the alleged misconduct was punishable only by virtue of the occupation.[23] By Elizabethan times it was established that some false imputations might be actionable where they touched the plaintiff in his occupation even if they were not punishable and would not otherwise have been actionable. Thus, it was not in itself actionable to call someone a bankrupt, which was a misfortune; but to call a merchant a bankrupt would obviously threaten his livelihood.[24] Likewise, there was no action for saying that a man was ignorant or illiterate; but the same words spoken of a barrister would be actionable, because it was necessary to his vocation to know some law, and no one would engage him if they believed he did not.[25] Here the potential loss was purely economic.

[21] E.g. *Barfote v. Smyth* (1533) KB 27/1089, m. 79d (merchant accused of falseness); *Wauton v. Maydewell* (1536) KB 27/1099, m. 68 (mercer accused of wretchedness, implying insolvency).

[22] E.g. *Woode v. Frogge* (1517) KB 27/1022, m. 67 (£40 damages for a barrister accused of treason and murder, which lost him clients); *Haukyn v. Lyncoln* (1525) KB 27/1055, m. 25d (£5 for an innkeeper accused of murder, which deterred people from staying in his inn).

[23] Lawyers were the main category: e.g. *Elyot v. Tofte* (1513) KB 27/1006, m. 62 (king's serjeant accused of accepting retainers against the Crown); *Southworth v. Bady* (1515) KB 27/1017, m. 103 (attorney accused of deceit); 101 SS lxxxi, xcviii. Cf. accusations of disqualification: *Arscott v. Escott* (1528) CP 40/1059, m. 277 (counsel said to have been disbarred); *Danby v. Thwyng* (1532) KB 27/1083, m. 32 (attorney said to have been 'cast over the bar' for misconduct).

[24] *Anon.* (1575) and *Anon.* (1580) B. & M. 699, 700; cf. 101 SS ciii. There are precedents from the 1550s: *OHLE*, VI, p. 787 n. 53.

[25] *Palmer v. Boyer* (1594) Cro. Eliz. 342; Owen 17; Goulds. 26 (barrister said to have 'as much law as a jackanapes'); *Bankes v. Allen* (1615) Rolle Abr., I, p. 54 (barrister said to be 'no lawyer' and unable to draw a lease); *Peare v. Jones* (1634) ibid. 55 (barrister called a dunce).

'Spiritual' Defamation

Most of the early actions on the case were designed to fill the obvious void between the temporal and spiritual jurisdictions. But it was not clear at first whether the new action could be used as an alternative to the ecclesiastical remedy, where the slander was of a kind within the permitted jurisdiction of the Church. The conservative view was that there could be no overlapping, because the king's courts could not try the spiritual matter if issue were joined upon it. This explains a demurrer of 1523 in a case where bastardy was alleged, and a reported Common Pleas decision in 1535 that no action would lie for calling someone a heretic; the judges could not try bastardy, and in 1535 they must have been especially disinclined to meddle with the mysteries of heresy.[26] But the bolder view, taken by the ecclesiastical reformers and the King's Bench judges, was that 'spiritual' defamation was actionable at common law if it caused temporal loss.[27] This was no encroachment on the Church courts, because they had no power to make good the loss in damages. In accordance with this view, the King's Bench gave judgment in 1537 in favour of another man falsely accused of heresy.[28] The King's Bench likewise allowed actions where an allegation of sexual misbehaviour – in itself punishable only in the spiritual courts – resulted in a lost marriage to someone of substance,[29] or damaged general credit,[30] or where an allegation of bastardy – a spiritual matter, but not even defamatory – cast doubt on an inheritance.[31] In all these cases there was temporal damage. The King's Bench view rapidly prevailed, and this was one development which did not bring the two courts into collision.[32]

Words Imputing Certain Diseases

A third special category of slander actions, which enjoyed an eccentric separate existence in the English common law until 2013, was that associated with the 'French pox' or great pox (syphilis).[33] It was not actionable to say that someone was ill, or had once had smallpox, unless the illness affected his calling.[34] But the imputation of French pox,

[26] *Pulham v. Pulham* (1523) *OHLE*, VI, p. 788 (allegation of bastardy; undetermined demurrer); *Anon.* (1535) B. & M. 688 ('heretic and of the new learning'), perhaps identifiable as *Elyot v. Mersshe* (1535) CP 40/1086, m. 192d ('Thou art an heretic…'; writ only); James Hales' reading (1532) B. & M. 387 at 390.

[27] St German, *Doctor and Student* (93 SS), pp. 330–1, favoured this view but thought it would require legislation (1531).

[28] *Howard v. Pynnes* (1536) B. & M. 689, endnote. Heresy was a capital offence: p. 510, post.

[29] *Davys v. Henbery* (1536) KB 27/1100, m. 8d; *Davyes v. Gardiner* (1593) B. & M. 689.

[30] In *Cowper v. Broun* (1543) CP 40/1117, m. 258, a married woman recovered 20s. damages for calling her 'measled whore, pocky whore, and priest's whore', whereby she was less able to do business for her husband.

[31] *OHLE*, VI, p. 792; *Stafford v. Barton* (1552) KB 27/1164, m. 183d (£200 damages recovered); *Banastre v. Banastre* (1583) Coke's autograph notebook (135 SS), no. 86. In *Anon.* (1564) B. & M. 696, an action was allowed for saying P's *father* was a bastard.

[32] There are plentiful precedents in CP before Eliz. I: *OHLE*, VI, pp. 791–2. Cf. *Anon.* (1598) B. & M. 689 n. 4, where the CP 'bid her [P] go to the Bawdy Court, which understood what bawdery was, for they did not'; but bawdery was the very example given in 1535 by Fitzherbert JCP of a spiritual matter actionable at law (B. & M. 689).

[33] An early instance in the rolls is *Outwell v. Waleys* (1535) CP 40/1085(2), m. 152 ('Thou art full of the French pox and wert laid of them at Newton Bushel'; issue joined).

[34] E.g. *Housden v. Stoyton* (1568) B. & M. 698 (innkeeper said to have plague in his house); *Anon.* (1572) ibid. 704 ('pocky merchant'); *Levet's Case* (1593) Cro. Eliz. 289 ('thy house is infected with the pox', of an innkeeper).

which became epidemic in Tudor England, was regarded as peculiarly offensive and harmful because it was associated with sexual promiscuity. The only other disease said to have been included in the same category was leprosy, because lepers could be ostracized by process of law (the writ *de leproso amovendo* to put them in quarantine).

Attempts to Abate the Flood of Actions

Within half a century of its first appearance, the action for words became part of the everyday business of the common-law courts. Indeed, there were often more slander cases in the rolls than *assumpsit*.[35] Even in Elizabethan times, when the use of *assumpsit* increased considerably, slander came a close second.[36] Though generally inclined to favour increases in their jurisdiction, the judges came to regret this particular increase, especially since juries frequently awarded sums of money wholly disproportionate to the harm or the ability of the wrongdoer to pay. Attempts were made to cut down the damages by various forms of persuasion,[37] but judicial antipathy led also to various legal restraints on the scope of the action.

As early as 1557 Staunford J approved a remark by Dyer J that actions on the case for words had become too common, being brought for 'every trifling thing', and that they properly lay only for an accusation of an offence or an imputation upon a person's 'mystery' or calling.[38] No doubt he should have added 'without proof of special damage', for that would render anything actionable. One reason for the increase in slander litigation which Dyer and Staunford JJ lamented was the early decision that the damage as alleged was not traversable, which meant that it could be presumed or fictitious.[39] The solution was a more restrictive approach, insisting on proof of special damage in all cases except the two categories mentioned by Staunford J, together with the third established category (French pox),[40] and any other cases in which damage could be presumed.[41]

A second line of attack was directed against actions for words spoken in anger or jest ('sport').[42] On this footing, the judges denied that any action lay for new-fangled or slang expressions which they deemed incapable of meaning anything beyond mere abuse.[43] It was held in 1565 that in such cases words were only actionable if the plaintiff

[35] E.g. in CP in 1535 there were 34 slander actions and 6 *assumpsit*: CP 40/1084–87 (issues only). In Hilary term 1564 there were 81 slander and 23 *assumpsit*: CP 40/1215–16 (as analyzed by Professor Milsom: MS. notes).

[36] In KB in Hilary term 1566 there were 30 slander actions and 42 *assumpsit:* A. K. R. Kiralfy, *The Action on the Case* (1951), p. 195. The proportion of slander to *assumpsit* continued to decline, perhaps as a result of the judicial discouragement discussed below.

[37] See R. H. Helmholz, 103 LQR 624.

[38] *Anon.* (1557) B. & M. 699 n. 22. Cf. *Carpenter's Case* (1558) ibid. 698, per Dyer J.

[39] *Old Natura Brevium* (1528 edn) B. & M. 688; James Hales' reading (1532) ibid. 387 at 390; *Russell v. Haward* (1537) ibid. 695.

[40] See p. 469, ante. The rule, later extended to other contagious diseases, was abrogated by the Defamation Act 2013 (c. 26), s. 14(2).

[41] E.g. libel: pp. 475–6, post.

[42] In *Strong v. Norres* (1546) CP 40/1127, m. 678, D pleaded that she had spoken in anger and impatience after P called her an old whore.

[43] *Gale v. Lowe* (1557) BL MS. Hargrave 4, fo. 248v (knave, villain); *Anon.* (1575) B. & M. 698 (rogue); *Anon.* (1579) ibid. 700 n. 24 (rogue, cozener, false knave); *Anon.* (1580) ibid. 699 (witch); *Middlemore v. Warlowe* (1587) 3 Leon. 71 (cozening knave).

could show malice.[44] Alleging malice was already common form;[45] but since it was not normally traversed it bordered on fiction, and its only role was to support the rebuttal of defences.

The third and most effective of the attacks was launched in the 1560s, when the courts introduced the policy of construing ambiguous words in the milder sense (*in mitiori sensu*) so that they would not be actionable.[46] The Common Pleas strongly favoured such a restriction. Dyer CJ (1559–82) said he 'wished such actions would go to the further end of the hall', meaning the King's Bench.[47] But the other end of the hall was no more welcoming. The King's Bench, normally keen to attract litigation, espoused the same policy under Wray CJ (1574–92).[48] They did so because, as Wray CJ complained in 1585, slander actions 'more abounded than in times past, and the intemperance and malice of men had increased'.[49] The *mitior sensus* approach was carried to extremes, and ambiguities were teased out by benevolent exegesis where no ordinary person could have felt any doubts about the meaning. One aspect of the policy was to restrict actions for accusations of misconduct to allegations of punishable crimes, harking back unconsciously to the medieval canon law.[50] Thus, if the defendant said that the plaintiff had stolen apples, this would be construed to mean growing apples, in which case there was no felony but only trespass, and consequently no action for the words. On the same principle it was held not actionable to say that a physician had killed a patient with his pills: the patient might have choked or suffered an unusual reaction, and so there was not necessarily an allegation of medical incompetence, let alone murder.[51] The disease cases were similarly restricted, so that a mere imputation of 'pox' would be taken to mean smallpox and therefore not actionable. Much subtlety was expended on expressions, such as 'pocky whore', which might be taken to indicate the kind of pox intended.[52]

Two cases of 1607 illustrate the seeming absurdities of the *mitior sensus* approach at its height. In one, the defendant had said that the plaintiff 'struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other'. Even this graphic description was held too ambiguous to amount to a clear allegation of crime; the cook might have survived, 'and then it is but a trespass'.[53] In the other case the defendant had said that a justice of the peace 'reported that he hath had the use of the Lady Morrison's body at his pleasure'. Lady Morrison's action

[44] *Anon.* (1565) B. & M. 699 (even 'murderer' not actionable if spoken in anger, without malice); *Anon.* (1579) ibid. 700 n. 24.

[45] It had become usual since the 1530s to allege not only malice but diabolical instigation: *OHLE*, VI, p. 785.

[46] An early indication of this is *Utting's Case* (1566) B. & M. 697.

[47] *Anon.* (1575) B. & M. 699.

[48] *Anon.* (1579) B. & M. 700 n. 24; *Gray's Case* (1582) ibid. 700–01; next note.

[49] *Stanhope v. Blythe* (1585) B. & M. 701 at 702. Coke said (4 Co. Rep. 20) that he had reported this and similar cases to 'deter men from subjecting themselves to actions . . . for words, which are but wind'.

[50] See R. H. Helmholz, 101 SS xcii–xcv.

[51] *Poe v. Mondford* (1598) Cro. Eliz. 620.

[52] *Jeames v. Rutlech* (1599) B. & M. 702 ('full of the pox' not actionable, even with an *innuendo* that this meant the French pox); and see ibid. 703 n. 33; but cf. *Anon.* (1572) ibid. 704.

[53] *Holt v. Astgrigg* (1607) B. & M. 704. Holt was created a baronet in 1611. What really happened to his cook is obscure. Local tradition was that the family had to bear a blood-red hand on their coat of arms in memory of the cook's murder, but in fact this was the red hand of Ulster, indicating a baronet.

succeeded, but no less a lawyer than Sir Henry Hobart A.-G. thought it worth arguing that the words should be taken in the best sense, 'to have the use of her body as a tailor, in measuring'.[54]

There was, however, a purpose to all this seemingly perverse ingenuity.[55] Once the *mitior sensus* principle was well known, the law successfully ensured that both parties could believe they had won. Plaintiffs in slander were not primarily interested in damages; winning the jury verdict was enough to restore the reputation and satisfy the sense of grievance. Upsetting the verdict later, on patently ludicrous grounds, could hardly detract from the vindication of honour which it had achieved, and yet it saved the defendant from possible ruin. It was an inspired solution, but it is doubtful how far the unrealistic hair-splitting did in fact deter prospective litigants. A writer on slander in 1647 attested that actions for words continued to bring 'as much grist to the mill, if not more, than any one branch of the law whatsoever'.[56] And a successful plaintiff could still do very well financially. Damages were entirely for the jury, and were frequently exemplary or punitive.[57] In 1786 Thomas Erskine tried to persuade a jury that a man of irreproachable character ought to receive no damages at all, since he could not possibly suffer any damage; but his audacity met with short shrift from Lord Mansfield CJ.[58]

The Scope of Defamation

The *mitior sensus* approach adds amusement to the older law reports but, having ultimately proved ineffective in deterring slander litigation, it was eventually abandoned. A reaction against it began in the mid-seventeenth century. Rolle CJ, who in his younger days had collected many of the ridiculous cases in his *Abridgement,* disliked strained interpretations because they enabled a man to be 'abused by subtlety'. It was said that people had taken the opinions of counsel on lists of slanderous words 'in order to know which they might out with safety', and Treby CJ (d. 1700) said that 'people should not be discouraged that put their trust in the law, for if men could not have a remedy at law for such slanders they would be apt to carve it for themselves; which would let in all the ill consequences of private revenge'. To carve for oneself meant to help oneself (to meat), but the allusion to blades was also a reminder of drawn swords and duels. Strained constructions were finally laid to rest in 1714, when it was held that words were always to be taken in their most natural and obvious sense.[59] The rule about

[54] *Morrison v. Cade* (1607) Cro. Jac. 162; HLS MS. 105, fo. 106v. Lady Morrison alleged that the earl of Kent and others had desisted from their suits for her hand in marriage. Widowed in 1599, she never did remarry.

[55] It was erratic in its operation because words were sometimes construed in the worst sense (*in malam partem*): *Anon*. (1572) B. & M. 704; *Gastrell v. Townsend* (1591) ibid. 705; *Morrison v. Cade* (1607) ante.

[56] J. March, *Actions for Slander* (1647), p. 2.

[57] As early as the 1550s awards of £1,000 are found: *OHLE*, VI, p. 793 n. 95. The future King James II recovered £100,000 (nearly £20M today) against the lord mayor of London in scan. mag.: *Duke of York v. Pilkington* (1682) 2 Show. K.B. 246.

[58] *Pitt v. Almon* (1786) *Mansfield MSS*, II, p. 862; Oldham, *ECLM*, pp. 234–5.

[59] *Hamond v. Kingsmill* (1647) Style 22 at 23; *Harrison v. Thornborough* (1714) B. & M. 705 at 706, per Parker CJ (quoting Treby CJ). A late stand for the old view was made by Vaughan CJCP (dissenting) in *King v. Lake (No. 2)* (1671) ibid. 713, endnote.

special damage, on the other hand, stayed in place. It had the important effect of putting emphasis in slander actions on the kind of damage suffered rather than on the kind of words spoken. The remedy was given for the damage caused by the words, not for the words alone. In the absence of real or presumed special loss, the only remedy for defamatory words continued to be that given in the spiritual courts. Although that was limited to allegations of a 'spiritual offence', such as fornication or drunkenness, and there was no possibility of obtaining damages, it continued to provide the consistory courts with business. The sentence of penance, performed in a white sheet, might even give the plaintiff better satisfaction than money. By the nineteenth century the jurisdiction was largely confined to allegations of sexual misbehaviour made by or against women from the poorer classes.

In other respects the common law went further than the ecclesiastical law was supposed to go in respect of the range of actionable words. It did not heed whether the false words disparaged the plaintiff's character, but only whether they resulted in special loss. A right-thinking person did not think less of another for being penniless, or illegitimate, or foreign, and yet some people could well suffer economic loss from being wrongly so described; therefore an action lay. It is hardly infamous to have a sweetheart; it might be thought flattering. But if a stranger wrote to a woman calling her his sweetheart, and the letter came to the notice of her fiancé, who as a consequence broke off the engagement, the woman had a plausible claim for damages.[60] If untruths caused harm, therefore, there was no reason why they should need to be defamatory in the narrow sense of the term. Yet the requirement of special loss meant that some plainly disparaging words became irremediable. The best known case was unchastity.[61] In 1681 it was held that a parson had no remedy at common law against those who spread a 'very scandalous' rumour that he had slept with all the women between his parish and another, unless it cost him his living.[62] And until 1891 there was no redress at common law for calling a woman a whore, unless she could prove special damage.[63]

In the eighteenth century the courts introduced a new restriction, that in order for words to be actionable they should not only cause loss but should also be capable of bearing a defamatory meaning. The action for 'words' thus became the action for 'defamation'. The purpose was to withhold frivolous actions from juries, particularly once the *mitior sensus* method had been abandoned. Lacking any rational basis, however, it was not straightforward. Although the word slander (*scandalum*) had always imported the idea of 'infamy, discredit, or disgrace',[64] it was difficult to define defamation in such a way as to include such sinless misfortunes as poverty and illness. The formulation adopted was that the words should expose the plaintiff to 'hatred, contempt, or

[60] *Sheppard v. Wakeman* (1662) 1 Keb. 255, 269, 308, 326, 459; 1 Sid. 79. Cf. injurious falsehood, p. 487, post.

[61] Allegations of unchastity had given rise to numerous actions in the 16th century: *OHLE*, VI, p. 793.

[62] *Yates v. Lodge* (1681) 3 Lev. 18.

[63] *Lynch v. Knight* (1861) 9 H.L.C. 577; Slander of Women Act 1891 (54 & 55 Vict., c. 51). The 1891 Act was thought necessary after the abolition of the slander jurisdiction of the ecclesiastical courts in 1855. It was repealed by the Defamation Act 2013 (c. 26), s. 14(1).

[64] *Smale v. Hammon* (1610) 1 Buls. 40, per Williams J. This formulation was criticized in *Holt v. Scholefeld* (1796) 6 Term Rep. 691 at 694, per Lawrence J.

ridicule'[65] or tend to cause him to be shunned or avoided.[66] This remains the accepted legal definition of defamation.

Since the basis of the action for words was the loss of credit or fame, and not the insult, it was always necessary to show a publication of the words.[67] A man could not lose credit as a result of words which reached no one's ears or eyes but his own. At one time it was said that publication had to be to someone other than a friend of the plaintiff, because a friend could be relied on to discount the scandal; but in the time of Elizabeth I it was decided that communication to anyone other than the plaintiff was sufficient, provided that it either resulted in actual special loss or fell within one of the categories where special loss was presumed. The one essential was that the words should have been understandable in a defamatory sense by the persons to whom they were published.[68] If that sense was not evident from the words themselves, which by the mid-sixteenth century were invariably set out in full in the declaration, it could be explained by an *innuendo* clause, a pleading device first developed in the 1540s to explain indefinite pronouns in defamatory speech.[69]

Justification and Privilege

In 1535 it was held that a man could sue for defamation even if he was of bad fame already; the essence of actionable slander was not so much a general injury to reputation as the untruth of the particular statement and the damage it caused.[70] Every man, however wicked, had the right to protection against false statements to his detriment. His bad reputation was relevant to the level of the damages, but not to his right of action. As a corollary, the defendant in slander could justify his words by pleading that they were true.[71] Truth, though it might hurt, was an absolute defence to an action for slander. The courts were careful, however, even at the height of the *mitior sensus* cult, to prevent abuse of this defence. The defendant's words might be literally true and yet carry a defamatory meaning: for instance, 'I think *X* is a thief', or 'someone told me that *Y* stole a sheep'. The defendant was not permitted to justify such expressions by asserting that he actually did think *X* a thief or had really heard the rumour about *Y*. For a while it was held on high authority that he could justify by identifying the source of his information[72] – a sort of voucher to warranty – but the view which prevailed was that

[65] W. Hawkins, *Pleas of the Crown* (2nd edn, 1724), I, p. 193 (defining *criminal* libel). For contempt and ridicule see *Cropp v. Tilney* (1699) 3 Salk. 225, per Holt CJ.

[66] See *Villers v. Monsley* (1769) 2 Wils. 403.

[67] This was not so of criminal libel, which was punished by the Star Chamber as a 'provocation to a challenge or a breach of the peace': *Edwardes v. Woolton* (1607) B. & M. 708; *Barrow v. Lewellin* (1614) Hob. 62; *Sir Baptist Hicks' Case* (1618) ibid. 215; and the cases in W. Hudson, *Star Chamber* (1621) B. & M. 709–11.

[68] See *Anon.* (1584) Moo. K.B. 182 (Welsh); *Jones v. Dawkes* (1597) Rolle Abr., I, p. 74 (Latin); *Price v. Jenkings* (1601) Cro. Eliz. 865 (Welsh).

[69] E.g. 'he (*innuendo*, P) is a thief'. *Innuendo* is from the Latin *innuere*, to hint or indicate. See *OHLE*, VI, p. 794; 94 SS *246* n. 5; 101 SS lxxxiii; B. & M. 702, 705–6.

[70] *Maunder v. Ware* (1535) Y.B. Hil. 26 Hen. VIII, fo. 9, pl. 1; CP 40/1083, m. 409d.

[71] *Legat v. Bull* (1533) Spelman Rep. 6 at 7, per Fitzherbert J (dissenting).

[72] *Earl of Northampton's Case, A.-G. v. Gooderick* (1612) 12 Co. Rep. 132. For earlier precedents see *OHLE*, VI, p. 795 n. 106; *Arundel's Case* (1594) *Coke's notebook*, BL MS. Harley 6686A, fo. 96.

the repetition of a rumour was in effect a new publication, to which the defence of truth was unavailable.[73]

There had been a school of thought in Henry VIII's reign that truth was not always a defence anyway, since accusations of crime should only be made in due course of justice and not bandied about in alehouses.[74] On this view, a defence to defamation would have required the concurrence of two factors which were afterwards seen as distinct defences: truth (the plea of justification) and an appropriate reason for speaking it (the plea of privilege). This was exploded at an early date, and the two defences were separated. Truth became an absolute defence by itself. The essence of privilege was that it provided an excuse for speaking words believed to be true, though they turned out to be false, on occasions where public policy encouraged openness. The defence of privilege was not known by that name in the sixteenth century; but privileged situations were certainly recognized, as ways of disproving malice. What was said in the course of judicial proceedings seems to have been excusable from the beginning, in the interests of justice,[75] though until Elizabethan times there remained some uncertainty about scandalous bills in courts not of record, such as the Star Chamber.[76] Some non-forensic species of privilege were added later, such as that of the employer writing a reference, a public official writing to another official in the course of duty, or a reviewer commenting on a book or performance. The establishment of a defence of privilege accounts for the beginning of actions for malicious prosecution in the 1530s, to provide a remedy in cases where the privilege of a prosecutor was forfeited by reason of malice.[77] By Lord Mansfield's time a similar result could be achieved in a slander action, by allowing the plaintiff to rebut a defence of privilege by proving malice. In the nineteenth century the courts came to recognize some categories of absolute privilege, such as words spoken in court, which availed the speaker regardless of his motives; malice was thereafter relevant only in cases of qualified privilege.

Libel

In the seventeenth century the common law drew no distinction between written and spoken defamation: 'It matters not how the words (if they be actionable) be published or divulged, whether by writing or by speech; for the action is maintainable in both cases.'[78] Blackstone did not find it necessary to make the distinction a century later.[79] Libel (written defamation) was simply a species of slander.[80] Libel was, nevertheless, treated in a special way by the criminal law, since in a prosecution for criminal libel

[73] *Meggs v. Griffith* (1595) Cro. Eliz. 400; Goulds. 138 ('a woman told me that she heard say…').

[74] *Legat v. Bull* (1533) Spelman Rep. 6 at 7.

[75] *Lord Beauchamp v. Croft* (1514) Caryll Rep. 156 (scan. mag.); *Anon.* (1534) Spelman Rep. 238. The privilege extended to witnesses and counsel: *OHLE*, VI, pp. 796–8.

[76] *Bulkeley v. Wood* (1591) KB 27/1311, m. 381 (judgment for P); 4 Co. Rep. 14; Cro. Eliz. 248. The reports omit to mention that the judgment was reversed in the Exchequer Chamber in 1592.

[77] *OHLE*, VI, p. 797. Doubts about the action were settled by *Knight v. Jerman* (1587) Cro. Eliz. 70, 134.

[78] W. Sheppard, *Epitome* (1656), p. 21.

[79] Bl. Comm., III, pp. 123, 125.

[80] W. West, *Second Part of Symboleography* (1597 edn), sig. Aaa3 (slander 'by words or writings' and 'slanderous libel').

neither publication nor untruth were essential elements.[81] A prosecution could even be brought for libelling the dead.[82] The Star Chamber, in particular, made a point of passing 'sharp sentences' in libel cases.[83] This recognition of the peculiar power of the written word to cause damage also accounts for the earliest decisions distinguishing libel from slander in civil cases. It was held that words which would not be actionable if merely spoken might become actionable if disseminated in writing,[84] and it was suggested that truth might not be a defence even in a civil action for libel.[85] Neither view survived.

The distinction now made between libel and slander is a different one, and of uncertain origin: it is that where the defamation is in written or permanent form there is no need to prove special damage. We have seen that in the sixteenth century three categories of defamation were actionable without proof of special damage: accusations of criminal offences, of unfitness for a calling, and of having certain infectious diseases. There was never any decision to close this list, though as a general principle other kinds of harmful words were only remedied on proof of temporal loss. But it was perhaps once orthodox learning that damage could be presumed in any case of 'great and malicious slander' even if it did not fall within the three commonest categories.[86] As a result, there was in effect an undefined fourth category of words actionable per se by reason of their being particularly malignant or widely disseminated. Public derision was an obvious case; thus, an action lay for 'riding skimmington', a rustic custom involving a procession with effigies and stag's horns, calculated to ridicule an ill-treated husband or wife.[87] Libel, at any rate when it involved distributing the printed word, also clearly fell into this category and became the paradigm case. Somehow the courts then lost sight of the wider principle, and came to regard libel as constituting the whole category. In 1812, when Sir James Mansfield CJ pronounced the rule to be clear, he could not divine the reason behind it.[88] The lasting result, however, is that English law draws a distinction – of dubious utility – between libel (permanent forms of defamation, even if not in writing[89]) and slander (evanescent forms of defamation, such as unrecorded speech).

[81] See Hudson, *Star Chamber* (1621) B. & M. 709–11; *Hollwood v. Pascall* (1601) BL MS. Add. 48061, fo. 6v (truth no defence); p. 474 n. 67, ante (as to publication).

[82] *A.-G. v. Barnard* (1582) next note; *De Libellis Famosis* (1605) 5 Co. Rep. 125. Criminal libel was not limited to defamation, since seditious, blasphemous, and obscene libel also became punishable: p. 512, post.

[83] E.g. *Edwardes v. Woolton* (1607) B. & M. 708. The Star Chamber jurisdiction was not limited to libel. See e.g. *A.-G. v. Barnard* (1582) 110 SS 345 (D sentenced to whipping and pillory for saying that Dyer CJ, just deceased, had procured a Cambridge scholar to conjure a dead parson's spirit into the Red Sea).

[84] *King v. Lake* (1667) B. & M. 712; *Austin v. Culpeper* (1683) ibid. 714; *Harman v. Delany* (1731) Fitzg. 753 at 754; *Bradley v. Methwyn* (1735) B & M. 715, endnote.

[85] *R. v. Roberts* (1735) B. & M. 711 n. 55.

[86] *Barnabas v. Traunter* (1640) B. & M. 690 (excommunication). An earlier example is *Morrison v. Cade* (1607) p. 472, ante (unchastity); Popham CJ said the words there were so foul and unclean that £100 damages were scarcely sufficient, though it may have been decisive that a loss of marriage was alleged.

[87] *Mason v. Jennings* (1680) T. Raym. 401; *Mingey v. Moodie* (n.d.) cited in B. & M. 714. For Star Chamber cases see ibid. 650. See also W. West, *Second Part of Symboleography* (1597 edn), sig. Aaa3v (depicting someone 'in any infamous or dishonest habit or sort, as hanging upon the gallows').

[88] *Thorley v. Lord Kerry* (1812) 4 Taunt. 355; Fifoot, *HSCL*, p. 149. The distinction was immediately criticized by Thomas Starkie: Ibbetson, *HILO*, p. 125. Starkie's *Law of Slander and Libel* (1813) was the first textbook on the subject.

[89] E.g. a waxwork effigy in the Chamber of Horrors: *Monson v. Madam Tussauds Ltd* [1894] 1 Q.B. 671.

The Age of Printed Media

By the nineteenth century actions for defamation between private individuals were becoming less common, but libels in print led to a new wave of litigation, this time against newspapers and magazines. News-sheets of a kind had been published since the seventeenth century, and *The Times* began in 1785, but the Victorian era brought in a plethora of more popular publications, many of which earned their profits by reporting scandalous and salacious titbits without too much regard for verifiable evidence. Already by 1889 the cases and statutes relating to newspaper libel were sufficiently numerous to warrant a separate textbook.[90] The press had by then taken the precaution of obtaining a number of legislative protections,[91] and the judges in parallel developed a defence of 'fair comment' on matters of public interest. But fair comment could be mixed with misinformation, and difficulties over the other defences arose in respect of printers, newsagents, and other distributors. Distributors were held to be under a duty to take steps to ensure there were no defamatory statements in the material they distributed, a duty which in practice it was impracticable to comply with. The requirement of malice was hardly appropriate in the case of mass publications, and its definition was 'finessed to the brink of incomprehensibility'.[92] In 1910 the House of Lords made liability for libel strict by upholding an action in respect of an article about a fictional character who happened to have the same unusual name as the plaintiff.[93] Growing dissatisfaction with the state of the law, not only among newspaper proprietors and distributors, but also authors and book-publishers, led to long deliberations by the Porter Committee (1939–48) and some modest reforms.[94] But remaining common-law rules continued to cause difficulty for publishers, especially with the growth of electronic and globalized publications. In 2013, following extensive public debate – encouraged by the media – about the freedom of the press and the public's 'right to know', the English law of defamation was radically overhauled.[95]

Further Reading

Fifoot, *HSCL*, pp. 126–54
Milsom, *HFCL*, pp. 379–92
Ibbetson, *HILO*, pp. 112–25
J. M. Kaye, 'Libel and Slander – Two Torts or One?' (1975) 91 LQR 524–39

[90] H. Fraser, *The Law of Libel in Relation to the Press* (1889; 6 more edns to 1936).

[91] E.g. Lord Campbell's Libel Act 1843 (6 & 7 Vict., c. 96), s. 2 (action barred by apology and paying amends into court); Newspaper Libel and Registration Act 1881 (44 & 45 Vict., c. 60) (fair reports of public meetings); Law of Libel Amendment Act 1888 (51 & 52 Vict., c. 64) (fair reports of court hearings).

[92] Mitchell, *History of Tort Law*, p. 136.

[93] *Hulton v. Jones* [1910] A.C. 20 ('Artemus Jones'). It was assumed that the publisher did not know of the real character, though he probably did: P. Mitchell, 20 JLH 64. The principle was extended to apply to a true statement about a real person which damaged an unforeseen namesake: *Newstead v. London Express Newspapers Ltd* [1940] 1 K.B. 377 ('Harold Newstead of Camberwell').

[94] Defamation Act 1952 (15 & 16 Geo. VI and 1 Eliz. II, c. 66); modified by the Defamation Act 1996 (c. 31).

[95] Defamation Act 2013 (c. 26). Inter alia, this introduced a 'public interest' defence, gave protections to the operators of websites in respect of matter posted by others, and removed the right to jury trial except with leave of the court.

J. R. Spencer, 'The Press and the Reform of Criminal Libel' in *Reshaping the Criminal Law* (P. R. Glazebrook ed., 1978), pp. 266–86
R. H. Helmholz and T. A. Green, *Juries, Libel and Justice: the Role of English Juries in 17th and 18th Century Trials for Libel and Slander* (1984)
R. H. Helmholz, *Select Cases on Defamation to 1600* (101 SS, 1985); 'Defamation' (2004) in *OHLE*, I, pp. 565–98
S. M. Waddams, *Sexual Slander in Nineteenth Century England: Defamation in the Ecclesiastical Courts 1815–55* (2000)
J. Baker, 'Defamation' [1483–1558] (2003) in *OHLE*, VI, pp. 781–808
P. Mitchell, *The Making of the Modern Law of Defamation* (2005); 'Media' in *A History of Tort Law 1900–1950* (2015), pp. 135–80
R. B Outhwaite, 'Defamation Suits' in *The Rise and Fall of the English Ecclesiastical Courts 1500–1860* (2006), pp. 40–6, and passim
W. R. Cornish, 'Defamation of Character' [1820–1914] (2010) in *OHLE*, XIII, pp. 852–78
D. Ibbetson, 'Edward Coke, Roman Law, and the Law of Libel' (2017) in *English Law and Literature*, pp. 488–506

26

Economic Torts and Interests

The actions of trespass *vi et armis*, and the actions on the case for negligence, conversion, and nuisance, all lay in respect of some direct interference with the person or property of the plaintiff. The action for words, as was shown in the previous chapter, protected a more subtle kind of interest. It did not lie for the insult directed at the plaintiff, or for the injury to his feelings, but for the economic damage done to him through the withdrawal of third parties from some beneficial relationship with him. The narrowing of that action in the eighteenth century to words which were defamatory made it a distinct legal compartment, but in its origin and in its nature it might be considered as belonging to a diverse family of actions which have never earned a satisfactory comprehensive name.[1] Those innominate torts which consist in the infringement of economic or social interests are sometimes known as the 'economic torts'. The lack of any such name in the past warns us that they were not formerly perceived as members of one family. They are simply a miscellany. Nevertheless, they possess some common features and invite comparison.

The principal common feature of the economic torts is that they involve three or more parties: the plaintiff, the defendant, and a third party whose relationship with the plaintiff is interfered with, or unspecified people (such as potential customers) who might but for the interference have entered into a relationship – or a more advantageous relationship – with the plaintiff. The indirectness of the harm does not diminish the wrong: one may break bones with sticks and stones, whereas to ruin a man usually requires the use of influence upon others. Yet the balancing of interests can be problematic. For instance, it has never been unlawful to ruin someone by fair competition, and so the mere fact that a person has deliberately caused economic damage to another by his activities does not give the damaged party a cause of action. Unless some legal right is infringed, the damage is *damnum absque injuria*, harm done without committing any legal wrong. And the law, at least since the sixteenth century, has generally been loath to recognize a right to be exempt from economic rivalry, because freedom of trade was considered more in the public interest than monopoly. This principle was predicated on presumed economic equality, though in a world of large business organizations the old assumptions have become less straightforward and have been modified by legislation.[2]

Broadly speaking, there are two kinds of situation where the common law did protect economic interests by actions in tort. The first was where someone was allowed to

[1] F. A. Shaw dubbed it in 1942 the tort of 'interference', but English writers now use this term in a narrower sense and it has therefore been avoided here.

[2] The unfairness caused by de facto monopolies and restrictive trade practices has engendered an extensive body of 'competition law' founded on statutory regulation, beginning with the Monopolies and Restrictive Practices Act 1948 (11 & 12 Geo. VI, c. 66). There is an earlier parallel in the laws against engrossing, forestalling, and regrating: Co. Inst., III, pp. 195–7.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

acquire a monopoly, in the sense of a legal right to prevent competition of a particular kind. The second was where a pre-existing de facto relationship or state of affairs, from which the plaintiff benefited, was interfered with by means deemed to be unlawful.

Monopolies

It has always been a principle of the common law that a person does not, by having enjoyed the sole use of a particular trade or occupation in a particular place, for however long, thereby acquire a legal monopoly which will entitle him to prevent others from setting up in competition. This was laid down in 1410 in a celebrated case which the courts have followed ever since. Two masters of the grammar school in Gloucester brought an action on the case against a master who had recently set up a rival school in the same town and compelled them to lower their fees in order to survive the competition. It was held by the Common Pleas that they had no cause of action, because no one could have an exclusive proprietary right in local education and it was both lawful and charitable for any qualified master to teach children anywhere.[3] The only advantage gained by being first in the field was the goodwill which had been earned; but this was so little regarded before the seventeenth century that it could not even be protected by contract.[4]

It was agreed in the argument of the Gloucester school case that the same principle applied to trade: a miller had no action if he lost business through the erection of a new mill in the same vicinity. It was not analogous in law to the diversion of a water-course to a new mill, where a miller downstream had a prescriptive right to the water, because that was a nuisance to his easement, an infringement of property.[5] A monopoly of milling grain could be claimed only by the lord of a manor, on proof of a manorial custom for the tenants or inhabitants of the manor to bring their grist exclusively to the lord's mill. A similar monopoly of baking bread or burning lime could be acquired in a manorial bakery or limekiln. In earlier medieval times such monopolies had been widespread in local communities, but in common-law theory they depended on proof of an immemorial custom, or at least of a tenurial service. They were protected by the real actions of *secta ad molendinum* (mill-suit) and *secta ad furnum* (oven-suit), in which the lord based his claim on seisin.[6] These actions lay only against the disloyal customers, to recover their custom, but in the fourteenth and fifteenth centuries they were supplemented by actions on the case against the rival millers and bakers.[7] The commonest medieval monopoly to survive into the early-modern period was the market or fair. The lord of a market profited from the tolls, which were taxes taken from people who traded in it, and was entitled to prevent sales being made free from toll within a

[3] *Hamlyn v. More* (the *Case of Gloucester School*) (1410) B. & M. 671. Cf. *Oursom v. Plomer* (1375) *CPMR 1364–81*, p. 206 (similar action in London, for setting up a scalding-house; compromised).

[4] Bonds in restraint of trade were once wholly unenforceable: *The Dyer's Case* (1414) Y.B. Pas. 2 Hen. V, fo. 5, pl. 26; *The Blacksmith's Case* (1587) 2 Leon. 210; *Colgate v. Bacheler* (1602) Cro. Eliz. 872; Baker, *Magna Carta*, pp. 312–13. But moderate restraints, limited in time and place, became enforceable in *assumpsit*: *Rogers v. Parrey* (1613) 2 Buls. 136; *Jollie v. Broad* (1620) 2 Rolle Rep. 201.

[5] See p. 456, ante.

[6] For mill-suit see Milsom, 80 SS xc–xcv. The *praecipe* form was 'Command N. that he do suit to the [plaintiff's] mill' (*praecipe quod faciat sectam ad molendinum*). For a specimen viscontiel writ see p. 580, post.

[7] The first known precedent is in 1397: 100 SS 1 n. 307 (mill). Cf. *Prior of St Neots v. Corbet* (1448) CP 40/751, m. 555d (oven). See also n. 11, post.

certain precinct. If someone set up a rival market, an assize of nuisance lay, or a writ of nuisance *quare levavit mercatum*.[8] For other infringements a range of trespass actions was used.[9] One of the first known actions of trespass on the case, of any kind, was that brought in 1309 against a tradesman who sold goods outside a market but within the lord's precinct, in derogation of the lord's rights.[10] Seignorial rights such as these were tolerated as inveterate survivals, even though they prevented competition and drove up prices.[11] They were assimilated to freehold property and the categories were limited. But prescription could not, in other contexts, establish a monopolistic right to exclude rivals. The schoolmasters in 1410 had indeed claimed, through the prior to whom the school belonged and who had appointed them, a monopoly of teaching in Gloucester since time immemorial; but even enjoyment since time out of mind could not prevent others from pursuing the same calling.

Another, albeit limited, way of establishing a monopoly was by grant from the Crown. Most markets and fairs were created, or confirmed, by royal charter, care being taken not to create new markets which interfered with pre-existing privileges.[12] The king's control of commerce in markets was so ancient that no one saw any need to justify this undoubted royal prerogative. Privileges were also granted by charter to the livery companies in London and other cities, which were guilds for those following particular trades or 'mysteries'. The main object of the earlier company charters was to confer the right to associate and to set up a governing body, with the power to make bye-laws laying down apprenticeship qualifications and imposing some control on standards; but in order to make such privileges effective it was usually granted that none should follow the same trade within the city concerned unless he was a member. This was a monopoly only in a limited sense, because membership of the guild was not closed, and it was intended to impose regulation and discipline upon a particular trade in a particular place rather than to restrict the trade to favoured individuals.[13]

In about 1561 William Cecil (later Lord Burghley), secretary of state, introduced the continental practice of granting monopolies to individuals who brought new inventions into the realm. The idea was to encourage people to import practical ideas from abroad and to ensure that the Crown profited from them, in return for a grant of exclusive privilege for a fixed term.[14] Over twenty such patents were granted in the 1560s.[15]

[8] See p. 460, ante.

[9] For *vi et armis* actions (e.g. for impeding the toll-collector or picketing toll-payers) see 74 LQR 418–23 (repr. in *SHCL*, pp. 42–7); 100 SS xlviii–xlix.

[10] *Prior of Coventry v. Grauntpie* (1309) B. & M. 669.

[11] The economic arguments were deployed in the prolonged but inconclusive litigation (1577–90) over Sir George Farmour's claim, as lord of the manor, to monopolize baking in Towcester: *Farmor v. Savage* (1583–6) Coke's notebook (135 SS), no. 80; *Farmour v. Brooke* (1589–90) B. & M. 676. For other manorial monopolies see *Bedingfield v. Leder* (1585) Coke's notebook (135 SS), no. 4 (sheepfold); *Hix v. Gardiner* (1614) 2 Bulst. 195 (mill).

[12] See J. Masschaele, 107 EHR 78.

[13] See the discussion in *A.-G. v. Joiners' Company of London* (1582) Baker, *Magna Carta*, pp. 312–13, 468–76.

[14] There was an early precedent in 1449, when the Flemish stained-glass maker Jan Utynam was brought over to work on the king's chapels at Eton and Cambridge: *Cal. Patent Rolls 1446–52*, p. 255 (privilege that his trainees should not compete for 20 years). There were more recent precedents in 1552 and 1554: J. Phillips, 3 JLH 71.

[15] The first for which the dealings with Cecil are recorded was granted to a German scientist in 1563 for making white salt without fire. The original patent belongs to the writer: JHB MS. 2155; Baker, *Magna Carta*, pp. 194–7. But there were earlier Elizabethan patents in 1561 (saltpetre) and 1562 (dredging machine).

Although they were enforceable with fines and imprisonment, backed up by the Star Chamber, they could not in principle affect anyone's previous livelihood. Their validity was tested in 1573, when the judges assembled in the Exchequer Chamber confirmed that they were only lawful if they did not restrain an existing trade or manufacture.[16]

A third type of monopoly which the Crown began to grant with increasing frequency in the sixteenth century was the exclusive right to conduct trade in foreign parts. Such a right was conferred upon the incorporation of a merchant trading company, by virtue of the royal prerogative to license overseas trade. Again no one could complain of loss, since no subject was entitled to trade overseas without a royal licence, but there was some initial doubt about the validity of such charters and it was thought advisable in some cases to obtain confirmation by Act of Parliament. Soon the known world had been shared out by charter: the medieval Merchant Venturers (chartered in 1551) traded in western and southern Europe, the Muscovy Company (or Russia Company) (1555) took northern Europe and beyond, the Levant Company (1581) took the Mediterranean region, the Cathay Company (1576) and the East India Company (1600) took Asia. Africa and America were shared out in the seventeenth century, though most of the American charters were for colonizing bodies – as was, in its eventual effect, the East India Company.[17]

Legal Restraints on Monopolies

The Crown reaped much profit from these monopolies. Not only could cash be demanded for issuing patents, but royalties could be extracted from their ongoing exploitation. By the end of the Tudor period there were so many chartered and patented monopolies, some of which stretched the legal requirement of innovation to the limit and beyond, that the matter was raised as a grievance in the parliaments of 1597 and 1601. When a list of thirty objectionable patents was read out in the Commons, a bothered young barrister asked why bread was not on the list, because if they did not do something it soon would be.[18] A grave constitutional issue ensued, which Elizabeth I tried to deflect with her 'Golden Speech' of eloquent contrition; she herself recognized that the prerogative was being abused by courtiers, but the matter was left to the courts to settle. In 1602 an action on the case was brought for infringement of a patent granting the plaintiff the sole right to import, make, and sell playing-cards. The patent clearly transgressed the principle that the Crown should not make a grant which injured existing trades, because playing-cards were already being made and sold in England,[19] and counsel maintained that it was against Magna Carta; but the law officers resorted to the disingenuous argument that card-playing was an undesirable activity which required

[16] *Bircot's Case* (1573) Co. Inst., III, p. 184 (smelting lead held not to be a new invention). 'Bircot' was Burchard Cranach, a German mining engineer: Baker, *Magna Carta*, p. 195.

[17] See n. 24, post. The principal later trading companies were the Africa Company (1660) and the Hudson's Bay Company (1670).

[18] Baker, *Magna Carta*, p. 198. The barrister was William Hakewill of Lincoln's Inn.

[19] The *importation* of playing-cards was prohibited by Stat. 3 Edw. IV, c. 4, and so the grant to Darcy also arguably operated as a dispensation from the statute. Contrary to Coke's report, the judges did not pronounce on this aspect of the grant; importation was not alleged in the declaration.

control. Shortly after the queen's death, the King's Bench held the patent void, declaring that monopolies were abhorrent because they operated in restraint of trade, tending to cause increased prices and reduced quality.[20] The decision was not intended to affect patents for genuine inventors. Nor did it strike at companies which existed to regulate rather than to limit trade, although it was established at the same period that it was contrary to Magna Carta for a company to make bye-laws creating monopolies with penal sanctions.[21]

James I, though professing to dislike monopolies, nevertheless found it as difficult as had Elizabeth I to restrain the greed of ministers, and late in his reign the continuous complaints in the Commons finally culminated in legislation. The bill was promoted in 1621 by Sir Edward Coke, who regarded monopolies as the principal economic grievance of the times and had attacked many of the patents proposed during the preceding few years. It was finally enacted in 1624. All monopolies for the sole buying, selling, making, or using of any thing within the realm were to be 'utterly void'. But Coke's draft bill was modified by the insertion of various exceptions before it was passed, mostly designed to preserve the status quo. The exceptions were: patents for the 'sole working or making of any manner of new manufacture' granted for not more than fourteen years[22] to 'the first and true inventor', patents concerning printing and certain other trades of public importance, licensing of taverns, and charters to 'corporations, companies, or fellowships, of any art, trade, occupation, or mystery'.[23]

The last proviso gave ministers the means of evasion. After the decision of 1602 a weird new batch of quasi-guilds had appeared, such as the Pinmakers (1605), Starchmakers (1607), Gold and Silver Thread Makers (1611), Brickmakers (1614), Tobacco-pipe Makers (1619), Westminster Soapmakers (1631) and Yarmouth Saltmakers (1636). They were not true craft guilds, but closed companies set up to monopolize old specialist trades, and yet they appeared to be saved under the 1624 Act. As blatant private monopolies in a transparent corporate guise, they were much complained of. But the arrangements whereby they paid duty to the Crown on sales yielded a substantial income by way of royalties on basic commodities, and this rendered reform under Charles I impossible. The era of the monopolistic company ended, however, with the Civil War, and the revenue from royalties was thereafter replaced by excise duty. It was then the turn of the overseas merchant companies to come under attack. The prerogative power to erect monopolies in overseas trade was vindicated after much debate in the case of the East India Company in 1683, with profound consequences for the future of the Indian sub-continent;[24] but it was also decided that the Crown could not grant

[20] *Darcy v. Allen* (*Case of Monopolies*) (1602–03) B. & M. 678; M. B. Donald, *Elizabethan Monopolies* (1961), pp. 196–249; D. S. Davies, 48 LQR 394; J. I. Corré, 45 *Emory Law Jo.* 1261; Baker, *Magna Carta*, pp. 319–23.

[21] *Davenant v. Hurdys* (1599) 11 Co. Rep. 86; Baker, *Magna Carta*, pp. 314–18. Coke A.-G. argued on behalf of Davenant that the ordinance in question was against Magna Carta, c. 29. See also *Tailors of Ipswich v. Sheninge* (1614) 11 Co. Rep. 53.

[22] Or 21 years in the case of existing patents.

[23] Statute of Monopolies 1624 (21 Jac. I, c. 3). The principal provisions remained on the statute-book until 1969.

[24] *East India Co. v. Sandys* (1683) 10 State Tr. 371. Though founded as a trading company, from the mid-18th century it assumed the power of government in India. Its rule was ended by the Government of India Act 1858 (21 & 22 Vict., c. 106), which transferred its territories and powers to the Crown.

the right to enforce a trading monopoly by forfeiture,[25] and in fact after this period the prerogative was no longer exercised.

Later Patent Law

The original justification for granting privileges to entrepreneurs had been that, by encouraging the importation of foreign innovations into England, they actually increased trade and employment for Englishmen. By the eighteenth century the emphasis on importing foreign inventions had diminished and the principal species of monopoly created by patent was the right to exploit a new invention. The beginnings of the Industrial Revolution brought a dramatic increase in patents for English inventions – from three or four a year in the 1710s to over a hundred a year in the 1810s[26] – and there was a corresponding surge of litigation. Until the mid-eighteenth century most disputes about patents were taken before the Privy Council, which took over the jurisdiction from the Star Chamber, but this practice was discontinued and patentees began to seek redress in Chancery and at common law. From the 1760s actions on the case for infringing patents were of frequent occurrence and often resulted in substantial awards of damages.[27] These developments were accompanied by a shift in the theoretical foundation of patent law, for the judges began to take the view that its object was to secure the revelation of beneficial secrets which could be exploited generally for the public good when the inventor's term was up.[28] Increasingly it was not the right to manufacture a particular substance or artefact which was granted but the industrial process itself, and this no doubt because of the greater sophistication of industry and an increase in domestic inventions. The new theory required that the inventor should prepare a specification sufficient to enable the invention to be used by posterity. A line had to be drawn, nevertheless, at pure ideas. It was not possible to gain a monopoly in an abstract idea, or a fact of nature, since scientific truths could not be owned privately. A patent could only be granted in respect of a new working process, or of an improvement in some existing process, not of the underlying theory.[29]

The chief defect of the common-law patent system was the cumbersome procedure involved in obtaining letters patent under the great seal, which was both expensive for petitioners and insufficiently protective of either the public or the private interest.[30] The international display of British manufacturing achievements at the Great Exhibition of

[25] *Horne v. Ivy* (1670) 1 Sid. 441 (Canary Island Co.); *Nightingale v. Bridges* (1690) 1 Show. K.B. 135 (Royal African Co.). The point was inconclusively reopened in *Merchant Adventurers Co. v. Rebow* (1689) 3 Mod. Rep. 126; Comb. 53.

[26] See K. Boehm, *The English Patent System* (1967), pp. 22–3.

[27] See 8 JLH 19. Lord Mansfield CJ praised a jury who awarded £500 for repeatedly infringing a patent: *Morris v. Braunson (No. 3)* (1776) *Mansfield MSS*, p. 745. Similar remedies were given in CP: *Dolland v. Champness* (1766) *Ann. Reg.*, p. 67 (£250 for infringing a telescope patent); cited, 2 Hy Bla. 487.

[28] They were probably unaware that this was the purpose of the first patent of monopoly in 1449: p. 481 n. 14, ante.

[29] *Liardet v. Johnson* (1778) 18 LQR at 285, per Lord Mansfield CJ; pleadings in Wentworth, VIII, p. 431; trial notes in *Mansfield MSS*, p. 748 (stucco patent); J. N. Adams and G. Averley, 7 JLH 156. A similar dispute concerning improvements to the steam engine proved difficult and no decision was reached: *Boulton and Watt v. Bull* (1795) 2 Hy Bl. 463; *Hornblower v. Boulton* (1799) 8 T.R. 98.

[30] It was not until 1905 that the Patent Office made searches to ensure that an invention was novel before a patent could be issued.

1851 gave an impetus to long-needed reform. In 1852 the procedure was improved and the cost reduced,[31] with the result that the number of patents obtained annually soared into four figures, and by the end of the century five. The deluge of new patents and applications for patents generated substantial business for a burgeoning profession of patent agents and for a new specialist Patent Bar.

Copyright

Closely analogous to the 'industrial property' rights in inventions are the 'literary property' rights of authors and publishers. The first forms of copyright belonged to publishers rather than authors, and likewise resulted from Tudor prerogative grants, in this case of 'royal privileges' conferring on printer-publishers the sole rights to publish particular books or classes of book. They may have been predicated originally on printing having been a recent invention, but they related to specific products of the invention and not to its use at large.[32] The prerogative was as much concerned with censorship as monopoly, and was arguably confined to those classes of book which the Crown claimed a special interest in controlling, such as bibles and service-books, statutes,[33] and other law-books,[34] though it was more widely exercised in practice.[35] Patentees could enforce their rights by actions on the case or Chancery injunctions. Since these rights prevailed over any rights of the owner of the manuscript copy,[36] and extended to the restraint of new publications within the class covered by the grant,[37] they were closer to trading monopolies than to copyright as now understood.

The recognition of copyright in an author or editor, or his assignee, was a later development. The first suggestion that the owner of the copy had a common-law right to damages for unauthorized publication seems to have been an inconclusive action brought in respect of Bunyan's *Pilgrim's Progress* in 1679.[38] The question only became pressing after the monopoly of licensing by the Stationers' Company was ended in 1695, and it came to a head after the union with Scotland in 1708, when it was feared that

[31] Patent Law Amendment Act 1852 (15 & 16 Vict., c. 83). A further decrease in the fees to £4 in 1883 led to a threefold increase in the number of patents.

[32] In 1561 the judges held that a general monopoly of printing would be illegal: Baker, *Magna Carta*, p. 190. If this referred to the 1557 charter of the Stationers' Company, the objections must have been overcome; the company controlled the London presses, which printed most English books, until 1695.

[33] From around 1505 until the present day the printing of statutes has been the monopoly of the king's (or queen's) printer.

[34] The tenuous argument here was that the law emanated from the king and that law reporting had been started by royal officials. Richard Tottell was granted a monopoly of printing common-law books in 1555, and the patent was upheld by the Privy Council in 1593: *Acts of the Privy Council*, XXIV, p. 369. See further *CPELH*, II, pp. 642–54; *Roper v. Streater* (1672) n. 36, post; *Rawlins v. Walthoe* (1704) Wright Rep., BL MS. Add. 22609, fo. 110 (upheld in Chancery, despite the argument that it was oppressive).

[35] A proclamation of 1538, aimed against unapproved religious publications, forbade the printing of any book in English without licence: *Tudor Royal Proclamations*, I, p. 270. Printers so licensed had the privilege of sole printing the book in question for a specified period. Printing monopolies were exempted from the Monopolies Act 1624 (p. 483, ante).

[36] *Roper v. Streater* (1672) cit. 2 Show. 260, Skin. 234 (decision of HL concerning Croke's reports).

[37] *Stationers' Co. v. Seymour* (1677) 1 Mod. 256; 3 Keb. 792; *Stationers' Co. v. Marlowe* (1680) cit. 2 Show. 261; Lilly's *Entries*, I, p. 63. These cases concerned English almanacs, and the court followed *Roper v. Streater* (concerning law books).

[38] *Ponder v. Braddill* (1679) Lilly's *Entries*, I, p. 67.

Scottish reprints would flood the market. The matter was clarified by the Copyright Act of 1710, which gave fourteen years' protection (as for inventions) to authors of books or other writings who registered them with the Stationers.[39] Authors could seek an injunction or damages for piracy of their work within the term. In the eighteenth century a major controversy arose as to whether literary copyright existed at common law independently of the statute. The Chancery thought it did. So did Lord Mansfield CJ and the majority of the judges, untroubled by the dearth of authority; but in 1774 the House of Lords (by a lay vote) succumbed to the eloquent opposition of Lord Camden LC and ruled that upon publication a book became public property at common law.[40] Any protection therefore had to come from Parliament.

The 1774 decision prevented the judges from filling gaps in the 1710 Act themselves, and so the development of copyright law depended on piecemeal legislation. The statutory system of 1710 covered only printed books. Although it had been decided in 1758 that the owner of an unpublished manuscript could restrain its publication, doubts were cast on this by the decision of 1774, necessitating a statute in 1801.[41] Works of art were given protection gradually, by a series of statutes beginning in 1735 in favour of engravings, by further statutes beginning in 1787 concerning fabric designs, and then by statutes of 1798 and 1814 governing sculptures. It was not until 1862 that copyright was extended to paintings, drawings, and photographs.[42] Printed or engraved music was held to be within the 1710 Act, but the judges were powerless to stretch the statute to deal with live performances or recordings.[43] Oral publication of writings raised similar problems, which were solved first in equity and then by Parliament: it was established in Georgian times that a person could be restrained from publishing notes taken from the spoken word at a play or lecture,[44] and conversely that a person could be restrained from performing a dramatic or musical work published in writing by another.[45] Further extensions were made by statute, in 1956, to cinematograph films, broadcasts, and typography,[46] and later still to 'works' in general, so as to include digital media.

Copyright was usually spoken of, from the eighteenth century, as a species of property generated by the author's labour, and it was treated as a property right in so far as the tort of infringing it was a tort of strict liability. But it was an unusual kind of property. Infringement was not a precise concept, since it was unclear how far it encompassed quotations, short extracts, abridgments, paraphrases, translations, or plagiarism of a general idea or plot rather than particular words. As with patents, protection was at first (until 1911) dependent on registration, and it was limited to a term of years,

[39] 8 Ann., c. 19. The 14 years could run again if the author survived the first term.

[40] *Millar v. Taylor* (1769) 4 Burr. 2303; *Donaldson v. Beckett* (1774) 4 Burr. 2408; 2 Bro. P.C. 129.

[41] *Duke of Queensberry v. Shebbeare* (1758) 2 Eden 329 (Clarendon's history of Charles II's reign); Stat. 41 Geo. III, c. 107, s. 1.

[42] Stat. 25 & 26 Vict., c. 68. Cf. *Prince Albert v. Strange* (1849) 2 De G. & Sm. 652; L. Bentley in *Landmark Cases in Equity* (ed. Mitchell), pp. 235–67 (publication restrained as a breach of confidence).

[43] *J. C. Bach v. Longman* (1777) 2 Cowp. 623; *Boosey v. Whight* [1900] 1 Ch. 122 (organ-rolls).

[44] *Macklin v. Richardson* (1770) Amb. 694 (play); *Abernethy v. Hutchinson* (1825) 1 H. & Tw. 28 (lecture). Cf. the Lecture Copyright Act 1835 (5 & 6 Will. IV, c. 65).

[45] *Morris v. Kelly* (1820) 1 Jac. & W. 481; Bulwer Lytton's Dramatic Literary Property Act (3 & 4 Will. IV, c. 15).

[46] Copyright Act 1956 (4 & 5 Eliz. II, c. 74).

though the copyright term came to be linked to the lifespan of the author and not the date of creation of the work.[47]

Unfair or Deceptive Competition

While the common law abhorred monopoly, it had little difficulty finding ways to protect trade and labour against wrongful interference. As between buyer and seller, the action on the case for deceit remedied those forms of unfair or misleading conduct which were not caught by the principle *caveat emptor*.[48] But the concept of deceit was wide enough to embrace also those situations where a person was hurt by the effect of deception on third parties. This provides an analogy with defamation, because there the action on the case lay for false assertions which drew third parties away from trading with the plaintiff.[49] The earliest cases of injurious falsehood were indeed cast in the form of defamation, by treating an aspersion on the plaintiff's wares or mode of doing business as being an aspersion on his personal reputation.[50] A false denial of the plaintiff's title to his property, whereby he was hindered in selling it, was actually called 'slander of title'; and this action was almost as old as the action on the case for defamation of character.[51] When, around 1700, the tort of defamation crystallized out of the wider action on the case for words,[52] these economic torts were regarded as having a different basis and it became necessary to show actual malice. Both slander of title and the unfair disparagement of property or wares were then regarded as species of the tort of maliciously making false statements so as to injure another,[53] a tort which Salmond named 'injurious falsehood' and others have called 'malicious falsehood'. Parliament in the twentieth century chose to invest the tort of malicious falsehood with some of the accidental attributes of the tort of defamation.[54]

A second category of deceptive competition was the wrongful copying of a trademark,[55] or the trade-name or get-up of the plaintiff's wares. This could injure the plaintiff both by diverting his potential customers to the defendant in the belief that they were buying the plaintiff's wares and also by driving customers away from the plaintiff through putting around inferior wares purporting to be his. Both types of

[47] In 1814 the period was extended to 28 years, determinable upon death; in 1842 to 42 years, or 7 years after death; in 1911 to 50 years from death; and in 1995 (to achieve harmony within the E.E.C.) to 70 years from death. The need for registration was removed in 1911 in order to comply with the international Berne Convention of 1883.

[48] See pp. 352–3, 380, ante. [49] See pp. 467–70, ante.

[50] E.g. *Rede v. Stubberd* (1557) KB 27/1182, m. 47 (miller's toll-dish said to be bigger than it ought to be, so that people did not bring their grain to him); p. 469 n. 34, ante (inn said to be infected with disease); *Fen v. Dixe* (1639) W. Jones 444 (coarse remarks about brewer's beer); *Harman v. Delany* (1731) 2 Stra. 898 (warning about gunsmith's products).

[51] Some examples beginning in 1512 are noted in *OHLE*, VI, p. 788 n. 59. The tort does not seem to have been extended to chattels until the 19th century.

[52] See p. 473, ante.

[53] The two came together in *Green v. Button* (1835) 2 C. M. & R. 707 (maliciously asserting a lien over goods bought by P, so seller would not deliver).

[54] Defamation Act 1952 (15 & 16 Geo. VI & 1 Eliz. II, c. 66), s. 3.

[55] The first marks were stamps used by goldsmiths, silversmiths, and pewterers. Cloth manufacturers used lead seals. After 1513 clothiers were forbidden to use a mark used by another: 5 Hen. VIII, c. 2; cf. 27 Hen. VIII, c. 12 (marks to be woven into cloth).

injury were alleged in the first known case dealing with this problem. In 1584 the Common Pleas judges were divided as to whether an action on the case would lie for discrediting the plaintiff's cloth by counterfeiting his trademark and selling unmerchantable cloth so marked.[56] Two of the judges argued that it was lawful for a tradesman to use any mark he chose, overlooking a statute of 1513 concerning cloth marks; but the other two held that it was wrong to injure another by deceptive means. The printed references to this case were so inconsistent that doubts were later entertained as to whether the action had been given to the purchaser of the goods, in which case it was an orthodox case of deceit on a sale, or to the original creator of the mark, in which case it seemed to be the first known action for infringing a trademark. Manuscript reports show that it was the latter, though it was not based on any discernible concept of intellectual property. It was brought rather for the damage caused to the plaintiff's reputation by selling inferior cloth with his mark, so that he was unable to sell the real thing; in other words, it was a near relation of defamation. Although no judgment is reported, similar precedents in a seventeenth-century manuscript suggest that such actions gained a foothold in practice.[57] But it was a matter of tort, not property. Lord Hardwicke LC opined in the eighteenth century that a person could not acquire a property or monopoly in a trademark simply by being the first to use it, any more than he could in his own surname or in an inn-sign.[58] An action would only lie if some fraudulent use was made of the plaintiff's name, mark, or sign,[59] for instance by 'passing off' the defendant's goods as his by deceptive imitation.[60] However, in the time of Lord Eldon LC it became possible in equity to treat the user of a trademark or trade-name as having a species of property akin to copyright, or goodwill, which could be protected by injunction. The result was a bifurcation of one remedy into two, which developed separately in the nineteenth century as the rise of mass-production industries gave ever-increasing commercial importance to this branch of the law. Usurping a trademark was an infringement of property, actionable per se, prohibitable by injunction, and eventually punishable as a crime,[61] whereas passing off by other means was a tort, usually actionable only on showing deceit or at least a tendency to deceive, and actual or prospective economic damage. The second remedy, though qualified, was useful

[56] *J. G. v. Samford (or Stamford)* (1584) B. & M. 673; BL MS. Lansdowne 1095, fo. 32 (better report); Lincoln's Inn MS. Misc. 361, fo. 67v (same); BL MS. Lansdowne 1057, fo. 60. Serjeant Fleetwood, recorder of London, asserted in argument that such an action would lie on the custom of London.

[57] Girdler's manuscript entries, CUL MS. Add. 9430, unfol. (action on the case by a scythe-maker for using his mark); *Waldron v. Hill* (1659) ibid. (declaration on a local custom as to the use of marks). Girdler also has a precedent of an action for marking cheese with the plaintiff's mark: *W. E. v. R. M.* (1670).

[58] *Blanchard v. Hill* (1742) B. & M. 684 (injunction refused). No mention was made of armorial bearings, which are a species of exclusive property in personal signs; but these were governed and protected by the law of arms, not by common law or equity: N. Dawson, 24 JLH 111; p. 132, ante.

[59] This was confirmed in *Sykes v. Sykes* (1824) 3 B. & C. 541 (same name and mark); *Blofield v. Payne* (1833) 3 B. & Ald. 410 (same packaging); *Powell v. Birmingham Vinegar Brewery Co. Ltd* [1897] A.C. 710 ('Yorkshire Relish'); but cf. *Payton & Co. Ltd v. Snelling, Lampard & Co. Ltd* [1901] A.C. 308 (similar looking coffee tins).

[60] E.g., in Mansfield's time, *Greenough v. Dalmahoy* (1769) and *Greenough v. Lambertson* (1771) *Mansfield MSS*, II, p. 741, 746 (actions by a chemist for imitating his pectoral lozenges). For other cases see 8 JLH 22; *Mansfield MSS*, II, pp. 728–9.

[61] Criminal sanctions: Merchandise Marks Act 1862 (25 & 26 Vict., c. 88). Registration: Trade Marks Registration Act 1875 (38 & 39 Vict., c. 91). The equitable concept of incorporeal property was embodied in the Patents, Designs and Trademarks Act 1883 (46 & 47 Vict., c. 57).

where the deception consisted in using a distinctive get-up, or a generic name associated with a particular manufacturer but not registrable as a trademark. When passing off was extended to literary property, it came close to merging with defamation.[62]

Domestic Relationships

Indirect interference with economic interests could also occur through dealings with domestic relationships. The medieval common law allowed an action of trespass for assaulting or threatening servants so that they left, or were rendered unable to perform their services for the plaintiff. This type of action belongs conceptually with the economic torts because, although force and arms were alleged, the force was not used against the plaintiff; the action lay for the loss occasioned to the plaintiff by interfering with an existing relationship of benefit to him. The gist of such actions was the loss of services, and they were extended by analogy, through trespass on the case, to situations where the plaintiff was deprived of benefits by non-forcible conduct. The extensions led to the diverse torts of enticement, criminal conversation, and inducing a breach of contract.

Servants and Apprentices

The extension may have begun in cases of competitive retaining, by using the *vi et armis* writ for abducting a servant fictitiously,[63] but before 1400 a direct remedy was available. The Ordinance of Labourers (1349), occasioned by the upheavals in the labour market consequent upon the Black Death, imposed criminal sanctions on workmen and servants who without reasonable cause departed from their employers within the agreed period of service, and upon those who retained or harboured deserting servants. It was soon held that a master could bring actions founded on the legislation both against the servant[64] and against his new master. The gaps in this scheme were filled in Tudor times by actions on the case. By 1530 at the latest there was an action on the case for retaining apprentices and independent contractors in breach of their contracts of service,[65] and for procuring or enticing servants to depart from service, a wrong which could be committed by an intermediary who did not himself retain the servant.[66] This extension engendered another. If causing a loss of service was actionable, then it ought not to matter whether it occurred because of a new retainer or for any other reason. From the early sixteenth century we encounter actions by masters for loss occasioned by negligently injuring a servant,[67] or making a servant pregnant,[68] or

[62] *Archbold v. Sweet* (1832) 1 Moo. & R. 162 (lawyer's reputation injured by publishing inaccurate new edition of his book in his name). Despite further litigation with Sweet, Archbold's better known book on criminal law and procedure is still published by Messrs Sweet & Maxwell.

[63] See M. S. Arnold, 100 SS xliv. [64] See p. 354, ante.

[65] These were outside the statute, but here also trespass *vi et armis* had been used in the interim: Milsom, *HFCL*, p. 292.

[66] *OHLE*, VI, p. 809. Cf. *Wren v. Bodefeld* (1515) Caryll Rep. 681 (no action if servant goes spontaneously).

[67] E.g. *Clerk v. Terrell* (1507) *OHLE*, VI, p. 765 (shooting accident); *Everard v. Hopkins* (1614) 2 Bulst. 332 (negligent doctor). Victorian judges were less sure about this: *OHLE*, XII, p. 1042.

[68] *Jermyn v. Dauson* (*c.* 1543) Girdler's entries, CUL MS. Add. 9430, unfol.

enticing a servant to waste time (and the master's money) playing cards and dice.[69] The master could sue for any wrong to the servant whereby he lost his or her service (*per quod servicium amisit*).[70] There was even an attempt in 1529 to recover compensation not merely for the loss of an apprentice's service but also for the wasted expenditure on the apprentice's education and clothing.[71]

The principle of the action *per quod servicium amisit* was not, however, extended to all relationships of dependency. For instance 'services' in this context did not in practice include the benefit of an employment contract where the person injured was not a menial servant.[72] A servant could not sue for the loss of his employment when his master was injured or killed. And a master or husband could not sue for loss caused by killing his servant or wife.[73]

Wives and Daughters

The servant cases were matched by similar actions in respect of wives. They are not strictly analogous, especially since the real grievance was almost always an act of adultery; but they were used in a similar way to replace earlier *vi et armis* actions founded on fiction. Pleadings in fourteenth-century actions for 'ravishing'[74] and abducting wives, together with the goods and chattels of the husband, often let slip that the underlying complaint was of a consensual elopement; at least some of the actions involved disputed marriages.[75] This was not so much a fiction as a legal construction. The law took the view that a wife's consent to adultery or elopement was unlawful and void, and therefore enticing her away consensually could be treated as an abduction or ravishment. The personal belongings which the eloping wife took with her were in law the husband's, and so they could also be made the subject of a trespassory complaint. Therefore, even if the jury found expressly that the abduction was not forcible, the husband could still recover damages.[76] A similar action lay for abducting a daughter, but only if she was an heiress presumptive whose marriage belonged to the plaintiff.[77] In the seventeenth century it was established that if a wife or daughter was debauched on the husband's property, he could bring trespass *quare clausum fregit* for the trespass on his land, since any implied licence to be on the premises was negatived by such behaviour, and he could recover

[69] *Walley v. Richmond* (1602) B. & M. 681. Note also *Stokys v. Est* (1528) KB 27/1066, m. 10d (hiding P's servants in his house so that they went absent for several days).

[70] G. H. Jones, 74 LQR 39.

[71] *Southworth v. Blake* (1529) *OHLE*, VI, pp. 809–10.

[72] Counsel in *Taylor v. Neri* (1795) 1 Esp. 386 (opera singer) admitted that he could find no precedent of this.

[73] See 102 SS 177 (1500). A remedy for dependents injured by a relative's death was introduced by Lord Campbell's Act 1846: pp. 445–6, ante. But this did not extend to masters or servants.

[74] The Latin verb *rapere* (French *ravir*, whence ravish) means to carry off or abduct, not necessarily importing sexual abuse.

[75] E.g. *Gyse v. Baudewyne* (1310) B. & M. 352 (which turned on whether the woman was P's wife or D's). See further Arnold, 100 SS xlv–xlviii. As to whether a man could justify helping a wife leave her abusive husband to pursue divorce proceedings see *Vernon v. Gell* (1504) *OHLE*, VI, p. 621 n. 217 (where the wife had brought an appeal of rape against her husband for forcing her to marry him).

[76] *Upton v. Heydon* (1308) 100 SS 73.

[77] Arnold, 100 SS xlv; *Lincoln v. Simond* (1391) 100 SS 96 (P asserts D's betrothal to his daughter without his consent to be a constructive ravishment); *Barham v. Dennis* (1600) Cro. Eliz. 770.

damages for the debauchery as a matter of aggravation.[78] In all these cases, the wrong appeared on the record as a forcible wrong against the husband or father.

The analogy of the action on the case for causing a loss of service gave rise in the sixteenth century to a more straightforward remedy for interfering with family relationships. The husband was permitted to bring an action for injuring his wife 'whereby he lost her help and companionship' (*per quod auxilium et consortium amisit*).[79] A similar action lay for seducing a maid or daughter *per quod servicium amisit*.[80] Provided some loss of service was made out, the courts allowed juries to assess aggravated damages for the dishonour and injured feelings caused by the sexual misconduct.[81] Only the slenderest of evidence of service was required: a 'quasi fiction', wrote Serjeant Manning, which favoured 'the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child . . . is sent unprotected to earn her bread amongst strangers'.[82] Where the wife eloped with a paramour, the husband might alternatively bring an action on the case for enticement, modelled on the action for enticing away servants.[83] In the seventeenth century another kind of trespass action appeared, called the action for criminal conversation, which treated the act of adultery as a trespass in itself, again on the principle that the wife's consent was invalid. The usual declaration was to the effect that the defendant with force and arms assaulted the wife, and ravished and debauched her, so that the plaintiff lost her comfort, fellowship, and society. Such actions became common, and notorious, in the eighteenth century;[84] and they came to be a standard preliminary to divorce proceedings.[85] But an action would not lie if the spouses were already separated, because there would then be no loss of consortium. In 1857 the action for criminal conversation was replaced by a statutory action for adultery, to be brought in the Divorce Court. Both that action and the action of enticement were abolished in 1970.[86]

Inducing a Breach of Contract

In the action for assaulting a servant *per quod servicium amisit* it was not necessary for the plaintiff to allege a contract between himself and the servant. The fact that the

[78] *Cole's Case* (*c.* 1625) B. & M. 350 n. 22; E. Littleton, *The Newe Littleton* (*c.* 1644) ibid. 350; *Sippora v. Bassett* (1664) Sid. 225; *Pool v. Lewis* (*c.* 1718) King Rep. (130 SS), p. 164.

[79] *Cholmley's Case* (1586) cited in Cro. Jac. 502 ('per quod negotia infecta remanserunt'); *Guy v. Livesey* (1618) ibid. 501 ('per quod servitium amisit'); *Hide v. Cyssell* (1620) B. & M. 349 ('per quod solamen et consortium necnon consilium et auxilium in rebus domesticis amisit').

[80] *Jason v. Norton* (1653) B. & M. 394.

[81] W. Selwyn, *Law of Nisi Prius* (3rd edn, 1812), pp. 1000–2. See e.g. *Edmund v. Johnson* (1781) *Mansfield MSS*, II, p. 1050 (£300 recovered by a mother for seducing her daughter and keeping her as a mistress).

[82] Serjeant Manning's note to 7 M. & G. 1044. Juries were allowed to give damages for the distress to the parent.

[83] The first printed report is *Winsmore v. Greenbank* (1745) Willes 577. But cf. *Ferdinando v. Clerk* (1528) KB 27/1069, m. 79 (inciting and procuring P's wife to leave P and live illicitly at D's command); *Byard v. Bradell* (1586) Clench Rep., BL MS. Harley 4556, fo. 177v (procuring P's wife to commit adultery: though here the complaint was joined with poisoning).

[84] See *Mansfield MSS*, II, pp. 1258–64. Few cases appeared in the law reports, but many were made the subject of sensational popular pamphlets.

[85] See p. 535, post.

[86] Law Reform (Miscellaneous Provisions) Act 1970 (c. 33), s. 5. It remains a tort to deprive a person of services by rendering a relative incapable of continuing to perform them.

servant was in his service de facto when the assault occurred was sufficient to ground the action, and so it protected a state of affairs rather than a contract. In the case of departures from service, however, it was necessary to show that the defendant knew the servant had been retained for a specific term which had not expired; and it may have been this allegation which led to the notion that the essence of the tort consisted in bringing about a breach of contract between the plaintiff and the servant. The idea of an action for inducing a breach of contract, independently of the relationship of master and servant, had certainly occurred to the common-law mind by 1529, when an action was brought against someone who purchased land knowing that the vendor had previously contracted to give the plaintiff the first refusal. The essence of the complaint was that the defendant had maliciously procured the vendor to break the contract, knowing him to be insufficient to pay damages for its breach.[87] But no judgment is recorded and the unreported precedent was forgotten. There are few sightings of this tort over the next three centuries, presumably because actions were rare, though Blackstone regarded the basis of the action for retaining someone else's servant to be 'the property which the master has by contract acquired in the labour of his servant'.[88]

Judicial recognition of the more general tort of inducing a breach of contract, a term coined by Blackstone in discussing loss of services, came in 1853. The manager of a theatre had retained Mlle Wagner, cantatrice to the King of Prussia, as a singer. The defendant offered her more money to sing at Covent Garden instead, and she accepted. In an action for enticing and procuring her to break her engagement with the plaintiff, her counsel argued that such an action lay only for servants because it was derived from the Ordinance of Labourers. Coleridge J thought that, since the only cause of damage was a breach of contract, and since that contract was not made with the defendant, the doctrine of privity precluded an action. The majority decided, nevertheless, to allow the action despite the absence of precedents; it was a tort to induce a third party by persuasion to break a contract with the plaintiff.[89] Later decisions confirmed what had been anticipated in 1529, that the tort could not in principle be confined to contracts for services. It was said to be an application of the broad principle that an action on the case lay for any wrongful act which, as its natural and probable consequence, caused injury.[90] The new departure was in treating interference with someone else's contract as wrongful.

Intimidation and Conspiracy

Although the common law never allowed an action for drawing away customers by fair competition, it was another matter if customers were harassed by violence or diverted

[87] *Palmer v. Wryght* (1529) *OHLE*, VI, p. 810. P added that he had kept aside funds, and built on adjacent land, in hope of the purchase.

[88] Bl. Comm., III, p. 142. By that time it was the practice to bring an action on the case for enticement rather than an action on the Ordinance of 1349: e.g. *Whiffin v. Foster* (1770) *Mansfield MSS*, II, p. 1336 (recovers £250). See also p. 399, ante.

[89] *Lumley v. Gye* (1853) 2 E. & B. 216; *OHLE*, XII, pp. 1043–9. Cf. *Lumley v. Wagner* (1852) 1 De G. M. & G. 604; cause papers in JHB MS. 2117 (injunction against the singer herself).

[90] *Bowen v. Hall* (1881) 6 Q.B.D. 333 at 337, per Brett LJ.

by unlawful conduct, such as defamatory statements or deception,[91] or by threats of unlawful conduct. The usual medieval actions for intimidation were for interfering with markets,[92] or for driving away tenants with threats.[93] Yet there was no obvious theoretical limitation. Actions are found in the fourteenth century for driving away servants, and even for frightening off oath-helpers so that the plaintiff could not wage his law.[94] But the first reported decision to allow an action for injuring a man's business by menacing potential customers was in 1621. Subsequent cases are equally scarce, though the same principle was applied in 1793 where shots were fired at natives in the Cameroon to deter them from trading with the plaintiff.[95]

The underlying principle, when pondered carefully, could not by any logic be limited to interference with potential personal dealings. In 1705 Holt CJ announced that an action would lie for any malicious injury of another in his trade. The circumstances were that the plaintiff owned a pond with a duck-decoy, and the defendant had fired shots on his own land to scare the ducks off the plaintiff's land. It was not in itself unlawful for a man to discharge a gun on his own land, and the plaintiff had no property in wild ducks; but this was malicious, and it caused economic loss. The wrong might have been treated as a nuisance by loud noise, but the court chose instead to treat it as an unlawful interference with trade: 'the decoy is in the nature of a trade, and there is the same reason that he should be repaired in damages for his decoy as for any other trade. It is true that there may be *damnum absque injuria*. If a man set up the same trade as mine in the same town, this is a damage to me, but it is *sine injuria*, for it is lawful to him to set up the same trade if he please. But this action is brought for disturbing him from exercising his trade.' The Gloucester schoolmasters would have been able to sue, on this footing, if the defendant had kept scholars away by shooting at them. That would have been unlawful, whereas offering schooling at lower fees was a lawful act of charity.[96]

The gist of any tort being wrongful conduct, and causing economic loss not being in itself unlawful, it fell to be determined what exactly was unlawful in this context. This became a vexed question in the nineteenth century, partly as a result of its becoming entangled with the concept of conspiracy. The writ of conspiracy, though an *ostensurus quare* writ like trespass, was founded on statute,[97] which limited its scope.[98] By later medieval times it was only brought in practice for conspiring to indict someone for an offence of which he was subsequently acquitted. Although a combination between two or more prosecutors was essential to the statutory action, since a person could not conspire with himself,[99] experiments were made with actions on the case in which this

[91] For slander see *Rede v. Stubberd* (1557) ante, p. 487 (miller). For deception see *Samford's Case* (1584) ante, p. 488 (clothier).

[92] See pp. 480–1, ante.

[93] E.g. *Terry v. Beverley* (1384) 100 SS 2; *Conyngesby's Case* (1493) Y.B. Mich. 9 Hen. VII, fo. 7, pl. 4.

[94] 100 SS xxxii.

[95] *Garret v. Taylor* (1621) Cro. Jac. 567; 2 Rolle Rep. 162; *Tarleton v. M'Gawley* (1793) Peake 270.

[96] *Keeble v. Hickeringill* (1707) B. & M. 683; Simpson, *Leading Cases*, pp. 45–75.

[97] Stat. Westminster II (1285), c. 12; *Ordinatio de Conspiratoribus* (1305). Civil actions on these statutes were common from the late 13th century onwards: P. Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921), pp. 39–59; G. O. Sayles, 58 SS liv–lxxi; J. Rose, *Maintenance in Medieval England* (2017), pp. 80–6, 140–6.

[98] See *Goldington v. Bassingburn* (1310–11) 20 SS 193, 31 SS 42.

[99] It was not, however, necessary that all the conspirators be joined in the action.

element was unnecessary; these became in Tudor times the action for malicious prosecution.[100] Conspiracy might also be alleged in other actions on the case, though it was usually combined with some other wrong. For instance, in 1662 an action was brought against some fellows of a Cambridge college for conspiring to eject another fellow, and for making a false and scandalous return to the *mandamus* to restore him. The significance of the 'conspiracy' there was that the action had to be brought against the fellows as a combination of individuals rather than against the college as a corporation.[101]

The law of criminal conspiracy was even wider in scope, and covered combinations to injure people in their trade, regardless of the lawfulness of the means used.[102] The reason why a combination was thought capable of turning something into a punishable crime, even though it would be lawful if done by an individual, is doubtless to be found in the fear of popular disorder. Prosecutions for conspiracy had been brought since medieval times against workmen combining to raise wages,[103] and they became frequent after a wave of strikes in the 1740s.[104] Alarm at the emergence of trade unions led to the criminal law being stiffened by the Combination Acts 1799–1800.[105] And yet, although there were occasional civil actions by workmen or tradesmen who had been harmed by combinations,[106] little could be found by way of a general principle of civil liability when it was investigated in 1844. An action was brought by an actor against a duke who had hired two hundred persons to 'hoot, hiss, groan, and yell at and against the plaintiff during his performance', and to cause such disruption that his engagement was terminated by the theatre management. The plaintiff succeeded, although the only precedent in point was a criminal information for conspiracy in 1775.[107] Perhaps Holt CJ's principle should have been invoked, since it is hard to see why an action would not have lain equally well in theory against a single person who had contrived to make sufficient trouble to put someone out of work.[108] But the pleadings had been framed on the basis that the conspiracy was the cause of action, and that was therefore the basis of the decision.[109]

[100] See p. 475, ante.

[101] *Widdrington v. Cudworth and others* (1662) Vidian's *Exact Pleader,* p. 3. There had been a dispute about the P's tutorial accounts: see also *Widdrington v. Goddard* (1664) B. & M. 511.

[102] *R. v. Journeymen Tailors of Cambridge* (1721) 8 Mod. 10; *R. v. Eccles* (1783) 1 Leach 274.

[103] E.g. *R. v. Osprenge and others* (1349) *CPMR 1323–64,* p. 225; *Case of the Journeymen Embroiderers* (1625) in *CPELH*, II, pp. 1087–8. For the origins of the crime see A. Harding, 13 TRHS (5th ser.) 89.

[104] C. R. Dobson, *Masters and Journeymen* (1980), pp. 21, 62. There was another crop of prosecutions temp. Geo. III: *Mansfield MSS,* II, pp. 1317–49; *Ann. Reg. 1765,* p. 79.

[105] 39 Geo. III, c. 81; 39 & 40 Geo. III, c. 106. These effectively outlawed trade unions and all collective bargaining by workmen, on pain of imprisonment.

[106] E.g. a master hatter recovered £100 against a hatmaker who had combined with others to hinder him from taking apprentices: *Leake v. White* (1786) Oldham, *ECLM*, p. 352. This was reported only in a newspaper and generally forgotten.

[107] This was for conspiring to ruin the actor Charles Macklin by disrupting his performance as Shylock at Covent Garden. Lord Mansfield CJ persuaded the conspirators to pay substantial compensation and the matter was settled: *Ann. Reg. 1775,* p. 117; Wentworth, VI, p. 443; *Mansfield MSS,* I, pp. 155–6.

[108] In the Macklin case Lord Mansfield CJ had distinguished the 'unalterable right' of hissing and applauding in a theatre from a conspiracy to ruin an actor; the former were spontaneous reactions to the performance. But an individual bent on causing serious disruption in a theatre could simply be removed.

[109] *Gregory v. Duke of Brunswick* (1844) 6 M. & G. 205 (judgment for P on demurrer), 953 (verdict for D on other counts).

This decision led some to believe that injurious trade competition, if carried out by a combination of persons, would be actionable as a conspiracy to injure a man in his trade. On this argument, the Gloucester schoolmasters would have succeeded if the new school had been set up by two masters in combination rather than one. But this proposition was rejected by the House of Lords in 1892. A trade association had endeavoured to secure a monopoly or cartel by driving out of business other traders who refused to join them. The means used were under-cutting at a loss, and withdrawing rebates and facilities from customers who dealt with the outsiders. One of those injured by the policy sued for a conspiracy to induce customers not to deal with him. In the opinion of the House of Lords, this was lawful competition. It was not legally wrong to aim at driving a competitor out of business in order to advance one's own business interests, and the pursuit of self-interest was not malice. The means here used were not unlawful by themselves, since there was no intimidation and no contracts were broken. The existence of a combination to effect a lawful end did not in itself make it unlawful.[110] This decision introduced a new complication in that it appeared to treat motive as a relevant factor. If the justification for injurious competition was the advancement of self-interest, would it be a tort to injure a trader by otherwise lawful means if it could be shown to be an act of spite which did not advance the interests of the competitor? And why should motive ever be relevant in the law of tort?[111]

This problem soon became of practical importance in a series of appellate cases concerning the civil liability of trade unions for damage done to individuals by strikes or threats to strike. Following a statute of 1875, such conduct had ceased to be indictable as a criminal conspiracy,[112] and the abolition of the criminal offence drove affected workmen and employers alike to seek redress through actions in tort. This inevitably brought a collision with the trade unions, which had gained in size and determination during the Victorian period. Unions were not like the medieval craft guilds and professional bodies, in that their object was not to impose standards of training and workmanship on their members but rather to put workmen collectively on a comparable economic footing with corporate or wealthy employers when negotiating terms of employment. They wanted the right to strike, as a means of coercing employers to settle with them, and the right to put individuals out of work in order to achieve monopolies of labour (the 'closed shop'). The Victorian judges were not imbued with the spirit of trade unionism, which for most of their lifetimes been tainted with crime, and were inclined to favour the individual worker against the combined power of a union. Their philosophy was embodied in Erle CJ's assertion that the right to dispose of one's labour as one wished necessitated a correlative duty to permit others to enjoy the same freedom.[113] If a union deployed all its might to prevent a man from exercising his right to work, and thereby to deprive him of the means of subsistence, the common-law

[110] *Mogul S.S. Co.* v. *Macgregor, Gow & Co.* [1892] A.C. 25.

[111] In *Bradford Corp. v. Pickles* [1895] A.C. 597, the HL decided that a malicious motive could not make an otherwise lawful act tortious. For this case see A. W. B. Simpson, *Victorian Law and the Industrial Spirit* (SS Lecture, 1995).

[112] Conspiracy and Protection of Property Act 1875 (38 & 39 Vict., c. 86); Cornish & Clark, pp. 309–23.

[113] W. Erle, *Law relating to Trade Unions* (1869), p. 12. The author was chairman of the Royal Commission on Trade Unions 1866–69.

mentality of the time was predisposed to afford him protection. But there could only be a right to work if there was a remedy for dismissal. If a union persuaded an employer to dismiss an employee instantly, in breach of contract, that would clearly amount to the tort of procuring a breach of contract. But if the union simply persuaded the employer to give his employee due notice, or to refuse a renewal of his contract, the matter was more difficult. It was not easy to distinguish it from persuading a customer not to deal further with a particular tradesman, and that was only unlawful if the means of persuasion were unlawful. This was where the notions of conspiracy and self-protecting motives became crucial.

In 1898 the House of Lords held by a majority, albeit contrary to the advice of most of the judges, that no legal wrong was done if someone merely threatened to do something he was entitled to do in order to induce someone else to do what he was entitled to do. Whether the threat was made with a malicious motive was irrelevant. In Lord Macnaghten's words, 'questions of this sort belong to the province of morals rather than to the province of law'.[114] The decision was taken as a victory for the trade unions over the individual working man, but the wide conflict of judicial opinion which it revealed did little to clarify the law, and only three years later the House felt compelled to qualify the decision. A butcher had been injured by a withdrawal of labour intended to penalize him for failing to effect a closed shop. He was allowed an action on grounds of conspiracy and threats.[115] Conspiracy had not been formally alleged in the 1898 case, while the threat to call the plaintiff's workers out on strike was held to constitute intimidation under Holt CJ's principle of 1705. The 1901 decision was considered by the Court of Appeal to have revived the individual's right to work. If someone prevented another from obtaining or holding employment in his calling, either by threats or improper influence, this was actionable even in the absence of conspiracy.[116] Although a union might be under a 'duty' by its own rules to protect the interests of its members, this was a duty they had conferred on themselves, and they could not confer on themselves a right to injure others contrary to law.[117] The difficulty lay in deciding what forms of pressure were improper or unlawful, now that the Combination Acts had been repealed and malice and motive had been held irrelevant.

The decisions of 1901–05 drove the trade unions to seek their ends in Parliament, and at their behest the Liberal government of 1906 introduced the Trade Disputes Act. This provided that procuring a breach of contract, conspiracy, and interfering with a trade or employment or with 'the right of some other person to dispose of his capital or his labour as he wills', should no longer be actionable if done in furtherance of a trade dispute; and that no action in tort could be brought against a trade union.[118] This reversed, in the context of employment disputes, the principle that motive was irrelevant. Trade union members were now given the right to place themselves outside the reach of the

[114] *Allen v. Flood* [1898] A.C. 1; reported in the Court of Appeal sub nom. *Flood v. Jackson* [1895] 2 Q.B. 21; R. F. V. Heuston, 102 LQR 90. It was the last occasion when the judges were summoned to the Lords for their opinions.

[115] *Quinn v. Leathem* [1901] A.C. 495. This restored the Court of Appeal decision in *Temperton v. Russell* [1893] 1 Q.B. 715.

[116] *Giblan v. National Amalgamated Labourers Union* [1903] 2 K.B. 600.

[117] *South Wales Miners Federation v. Glamorgan Coal Co.* [1905] A.C. 239.

[118] Trade Disputes Act 1906 (6 Edw. VII, c. 47). See R. Kidner, 2 *Legal Studies* 34.

ordinary law of the land by combining to further their own interests, or by involving themselves in a dispute with their employers. The justification for this was that the common law had become unclear, and had treated employees differently from employers and trade competitors who acted out of self-interest. It gave the work-force a collective bargaining power.

A short-lived attempt was made by the courts in the 1960s to curtail misuse of the seemingly unfettered power to strike by salvaging from the pre-1906 case-law a tort of intimidation. This tort had its origins in the cases where trade had been lost because of threats of violence. If threatening a tort against a third party, to induce him to act to the detriment of the plaintiff, constituted intimidation, then so (it was now held) should threatening a breach of contract.[119] This was not one of the torts mentioned in the 1906 Act, and was therefore unaffected by it. But legislation was promptly introduced to sweep it under the statutory immunity. For the next twenty years the law of intimidation was buffeted by party politics and a plethora of statutes dealing with industrial relations.[120] Outside this troubled sphere, the courts in the same period returned to Holt CJ's simple principle, and interpreted the disjointed legal materials as representing various species of a generic tort of interfering with the trade or business of another by unlawful means.[121] The nature of this tort, and of the related tort of conspiracy, has nevertheless continued to give the courts considerable difficulty.[122]

Further Reading

Holdsworth, *HEL*, VIII, pp. 392–7, 425–31; XI, pp. 477–501
Cornish & Clark, pp. 267–301, 309–36
T. A. Street, *Foundations of Legal Liability* (1906), I, pp. 263–72, 322–5, 342–73, 417–34
C. H. S. Fifoot, *English Law and its Background* (1932), pp. 211–20
D. O. Wagner, 'Coke and the Rise of Economic Liberalism' (1935) 6 *Economic History Rev.* 30–44
B. Malament, 'The "Economic Liberalism" of Sir Edward Coke' (1967) 76 *Yale Law Jo.* 1321–58
S. D. White, *Sir Edward Coke and the 'Grievances of the Commonwealth'* (1979), pp. 115–41
J. V. Orth, *Combination and Conspiracy: a Legal History of Trade Unionism 1721–1906* (1991)
J. Masschaele, 'Market Rights in 13th-Century England' (1992) 107 EHR 78–89
M. Lobban, 'Strikers and the Law 1825–1851' (1993) in *Life of the Law*, pp. 211–33
J. Oldham, 'Labor and Employment' (2004) in *ECLM*, pp. 343–55
M. Lobban, 'Intentional and Economic Torts' [1820–1914] (2010) in *OHLE*, XIII, pp. 1033–67
J. Baker, *The Reinvention of Magna Carta 1216–1616* (2017), pp. 190–9, 318–23

Intellectual Property

J. Bellido (ed.), *Landmark Cases in Intellectual Property Law* (2017)
E. W. Hulme, 'The Early History of the English Patent System' (1907) in *Essays AALH*, III, pp. 117–47

[119] *Rookes v. Barnard* [1964] A.C. 1129.

[120] The story in outline is: immunity was first introduced under Wilson's Labour government in 1965, removed under Heath's Conservative government in 1971, restored by Wilson's second administration in 1974, and then modified in 1980 under Mrs Thatcher's Conservative government following the 'Winter of Discontent' (caused by extensive strike action) and the general election which it precipitated. Strike action is at present regulated by the Trade Union Act 2016 (c. 15).

[121] See *Hadmore Productions Ltd v. Hamilton* [1983] 1 A.C. 191 at 202; *Merkur Island Shipping Corp. v. Laughton* [1983] 2 A.C. 570 at 609.

[122] The cases were reviewed in *OBG Ltd v. Allan* [2005] Q.B. 762; *Douglas v. Hello! Ltd* [2006] Q.B. 125; and again in HL, hearing appeals in both cases, [2008] 1 A.C. 1.

W. S. Holdsworth, 'The Press' (1924) in *HEL*, VI, pp. 360–79
E. I. Schechter, *The Historical Foundations of the Law Relating to Trademarks* (1925)
D. S. Davies, 'The Early History of the Patent Specification' (1934) 50 LQR 86–109, 260–74
H. G. Fox, *Monopolies and Patents* (1947)
C. Seville, 'Copyright' in *Cambridge History of the Book in Britain*, VI (1830–1914) (D. McKitterick ed., 2010), pp. 214–37
A. Sherman and L. Bently, *The Making of Modern Intellectual Property Law: the British Experience 1760–1911* (1999)
J. Oldham, 'Intellectual Property' [1756–88] (2004) in *ECLM*, pp. 190–205
W. Cornish, 'Intellectual Property' [1820–1914] (2010) in *OHLE*, XII, pp. 879–1014, 1030–2
S. Bottomley, *The British Patent System during the Industrial Revolution 1700–1852* (2014)

27

Persons: Status and Liberty

The treatment of status in this book after property and actions reflects the relative lack of prominence given to the matter in older legal sources rather than its intrinsic importance. Status could profoundly affect property rights and contractual capacity, not to mention personal liberty and access to the common-law system itself. The principal disabilities known to the common law were those of married women, aliens, monks, and villeins. Outlaws and excommunicates also suffered from disabilities, intended to be temporary, as sanctions in legal process. Women and children were *homines* for the purposes of Magna Carta and entitled to the full protection of the law,[1] but for some purposes the law treated them differently from others. Infants and lunatics lacked capacity to perform certain legal acts, but this was for their own protection.

Some Partial Legal Disabilities

Women

The restricted autonomy of the married woman resulted from the doctrine that her legal personality was merged during marriage in that of her husband.[2] Single women (including widows) were, however, generally treated the same as men for the purposes of private law, save that the rules for inheriting real property favoured males before females in the same degree of kinship.[3] In a notable case around 1530, not reported in print, the judges declared that women were entitled to the same legal rights as men, were as capable of holding civil office as men, and in the case of some offices might in fact be more suitable than men.[4] Although females who inherited peerages were excluded from the House of Lords until 1919, a woman could serve as queen regnant. Any doubt about that possibility was ended by the accession of Mary I in 1553, though it was thought prudent to legislate that a queen should be deemed to be the same as a king and that she should be treated as a single woman for royal purposes even if she married.[5] Opposition to Mary's rule on religious grounds led to an outburst of mysogyny in public discourse, and a short-lived Protestant doctrine that women were unfit to

[1] 132 SS lxxi; Baker, *Magna Carta*, p. 34. The Latin word *homo* is gender-neutral.

[2] See p. 522, post.

[3] See p. 287, ante. An exception was that the rules were more favourable to a younger sister without brothers, since she became a coheir, than to a son with an elder brother, who inherited nothing. Legal theory permitted lands to be entailed to female heirs (Litt., s. 22), but no instance has been found.

[4] *Lady E. S.'s Case* (*c.* 1530) 121 SS 292 at 294 (victualling of the garrison at Berwick by a married woman). Cf. 132 SS 47, 54–5.

[5] *OHLE*, VI, pp. 60–1. Mary had been bastardized by Henry VIII's first divorce and by a statute of 1536, but the Crown was settled on her in remainder after Prince Edward by a statute of 1544. Her husband, King Philip of Spain, lost the title of king of England on her death.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

bear rule, but this was rapidly dispelled after the accession of Elizabeth I in 1558.[6] The qualms which arose in later times about the exercise of lesser public functions by women, whether married or single, were occasioned more by the rarity of its occurrence – and a consequent sense of social inappropriateness[7] – than by any clear abstract legal principle. In fact women did occasionally occupy public positions, when a hereditary office descended to a female heir,[8] but they usually exercised them by deputy. Nevertheless, they were never appointed to important public offices, and this gave rise to a misapprehension that it was not legally permissible. In 1919 it was enacted that a person should not be disqualified by sex or marriage from the exercise of any public function, or from holding any civil or judicial office, or from following any civil profession or vocation.[9]

Aliens

Aliens – generally those born outside the realm,[10] or outside the dominions of the Crown,[11] and not naturalized[12] – were treated in the early common law as having virtually no enforceable rights at all. Although aliens within the realm owed a temporary allegiance by virtue of their presence,[13] this did not enable them to own land or (at first) to bring actions in the courts. England, however, was a trading nation, and it was commercially necessary to extend legal rights to alien merchants.[14] Protection was originally specific to individuals, and conferred by royal letters of safe conduct. The recipient of such a document was an 'alien friend' (*alien amy*), and the law increasingly extended rights to such friendly aliens, who were distinguished from alien enemies. Foreign merchants could find justice in local courts, such as the courts of fairs and boroughs, and in the Council, Admiralty, and Chancery. The common-law courts also modified their attitudes, allowing friendly aliens to bring personal actions and to own personal property,[15] and dropping the need for letters of safe conduct. In legal proceedings aliens

[6] Baker, *Magna Carta*, pp. 229–31.

[7] According to a legal opinion of 1766, a public office attended by 'trouble' could not be performed by a woman in person, because the duties would be 'totally inconsistent with that decency of character which the law attempts to preserve in a woman': JHB MS. 310.

[8] The countess of Salisbury was sheriff of Wiltshire temp. Hen. III, and Elizabeth Venour was warden of the Fleet Prison in the 1460s. Lady Anne Clifford (d. 1676), was sheriff of Westmorland. As to women JPs see 102 SS 113; 132 SS lxxi, 148, 282.

[9] Sex Disqualification (Removal) Act 1919 (9 & 10 Geo. V, c. 71). For its effect on the legal profession see p. 183, ante. The word 'civil' excluded clergy; women could not be ordained as priests until 1994.

[10] Persons born abroad to English parents were not aliens: Stat. 25 Edw. III, st. i (1351). Nor were children born in England to foreign parents: *Anon.* (1544) Bro. N.C. 58.

[11] *Calvin's Case* (1609) 7 Co. Rep. 1, established that Scots born after the accession of James VI to the English throne in 1603 were subjects and not aliens. Scots born before 1603 remained aliens in England; but cf. the next note.

[12] Aliens could be naturalized by letters patent. For the effect in England of an Irish statute of 1634 naturalizing all Scots born before 1603 (to encourage immigration) see *Craw v. Ramsay* (1670) *CPELH*, II, pp. 907–22.

[13] They could be convicted of treason: *R. v. Sherlles* (1554) Dalison Rep., 124 SS 122; Dyer 144; *Case of Mary, Queen of Scots* (1571) 110 SS 256. This was not so of enemy aliens: *Perkin Warbeck's Case* (1499) 102 SS 125; 109 SS 206.

[14] An early provision was Magna Carta (1225), c. 30 (1215, cl. 41): 'All merchants shall be safe and sure in leaving and entering England…'.

[15] Cf. Stat. 32 Hen. VIII, c. 16, which forbade leases of dwelling houses and shops to aliens; this was soon suspended by proclamation.

were entitled to special half-alien juries, to counterbalance possible prejudice.[16] The principal remaining disability was the incapacity of an alien to own real property. If land was conveyed to an alien, the king could seize it, while in a real action a plea of alienage (*alien né*) would abate the writ. This incapacity continued until 1870.[17]

Religious Persons

Monks, friars, and nuns were considered dead to the world, a principle of canon law recognized at common law for the purposes of property and contract.[18] Upon 'profession' the monk gave up his secular name and legal personality, his real property descended at once to his heir, and his personal estate was subject to administration, as if he were dead. As with villeins, escaping to freedom could be prevented with force.[19] But profession was not a sacrament. Unlike the naturally dead, monks could return to life by the annulment of their profession ('deraignment'). According to the law books, this typically happened when a woman claimed a monk as having entered into a precontract of marriage with her. How common this was in reality is uncertain, but it was a situation beloved of law teachers because of the property problems it caused.[20] Monks could also revive temporarily, when acting in other capacities: for instance, as an executor, or an abbot acting on behalf of a monastery. The law of profession came to an end in 1539 when, after facilitating the dissolution of the monasteries, Parliament resurrected ten thousand or so religious persons from the dead.[21] Apart from the few who were ordained as priests, they were then free to marry, and could inherit land from ancestors dying after the discharge from religion.

A more sweeping and widespread disability was that of villeinage, and this deserves more detailed attention.

Villein Status

'Villein' once meant simply a villager (*villanus*), and villeins had sometimes been substantial villagers. The original, and more appropriate, word for truly unfree status was serfdom. 'Serf' derives from the Latin word for slave (*servus*), and serfs were well known by that name at the time of the Norman conquest. The status may have originated from capture or punishment, or sometimes from voluntary submission to bondage in

[16] Stat. 28 Edw. III, c. 13; 8 Hen. VI, c. 29. For juries of the half-tongue (*de medietate linguae*) see *OHLE*, VI, pp. 612–14. The concern was xenophobia rather than language, and so the alien jurors did not have to be of the same tongue (which might at times have been unachievable): *Dr Julius Caesar v. Corsini* (1593) BL MS. Lansdowne 1078, fo. 15 (Flemish jurors returned to try Italians). And if both parties were aliens, the procedure was unavailable.

[17] Naturalisation Act 1870 (33 & 34 Vict., c. 14), s. 2.

[18] A monk's person was protected by the criminal law, and his behaviour subject to it. But if a monk committed a tort, or incurred a debt, the action lay only against his superior.

[19] Escaping monks could be forced to return to their houses, with the aid of the sheriff, by the writ *de apostata capiendo*. See D. Logan, *Runaway Religious in Medieval England c. 1240–1540* (1996).

[20] See 105 SS lxxii. Deraignment for precontract annulled the profession *ab initio.* A monk who became a bishop or parson could own property, sue, or be sued, in that capacity only, and was dispensed from obedience while in that position, but was still disabled from inheritance.

[21] Stat. 31 Hen. VIII, c. 6.

desperate straits. It was no rarity: the Domesday survey of 1086 recorded more than 25,000 serfs, a category which it carefully distinguished from villeins. The Anglo-Saxon slave seems indeed to have suffered a miserable plight. He was liable to severe punishment and had few if any rights. What the status of a slave implied by 1086 is less certain, and it must have varied from place to place;[22] but in the following century the more abject varieties of slavery disappeared and the unfree peasants became manorial tenants 'in villeinage'. The word 'serf' did not enter the common-law vocabulary, and in so far as it remained in use at all it did not connote a status lower than that of villein.[23] Slavery, in the Anglo-Saxon or Roman sense, therefore disappeared before it could be received as part of the common law.

Villeinage came to have two meanings in the medieval common law, villein tenure of land, and villein status. We are concerned in this chapter with the second aspect, unfree status, known as villeinage *de sank* (of blood). This distinction would have been meaningless in the twelfth century. Villeinage of both kinds went together. And, according to the author of *Glanvill*, it was an indelible status: even a 'manumission', a grant of freedom by the lord, worked only as against the grantor and his heirs. Yet by 1250 legal rethinking had brought about a significant transformation of both aspects of villeinage.

Villeinage at Common Law

The treatise called *Bracton* devoted much space to villeinage. Pursuing an abstract legal logic which treated liberty as a right akin to property, it adopted what were to be the three principal characteristics of the common law of villeinage. The first was that there was only one kind of villein status: all villeins were equally unfree.[24] The second was that villeinage was relative: a villein was unfree only as against his own lord, and free as against the rest of the world. It followed that a villein of one lord could be a free tenant of another, and that manumission by the lord freed the blood absolutely. This thinking reversed the doctrine in *Glanvill* and brought all villeins within the 'No free man' chapter of Magna Carta.[25] The third rule was that villein tenure of land – that is, the holding of land by 'unfree' (or undefined) services – was distinct from unfree status and did not in itself provide evidence of it. A man could therefore acquire land held in villeinage without becoming personally unfree; and, conversely, a villein could be manumitted without altering his villein tenure. Moreover, a tenant in villeinage was free to give up his tenancy, whereas a villein by blood could not unilaterally renounce his status. The development of villein tenure into 'copyhold' has been considered already.[26] Villein status survived independently, as a condition which ran with the blood rather than the land, and passed by inheritance from father[27] to child.

[22] See D. A. E. Pelteret, *Slavery in Early Medieval England* (1996); J. Hudson, *OHLE*, II, pp. 212–18, 424–8. The ecclesiastical Council of Westminster (1102) forbade the selling of men 'like brute beasts'.

[23] *The Mirror of Justices* (7 SS), p. 80, written *c.* 1290, asserted that villeins were not serfs; but it described serfs in terms of the common law of villeinage. The author was making the point that many poor villagers had been wrongly driven into servitude by the Normans (ibid. 165).

[24] Villeinage might, however, be suspended temporarily. If a tenant for life freed a villein, the freedom arguably lasted only *pur auter vie*: see p. 505 n. 38, post. For the far-fetched moot case of the person who became a villein every other day see *OHLE*, VI, p. 602.

[25] Magna Carta (1225), c. 29; 132 SS lxxii–lxxiv; Co. Inst., II, p. 4.

[26] See pp. 325–8, ante.

[27] *Glanvill*, v. 6 (p. 58), stated the harsher rule (taken from canon law) that a child could acquire villein status from either parent. Under Bractonian theory, the status would pass from an unfree father only if mar-

If lawyers occasionally referred to villeins as chattels, it was an imperfect analogy. They were not slaves but people with rights. They could be bought and sold with the tenements to which they belonged, as tied labour; but it was not a sale of flesh and blood. What passed on sale was a bundle of rights over the villein, and this was little different in kind from the transfer of a free man's services to a new lord. Another analogy, found in *Bracton*, was with the monk; but that was also inexact, because the villein could own property and bring actions in his own name. The unfree nature of servile status cannot be understood by such analogies. It turned on the extensive rights which the lord had over the person and property of his bondman.

There were three principal consequences of unfree status at common law. The first was that whatever property the villein acquired, whether real or personal, was liable to seizure by the lord. It was a popular saying that villeins owned only what they had in their bellies; but this coarse exaggeration was also ignorant, because until seizure by the lord any real or personal acquisitions belonged to the villein and he could pass good title to a third party. Villeins could thus own property, albeit precariously and at the will of the lord. The second consequence was that the lord could exercise corporal discipline over his villein, for instance by putting him in the stocks, without being liable to an action of trespass. This did not, however, give him authority to maim, rape, or kill: the villein was within the protection of the criminal law, and was entitled to sue the lord for unreasonable treatment. The third consequence was that the villein could not run away from his tenement, or even work away from it without his lord's consent; escape could be prevented by force. That was the main analogy with the monk.

In reality, the villeins' lot was not normally one of abject oppression. Several statutes assumed that they would have assets,[28] and they were often allowed to retain earnings, even to pursue professions. The bonds which tied them to their lords were little different in practice from those which bound low-born free men to lords or masters.[29] Most important of all, the villeins' exclusion from full common-law rights did not exclude them from manorial justice. By the customs of manors villeins enjoyed rights analogous to those of free men at common law; they might make wills of their chattels, and hold lands heritably. Under manorial custom a lord's rights were typically limited to the usual services, an annual poll tax (tallage, or chevage for those living away from the manor), and a payment on marriage of the villeins' children (merchet, or 'ransom of flesh and blood'). Customs as to taxation acknowledged that villeins had money of their own, and custom also frequently fixed the sums payable, so that (as with free tenure under the common law) the regulation of incidents replaced the lord's sovereign power with accepted norms. It was, in any case, in the lord's own interests to maintain a productive workforce. Treating villeins badly, by excessive tallage or taking away their means of livelihood, was bad husbandry; and if it drove men away in times of labour shortage it could amount in law to waste of the inheritance.[30] If a villein's life was hard

ried, and from an unfree mother only if unmarried. The latter doctrine was abandoned in the 14th century: p. 505, post.

[28] E.g. Magna Carta (1215), cl. 20 (1225, c. 14), assumed that they owned carts and could pay fines. The protection of their 'wainage' was formerly read as a charitable favour; but it was intended to stop the king depriving other people's villeins of the wherewithal to serve them.

[29] Cf. the restrictions imposed on labourers and servants by the legislation of 1349: p. 354, ante.

[30] 'Exile of men' was one of the species of waste listed in Stat. Marlborough (1267), c. 23.

by modern standards, in a harsh world it was not necessarily worse than that of his free neighbour. Nevertheless, villeins were more vulnerable to exploitation than free men, and the status of being unfree affected a person's security and sense of dignity. The law of villeinage was regularly discussed in the inns of court, and it gave rise to some intriguing conundrums, but the core learning was that the status was odious and that any lawful means of escape should be exploited.[31] Assertions of villeinage were frequently disputed in the royal courts.

The oldest writ by which such disputes could be initiated was the action by the lord to recover a runaway villein, the writ of naifty (*de nativo habendo*). The writ was cast in executive (*praecipimus tibi*) form, ordering the sheriff to secure the return of a 'neif',[32] and it was doubtless invented as a remedy against rival lords thought to be poaching native labour. It enabled villeins straying from their 'nests' (places of birth) to be recovered, along with their 'brood' and chattels. But if an alleged villein claimed to be free, the case had to be removed before royal judges,[33] and by the thirteenth century the action of naifty was normally brought against the alleged villein himself with the object of achieving a trial of his status in the royal court. Although the lord counted of his 'right and inheritance', some authorities considered it to be a possessory action based on seisin of the villein: the uncertainty arose from the difficulty of applying the distinction between right and possession to persons. The plaintiff would assert seisin, evidenced by 'tallaging high and low at his will,[34] and taking ransom of flesh and blood', and offer as proof either 'suit of kin', which meant producing the bodies of at least two male villeins of the same blood, and in his power, who would swear to their status, or the record of a previous judgment. If seisin was recovered, the villein was delivered to the lord in court by the tuft of his hair.[35] It was the last action in which 'suit' remained a reality, and its cumbrous nature led to the decline of the action in the later medieval period.

The End of Villeinage

Villeins could achieve their freedom in several different ways: for instance, by manumission (an express grant of freedom from the lord), by estoppel (as where the lord made a grant to a villein or sued him as a free man[36]), or in certain cases by marriage.[37] A more qualified freedom was obtained by knighthood, ordination, profession in religion, or residing in a privileged town for a year and a day. The lawyers of the fourteenth century added a wider means of escape: if a villein's child could prove that his parents or ancestors were unmarried, he must be free. Status being inheritable, a bastard could

[31] *OHLE*, VI, pp. 600–2.

[32] For the writ see p. 580, post. The Latin word *nativus* (neif) meant a bondman by birth. In later law French, 'neif' denoted a female villein.

[33] This was effected either by P (using a writ of *pone*) or by the alleged villein (using a writ of *monstravit de libertate probanda*). The latter procedure was found impracticable for technical reasons: *OHLE*, VI, p. 603.

[34] This must in later times have bordered on fiction, treating customary restraints as extra-legal concessions.

[35] *Abbot of Crowland v. Thrupp* (1285) 122 SS 289 at 290 ('per tupam'); 123 SS xxxix.

[36] Giving clothes or pocket-money did not count, since it was consistent with villein status, but paid employment by the lord was a moot point: *OHLE*, VI, p. 601 n. 34.

[37] If a female villein married a free man, she was free, at least during the marriage. If a male villein married his seignoress, the villeinage was extinguished for ever. Several actions on the case were brought by lords for the tort of marrying their villeins: *OHLE*, VI, p. 602 n. 45.

not inherit it from either parent. This new learning replaced the older rule that bastards followed the status of their mother, and it turned out to be very helpful in freeing villein families. Some episcopal courts of the fifteenth and sixteenth centuries would routinely certify bastardy on request in cases of disputed villeinage; and we may charitably suppose that this was a pious lie, unrelated to the morality of villein couples or to their legal acuity in avoiding marriage. If the diocese of birth was known to take facts seriously, the alleged villein would simply plead his birth in a diocese (such as Norwich) known to be more co-operative. This fictional procedure can be shown in some cases to have been the outcome of an agreement between lord and villein, and collusion may explain the predictability of the outcome. A judgment on the plea rolls was the most secure conveyance of liberty, and such security was advisable where – as must often have happened – the lord in possession was only a tenant in tail or for life.[38]

The other principal means of escape was the jury, which could give effect to popular attitudes even when they were at odds with strict law. By the fifteenth century there was no socially identifiable villein class. Both villeins and free men could be found in the same families, and free countryfolk regularly married their villein neighbours. Men of villein stock could reach high places, even the chief justiceship of England.[39] Doubtless many families genuinely did not know whether they were bond or free. Unfree status had become an outmoded legal anomaly rather than a social reality, and it had actually disappeared in many parts of the country, especially the north. Jury trial therefore offered a good chance of freedom, and there were several ways in which an alleged villein might obtain it. The most obvious was to resist the lord's demands, and thus provoke him into bringing a writ of naifty. During the fifteenth century it became more common for the alleged villein to initiate an action himself. It could be an action of trespass for lying in wait and threatening to seize him as a villein,[40] or, if the lord was actually detaining him, the writ *de homine replegiando*, which enabled him to recover his liberty and goods pending trial of the issue. This latter was an important safeguard, because without it an aggressive lord could in the last resort have prevented a man from suing him by taking his substance and locking him up. But it lay only if the alleged villein was in custody. By what seems to have been an act of judicial legislation in 1498, the King's Bench under Fyneux CJ filled the gap by holding that an alleged villein's goods could be replevied in an action of trespass, pending trial of his status, even when he was not himself in custody.[41] In the next two decades the nascent action on the case for defamation was also used to test villein claims.[42] But any action would do, since the defendant could plead villeinage, and issue would be joined on the status. Verdicts almost always went in favour of liberty, and large sums were sometimes recovered in

[38] As to whether manumission by a particular tenant concluded the reversioner see Holdsworth, *HEL*, III, p. 504 n. 3; *OHLE*, VI, p. 602. In 1545 it was said that a manumission for an hour was a manumission for ever: Dyer 60.

[39] John Hody CJKB (1440–41) was the son of a villein. An alderman of the city of London was seized as a villein in 1308: 17 SS 11.

[40] Ante, p. 466; *Haukyns v. Broune* (1477) B. & M. 691. If actual force was used, a general action of trespass would suffice.

[41] *Thomson v. Lee* (1498) 102 SS 6; 94 SS *190* n. 9. For 'replevin' see p. 257, ante.

[42] See p. 467, ante. Most were not real claims, since 'churl' and 'villain' became terms of mere abuse.

damages.[43] This, more than any other single factor, made it too troublesome to preserve villeinage. Lords might cut their losses by abandoning the capital asset and selling manumissions; others just gave up their position as uncharitable and obsolete. From time to time a 'general manumission' by statute was discussed, and the Crown effected a general manumission of most of its own remaining bondmen (at a price) in the 1570s;[44] but in the event no legislative change was needed to give effect to the prevailing general sentiment. As a consequence villeinage is still, in theory, recognized by the common law, and there may be a few unwitting villeins still breathing English air. But, for practical purposes, villeinage *de sank* had effectively died out by the seventeenth century.

Freedom from Arbitrary Imprisonment

The most celebrated provision in Magna Carta was that in chapter 29: 'No free person (*Nullus liber homo*) shall be taken or imprisoned, or disseised or outlawed or exiled, or in any way destroyed… except by the lawful judgment of his peers or by the law of the land.'[45] No remedy was mentioned, and the provision had little effect before 1500.[46] Yet this vague promise was destined to become a broad guarantee of personal liberty and a source of protection against the Crown itself. It was construed in the early seventeenth century, anachronistically but beneficially, to guarantee procedural natural justice, *habeas corpus*, the grand jury, and jury trial, and to protect the subject against extra-parliamentary taxation and monopolies.[47] In medieval times it was more often cited as the warrant for trial by peers in the House of Lords. None of these was part of the original intent. It was, however, the first of a stream of enactments entrenching 'due process of law' as a safeguard against arbitrary acts under cover of the king's prerogative. The fourteenth-century statutes of due process were aimed against irregular prerogative jurisdictions. But the same principle was deployed in the sixteenth century in checking the claims of kings and their ministers to imprison subjects without showing cause. The advantage of relying on the great charter was that it had been repeatedly confirmed by successive kings and had come to be seen, even by kings themselves, as embodying ancient principles which could not be overridden.

As against sheriffs and inferior ministers, persons who claimed to be wrongly imprisoned had the remedies of *de homine replegiando* (to secure release) or false imprisonment (a form of trespass, to recover damages after the event), and in all but the most serious cases prisoners taken by legal process were entitled to bail if they

[43] The damages in *Haukyns v. Broune* (1477) ante, n. 40, were £110 (about £75,000 today). Damages of £120 were recovered against a peer in 1499, and £340 against a prior in 1509: 94 SS *189* n. 15, *190* n. 4.

[44] The profits were granted to Sir Henry Lee, who manumitted nearly 500 villeins in return for suitable composition payments. Poor villeins were passed over.

[45] Magna Carta 1225, c. 29 (1215, cl. 39).

[46] Stat. Marlborough (1267), c. 5, authorized writs against infringers of Magna Carta, but none have been found before Tudor times. A number of actions on c. 29 were brought between 1500 and 1530, mostly complaining of suits in sub-conciliar courts: Baker, *Magna Carta*, pp. 97–9, 456–62. An attempted revival in *Parsons v. Locke* (1595) ibid. 277–8, 484–7 (for suing in the Requests) was stopped by the Privy Council.

[47] The wider possibilities inherent in c. 29 were explored by Puritan lawyers in the 1570s and 1580s, notably in a 1581 reading by Robert Snagge: Baker, *Magna Carta*, pp. 249–75. The widest claims were made in Francis Ashley's reading of 1616: ibid. 427–35.

could find sufficient surety for appearance.[48] But the king himself could not be sued, and the medieval law-books are virtually silent on the king's powers of imprisonment. The boldest assertion, in 1438, was that the king could not commit a subject to custody by word of mouth, because if he acted wrongly the subject would then be without a remedy.[49] The principle here was that loss of liberty required legal process, which could be scrutinized by the courts. But there was no remedy if the king did act wrongly, or if ministers sheltered behind the authority of a conciliar tribunal which kept no record. Some of the chief ministers of the Tudor period acted in the belief that they could imprison at will, under the aegis of the Privy Council, though the power was always denied by the judges.[50] In 1536 a prisoner who had been sent to the Tower by Thomas Cromwell, as principal secretary of state, was released by writ of privilege (a form of *habeas corpus*) and the court refused to accept that the order of a single privy councillor, however mighty, was a sufficient cause of imprisonment.[51] Four years earlier the judges had advised the Council that, although the king had the same powers of imprisonment as his justices, the cause of imprisonment could be reviewed; and they attributed this to chapter 29 of Magna Carta.[52] In 1588 the queen's chief minister was moved to acknowledge the importance of this learning. Speaking in the Star Chamber, Lord Treasurer Burghley – who had been educated in Gray's Inn – declared that it was 'the liberty of the subject of England, more than of all other nations, that he should not be molested or imprisoned without indictment', and that 'the procuring of Magna Carta cost many a nobleman's life; and therefore, being so hardly got, we ought not to suffer it so easily to be lost'.[53] He was not, however, contemplating its use against the government.[54]

The development of habeas corpus in the 1560s[55] enabled the judges to give practical effect to the principle that, although the whole Council could justify ordering an imprisonment, the order of an individual councillor would not suffice.[56] But some ministers were unwilling to give way, and even took to ordering the re-arrest of persons released on habeas corpus and having them removed to secret locations. This caused much disquiet, and the last straw was the imprisonment of John Agmondesham, a bencher of the Middle Temple and Puritan member of Parliament, in 1590. By 1591 the judges were so incensed by these repeated challenges to the rule of law that they took the unprecedented step of complaining to the queen and drafting a series of 'resolutions'

[48] Stat. Westminster I (1275), c. 15.

[49] Trin. 16 Hen. VI, Fitz. Abr., *Monstrans de faits*, pl. 182; cf. Y.B. Mich. 1 Hen. VII, fo. 4, pl. 5.

[50] See p. 126, ante.

[51] Cited in *John Hynde's Case* (1576) 110 SS 355 at 356, per Dyer CJ (who was called to the bar around 1536).

[52] *Serjeant Browne's Case* (1532) Spelman Rep. 184 (misdated there). This was the first suggestion that Magna Carta could be deployed against the Crown in the context of imprisonment, but the report was not printed until 1976. It was not a habeas corpus case, since Browne had been released.

[53] *Case of the Sheriffs of London* (1588) Baker, *Magna Carta*, pp. 266–70, at 268, 520.

[54] The sheriffs had imprisoned 2 gentlewomen without due process and had them whipped as prostitutes. They were heavily fined, ordered to ask the women's forgiveness, and made to pay them £600 in compensation.

[55] Ante, p. 157.

[56] *Hynde's Case* (1576) 110 SS 356; 4 Leon. 21; *Howell's Case* (1587) 1 Leon. 70; *Agmondesham's Case* (1590) Baker, *Magna Carta*, pp. 495–6.

on the matter.[57] Any prisoner, they said, could be removed into court by writ of *habeas corpus* so that, if a lawful cause of imprisonment was returned, he could be remanded. Prisoners would be remanded, even though no specific cause was shown, if the committal was by the queen in person, or by the whole Privy Council, or if it was a case of treason. The obvious implication, which they refrained from spelling out, was that in all other cases the prisoner would be released, or at least bailed.[58] This was tactfully obtuse; but when a brasher proposal was made in the Commons the following year to clarify the matter by statute, the Speaker (Edward Coke) was ordered by the queen to stop discussion on the bill, and the member responsible was 'sharply chidden' and placed under house arrest.[59] Even so, habeas corpus had become sacrosanct and was already achieving its main objectives. In 1604 Coke, as attorney-general, wrote a memorandum anchoring its authority firmly to Magna Carta.[60] It was a potent combination, and it was to bear its heaviest burden in the reign of Charles I.

The question of imprisonment by executive authority came to a head in 1627 when Sir Thomas Darnel and four other knights were committed to prison for refusing to subscribe to a forced loan to the Crown.[61] The five knights obtained writs of *habeas corpus*, and the returns stated merely that they had been committed 'by special command of the king'. The case was argued in the King's Bench, where the greatest constitutional issue – the nature of English monarchical government – was treated as a question of common law, the 'law of the land' enshrined in Magna Carta. John Selden and others prepared the arguments with much historical learning, but the precedents were inconclusive and the court declined to release the prisoners.[62] Most contemporaries, including Coke, accepted that the Crown needed a prerogative right to imprison suspected traitors and terrorists on grounds of state, without disclosing the reason before trial, and the royal prerogative was part of the 'law of the land'; but it had here been abused as a means of enforcing an unconstitutional form of taxation. An unqualified power of imprisonment would enable the Crown to tax subjects without the consent of Parliament, which had never been allowed, and its use to enforce the loan was seen as another sign of growing absolutism in the Stuart government.

The question was debated at a lengthy conference between the House of Lords and House of Commons in 1628.[63] The judges, asked secretly for their opinions by the king,

[57] The original memorial of 9 June 1591, addressed to Hatton C and Lord Burghley, with the judges' autograph signatures, is BL MS. Lansdowne 68(87). A revised version was presented in Easter term 1592, though it is not certain it reached the queen: Baker, *Magna Carta*, pp. 166–70, 496–9.

[58] Coke CJ held that bail would be refused upon a committal by the king, and would be allowed upon a committal by the Privy Council only with written authority from the Council or the A.-G.: *Saltonstall's Case* (1614) Baker, *Magna Carta*, pp. 401–2. He had to retract this in 1628: 3 State Tr. 81, 82.

[59] Baker, *Magna Carta*, pp. 273, 402. The member was James Morice, bencher of the Middle Temple.

[60] See p. 130, ante. The linkage had been made in 1572 by Edmund Anderson, bencher of the Inner Temple, who later (as CJCP) probably helped to draft the memorandum of 1591 – which avoided mentioning Magna Carta.

[61] In 1615 a Wiltshire gentleman had been fined £5,000 for claiming that a forced loan was contrary to Magna Carta, and in 1626 Crewe CJ was removed from office for denying the legality of the loan. For loans and 'benevolences' see Baker, *Magna Carta*, pp. 185–6, 407–9.

[62] *The Five Knights' Case*: *R. v. Warden of the Flee***t**, *ex parte Darnel* (1627) 3 State Tr. 1. No formal judgment was entered, because of a dispute as to how it should be worded.

[63] Full texts of the debates are available in R. C. Johnson et al. (ed.), *Proceedings in Parliament 1628* (1977–83). See further L. S. Popofsky, 41 *Historian* 257; J. A. Guy, 25 *Historical Jo*. 289.

advised that if a case required secrecy he could commit without showing cause 'for a convenient time'.[64] But Sir Edward Coke and Sir Edward Littleton, representing the Commons, argued that if a man could be imprisoned without cause he would be worse than a villein, and appealed to Magna Carta and the statutes of due process as inveterate confirmations of the 'fundamental laws' of the realm. Coke told the Lords that it was the greatest cause that ever came into Westminster Hall or into any parliament, and warned that the peers were 'involved in the same danger with us'. The king was unmoved, and replied dismissively that he was willing to confirm Magna Carta 'saving the rights of the Crown'. That being unacceptable to the Commons, they presented the Petition of Right, which did receive the royal assent and has remained on the statute-book ever since. It provided that no one should be taxed without the consent of Parliament, and included a clause that subjects should not be detained by the king's special command without cause shown.[65] The king asked the judges privately whether this would prevent him ever committing anyone without showing cause, but they told him they could not decide that until the case happened.[66]

The political atmosphere at this period was explosive. The king frequently confronted the judges in private meetings, a member of the Commons was committed to prison for what he had said during the 'free' discussion, and a number of members (including John Selden) were committed by the Star Chamber in 1629 for supposedly seditious behaviour in the House.[67] Again *habeas corpus* was resorted to, but a head-on collision with the courts was avoided by the offer of bail.[68] In 1629 the king dissolved the parliament, and thereafter tried to rule without one, supposing that his prerogative powers would enable him to raise the revenue he needed. More trouble arose over this issue when John Hampden MP was pursued in the Exchequer for failing to pay £1 assessed on him for ship-money, another form of prerogative taxation. The case was referred in 1638 to all the judges of England in the Exchequer Chamber, where Hampden lost by seven votes to five.[69] When Parliament met again in 1640, at the reluctant behest of a bankrupt king, it reversed the judgment in *Hampden's Case*, overturned the effect of the *Five Knights' Case*, and guaranteed *habeas corpus* as a remedy in case of committal by the king or the Council.[70] The remedy of *habeas corpus* was further improved by legislation in 1679.[71] One remaining lacuna was that habeas corpus could not be used to

[64] Sir Nicholas Hyde's reports, BL MS. Hargrave 27, fo. 105v. This accorded with Coke's earlier opinion.

[65] Stat. 3 Car. I, c. 1, s. 5. [66] Hyde Rep. (n. 64, ante), fo. 106.

[67] *A.-G. v. Strode, Long, and Selden* (1629) 3 State Tr. 235; *A.-G. v. Elliot, Hollis, and Valentine*, ibid. 293. When the king asked the judges whether Elliot was guilty, they 'desired to be spared to give any answer to a particular case which might peradventure come before them judicially': Hyde Rep. (n, 64, ante), fo. 121. For these cases see P. Christianson, 6 CJH 65; J. Reeve, 25 *Jo. British Studies* 264.

[68] Bail was always allowed in cases of misdemeanour. Nevertheless Strode and Valentine refused to find surety, and remained in custody until 1640.

[69] *R. v. Hampden* (1638) 3 State Tr. 825; D. L. Keir, 52 LQR 546. Ship-money was a levy to build war-ships, imposed under the royal prerogative for defence of the realm. At the time of the Spanish Armada (1588) it had been collected voluntarily.

[70] Stat. 16 Car. I, cc. 10, 14. Preliminary steps were taken to impeach those judges who had voted against Hampden, for high treason in subverting the laws: 3 State Tr. 1260.

[71] Habeas Corpus Act 1679 (31 Car. II, c. 2); p. 157, ante. This applied only to criminal cases. Its main provisions were extended to other restraints on liberty (excluding imprisonment in civil actions) by the Habeas Corpus Amendment Act 1816 (56 Geo. III, c. 100). For *habeas corpus* see also pp. 156–8, ante.

secure review of a committal by the House of Lords[72] or the House of Commons;[73] by convention, however, the power of committal by either house is regarded as obsolete.

The same period saw the end of torture. In the form of 'the rack' it had been used since the sixteenth century, on the orders of the Privy Council, chiefly in the interrogation of suspected traitors. It was never sanctioned by the common law, but it was not until 1628 that the judges held the rack to be unlawful.[74] Coke thereupon declared that it was against Magna Carta.[75]

Freedom of Thought and Expression

One freedom which Magna Carta did not in terms guarantee, because it would not have been understood in the thirteenth century, or for a considerable period of time thereafter, was freedom of religious belief. Chapter 1 granted that the English Church should have all its rights and liberties inviolate, and these rights included its jurisdiction over heresy. The medieval Church claimed the right to condemn to an agonizing death by fire those who obstinately refused to accept the theories invented by its favoured theologians. In exercising this jurisdiction, the ecclesiastical courts did not follow their usual principles of due process; suspects were tried by inquisition without specific charges against them, and they were secretly interrogated on oath about their private beliefs. It was no defence that one can only truly believe what one in fact believes: people were therefore coerced into lying on oath about their beliefs, on pain of death if they spoke the truth. A statute of 1401 authorized sheriffs to burn at the stake those whom the Church condemned.[76]

Religious debate was thus driven underground, but it began to resurface in the 1520s in response to the teaching of the Protestant theologian Martin Luther. Henry VIII was named 'defender of the faith' by the pope for writing against Luther, and Sir Thomas More (LC 1529–32) lent him his enthusiastic support by pursuing a number of theologians to their deaths. Disgusted by More's campaign, Parliament enacted in 1533 that no one should be accused of heresy without due accusation and presentment, that suspects should be allowed bail, and that the trial should be in open court.[77] The statute was repealed in the time of Mary I, and during the five years of her reign the burnings of clergymen reached unprecedented numbers. The consequence was such a general revulsion against heresy prosecutions that they all but ceased under Elizabeth I, who is reputed to have said that there was no need to make windows into men's hearts and secret thoughts. Nothing thereafter was to be adjudged heresy unless it had been so

[72] *The Earl of Shaftesbury's Case* (1677) 6 State Tr. 1269. The prisoner could be released by *habeas corpus* once the parliament was prorogued.

[73] *Paty's Case* (1705) 2 Ld Raym. 1105; Wright's reports, BL MS. Add. 22609, fo. 114. Paty's offence was to have brought an action on the case similar to that in *Ashby v. White* (p. 461, ante), and so the imprisonment was a serious challenge to the rule of law. Holt CJKB dissented eloquently; but the decision has never been overruled.

[74] *R. v. Felton* (1628) noted in J. Rushworth (ed.), *Historical Collections* (1659), pp. 638–9; A. Bellany in *English Law and Literature*, pp. 549–65. For Elizabethan practice see Baker, *Magna Carta*, pp. 170–3.

[75] Co. Inst., II, p. 48; III, p. 35. He had, however, been A.-G. when Guy Fawkes was racked in 1605.

[76] Stat. 2 Hen. IV, c. 15. This was directed against the so-called Lollards, who were encouraging people to read bibles and to question theology which lacked scriptural foundation.

[77] Stat. 25 Hen. VIII, c. 14. The draft bill recited Magna Carta, c. 29.

determined by authority of the express words of scripture.[78] The last execution was in 1612, and that was opposed by Coke CJ.[79] The judges in the same period denied any authority for the ecclesiastical High Commission to examine laymen under the oath *ex officio* as to their innermost thoughts or beliefs.[80] It was 'too much savouring of the Romish inquisition'.[81]

Thought was now free,[82] but this did not extend to worship, and religious observance was still controlled by law. Severe legislative measures were taken against Roman Catholic priests and their adherents in the time of Elizabeth I and James I, when some of them were found to be involved in treasonous plots.[83] Nonconformists were also penalized, albeit less brutally, and the High Commission punished people who held 'conventicles', or bible-reading classes. Although in 1641 the Church was deprived of the power to fine, imprison, or impose corporal penance,[84] most of the statutory controls on religion remained in place;[85] indeed, some minimal church attendance remained compulsory until 1846.

Restraints on the free expression of opinion were not limited to religion. Freedom of thought did not mean complete freedom to express thoughts.[86] In particular, open criticism of the king's government was not countenanced in the Tudor and Stuart periods. The proper place for debate was the House of Commons, and even there – despite its claim to freedom of speech – its members did not enjoy immunity. Elizabeth I informed Coke as Speaker (in 1593) that the Commons were not to discuss constitutional matters, and she placed several members under house arrest for their speeches. In 1629 three members were convicted of sedition for words spoken in the Commons.[87] Counsel were generally immune from punishment for what they said in court, unless it amounted to a contempt or a crime,[88] though a future judge was imprisoned by the Privy Council in 1613 for citing Magna Carta in an opinion,[89] and in 1616 an irate

[78] Stat. 1 Eliz. I, c. 1, s. 36. This had been Luther's teaching. It saved Roman Catholics as well as Protestants from the flames.

[79] *Wightman's Case* (1612) 12 Co. Rep. 93; Co. Inst., III, p. 40. Wightman had denied the divinity of Christ and proclaimed himself the Messiah. There were only 4 executions under Elizabeth I, all for Arianism.

[80] *Oaths ex Officio* (1606) 12 Co. Rep. 26; *Walton v. Edwards* (1608) 13 Co. Rep. 9. Clergymen could be interrogated under the oath, since they owed canonical obedience: *Maunsell's Case* (1607) Baker, *Magna Carta*, pp. 355–63, 517–30.

[81] Lord Burghley to Archbishop Whitgift (1584) Baker, *Magna Carta*, p. 260. For the High Commission see also pp. 141–2, ante.

[82] *Walton v. Edwards* (1608) 13 Co. Rep. 9, per Coke CJ. Cf. W. West, *Second Part of Symbolaeographie* (1594), sig. H.vii ('in our law, thought is free from offence').

[83] Pope Pius V in 1570 had purported to release Roman Catholic subjects from their allegiance to the queen.

[84] Stat. 16 Car. I, c. 11. The statute had to be modified in 1661 (13 Car. II, c. 12), because the ecclesiastical courts needed power to imprison for contempt.

[85] For the law in the mid-17th century see M. Hale, *Historia Placitorum Coronae* (S. Emlyn ed., 1736), II, pp. 383–410. For the 18th century see Oldham, *ECLM*, pp. 236–47.

[86] *A.-G. v. Gresham* (1596) Hawarde, *Cases in Camera Stellata*, p. 65 at 66, per Egerton LK ('Thought is free, but the tongue should be governed by knowledge').

[87] *A.-G. v. Elliot, Holles, and Valentine* (1629) 3 State Tr. 293 (judgment reversed 1667). For a related *habeas corpus* case see p. 509, ante. For the 1593 incident see p. 508 n. 59, ante.

[88] *Fuller's Case* (1607) Baker, *Magna Carta*, p. 359. Nicholas Fuller, a bencher of Gray's Inn, pleaded the immemorial privilege of barristers to speak freely on behalf of clients; but he was still punished by the High Commission for schism.

[89] *Whitelocke's Case* (1613) ibid. 400.

James I wanted counsel disbarred for arguing against the prerogative.[90] Ordinary private citizens lacked even these fragile claims to privileged speech.

Printed opinion was regarded with especial suspicion and was carefully watched by the Star Chamber. Licensing of the press continued after the abolition of the Star Chamber in 1641, but when it was ended in 1694 it could be said that 'the press became properly free . . . and has ever since so continued'.[91] Yet the freedom was still constrained by the law of libel, both civil and criminal.[92] Blackstone explained that 'The liberty of the press . . . consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published'. Criminal libel was not limited to defamation. Seditious libel, a common-law misdemeanour of considerable obscurity, was commonly associated in earlier cases with publications critical of the ecclesiastical polity,[93] but sometimes extended to other serious criticisms of government policy.[94] In addition, blasphemous libel[95] and obscene libel[96] came to be recognized as independent secular crimes, though prosecutions were uncommon. The principal safeguard for the press was the jury, which could in theory thwart unpopular prosecutions by a verdict of acquittal. All libel cases were tried by jury. However, the judges sought to curtail its power by requiring the full words of an offending publication to be set out in the indictment, and by holding that their meaning was a matter of law for the court. Since they also held it unnecessary to find an intention to commit sedition, which would have been difficult to prove, the role of the jury was thus reduced to pronouncing on the fact of publication, not on whether it was seditious. Lord Mansfield CJ justified this approach on the ground that the law would otherwise be whatever twelve men, 'under all the prejudices of the popular cry of the day', held it to be. Liberty should not, he said, be confused with licentiousness.[97] But in 1792 Parliament overturned these relatively recent efforts to limit the independence of the jury, and gave jurors the absolute right in libel cases to return a general verdict of Not Guilty.[98] This was not quite the end of criminal libel, but the various species had in practice become obsolete when they were finally abolished in 2009.[99] The old restraints have been replaced by new ones focused on 'hate speech', some of which mirror their precursors.[100] While freedom of expression

[90] *Case of Commendams* (1616) ibid. 422–6. The king's outburst was ignored, and Coke CJ also rejected Bacon A.-G.'s submission that counsel could not be heard against the prerogative, saying 'Justice knows no such strange prerogative to shut up the mouth of the subject'.

[91] Bl. Comm., IV, p. 153 n. [92] See also pp. 475–6, ante.

[93] E.g. *A.-G. v. Cooke and others* (1569) 109 SS 161 ('seditious books' disputing the queen's supreme headship). In *A.-G. v. Bastwick, Burton, and Prynne* (1629) 3 State Tr. 211, the Star Chamber ordered the loss of ears for attacking the Church government. Sedition was often alleged in aggravation of other offences.

[94] See *R. v. Taylor* (1703) 2 Ld Raym. 879; *A.-G. v. Tutchin* (1704) 14 State Tr. 1095, Holt 424 ('ill opinion of the government' expressed in a periodical). Tutchin was discharged on a technicality and continued to publish political articles with impunity. See also P. Hamburger, 37 *Stanford Law Rev*. 661.

[95] *A.-G. v. Taylor* (1678) 1 Vent. 293; Blasphemy Act 1698 (9 Will. III, c. 35) [= 9 & 10 Will. III, c. 32, in the *Statutes at Large*] (repealed 1967). Until 1641 it was principally a matter for the High Commission.

[96] *R. v. Curll* (1727) 2 Stra. 788, overruling *Reed's Case* (1708) 11 Mod. 142, Fort. 98.

[97] *The Dean of St Asaph's Case, R. v. Shipley* (1784) 4 Dougl. 73, 21 State Tr. 847. For earlier cases see Oldham, *ECLM*, pp. 217–27.

[98] Fox's Libel Act 1792 (32 Geo. III, c. 60). In 1794, after the acquittal of Horne Tooke, commemorative medalets were distributed with the triumphant legend 'Not Guilty say the jury, equal judges of law and fact'.

[99] Criminal Justice and Immigration Act 2008 (c. 4), s. 79 (blasphemy); Coroners and Justice Act 2009 (c. 25), s. 73 (criminal libel, obscene libel, and seditious libel).

[100] The last prosecution for seditious libel was for stirring racial hatred, though it ended in an acquittal: *R. v. Caunt* (1947) 64 LQR 203 (anti-semitism).

is recognized as an ideal, and even as a human right, it has never been absolute. It resides in the interstices of the criminal law.[101]

Freedom from Slavery

An extensive traffic in negro slaves from Africa began in the seventeenth century, primarily to supply labour for the sugar, cotton, and tobacco plantations in the West Indies and North America. English merchants were prominent in this trade, and the wealth of Liverpool was largely built upon it in the eighteenth century. Slavery soon presented the English courts with new legal questions. By the international custom of merchants, slaves were treated as chattels, with few if any rights. But could English law treat such a custom as reasonable?

The courts held in the seventeenth century that trover would lie for negroes, as if they were chattels, apparently on the ground that they were infidels;[102] but Holt CJ rejected this view,[103] and in 1706 also denied the possibility of bringing *assumpsit* on the sale of a negro living in England, for 'as soon as a negro comes to England he is free; one may be a villein in England, but not a slave'.[104] That principle had been current since Elizabeth I's time,[105] but the 1706 decision actually concerned a slave who was not in England; the plaintiff had simply overdone the fictions by locating everything in London, and was allowed to amend his declaration to tell the truth: the slave was in Virginia, where slavery was recognized by law. Overseas slaves were regularly sold on the Liverpool and London markets, and actions on such contracts were common in the eighteenth century. Even the trover decisions were directed to good pleading rather than the legality of slavery; the plaintiffs had declared on the conversion of 'negroes', not 'slaves', and there was no inherent reason why a negro should not be a free man.[106] The infidel argument also had to be abandoned, since slaves could hardly be prevented from converting to Christianity. Holt CJ's liberal opinion therefore had but little effect.

In the England of 1700 there was no extensive use of slave labour, as in the colonies. Negro servants were becoming common as status symbols, and increasing numbers

[101] The same is true of collective public protest. At common law this could amount to sedition, riot, or unlawful assembly, and further restraints have at times been imposed by legislation: e.g. the 'Six Acts' following the 'Peterloo Massacre' of 1819, and the Emergency Powers Act 1920 (10 & 11 Geo. V, c. 55) during the nationwide miners' strike. The all-embracing Civil Contingencies Act 2004 (c. 36) reintroduced war-time powers on a permanent footing. In earlier times martial law was used: p. 131 n. 36, ante.

[102] *Butts v. Peny* (1677) 2 Lev. 201, 3 Keb. 785; *Lowe v. Elton* (1677) Girdler's entries, CUL MS. Add. 9430(3), p. 373 (trover for '*una Ethiopissa anglice* a she-negro or blackamore', being an infidel slave); *Gelly v. Cleve* (1694) 1 Ld Raym. 147. Cf. *Grantham's Case* (1687) 3 Mod. Rep. 120, in which *de homine replegiando* was brought to recover a 'freak' (apparently a Siamese twin) captured in the Indies, who had later been baptized.

[103] *Chamberlain v. Harvey* (1697) 1 Ld Raym. 146; *Smith v. Gould (or Brown)* (1705–07) 2 Ld Raym. 1274; Herbert Jacob's reports (ed. Bryson, 2015), pp. 17–22; Oldham, *ECLM*, pp. 309–10.

[104] *Smith v. Brown* (1706) 2 Salk. 666. Cf. *Shanley v. Harvey* (1763) 2 Eden 126 at 127, per Lord Hardwicke LC ('As soon as a man sets foot on English ground he is free'). Hardwicke had once been of another view: *Pearne v. Lisle* (1749) Amb. 75. In 1760 the archbishop of Canterbury had written to him concerning a runaway slave, 'some have said, that as soon as they set their foot on English ground, they are free… But I believe the practice has been otherwise': BL MS. Add. 35596, fo. 155.

[105] *Cartwright's Case* (1569) cited in 2 State Tr. 1354; Baker, *Magna Carta*, p. 35; W. Harrison, 'Description of England' (*c.* 1577), quoted in *CPELH*, II, p. 886.

[106] See Ambl. 75.

were brought to Britain in the eighteenth century,[107] but their treatment was not comparable with that of the plantation slaves. There was, nevertheless, a growing public awareness of the issues raised by the existence of slavery. Quite apart from moral considerations, there was an obvious legal conflict between the mercantile custom recognizing property in slaves and the English tradition of freedom protected by *habeas corpus*. Even if the courts acknowledged the property which existed in slaves under American legal systems, it did not follow that it would continue if a slave was brought to England. Moreover, those cases in which the courts had assumed a property to exist in slaves had arisen from commercial disputes and therefore did not establish any rights exercisable as against the slaves themselves, if personally within the jurisdiction. As with villeins, the imperfect analogy with chattels failed to answer the question whether slaves could recover their freedom in the courts. The writ *de homine replegiando* was outmoded, and so the eighteenth-century question was whether *habeas corpus* would lie to free slaves from captivity. Blackstone was in no doubt: 'the spirit of liberty is so deeply implanted in our constitution' that a slave, the moment he lands in England, is free.[108] But other prominent lawyers, such as Lord Hardwicke and Lord Mansfield, felt that it was the lesser of two evils to accept slavery, and to impose regulation on the slave trade rather than to withdraw from it, since less enlightened nations would reap the benefits of abolition and slaves would suffer the consequences.

The question came squarely before Lord Mansfield CJ and the King's Bench in 1771.[109] A writ of *habeas corpus* had issued to secure the release of James Somerset, a negro confined in irons on board a ship arrived in the Thames from Virginia, bound for Jamaica, and the return stated that he was a slave under the law of Virginia.[110] Lord Mansfield was anxious to avoid the issue of principle, and pressed the parties to settle;[111] but the cause was taken up on one side by the West India merchants, who wanted to know whether slaves were a safe investment, and on the other by abolitionists headed by Granville Sharp. The law of villeinage was artfully turned by Somerset's counsel into an argument against slavery, since the exacting requirements for proving villein status could not be met in claiming slaves. In the event the court ordered in 1772 that 'the black must be discharged'. But Lord Mansfield, while stating that slavery was 'odious', did not decide that slavery was unlawful, let alone that Somerset was no longer a slave, confining himself to the narrow point that a slave could not be forced to leave England against his will.[112] The decision also had no bearing on the conflict of laws: if a person was a slave by the law of his place of domicile, which was not disputed in the case of Somerset, a mere temporary presence in England would not free him permanently, even for purposes of English law.[113] Several contract cases concerning overseas slaves

[107] In 1772 it was estimated that there were as many as 14,000 in the country.

[108] Bl. Comm., I, p. 123; and see W. Prest, *William Blackstone* (2008), pp. 280–3, as to modifications of the passage in later editions. See also *Shanley v. Harvey* (1762) 2 Eden 126.

[109] *R. v. Knowles, ex parte Somerset* (1771–72) 20 State Tr. 1.

[110] Under a Virginian statute of 1705 slaves were real property and inheritable.

[111] *Mansfield MSS*, II, p. 1223 ('I hope it never will be finally discussed; for I would have all masters think them free, and all negroes think they were not, because then they would both behave better').

[112] *Ann. Reg. 1778*, p. 163; confirmed by Lord Mansfield's own remarks at dinner in 1779 (*Mansfield MSS*, II, p. 1239) and in *R. v. Thames Ditton* (1785) 4 Dougl. K.B. 300 at 301.

[113] *The Slave, Grace* (1827) 2 Hagg. 94. This Admiralty decision by Lord Stowell caused a stir in the press.

later came before Lord Mansfield, and counsel did not even think it worth arguing that the contracts were illegal or contrary to public policy.[114]

Abolition

The common law would go no further. But the decision of 1772 was widely understood as freeing slaves in England, and this understanding assisted the abolitionist movement. Overseas slavery was not so easily ended. It would not, like villeinage, die naturally from adverse popular opinion, because vested mercantile interests were too valuable, and also no doubt because many white people still regarded blacks in faraway countries as innately inferior. Despite these difficulties, in 1792 the House of Commons voted in favour of 'gradual' abolition, and in 1807 Parliament outlawed the African slave trade by legislation.[115] This prevented British merchants exporting any more people from Africa; but it did not alter the status of the several million existing slaves, and the courts continued to recognize colonial slavery. The abolitionists therefore turned their attention to the emancipation of the West Indian slaves. This was still more difficult to achieve, since it required the compulsory divesting of private property; but it was finally done in 1833, at a cost of £20 million paid from public funds in compensation to slave owners. From 1 August 1834 all slaves in the British colonies were 'absolutely and for ever manumitted'.[116]

Further Reading

Pollock & Maitland, I, pp. 412–32
J. Hudson, 'Status' [871–1216] (2012) in *OHLE*, II, pp. 750–75

Villeinage
Holdsworth, *HEL*, III, pp. 491–510
H. G. Richardson and G. O. Sayles, *Law and Legislation from Aethelberht to Magna Carta* (1966), pp. 139–48
R. H. Hilton, *The Decline of Serfdom in Medieval England* (1969); *Bond Men made Free* (1973)
P. R. Hyams, 'The Action of Naifty in the Early Common Law' (1974) 90 LQR 326–50; 'The Proof of Villein Status in the Common Law' (1974) 89 EHR 721–49; *King, Lords and Peasants in Medieval England* (1980)
J. H. Baker, 'Villeinage' (1995) repr. in *CPELH*, II, pp. 877–87; 'Villeinage de Sank' [1483–1558] (2003) in *OHLE*, VI, pp. 598–607
J. Hatcher, 'English Serfdom and Villeinage' (1981) 90 *Past & Present* 1–39
D. MacCulloch, 'Bondmen under the Tudors' in *Law and Government under the Tudors* (C. Cross et al. ed., 1988), pp. 91–109

Liberty of the Subject
M. Cohen, 'Habeas Corpus cum Causa – the Emergence of the Modern Writ' (1940) 18 *Canadian Bar Rev.* 10–42, 172–97

[114] The most notorious was *Gregson v. Gilbert* (1783) 3 Dougl. 232; 28 JLH, part 3, pp. 283–370. This arose from the jettisoning of 133 African slaves at sea from the slave-ship *Zong*, bound for Jamaica, apparently to avoid a potential loss of insurance benefits. Granville Sharp tried unsuccessfully to have the crew indicted for murder.

[115] Stat. 47 Geo. III, c. 36. The offences thereby created were made felony in 1811. Slaves exported after 1807 were forfeited to the king, for the purpose only of divesting the property; they could be impressed into the armed forces. The legislation was enforced by the Royal Navy.

[116] Stat. 3 & 4 Will. IV, c. 73, s. 12. Transitional provisions, turning the freed slaves into bound 'apprentices', ended in 1838.

F. Thompson, *Magna Carta: its Role in the Making of the English Constitution 1300–1629* (1948), esp. chs 3 and 11
S. D. White, *Sir Edward Coke and 'The Grievances of the Commonwealth'* (1979), ch. 7
W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), pp. 3–94
J. H. Baker, 'Individual Liberty and Executive Authority' (1994) 109 SS lxxvi–lxxxv; 'Personal Liberty under the Common Law of England 1200–1600' (1995) repr. in *CPELH*, II, pp. 871–900; *The Reinvention of Magna Carta 1216–1616* (2017)

Freedom of Thought, Speech, and Assembly
F. S. Siebert, *Freedom of the Press in England 1476–1776* (1952)
J. Guy (ed.), *The Complete Works of St Thomas More,* X: *The Debellation of Salem and Bizance* (1987), pp. xlvii–lxvii (on heresy)
H. Kelly, 'Inquisition and the Prosecution of Heresy' (1989) 58 *Church History* 439–51
M. Lobban, 'From Seditious Libel to Unlawful Assembly' (1990) 10 OJLS 307–52
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D. Cressy, *Dangerous Talk: Scandalous, Seditious, and Treasonable Speech in Pre-Modern England* (2010)
K. Smith, 'Sedition' [1820–1914] (2010) in *OHLE*, XIII, pp. 334–40; 'Obscenity', ibid. 363–73
J. Baker, 'Magna Carta and Personal Liberty' in *Magna Carta, Religion and the Rule of Law* (R. Griffith-Jones and M. Hill ed., 2015), pp. 81–108; 'Personal Liberty and the Church' (2017) in *Magna Carta*, pp. 110–43; 'Puritans and the Law', ibid. 255–61; 'The High Commission', ibid. 292–5, 353–75
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England and Black Slavery
F. O. Shyllon, *Black Slaves in Britain* (1974)
D. B. Davis, *The Problem of Slavery in the Age of Revolution 1770–1823* (1975), chs 8–10
J. C. Oldham, 'New Light on Mansfield and Slavery' (1988) 27 *Jo. British Studies* 45–67; 'Slavery' (2004) in *ECLM*, pp. 305–23
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R. Paley, 'After *Somerset*: Mansfield, Slavery and the Law in England 1772–1830' in *Crime and English Society 1660–1830* (N. Landau ed., 2002), pp. 165–84
'Forum: *Somerset's Case* Revisited' (2006) 24 LHR 601–71
'Symposium – *The Zong*: Legal, Social and Historical Dimensions' (2007) 28 JLH, part 3, pp. 283–370
A. Lyall (ed.), *Granville Sharp's Cases on Slavery* (2017)

Aliens
Pollock & Maitland, I, pp. 458–67
Holdsworth, *HEL*, IX, pp. 72–104
K. Kim, '*Calvin's Case* (1608) and the Law of Alien Status' (1996) 17 JLH 155–71; *Aliens in Medieval Law: the Origins of Modern Citizenship* (2000)
P. J. Price, 'Natural Law and Birthright: Citizenship in *Calvin's Case*' (1997) 9 *Yale Jo. Law and the Humanities* 73–145
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28

Persons: Marriage and its Consequences

The law of marriage was the most pervasive aspect of the English law of persons, not only because of its effect on the individual lives of married couples, and on the legal capacities of the married woman, but also because the inheritance of property was predicated on relationships brought about by marriage. Moreover, since the union of man and woman in matrimony was from the twelfth century until the sixteenth regarded by the Church as not merely a contract but a 'sacrament',[1] it was the concern of theologians and canonists as well as secular lawyers. In England questions of matrimony were regarded as spiritual questions as early as the seventh century, and after the separation of lay and spiritual jurisdictions was completed in the twelfth century they fell exclusively within the province of the latter. When the existence of a marriage came in issue in the lay courts, the question was invariably referred to the bishop to be determined and certified in accordance with the law of the Church. That division of functions persisted until 1857, until when it was true to say that the English law of marriage was the canon law of marriage as received in England.[2]

The Law of Marriage

The earliest canonists held marriage to be effected by the union of man and woman in carnal copulation. They became one flesh by *commixtio sexuum*. But, since copulation could occur outside marriage, there had also to be a prior agreement to marry. This could be declared in a wedding ceremony, and it was sinful to marry without the publicity of a ceremony, but the ceremony was not essential. According to Gratian (*c*. 1140) marriage began by agreement but became complete and indissoluble when the agreement had been consummated in a physical union. However, in an English case of the same period, Pope Innocent II adopted a different doctrine of marriage, based on Parisian teaching. It was further expounded by Alexander III in the decretal *Veniens ad nos* (*c*. 1175/81), a case from Norwich which was published in the Gregorian Decretals and came to be universally accepted. The prevailing doctrine was that marriage was contracted by consent alone, without any need for ecclesiastical ceremony, parental consent, or physical consummation, provided the consent was notified in words of the present tense (*sponsalia per verba de praesenti*).[3] A church marriage was therefore

[1] This was taught by St Augustine in the 5th century but not fully accepted until the 11th. Its meaning varied from one theologian to another, and it was abandoned by Protestant religions in the 16th century as having no scriptural foundation. But all agreed that marriage was indissoluble.

[2] In the 18th century the Church courts also recognized Jewish and Quaker marriages: *Lindo v. Belisario* (1796) 1 Hagg. Con. 216.

[3] *Albreda de Sackville's Case* (*c*. 1139) 107 SS 387–9, upholding the marriage *per verba de praesenti* between William de Sackville and Albreda de Tregoz (whom he had deserted before consummation) against his

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

effective immediately. A clandestine marriage was irregular, in so far as the parties could be compelled for the sake of order and decency to solemnize the marriage publicly at the door of a church, and punished for any carnal connection beforehand; but it was equally valid, and created an indissoluble bond which would be upheld in preference to a subsequent church marriage with a different spouse.[4] On the other hand, a promise to marry in the future (*sponsalia per verba de futuro*) gave rise only to an executory contract of marriage. Before being perfected, such espousals were but an engagement to marry and could be dissolved. The regular way of executing the contract was to solemnize the marriage in a wedding ceremony, using present words. But the canon law acknowledged that it could also be turned into the indissoluble bond of present matrimony by physical consummation. When sexual intercourse took place following an executory agreement to marry, it was deemed to raise an irrebuttable presumption of present consent to be married and also dissolved any condition attached to the future promise. This enabled it to be said that all marriages depended essentially on consent, even if this sometimes rested on fiction.

It followed from this analysis that, in the absence of copulation, the validity of a marriage depended on whether the contract was by words *de praesenti* or *de futuro*. Maitland remarked that this distinction was 'no masterpiece of human wisdom . . . of all people in the world, lovers are the least likely to distinguish precisely between the present and future tenses'.[5] And it is hardly surprising that it gave rise to much wrangling and verbal wriggling, or that the commonest species of matrimonial suit in the medieval consistory courts was brought to interpret and enforce espousals. Despite the Church's coercive measures, medieval marriages were frequently entered into at home or in the open air, using words such as 'I here take you as my wife, for better or worse, to have and to hold until the end of my life, and of this I give you my faith'.[6] Since no set form was necessary, difficulties of interpretation frequently arose. What was one to make of the words 'I will have you as my wife'? Was it a present marriage, or an engagement? There were four schools of canonistic thought by the sixteenth century on that phrase alone.

Although the canon law required the present consent of both parties for a valid marriage, until 1753 the Church could order parties to a contract *de futuro* to perform. In practice the sanction was little used unless intercourse had occurred.[7] As an alternative, from the seventeenth century, the common law allowed an action of *assumpsit* to recover damages for breach of promise of marriage.[8] The thinking behind this was not to compel men to go through with marriages contrary to their second thoughts, but to

subsequent marriage to Adelise de Vere, which was consummated. The decision was confirmed by Alexander III in 1161, bastardizing Adelise's child with William: 107 SS 396–7.

[4] This rule was applied in *Bunting v. Leppingwell* (1585) 4 Co. Rep. 29; Baker, 'Elizabethan Marriage Cases', pp. 197–9. However, a wife who married privately would not be entitled to dower: Fitz. Abr., *Dower*, pl. 200 (dated 1225) (marriage in a chamber because of illness).

[5] Pollock & Maitland, II, pp. 368–9.

[6] Helmholz, *Marriage Litigation*, p. 28 (quoting from a case of 1372).

[7] It was removed by Lord Hardwicke's Act (26 Geo. II, c. 33), s. 13.

[8] Holt CJ said the action was introduced temp. Vaughan CJCP (1668–74) and 'greatly opposed': *Collins v. Jessor* (1704) Holt 458 at 459. But it was older: *Curtes v. Chersey* (1559) CP 40/1176(1), m. 636 (demurrer; no judgment); *Stretch v. Parker* (1638) 1 Rolle Abr. 22 (judgment). Cf. *Lewes v. Style* (1506) *OHLE*, VI, p. 855 (suit for return of the ring and jewels, studiously not alleging a promise to marry); *Anon.* (1595) BL MS. Hargrave 26, fo. 54v (*assumpsit* to marry P or pay her £16).

make them compensate women whom they had disappointed.[9] The cause of action was not abolished until 1970.[10]

Concubinage, where there was no marriage contract of either kind, was punishable as fornication. Medieval spiritual courts occasionally gave unmarried couples the option of marrying or forswearing each other's company: the *abjuratio sub poena nubendi* took the form of a compulsory conditional marriage by present words, that they took each other for man and wife if (but only if) they had further sexual relations. This procedure was inconsistent with the notion that marriage should be freely entered into, and it was abandoned in the fifteenth century.

The Formal Marriage

Both the ecclesiastical and secular authorities were from an early period aware of the importance of publicity in marriage, and insisted on public ceremonies, not as a requirement for validity but for the sake of regularity and the avoidance of fraud or doubt. Archbishop Hubert Walter promulgated an English constitution in 1200 requiring banns to be published in church on three successive occasions before solemnization; this practice was established universally by the Lateran Council in 1215 and still continues in England. The purpose of banns was to call upon the congregation to declare any known impediment (such as consanguinity or precontract) why the parties should not be joined in matrimony. In medieval times it was not unknown for rival lovers to 'make reclamation' at that stage, and then the question of precontract had to be referred to the consistory court. If no objection was raised, the ceremony went ahead at the church door. The priest charged the parties themselves to declare any known impediment, the parties exchanged words of betrothal and present matrimony, the husband placed a ring on the wife's third finger as a token or *wed*, and delivered to her the tokens (usually coins) representing dower.[11] The ceremony would conclude with a blessing and a nuptial mass inside the church, and would be followed by secular festivity. The purpose of the formalities was not only to impress on the parties the solemnity of what they were undertaking, but also to secure the event in the minds of witnesses, there being no written registration of church marriages until 1538. In essence, however, the church wedding was the same as the meadow wedding. The parties were not married by the priest's blessing or the other ceremonies. They married each other.

Clandestine Marriages

It is clear from the records of the medieval consistory courts that official exhortations were not very successful in altering social customs. The informal marriage remained common at least until the fifteenth century, and indeed seems to have lasted longer in England than on the Continent. One of the least convenient results of the papal pronouncements on marriage was the necessity of recognizing these unions as valid. The

[9] In theory a man also could sue for breach of promise, but it was very rare and regarded as ungentlemanly. In 1914 a barrister was disbarred after bringing such an action: *Black Books of Lincoln's Inn*, VI, p. 78.

[10] Law Reform (Miscellaneous Provisions) Act 1970 (c. 33), s. 1.

[11] For dower see pp. 289–90, ante.

problem was compounded by the canonical requirement of two witnesses to prove a marriage. If present words of matrimony were exchanged in private, and then a subsequent marriage with another woman took place before witnesses, the Church courts would have to order the man to live in adultery with the second woman.[12] Theologians were forced into the awkward position that such a man ought in conscience to disobey the Church and suffer excommunication on earth, safe in the knowledge that he would be absolved at the last judgment.

By the sixteenth century there was a more prevalent social assumption that only church marriages were proper. In 1563 the Roman Church (at the Council of Trent) changed the law accordingly, requiring the presence of a priest for validity. But the law of England did not follow suit, except to the extent of making it more difficult to prove clandestine marriages and increasing the penalties on clergymen who assisted with them. Informal marriages, though still punishable, were by no means unknown in late Tudor England: indeed Edward Coke in 1598 married his second wife in a private house.[13] The old law remained in force in England until it was altered by Parliament. In 1653 the anti-clerical radicals who had gained control of Parliament introduced civil marriage before justices of the peace and enacted that all other marriages were invalid. The quarter sessions were given jurisdiction to annul marriages which failed to comply with the minute formalities then laid down. Now marriages conducted by clergy were irregular and void, though in fact many couples continued to follow the old customs, with or without the civil ceremony.[14] This secular regime was ended in 1660, and in 1661 the King's Bench held that an informal marriage in the 1650s, which had been annulled by quarter sessions, was in law valid, since the jurisdiction conferred on magistrates to annul marriages had been contrary to the law of God.[15] But the popular understanding of marriage law had become confused. Clandestine marriages became more frequent,[16] the advantages being secrecy, expedition, the avoidance of parental control, and sometimes deception – as where marriages were antedated in non-parochial records to disprove an illegitimate birth. The courts sought to discourage them, pointing out that the informal marriage was not 'complete' and did not entitle the parties to rights of dower or succession to chattels.[17] The first legislative sanctions were imposed in the 1690s, when it became a criminal offence to marry without banns or a licence, though the stated purpose behind this was to facilitate the taxation of marriage certificates and licences rather than to improve publicity.[18]

[12] An instance of a conveniently unprovable marriage was that of Lady Katherine Grey, a potential heir to the throne in 1562: Baker, 'Elizabethan Marriage Cases', pp. 183–5.

[13] He incurred the censure of the archbishop of Canterbury, but there was no doubt about the validity of the marriage (which Coke later had cause to regret).

[14] See C. Durston, 31 *Historical Jo*. 45.

[15] *Tarry v. Browne* (1661) 1 Sid. 64 (midnight marriage in an alehouse, with a 'parson'). Marriages before JPs in the 1650s were valid at common law, and were confirmed by Parliament.

[16] For their social history see J. R. Gillis in *Disputes and Settlements* (J. Bossy ed., 1983), at pp. 261–73; R. B. Outhwaite, *Clandestine Marriage in England 1500–1850* (1995), ch. 2. On some estimates they accounted for a third of all marriages in the early 1700s.

[17] *Sir Robert Paine's Case* (1660) 1 Sid. 13, per Twisden J; *Haydon v. Gould* (1710) 1 Salk. 119 (husband denied administration of wife's goods). As to dower see p. 518 n. 4, ante. The same disadvantages beset marriages by Dissenters (though not clandestine): *Wigmore's Case* (1706) Holt 459.

[18] Stat. 7 & 8 Will. & Mar., c. 35, s. 4 (fine of £10). Cf. Stat. 6 & 7 Will. & Mar., c. 6 (parson liable to a fine of £100).

Numerous bills were laid before Parliament between the Restoration period and 1753 to end clandestine marriages. The principal contention of their promoters was that marriages which were entered into informally and hastily, especially by the young, were likely to come to grief. They might also, if poorly documented, lead to property disputes. But reform was opposed on the ground that formal marriages were too expensive for the poorer classes and that such a change would compel them to live in sin. A major cause for official concern was the effectively clandestine marriage in ecclesiastical form, certified by a priest, which could be obtained in certain privileged places outside episcopal control. The most notorious was the 'Fleet marriage'. The Fleet Prison in London, besides serving as a gaol, was an ecclesiastical liberty and something of a social centre, with coffee shops and a tennis court. Its facilities included a number of marriage shops, where seedy clerics would conduct hurried marriages for a small fee. Hundreds of thousands of couples took advantage of this service in the eighteenth century, not all of them from the lower classes. Lord Hardwicke CJ was a strong opponent of such liberties,[19] and in 1753 the publicity aroused by a case in the House of Lords gave him the opportunity to reintroduce the bill which finally ended the clandestine marriage.[20] Under Lord Hardwicke's Act secret marriages were completely abolished; liberties such as the Fleet were swept away; and the publication of banns or purchase of a licence (which required parental consent in the case of an infant under 21), the presence of at least two witnesses, and the recording of the marriage in a public register, all became essential requirements for validity.[21]

The 1753 Act was not without its own shortcomings. Its requirements proved to be in some respects too rigid: for instance, the need for parental consent (in the case of an infant marrying by licence) upset some marriages on technical grounds.[22] The requirement of a church marriage was subject to an exemption for Quakers and Jews, but not for Roman Catholics, Nonconformists, and non-believers. Many of the problems were removed in 1823, when bona fide marriages were protected against invalidity resulting from unwitting failures to comply with the law, and in 1836 by the introduction of a civil marriage ceremony, in a register office or registered building (such as a Nonconformist chapel), as an alternative.[23] The civil and ecclesiastical forms of marriage have existed in parallel ever since.[24]

The statutory provisions were not applicable to members of the royal family, to marriages with the special licence of the archbishop of Canterbury,[25] or to marriages

[19] In *Middleton v. Croft* (1736) Ridg. t. Hard. 109, 2 Stra. 1056, he referred to them as an 'evil' and producing 'many calamities'. He was said to tear up Fleet registers produced as evidence: *Lawrance v. Dixon* (1792) Peake 185, per Lord Kenyon CJ.

[20] For this legislation and its aftermath see Outhwaite, *Clandestine Marriage in England*, chs 4–6; D. Lemmings, 39 *Historical Jo.* 339; L. Leneman, 17 JLH 161; R. Probert, *Marriage Law and Practice in the Long Eighteenth Century* (2009), chs 6–9.

[21] An Act for the Better Preventing of Clandestine Marriages (26 Geo. II, c. 33). Falsification of the register of marriages was soon afterwards made a capital offence.

[22] E.g. in *Priestly v. Hughes* (1809) 11 East 1 (as to consent of an illegitimate child's parent); *Reddall v. Leddiard* (1820) 3 Phill. Ecc. 256 (as to consent of a testamentary guardian appointed by an inadequately attested will).

[23] Stat. 4 Geo. IV, c. 76; Marriage Act 1836 (6 & 7 Will. IV, c. 85).

[24] Marriage Act 1949 (13 & 14 Geo. VI, c. 76).

[25] Ecclesiastical Licences Act 1533 (25 Hen. VIII, c. 21).

outside England and Wales. In the last case the law governing their validity in England is the law of the place of celebration, which in some jurisdictions may be the common law (that is, the old canon law).[26] The courts might therefore still have to pronounce on the validity of common-law marriages[27] contracted outside England and Wales. In 1843 the House of Lords was asked to decide upon the validity of an Irish marriage celebrated without the presence of an episcopally ordained priest. Both the Irish court and the House were evenly divided, leaving in place an apparent 'decision' that the presence of a priest was essential.[28] The misreading of history behind this outcome put an end to the possibility of informal marriage.[29]

Unity of Person

It was a common saying among canonists and common lawyers alike that, in the eyes of the law, husband and wife were but one person: they were two souls in one flesh (*erunt animae duae in carne una*).[30] This one person was for practical purposes the husband,[31] since 'the very being or legal existence of a woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband'.[32] It might have been less confusing to say that husband and wife were a corporation, of which the husband was the head. Stating the fiction in physical terms was not calculated to be understood by laymen, and it prompted Bumble the beadle to utter the immortal words, 'if the law supposes that . . . then the law is a ass'.[33] Like most legal fictions it was not universally applicable: for instance, the wife was not executed for her husband's crimes, or made answerable for his debts, and if she killed him it was not suicide but petty treason. The origin of the doctrine, and its one-sidedness, may be found in the power and superiority which social custom and religion gave the husband over his wife. According to the scriptures, which reflected Middle Eastern social norms in antiquity, woman was created for man and bound to obey him. And according to the law as stated in *Bracton*, the married woman was 'under the rod' of her husband,[34] who was both her sovereign and her guardian. In law French she was said to be *feme covert*, as opposed to a *feme sole* (single woman), and her husband was her *baron*. He looked after her and her property during the 'coverture', while she lost the capacity to own separate property or make contracts. She could not sue or be sued at common law

[26] E.g. in Scotland. After 1753 eloping couples could travel to Gretna Green, the first village over the border, for a valid informal marriage without parental consent.

[27] This term is sometimes misused for concubinage. Without the intention to be presently married, this was never a valid form of marriage at common law.

[28] *R. v. Millis* (1844) 10 Cl. & Fin. 534; R. Probert, 28 *Legal Studies* 337. Millis was convicted of bigamy, and one of the judges withdrew an opinion in his favour so that judgment could be given against him and then challenged by writ of error; but the indecision of the Lords left the arranged conviction standing. See also *Beamish v. Beamish* (1861) 9 H.L. Cas. 274.

[29] See J. C. Hall, 46 CLJ 106. The 'decision' did not apply to a marriage celebrated in a foreign place where priests were not available: *Catterall v. Catterall* (1847) 1 Rob. Ecc. 580.

[30] 4 Co. Rep. 118; Co. Litt. 41. Cf. *Genesis*, ii. 24 ('erunt duo in carne una'); *Glanvill*, xiv. 3 (p. 174).

[31] *Dialogue of the Exchequer*, ii. 18 (p. 173) (tr. 'You have heard often enough that he who takes a wife "becomes one flesh with her", but this is in such a way that he is her head').

[32] Bl. Comm., I, p. 442. [33] C. Dickens, *Oliver Twist* (1838), ch. 51.

[34] Even in the 18th century, the law allowed a husband to chastise his wife. Buller J earned the nickname 'Judge Thumb' by laying down in 1782 the restriction that the stick should not be thicker than the thumb.

without her *baron*, and this prevented her from suing him for any wrong done to her. As with wardship in chivalry, the guardianship of a wife by her husband was not subject to judicial review. The fiction of unity has never been abolished outright by legislation, though so many of its consequences have been extirpated that the courts have declared that it no longer exists even at common law.[35]

Property of Married Women

There was some possibility in the earliest days of the common law that husband and wife might be regarded as owning property in common, so that the wife could take a share on the husband's death. There was indeed a widespread custom allowing the widow a third share of movable goods, and an early common-law writ to recover it (*de rationabili parte bonorum*); but the right was generally overtaken by the transfer of jurisdiction to the Church courts.[36] In some towns a wife who traded separately was allowed by custom to own personal property as if she were single.[37] The queen consort was also treated as a *feme sole* for property purposes.[38] But these were exceptions to the general doctrine, established as law by the early thirteenth century, that any property which a wife had owned as a *feme sole* became the husband's on marriage.

Personal property vested in the husband absolutely, since there could be no estates in chattels, and therefore he could dispose of it absolutely. If the husband died first, the widow had no right to claim back any of her personal property disposed of during coverture, though she could have what remained. Likewise upon divorce, the wife could only reclaim such of her goods as had not been disposed of in good faith while the marriage was believed to be valid.[39] If the husband died testate, the widow could only have whatever legacies he had left her, and her *paraphernalia* (personal clothes and jewels).[40] The wife's claim to *paraphernalia* as against a residuary legatee was limited to necessaries and personal ornaments appropriate to her degree; but even these were liable to the husband's debts, 'for it is not fit she should shine in jewels, and the creditors in the mean time to starve'.[41]

The wife's real property vested in the husband during coverture, although if she died first he was entitled to be tenant by the curtesy for the rest of his own life.[42] The husband was deemed to have the seisin during the marriage in right of the wife, and took the profits; but he did not acquire the wife's inheritance, and if he granted away her land it could be recovered back after his death by the widow or her heir.[43] If the wife wished to alienate her patrimony during the marriage she had to obtain her husband's consent,

[35] *Midland Bank Trust Co Ltd v. Green* [1981] 3 All E.R. 744 (reversing the rule that husband and wife could not commit the tort of conspiracy). In *R. v. R.* [1992] 1 A.C. 599, the HL held (overruling old authorities) that a husband could be convicted of a rape on his wife.

[36] See p. 411, ante. It survived where a local custom could be asserted.

[37] For the custom of London see *Beard v. Webb* (1800) 2 Bos. & P. 93.

[38] *Queen Philippa v. Abbot of Cirencester* (1344) Y.B. Hil. 18 Edw. III (RS), p. 430, pl. 6.

[39] *Anon.* (1534) Y.B. Mich. 26 Hen. VIII, fo. 7, pl. 1; Dyer 13; Spelman Rep. 216.

[40] She was also allowed to leave her paraphernalia by will: *Anon.* (1478) B. & M. 109 at 110, per Vavasour sjt.

[41] *Shipton v. Tyrrell* (1675) Freem. 304; 2 Eq. Cas. Abr. 155; 73 SS 150, per Finch LK.

[42] See pp. 290–1, ante.

[43] Originally by the writ of entry *cui in vita*.

and if the husband wished to alienate her patrimony he had to obtain hers. In either case they would join in levying a final concord in the Common Pleas, and before it was accepted the judges would question the wife privately to ensure that she was not acting under coercion. A fine would bar the wife and her heirs. Already in the thirteenth century the fine was the only method of achieving this;[44] and another of its principal uses was to enable a husband to convey his *own* land demonstrably free of any claim by a widow to dower.

The doctrine of unity also meant that any conveyance *to* the wife during coverture vested the property at common law in the husband and wife, and placed it under the husband's control.[45] Even the husband could not make a grant to his wife after marriage, though he could make future provision for his wife at the time of marriage, to take effect if she survived him. Originally this took the form of nominated dower, but from the fourteenth century it usually took the form of a jointure, which would bar dower.[46] The rule against separate acquisitions applied equally to personalty. Thus, if a wife saved a little cash out of her living allowance, the benefit of her frugality redounded to the husband. The intention of her allowance was to keep her in necessaries, 'not that she should grow rich and lay up treasure for herself alone'.[47]

By early modern times some of these rules seemed antiquated and inconvenient in higher society, and the means of avoidance were found in equity. The Chancery generally regarded the married woman as a separate person for property purposes, and allowed her to sue independently of her husband.[48] It was perfectly consonant with good conscience to benefit a wife independently of her husband, and if that was the intention of a transaction equity would seek to carry it out. As early as the fifteenth century, a use in favour of a married woman was regarded as binding, and it would be protected by the Chancery against an alienation by the husband and wife.[49] Not long after the Statute of Uses, trusts of property for a wife's separate use were likewise enforced.[50] The Court of Chancery thereby gave the married woman beneficiary under a trust the same independence of ownership as if she had been single.[51] In the course of time, it was feared that the separate use could be circumvented, because a compliant wife might be induced to dispose of her equitable estate at her husband's bidding, or to charge it with the payment of his debts. To prevent this, conveyancers in the late eight-

[44] See *Countess of Aumale v. Countess of Gloucester* (1276) B. & M. 44. This concerned an alienation of the wife's *maritagium*. For final concords see pp. 290, 302, ante.

[45] Moreover a grant to husband, wife, and a third party, gave only half to the husband and wife.

[46] See pp. 289–90, ante.

[47] *Shipton v. Tyrrell* (n. 41 ante), per Finch LK.

[48] E.g. *Sanky v. Golding* (1579) Cary 87; Tothill 95 (action without husband); *Rivet v. Lancaster* (1597) Tothill 93 (action against husband)

[49] *Anon.* (1467) B. & M. 108. Cf. *Anon.* (1478) ibid. 109 (as to the effect of a wife's will leaving land to her husband). The separate use was recognized at moots: 105 SS 209 (Inner Temple, *c.* 1496); HLS MS. 125, no. 170 (Gray's Inn, 1518).

[50] See N. G. Jones, 19 CSC 186–9. If a passive use was executed the husband would become seised, but execution could be prevented by requiring the trustees to perform active duties: *Nevil v. Saunders* (1686) 1 Vern. 415. This was the common case of a trust to pay maintenance to a wife. Cf. *Wytham v. Waterhowse* (1596) B. & M. 146.

[51] See *Herbert v. Herbert* (1692) 1 Eq. Cas. Abr. 66. In the 18th century the Chancery would sometimes direct a husband to settle property to his wife's separate use.

eenth century – some said it was Lord Thurlow LC while at the bar[52] – invented the 'restraint on anticipation'. This was a condition inserted in a settlement to restrain a wife from alienating or charging her capital during the marriage. The wife's absolute property was thereby postponed until widowhood, and she was forbidden to 'anticipate' her estate on pain of forfeiture. It was not clear at first whether the courts would accept such a total restraint, which in the case of a man or a single woman had been treated since medieval times as repugnant and void. In the case of a wife, however, although it was a restriction on her present capacity, it was accepted as serving her best interests; and after 1800 clauses of this nature were inserted in most marriage settlements.

The courts were slower to recognize a separate trust of money, for fear (more affected than real) that a wife might misuse it for inappropriate purposes. Although the early Stuart Chancery was willing to protect a wife's spending-money against a spendthrift husband,[53] it held in 1640 that a woman could not save money surreptitiously and put it in trust: 'it would be a dangerous precedent to suffer women to have such power to collect money secretly…for although this wife had disposed of it honestly…another wife might dispose the money to her paramour or some other in an unseemly manner'.[54] Within a few generations, this ungracious position had been abandoned and a wife was allowed to save pin-money.[55]

Thus did equity protect the women of the landed classes, but it could not assist those of the middle and poorer classes for whom the machinery of a trust was beyond reach. For centuries such protection was little needed, because working married women were rarely in a position to earn money enough to save. As the social position of women began to change, and the opportunities for their employment increased, the archaic rule which gave a woman's earnings absolutely to her husband became a source of loud complaint. In 1856 a number of eminent ladies, including several well-known novelists, petitioned Parliament to alter the law, on the basis that modern civilization had begun to break down the dependence of women upon men. The married woman, they said, had no more protection than a slave. They begged the legislature to consider the plight of the woman who 'worked from morning till night to see the produce of her labour wrested from her, and wasted in a gin-palace'.[56] A Royal Commission was appointed, and enquiries showed that the law had already been changed in America and Canada without ill consequences. Parliament was therefore moved, in 1870, to risk a modest reform. Instead of making the radical change of conferring upon married women the capacity to own property, Parliament simply extended the equitable concept of the separate use to wages and earnings and certain other acquisitions.[57] The statute effected a fictional settlement whereby (in Dicey's words) the rules of equity, framed for the

[52] 3 Bro. C.C. 340 n. 1, per Lord Eldon LC. See 40 LQR 221.

[53] *Fleshward v. Jackson* (1623) Tothill 94. Cf. *Sanky v. Golding* (1579) Cary 87, Tothill 95 (money put in trust for wife's maintenance).

[54] *Scott v. Brograve* (1640) CUL MS. Gg.2.5, fo. 81, per Finch LK (reversing Coventry LK).

[55] *Milles v. Wikes* (1694) 1 Eq. Cas. Abr. 66; *Slanning v. Style* (1734) 3 P. Wms 334.

[56] Manchester, *Sources*, pp. 400–1. One immediate measure was the insertion in the Matrimonial Causes Act 1857 (p. 536, post) of protection for anything a *deserted* wife acquired 'by her own lawful industry' (s. 21).

[57] Married Women's Property Act 1870 (33 & 34 Vict., c. 93). Such property was to be 'deemed' to be settled to her own use, 'independent of any husband to whom she may be married', and she was enabled to sue for it in her own name.

daughters of the rich, were extended to the daughters of the poor.[58] But it was full of technical difficulties, and in 1882 Parliament introduced a more sweeping reform. The married woman was now made capable of acquiring, holding, and disposing of real and personal property as if she were a *feme sole*.[59] However, her liability in contract and tort attached only to her separate estate, and this remaining distinction between the property of the *feme covert* and the *feme sole* was not removed until later.[60]

Contracts of Married Women

The wife's inability to make contracts was a direct consequence of her inability to own separate property. There was no difficulty about contracts made by her as an agent or a personal representative, because in those capacities she was dealing with another person's property. For the same reason, she could make contracts in relation to property which (in equity or by custom) she owned separately. Except in those cases, a purported contract by a married woman was merely void, and neither she nor her husband could be sued upon it.[61]

A wife was able to make contracts as her husband's agent, and it was settled by 1300 that she could bind her husband to a sale of goods which came to his use or profit. But it was settled in the fifteenth century that the husband was bound in such a case only if he had either given his wife prior authority or subsequently ratified a contract made for his benefit.[62] He could not be held liable for his wife's prodigality or extravagance.[63] If a wife was accustomed to order household goods on credit, an agency might be presumed; but the husband was free to revoke it by express notice. The married woman could not in theory make a contract, as agent, for her own separate benefit. But this limitation on the agency doctrine caused injustice if a wife was neglected or evicted by her husband. Although she could sue in the ecclesiastical courts for alimony, such proceedings cost time and money which she might not have.[64] The courts therefore began, in the seventeenth century, to find in such cases of hardship an implied authority to pledge the husband's credit for necessaries for her own support.[65] This rested on the triple fiction that the goods were supplied to the husband, that they were supplied at his request, and that he promised to pay for them.[66] In 1663 the judges in the Exchequer Chamber undermined this innovation by holding that the implied authority had to be consistent with the evidence, and so it could be rebutted on proof that the husband had

[58] A. V. Dicey, *Law and Public Opinion during the 19th Century* (1905), p. 393.

[59] Married Women's Property Act 1882 (45 & 46 Vict., c. 75).

[60] See pp. 527, 528, post. Only then was it time to abolish restraints on anticipation: Married Women (Restraint upon Anticipation) Act 1949 (13 & 14 Geo. VI, c. 78).

[61] The husband could, however, be sued for his wife's ante-nuptial debts.

[62] Y.B. Hil. 20 Hen. VI, fo. 21, pl. 19, per Markham sjt; Mich. 21 Hen. VII, fo. 40, pl. 64; *Hagger's Case* (1598) B. & M. 243.

[63] See Y.B. Pas. 11 Hen. VI, fo. 30, pl. 16, per Martin J (tr. 'If my wife borrows money from someone, and buys herself better clothes than befit my estate, I shall not be charged to pay off this loan, even though it comes to my use and profit as husband inasmuch as my wife must needs be clothed').

[64] A suit for alimony was normally ancillary to a suit for divorce *a mensa et thoro*: Helmholz, *OHLE*, I, pp. 558–60.

[65] *Sir Henry Compton's Case* (*c.* 1612) 1 Brownl. & Golds. 47; *Sir Thomas Gardener's Case* (1615) Rolle Abr., I, p. 351.

[66] *Dent v. Scott* (1648) Aleyn 61. All agency rested on a pleading fiction: p. 377, ante.

warned traders not to trust the wife.[67] The doctrine was therefore of only limited assistance to deserted wives. Traders gave credit to wives at their peril, and a separated wife might in reality find it difficult to obtain necessaries without ready cash. Equity helped by encouraging loans to a wife in distress: provided the money was actually spent on necessaries, the lender could recover it from the husband as if he had supplied the goods himself.[68] In the twentieth century the ability of many women to support themselves from their own earnings, and their right to claim maintenance by summary proceedings in magistrates' courts, assisted by legal aid, made the implied authority to pledge credit of little practical value. It had fallen into disuse when it was abolished in 1970.[69]

A married woman who owned separate property in equity was able to make contracts in respect of such property, provided the property was held to her separate use at the date of the contract. But the employment of restraints on anticipation later prevented some wives from contracting in this way. The effect of the 1870 and 1882 Acts was to enable a wife to make contracts in respect of her own property, and to render her liable to be sued separately. Still the contractual liability attached to the property and not the person, so that a plaintiff suing a married woman for breach of contract had to prove that she had separate property at the time of contracting, and a judgment for damages could only be executed against her unrestrained separate property.[70] This gave the married woman an irrational and unnecessary privilege, which she lost in 1935 when she was finally given the same contractual capacity as a *feme sole* (or a man).[71]

Torts By and Against Married Women

Her inability to own property did not render a married woman less capable of committing torts, any more than it exempted her from criminal liability. But it rendered her incapable of paying compensation, and as a matter of procedure an action for a wife's tort had to be brought against husband and wife jointly. The wrong was not attributed to the husband personally, even in a vicarious sense, for if the wife died his liability came to an end; but he nevertheless bore the financial brunt of any successful suit. After 1882 it was possible to sue a married woman in tort as if she was single, but judgment could only be executed against her separate property. Husbands remained jointly liable as well, until they were relieved from this obsolete consequence of the doctrine of unity of person in 1935.[72]

The converse principle applied to torts committed against a wife. The husband and wife had to bring the action jointly, and the damages belonged to the husband. The husband could also claim separately for any loss he had suffered through the loss of his

[67] *Manby v. Scott* (1663) 1 Sid. 109; 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 29. The implication also failed if the wife was the guilty party.

[68] *Harris v. Lee* (1718) 1 P. Wms 482; Prec. Ch. 502; 2 Eq. Cas. Abr. 135. The loan could not be recovered at law; but equity held the lender to be 'subrogated' to the position of the supplier.

[69] Matrimonial Proceedings and Property Act 1970 (c. 45), s. 41.

[70] Any property acquired during coverture was liable, but until 1893 the liability did not extend to property acquired after discoverture: Married Women's Property Act 1893 (56 & 57 Vict., c. 63).

[71] Law Reform (Married Women and Tortfeasors) Act 1935 (25 & 26 Geo. V, c. 30), s. 1.

[72] Ibid., s. 3. The injustice of the rule was brought to general notice by *Edwards v. Porter* [1925] A.C. 1.

wife's services or *consortium*.[73] After 1935 a wife had an independent action in respect of torts committed against her.

Bastardy

Bastardy, or illegitimacy, was a condition imposed upon a child by the Church as a punishment for the sin of parents who conceived it by illicit connection. By legal fiction, a child born out of wedlock was no one's child, *filius nullius*. This condition was visited by the canon law on children born of a single woman, of an adulterous union, of a clandestine marriage which was found to be void, or of a church marriage where both parties knew of an impediment. However, in deference to the penal or disciplinary theory of bastardy, the canon law treated the children of a bona fide putative marriage as legitimate if they were born before annulment, and also allowed that a bastard born out of wedlock was legitimated by the subsequent marriage of his parents. The Church took notice of illegitimate parentage to the extent of requiring a putative father to contribute to the support of his child; but affiliation proceedings in the ecclesiastical courts were uncommon in medieval times.[74]

The Church treated bastardy as an inferior status, which prevented an illegitimate man from being ordained priest. In English law, on the other hand, it was not a status or condition but simply the absence of a legitimate family relationship. The bastard had the same rights as any other free man, with the single exception that he could not be heir to his parents or have any collateral heir[75] himself. If he happened to be a villein, this was a distinct advantage.[76] But one obvious disadvantage was that he could not acquire real property by inheritance. It was settled in the twelfth century that bastardy could be pleaded in bar of a real action in which the plaintiff relied on a descent to himself, and the question of fact (if disputed) would be referred to the ecclesiastical court. From an early date, however, there was a conflict between the canon law and the common law over the doctrine of legitimation by subsequent marriage and the effect of annulment of marriage. The common law took the coldly logical view that bastardy was established at the moment of birth and was indelible. It followed that nullity of marriage always bastardized the issue, and that bastardy could not be removed by subsequent marriage. Since inheritance was a question for the temporal law, the king's judges felt their law should prevail; yet, on reference to the bishop, his certificate would preclude them from applying it. The judges therefore proposed a new procedure in 1236. The question referred to the bishop should not be whether the person was legitimate but whether his birth preceded the parents' marriage. The bishops' reaction was that the canon law doctrines ought to be received into English law; but they received a scornful rebuff from the assembled earls and barons, who 'with one voice answered, that they would not change the laws of England which have been used and approved'.[77] The

[73] See p. 491, ante.
[74] Helmholz, *Canon Law and the Law of England,* pp. 169–86; *OHLE*, I, pp. 560–1.
[75] I.e. an heir traced through his parents.
[76] An illegitimate child was necessarily free, since he or she could not inherit villein status: p. 504, ante.
[77] Provisions of Merton (1236), c. 9 ('Nolunt leges Angliae mutare…'). See *Bracton's Notebook* (F. W. Maitland ed., 1888), I, pp. 104–15; *Bracton,* III, pp. xv–xvii.

solution adopted by the judges was that in all except the old real actions a party could plead 'special bastardy' – that is, birth out of wedlock, which was a question of fact capable of trial by jury. This pleading device could be used to keep the matter from the Church courts where the marriage itself was not in dispute.

The common law developed one apparent exception to its harsh doctrine of bastardy. Where the eldest son was born out of wedlock (the *bastard eigné*) and the next son was born to the same parents after the marriage (the *mulier puisné*), and upon the ancestor's death the *bastard eigné* entered as heir and remained in undisturbed possession until his own death, the *bastard eigné* was treated as if he had been legitimate with respect to the inheritance of that land. The reason given by Littleton was that a person who was legitimate by the canon law could not be bastardized posthumously, when he no longer had the opportunity to contest the issue.[78]

The 'used and approved laws of England' which the barons would not alter in 1236 were eventually changed in 1926.[79] Since 1969 an illegitimate child also takes on intestacy as if legitimate, and likewise under a bequest to 'children' or similar words of relationship.[80] But the old law of *filius nullius* still applies to peerages.

Divorce

The contract of matrimony was the most important contract two persons could make, and yet, unlike all other contracts, there was no escape from it if it proved unsatisfactory. This followed from the teaching of the medieval canonists, to which the common law deferred upon all matrimonial questions. In Anglo-Saxon England divorce by consent had been known; and there is evidence that the early Church, while punishing divorce as a sin, had nevertheless recognized it as ending a marriage, at least when based on adultery or desertion. The canonists, however, adopted Christ's reported teaching that the bonds of matrimony were indissoluble: 'What God has joined together let not man put asunder'.[81] The Church would not even dispense with this for money. A divorce from the bond of matrimony (*a vinculo matrimonii*) could only be granted on the ground that the putative marriage had been void from its inception by reason of a 'dirimentary impediment'. No court could break the chains, but it could declare that the chains were never there. Whether a marriage existed or not was a question for the Church and its law; but once a valid marriage was shown to have been contracted *per verba de praesenti*, or by physical union following espousals, only God could end it by extinguishing the life of one spouse. The law of divorce *a vinculo* was, for that reason, the same as the law of marriage.

[78] Litt., ss. 399–401. See F. E. Farrer, 33 LQR 135.

[79] Legitimacy Act 1926 (16 & 17 Geo. V, c. 60). This did not apply if one of the parents was married to someone else at the time of conception, but this restriction was removed by the Legitimacy Act 1959 (7 & 8 Eliz. II, c. 73).

[80] Family Law Reform Act 1969 (c. 46), ss. 14–15 (limited to the intestacy of parents); replaced and enlarged by the Family Law Reform Act 1987 (c. 42), ss. 1, 18.

[81] See Matthew, v. 31–2; xix. 3–9; Mark, x. 2–12; Luke, xvi. 18. The Mosaic law had allowed the husband to serve his wife with a bill of divorcement for misconduct, but Christ said this was not to be followed: Deuteronomy, xxiv. 1–2. Christ did allow that a husband could divorce his wife for adultery: p. 534 n. 102, post. But the Church did not.

Nullity of Marriage: Divorce *A Vinculo Matrimonii*

According to the classical canon law, which for this purpose was effective in England until 1857, persons who had undergone the outward forms of marriage could only be divorced – in the full sense of being free to remarry – if they could establish either a want of capacity to intermarry or a want of true consent at the time of marriage. In those cases the marriage was a nullity from the beginning, and no legal proceedings were needed to make it so.[82] In medieval times divorce could therefore be obtained by self-help without litigation: if a party conceived that he was not lawfully married, he left his 'wife' and, if he was so entitled and so desired, married another.[83] The Church did not interfere. Indeed, if the first marriage was void, it was the parties' duty not to cohabit. There was, nevertheless, a presumption in favour of a solemn church marriage: 'even if one marry his mother, it is lawful matrimony until it is defeated'.[84] It was therefore not only more regular but more prudent, in case questions relating to dower or the legitimacy of children arose in the secular forum, to seek a formal divorce in the consistory court.[85]

Consent might be negatived not only by proof of duress, insanity, or mistake, but also by showing that the parties were of such tender age that they were by presumption incapable of consenting. The doctrine that marriage was contracted by words alone, without physical connection, made possible the marriage of young children, the minimum age being set at seven; but until they were older either party could avoid the marriage. The age of final consent was fixed by the canon law (following Roman law) as twelve years in the case of girls and fourteen in the case of boys.[86] In the landed classes marriages were often arranged, even in early modern times, while the children were well below those ages, and the practice was rarely contested by those concerned. Even if pressure from guardians or parents verged on duress, the children usually submitted. In any case, voluntary coition after reaching full age purged any inherent defects of this nature. There was a conundrum if one of the parties died before becoming old enough to ratify the marriage, though the better view was that this did not deprive a widow of her dower.[87]

The other impediments to a marriage went to capacity. They were precontract (a previous marriage with another spouse, still living), consanguinity (blood relationship), affinity (relationship by marriage or carnal connection), and impotence at the time of marriage. Since Christian marriage has always been monogamous, a church

[82] See *Riddlesden v. Wogan* (1601) Cro. Eliz. 858.

[83] For medieval instances see Helmholz, *Marriage Litigation*, pp. 59–62.

[84] Y.B. Trin. 9 Hen. VI, fo. 34, pl. 3, per Paston J.

[85] An issue in *Albreda de Sackville's Case* (*c*. 1139) ante, p. 517 n. 3, was whether the divorce decree (following the guidance from Innocent II) was invalidated by a breach of natural justice by the bishop. Alexander III's decretal (107 SS 398) treated the bishop's decree as necessary, since Innocent's decretal was merely advisory.

[86] The age of consent was raised to 16 for both sexes by the Age of Marriage Act 1929 (19 & 20 Geo. V, c. 36).

[87] *Mynne's Case* (1572–80) in Baker, 'Elizabethan Marriage Cases', pp. 189–93. Here the widow of an infant who died aged 11 recovered her dower only after 3 certificates from the bishop were rejected by the CP as irregular. Although the marriage was solemnized in church, the bishop was initially advised that it could not be certified as 'lawful matrimony'.

marriage between *A* and *B* could be upset by proving a previous clandestine marriage between *A* and *C*, if *C* was alive; and in this case *B* would be free to remarry. A person could not marry a blood-relation within the prohibited degrees. Affinity was also an impediment within certain degrees; thus, a man who had fornicated with *X*'s sister was forbidden to marry *X*, and a past liaison with the sister was consequently a ground for divorce from *X*. Some of the subtleties of the canonists in this regard seem remote from theology, morality, or human feeling, and served merely to facilitate divorces on flimsy grounds, by the discovery of forgotten indiscretions or genealogical obscurities. But they were profitable to the Church, since many of the impediments could be dispensed with in return for money. At the time of the break with Rome the opportunity was taken of discarding some of this old learning in favour of a simpler statutory table of prohibited degrees, based on the Book of Leviticus, and it was enacted that no other marriage which had been solemnized in church and consummated should be impeached.[88]

A putative marriage could be declared void if one of the parties failed to consummate it on account of incurable impotency which existed at the date of the marriage. Failure to consummate did not itself invalidate a marriage contracted by present words: it was the inability to consummate, if unknown to both parties at the time, which made the marriage void *ab initio*. Impotence might arise from physical causes or from invincible frigidity. Assertions of frigidity raised difficult questions of proof, which in the fourteenth and fifteenth centuries were solved by surprisingly forthright testing techniques.[89] They were also open to abuse, especially when it was suggested that frigidity might be relative:[90] as a witty serjeant quipped in 1598, 'he that is *frigidus quoad unam* and *calidus quoad alteram* is likely to prove *callidus nebulo*'.[91] The remark was occasioned by a strange case. John Bury was divorced for impotency in 1561, having been found by doctors to suffer from a condition which (as they certified) neither medical science nor the passage of time could remove. He promptly remarried, his second wife had a child, and – after his death – the question arose whether the child was his legitimate heir. What the courts could not investigate, and did not question, was whether the second wife had conceived the child with someone else. If the birth proved that the cause of divorce recited in the decree was untrue, the decree was invalidated because the Church had been deceived; yet, if it was true, the second marriage was necessarily void by reason of the same impediment. On either view, John's second marriage was invalid. Nevertheless, after thirteen years of litigation, the courts of common law decided in favour of legitimacy, despite the medical evidence, on the ground that a divorce decree remained effective unless overturned by the proper ecclesiastical court.[92]

[88] Marriage Act 1540 (32 Hen. VIII, c. 38). Since 1835 marriages within the Levitical degrees have been absolutely void: Lord Lyndhurst's Act 1835 (5 & 6 Will. IV, c. 54). But some impediments based on affinity were removed piecemeal: e.g. the Deceased Wife's Sister's Marriage Act 1907 (7 Edw. VII, c. 47); Deceased Brother's Widow's Marriage Act 1921 (11 & 12 Geo. V, c. 24).

[89] Helmholz, *Marriage Litigation*, p. 89.

[90] Popham CJ said this concept 'poit worker straunge conclusions inter les married gentes, quar issint poit estre infinite divorces': *Mountjoy v. Bury* (1595) CUL MS. Gg.6.29, fo. 22.

[91] *Webber v. Bury* (1598) BL MS. Lansdowne 1074, fo. 291. *Calidus* (warm) was the opposite of *frigidus*. *Callidus nebulo* means crafty rogue.

[92] Baker, 'Elizabethan Marriage Cases', pp. 201–10. The concept of frigidity *quoad unam* resurfaced in the notorious divorce case of Lady Catherine Howard and the earl of Essex in 1613: 2 State Tr. 785.

Divorce *a Mensa et Thoro*

Although the Church did not allow divorce by consent, some medieval theologians regarded chastity as superior to sexual activity of any kind. The canon law in consequence accepted that, if a married couple agreed, they could both enter religion (or take a vow of chastity) and be divorced *causa castitatis*. Indeed, if the marriage had not been consummated, one party could do this unilaterally, and the other would be free to remarry.[93] Except in that case, however, the marriage remained in being after the separation and the wife retained a right to dower.[94] A more frequent cause of separation sanctioned by the later canon law was the commission of an intolerable matrimonial wrong subsequent to the marriage. In such a case the parties could be divorced from board and hearth (*a mensa et thoro*). This meant that, although they remained indissolubly united, they were licensed to live apart. Such a separation was different from nullity, in that the issue of the parties remained legitimate and the parties were not free to remarry. A divorce *a mensa et thoro* could be decreed by the ecclesiastical court for such misconduct as adultery, cruelty, sodomy, and heresy, or where there was a real fear of future injury; and by 1600 an innocent wife could be awarded alimony for her support.[95] There was an element of discretion, or canonical equity, in granting such a separation, which could be refused if the petitioner had been guilty of 'conduct conducing' to the offence, or had condoned the offence subsequently, or if there was collusion. By the mid-seventeenth century, however, a practically effective separation by consent could be achieved without entering this juridical minefield, by means of a deed of separation which provided for the wife's maintenance and (if appropriate) a partition of property by means of a trust.[96]

Divorce and the Reformation

One of the immediate causes contributing to the separation of the Anglican Church from Rome in 1534 was the clash between King Henry VIII and Pope Clement VII over the matter of the king's first marriage, to Katharine of Aragon. The dispute made divorce a topic of widespread debate and provoked fresh thinking on the subject. We may also take the matrimonial history of Henry VIII as an illustration of the workings of the unreformed canon law.

[93] 107 SS 391; R. H. Helmholz, *The Spirit of Classical Canon Law* (1996), pp. 247–9. This was an exception to the general principle that marriage *per verba de praesenti* was indissoluble. But if the marriage had been consummated, the party who entered religion without the consent of the other could be reclaimed: p. 501, ante.

[94] *Joan Curtes's Case* (1336) Y.B. Trin. 10 Edw. III, fo. 35, pl. 24, per Shardlow sjt; 132 SS 24. In an action of dower the common law did not allow issue to be joined on a divorce, but only on whether the parties had been joined in lawful matrimony.

[95] Alimony was virtually unknown to the medieval canon law. The conciliar courts and High Commission led the way: *Bowdo v. Bowdo* (1542) Caesar's *Ancient State of the Court of Requests,* p. 143; Helmholz, *OHLE*, I, pp. 287, 559. But the jurisdiction of the ordinary ecclesiastical courts was acknowledged in *Hyat's Case* (1615) Cro. Jac. 364.

[96] For the legal effects of such separations in the 18th and early 19th centuries see Cornish, *OHLE*, XIII, pp. 769–73; S. Staves, *Married Women's Separate Property in England 1660–1833* (1990). A separation agreement of 1645 is in the writer's possession (JHB MS. 1118).

Henry married Katharine in 1509. As she was the widow of his deceased brother Arthur, Henry had first obtained a papal dispensation from the impediment created by affinity. After eighteen years of married life, and the birth of a daughter but no son, Henry wanted the marriage declared void so that he could marry Anne Boleyn. He felt sure that God had denied him a son as a punishment for incest in marrying his brother's widow, and that this was an impediment which could not be dispensed with by the pope because it derived from divine law and was not merely an arbitrary rule of canon law.[97] This being a theological as much as a legal question, it was referred to Cardinal Wolsey as papal legate. No decision was reached, because it was certain that if the decision went in favour of the king the queen would appeal successfully to the pope;[98] and in any case the queen had complicated the issue by claiming that her marriage to Prince Arthur had never been consummated. The king's advisers then set about collecting juristic opinions from law faculties, and in 1533 the king felt sufficiently sure of his ground in treating the marriage as void without obtaining a formal decree. In future documents the king referred to Katharine, now dowager princess of Wales, as his 'dear sister'. The king's foremost protagonist, Dr Cranmer,[99] was appointed archbishop of Canterbury; the king married Anne Boleyn privately, and she was crowned; the archbishop delivered a judicial sentence confirming that the marriage with Katharine was contrary to God's law and void; and Parliament abolished appeals to the pope. Those who spoke against these arrangements were to be guilty of statutory treason.

Three years later Cranmer exercised his archiepiscopal jurisdiction to declare void the marriage with Anne. No reasons were published. It was rumoured that a precontract had been established, but more likely it was the king's prior misconduct with Mary Boleyn, the queen's sister, which was taken to render the marriage void for affinity. Anne was beheaded for treason two days later, on grounds of adultery with several courtiers,[100] and that would have enabled the king to remarry in any event; but the purpose of the divorce was to bastardize Princess Elizabeth, the child of the marriage, later Queen Elizabeth I. Four years later Henry also divorced his fourth wife,[101] Anne of Cleves, on the grounds of precontract *per verba de praesenti* with Francis of Lorraine, want of full consent (supposing the marriage to have been conditional), and want of consummation (by reason of the king's impotence *quoad ipsam*). This divorce enabled the king to marry Katharine Howard three weeks later. The fifth marriage lasted only a year, but this time there was no divorce. In fact there was evidence of a precontract with Francis Dereham, but the king's advisers preferred to have Dereham tried, convicted and executed for treason by reason of his sexual liaison with the queen; Katharine was then attainted of treason by Parliament and beheaded.

These proceedings show how the old canon law was capable of flexible application, if not abuse. There has been much debate about the relative sincerity of Henry VIII,

[97] Parliament did not venture to remove this particular impediment until 1921: n. 88, ante.

[98] Pope Clement VII was virtually a prisoner of the queen's nephew, the Emperor Charles V, who was besieging Rome.

[99] Thomas Cranmer (1489–1556) was a fellow of Jesus College, Cambridge, and a theologian of note. He was burned to death for heresy under Mary I.

[100] *R. v. Queen Anne* (1536) Spelman Rep. 70. Spelman J described the execution: ibid. 59.

[101] Henry's third queen, Jane Seymour, died soon after giving birth to the future King Edward VI.

Cranmer, and Clement VII, in these proceedings, but from any perspective the law of divorce seemed unsatisfactory. On the one hand the Church could manipulate the concept of nullity by disingenuousness, compounded by the sale of dispensations, but on the other hand its refusal to allow divorce by way of dissolution was unduly harsh. Even in Thomas More's Utopia – admittedly not a Christian state – divorce was allowed for adultery and cruelty. There was a strong case for accepting divorce *a vinculo* for adultery, since Christ himself had sanctioned it,[102] and it became law in some Protestant countries such as Switzerland and (in 1560) Scotland. Henry VIII had not gone so far as to approve any such change. As defender of the faith he was committed to the sacramental theory of marriage and wished to be seen as conforming to the old theology. But Cranmer wanted a more honest approach. He wrote that separation *a mensa et thoro* was a travesty of Christian marriage, which was founded on the cohabitation of man and wife, and that dissolution should be permitted for supervening causes. In his draft code of reformed canon law for the Church of England, prepared in 1553 but shelved under Mary I and not published until 1571, he proposed that divorce *a vinculo* be permitted for adultery, cruelty, desertion, and bitter enmity. These proposals were never fully implemented. But after the death of Henry VIII there was a doubt whether the newer Protestant theology had not in itself altered the case, since marriage was no longer considered a sacrament.[103] In the time of Edward VI a precedent was set by the marquess of Northampton. In 1548 he divorced his wife for adultery and then sought to remarry. Cranmer, asked to pronounce on the propriety of a remarriage, procrastinated, and so the marquess took the decision himself and remarried. Eventually the validity of the second marriage was upheld by the Court of Delegates and confirmed by Parliament. The precedent was at first followed and then overruled in Elizabeth I's reign,[104] after which it was understood that the old law had not changed. The reform had to wait another three hundred years.

Divorce by Private Act of Parliament

Henry VIII had been careful to avoid introducing a novel approach to divorce, and such statutes as he passed concerning his marriages were consonant with the universal law of the Church. But his divorces had bastardized two future queens of England: Mary, the daughter of Katharine of Aragon, and Elizabeth, the daughter of Anne Boleyn. Each of them upon her accession restored her legitimacy by Act of Parliament, and it was their statutes rather than their father's which demonstrated the sovereign power of Parliament to interfere with the laws of marriage. The statute passed for the marquess of Northampton provided a slightly earlier example of this sovereignty. Even so, by interfering only with the application of the rules to particular cases, these statutes left intact the rules themselves.

[102] Matthew, v. 32, and xix. 9 (approving of remarriage after divorce for adultery).

[103] This was Cranmer's position, but it was not clearly official doctrine until the publication of the 39 Articles of Religion in 1571.

[104] *Sir John Stawell's Case* (1572) 29 LQR 86; *Harburgh's Case* (1574) 110 SS 299; *Rye v. Fuljambe* (1602) Moo. K.B. 683; Noy 100. See also Helmholz, *OHLE*, I, p. 555; Baker, 'Elizabethan Marriage Cases', p. 196.

In 1670 the view that the law of God permitted divorce for adultery was again given effect by statute, when the Lord Roos's marriage was dissolved and he was enabled to remarry. After this, the promotion of private divorce bills on grounds of adultery became common. What could still not be done in the ecclesiastical courts could now be done in Parliament, often with the ayes of the bishops. But the legislature was not an ideal forum for unravelling matrimonial disputes. When the duke of Norfolk failed to secure a divorce Act in 1692 after a trial in Parliament, one reason for the failure was said to be the unsatisfactory character of such a trial, which would have been better conducted before a jury.[105] The duke therefore brought an action for 'lascivious conversation', won the verdict, and eight years later presented a successful petition for a divorce statute.[106] Thereafter it became the usual procedure for a petitioning husband to start by bringing an action for criminal conversation to establish the adultery, then to obtain a divorce *a mensa et thoro* in the ecclesiastical court on the ground of that adultery, and then to present a petition to the House of Lords for dissolution.[107]

In this way divorce for adultery slipped into English law, without altering the procedure or jurisdiction of the Church courts, or abrogating the distinction between separation *a mensa et thoro* and divorce *a vinculo.* Yet the parliamentary procedure was long-winded and expensive. Its cost could be offset by the damages obtained in a successful suit for criminal conversation, which – unless the suit was collusive – were usually set at a sufficient level to cover the subsequent proceedings; but this depended in reality on the ability of the defendant to pay them, and it did not avail a wife petitioner.[108]

Reform of the Divorce Laws

Cranmer's proposal to introduce judicial divorce *a vinculo* for adultery and cruelty was not implemented for three centuries. Once the opportunity for reform was lost immediately after the break with Rome, any further hope of change was stifled by the conservatism of the ecclesiastical authorities. But resistance to change was no longer the defence of an inviolable principle, since the principle could be dispensed with ad hoc by Parliament; and it bore hard on those who could not afford the parliamentary procedure. By the nineteenth century, preserving the medieval law of marriage was beginning to seem absurd. It did, arguably, protect women from being cast aside at a husband's whim, but it also ensured that those whose spouses mistreated them could not make a new start by remarrying. Those with unbending religious views on the subject were entitled to reconcile themselves to a life of misery, consoled by the belief that it was the spiritually preferable course, but not to inflict their opinions on others. In a plural society, the indissolubility of marriage could only be justified by secular reasoning.

[105] 12 State Tr. 948 n. Another reason may have been that the bishops were divided on the remarriage question: ibid. 883 n.

[106] *Duke of Norfolk v. Duchess of Norfolk* (1692) 12 State Tr. 883; *Duke of Norfolk v. Germaine* (1692) ibid. 1283.

[107] Adultery was the only recognized ground. For the action of crim. con. see p. 491, ante.

[108] Only 4 women ever obtained divorces by private Act of Parliament, all after 1800.

Jeremy Bentham (d. 1832) advocated a utilitarian approach to divorce in his *Theory of Legislation*, first published in French in 1802. He admitted that the natural duration of marriage was life, but thought a dissoluble marriage would be a stronger and more loving union, because 'what is now done only to gain affection, would then be practised to preserve it'. He concluded that divorce ought to be allowed in certain cases, at the behest of an innocent party. The introduction of civil marriage in 1836 demonstrated that marriage no longer had to be viewed as an exclusively ecclesiastical institution, or as the property of any one religion, and two bills to enable civil divorce were introduced, unsuccessfully, in the 1830s and 1840s. The movement for reform was brought to a head by a much publicized observation of Maule J at Warwick assizes in 1845. A pauper, whose wife had deserted him, had gone through a form of marriage with another woman and had consequently been convicted of bigamy. In terms of mordant irony, the judge told the prisoner that the proper course would have been to obtain a divorce by Act of Parliament. True, it would have cost him about £500 and he had not so many pence, but the law was the same for rich and poor alike. The sentence was four months' hard labour, which the judge 'hoped would operate as a warning how people trifled with matrimony'.[109] Over the next few years, the Society for Promoting the Amendment of the Law worked out proposals for transferring the divorce function of Parliament to a court of law, with simpler and cheaper procedure. The proposals were considered in detail by a Royal Commission which reported in 1853. The commissioners recommended the retention of divorce *a mensa et thoro* – to be renamed judicial separation – but urged the erection of a divorce court, with jurisdiction to grant dissolution in cases where it could already be obtained from Parliament, without the need for previous proceedings in any other court. These recommendations were carried into effect in 1857, when the Court for Divorce and Matrimonial Causes was established and the divorce jurisdiction of the Church courts abolished.[110] The new court was empowered to dissolve a marriage or decree judicial separation, and in either case to award alimony and decide on the custody of children. It followed common-law trial procedure, though this attracted complaints that hearing oral evidence in public was making the court a place of salacious popular entertainment.[111]

The reform was momentous but qualified. Although the machinery was improved and the cost reduced, there were no changes in the grounds for divorce: adultery remained the sole ground for dissolution. The equitable bars to divorce *a mensa et thoro* – collusion, condonation, and conduct conducing – were made applicable in proceedings for dissolution as well;[112] and, in the case of a wife petitioner, cruelty or desertion (or something worse) had to be proved in addition to adultery. The Victorian divorce court sat only in London, and its costs were still too high to bring divorce within the reach of all classes. To allay fears of collusion, decrees of divorce were to be provisional, so that

[109] *R. v. Hall* (otherwise *Rollins*) (1845) *The Times,* 3 April, p. 8.
[110] Matrimonial Causes Act 1857 (20 & 21 Vict., c. 85). Barristers were given rights of audience.
[111] P. Polden, *OHLE*, XI, pp. 742–56.
[112] This reflected the previous practice of requiring a divorce *a mensa et thoro* as a preliminary to a parliamentary divorce.

enquiries could be made by the queen's proctor, after which the decree *nisi* would be made absolute.[113]

In 1909 the government was pressed to introduce further reforms; but, in the words of Judge Parry, they 'funked a quarrel with the organized priesthoods' and took refuge in the constitutional asylum of a Royal Commission.[114] The commission, under the chairmanship of Sir Gorrell Barnes, reported that they could find no unanimity among theologians on the subject of divorce and no logical secular reason for confining the grounds to adultery. They recommended as additional grounds, inter alia, cruelty or three years' desertion, and also that wives should possess the same rights as husbands. The Convocations of Canterbury and York immediately declared their hostility to any proposal to facilitate divorce, and the bill to implement the suggestions of the Barnes Commission was defeated in 1914. Another attempt, by Lord Buckmaster in 1923, failed in its main object, though it succeeded in giving wives the same grounds for divorce as husbands.[115]

In reality divorce by consent had come to be achievable by staging a fictitious act of adultery in a hotel room, and some considered it a gentleman's duty to 'provide' such evidence if his wife sought to be released from the marriage.[116] The device shocked many consciences when it was drawn to public attention by A. P. Herbert's novel *Holy Deadlock* in 1934, and the ensuing reaction strengthened the case for a statutory widening of the grounds for divorce. In 1935 a committee of churchmen managed to reconcile themselves to a divergence between the secular law of marriage and the ideals of Christian doctrine and discipline, and soon afterwards the Barnes proposals were accomplished.[117] The Church of England promptly legislated that divorced persons should not be allowed to remarry with the rites of the Church. But there was no bar to a civil marriage. The dilemma was thus ended: the law of divorce and the canon law of marriage were legally separated.

After the Second World War, discussion turned to the question whether it was right to make divorce dependent on proof of a matrimonial offence. A bill was presented in 1951 to permit divorce after separation by consent for seven years, but the matter was referred to another Royal Commission, which reported in favour of retaining the matrimonial offence.[118] Lord Walker, in a persuasive dissent, argued that divorce should be permitted where a marriage had irretrievably broken down; and ten years later this approach was endorsed by a commission appointed by the archbishop of Canterbury. Unless divorce was to be regarded purely as a form of punishment, it seemed irrational to permit divorce for a single act of adultery while denying it where

[113] Matrimonial Causes Act 1860 (23 & 24 Vict., c. 144), s. 7. For the role of the queen's proctor see Cornish, *OHLE*, XIII, pp. 794–6.

[114] E. A. Parry, *The Gospel and the Law* (1928), p. 238.

[115] Report of the Barnes Commission (1912) Cd 6478; Matrimonial Causes Act 1923 (13 & 14 Geo. V, c. 19). A proposal to confer divorce jurisdiction on county courts was also resisted as a way of facilitating divorce, and the opposition was not overcome until 1967.

[116] Collusion was a bar to divorce, but if the petition was uncontested it might not come officially to light. The king's proctor rarely intervened.

[117] *The Church and Marriage* (1935); A. P. Herbert's Act 1937 (1 Edw. VIII & 1 Geo. VI, c. 57). See S. Redmayne, 13 OJLS 183; S. M. Cretney, 116 LQR 583; Baker, *Law's Two Bodies*, p. 36.

[118] Report of the Morton Commission (1955) Cmnd 9678.

a marital relationship was completely dead for reasons independent of fault. The new approach to divorce, which stressed the breakdown of the marriage rather than the commission of a matrimonial offence, became law in 1969.[119] But it was still necessary to prove adultery, unreasonable behaviour, desertion, or a period of separation, and it therefore remains the case that wretched unhappiness is not in itself a ground for divorce.[120] For those without the means to support a separate household, an allegation of adultery has remained in practice the least offensive course. Fictions have therefore continued.[121]

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[119] *Parliamentary Debates* (HL), vol. 250 (5th ser.), col. 1547; Report of the Archbishops' Commission, *Putting Asunder* (1966); *Field of Choice* (Law Comm., 1968); Divorce Reform Act 1969, c. 55.

[120] *Owens v. Owens* [2017] EWCA Civ 182; [2018] UKSC 41. The husband in this case would not consent to a divorce. The Family Law Act 1996 (c. 27) would have introduced divorce on the sole ground of marital breakdown, as judged by either party, subject to a 9-month 'period for reflection'; but this was never brought into operation.

[121] Statistics from 2015 showed that 60% of all divorce petitions alleged fault, and in a survey the same year 27% of the petitioners alleging fault admitted that the allegation (normally uncontested) was untrue. See House of Commons Library, Briefing Paper No. 1409 (2017), pp. 4–5.

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29

Pleas of the Crown: Criminal Procedure

The history of crime is a favourite topic of study among social historians, because the records of criminal justice are rich in colourful details; but the history of criminal law has proved less attractive to legal historians, because the same records are more than usually wanting in jurisprudential content. For many centuries there was little to parallel the reasoning processes which shaped private law. The absence of pleaders and of special pleading from the criminal courts meant that all criminal cases were tried, as they still are, on the general issue 'Not Guilty', and so the only substantive question which could arise on the face of the record was whether the accused was charged with a known crime. So long as the detailed facts which might constitute an offence, or furnish a defence, were matters purely of evidence, kept off the record,[1] sophisticated definitions of crimes were needless. All the mechanisms whereby the law was developed in the civil courts were absent, and such legal thinking as there was remained irretrievably (and deliberately) obscured behind the inscrutable and final verdicts of juries. Yet the criminal law does have a history. And it is not an uninteresting story, because amongst other things it shows how law can develop from common opinion, practice, and professional discussion, without formal judgments in the central courts to serve as recorded precedents. The emergence of legal principles will be the subject of the next chapter, but the procedures deserve equal attention. The administration of criminal justice continued to be governed by a combination of simple procedure and wide discretion long after the law of property, the core of the common law, had been reduced from feudal discretion to a body of intricate and settled rules. Indeed, as with revenue collection, it may for centuries have been thought of more as a matter of orderly government than as an area of jurisprudence.

Crime and Tort

The distinction between criminal and civil justice has been such a basic feature of the common law for so long that it might be tempting to regard it as eternal. Not only are there different courts and procedures, but there is a fundamental difference of purpose. The civil law is designed to provide private redress for wrongs to individuals, or to enable rights to be vindicated, whereas the criminal law is concerned with public order and the punishment or removal from society of offenders against that order. Yet there was a time when no such distinction could be made.

In early societies there is no concept of prosecution in the name of the Crown, let alone the 'state'. For violent crimes, both compensation and retribution for wrongdoing

[1] For a specimen record of a criminal case see p. 594, post.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

were exacted at the instance of the wronged individual and his kin.[2] Either there was a feud between one family and another until satisfaction was wrought, or the potential feud was averted by customary arbitration processes designed to secure the payment of money as 'emendation' for the wrong. The purpose of emendation payments was overtly retributive, yet it was at the same time compensatory. In so far as feuds and their settlement were governed by rules about how much should be paid, and for what injuries, there was a law of wrongs. But there was no division of wrongs into crimes and torts. The main purpose of introducing fixed law into the matter was to protect the wrongdoer against excessive private vengeance rather than to punish him in the name of public authority.

The notion of crime as a species of wrong requiring punishment because it was sinful was fostered by the early Church, through its teaching on the need to atone for sin by penance.[3] Even when it was admitted that penance could be compounded for by pecuniary payments according to specified tariffs, resembling those for feud-compensation, the underlying penal theory was maintained. Penance, as the word suggests, was primarily about repentance;[4] but it was also meant to be punitive. Sinners deserved, and needed, afflictive punishment. And the punishment was adjusted according to the inherent gravity of the crime.

Alongside the kind of open affront which called for a feud, there were other kinds of wrongdoing which required detection and severe punishment at the instance of the community. Chief among these, in the Anglo-Saxon period, was theft. Robbery was an offence of violence, but theft was often committed by stealth and posed problems of detection which might involve the community.[5] Procedures were needed for witnessing sales, tracing stolen goods, and chasing suspects. It was thought commendable to kill thieves taken red-handed, and a public duty to bring suspects to justice. Anglo-Saxon kings took a keen interest in punishing thieves, both on behalf of the community[6] and in claiming the penalties. This did not at first necessitate separate royal courts, but it was the beginning of the idea that serious crimes were affronts to the king and should be punished by the king rather than privately. During the twelfth century this vertical form of criminal justice displaced the horizontal, and revenge had to be pursued through an appeal of felony in the king's court.[7] A 'criminal plea' was then seen as clearly distinct from a 'civil plea'. Indeed, in *Glanvill*, the distinction is fundamental.[8] The *placita criminalia* punishable by death or mutilation, as listed in *Glanvill*, were treason, concealment of treasure trove, breach of the king's peace,[9] homicide, arson, robbery, rape, and forgery. Theft, though also criminal, was omitted from the list because

[2] See pp. 4–6, ante.

[3] See T. P. Oakley, *English Penitential Discipline and Anglo-Saxon Law* (1923); Helmholz, *OHLE*, I, pp. 30–5.

[4] The Latin *paenitencia* meant both. It may have become confused with *poena* (punishment, retribution).

[5] Murder was likewise (as originally understood) a hidden crime: p. 570, post.

[6] The 9th-century coronation oath included a clause that the king would prevent *rapacitates* (robberies).

[7] See p. 543, post. *Glanvill*, i. 32 (p. 21), makes it clear that an appellor sued on the king's behalf as well as his own.

[8] *Glanvill*, i. 2 (p. 3). The earlier treatise *Leges Henrici Primi* also mentions *causae criminales*.

[9] Evidently here meaning something very serious, perhaps maiming (Hudson, *OHLE*, II, p. 713) or breaches of specific grants of the king's peace (*Leges Henrici Primi*, ed. Downer, pp. 114, 116).

it was solely within the jurisdiction of the sheriff. The list corresponds closely with the unemendable offences in the laws of Cnut. But the lesser criminal pleas in *Glanvill* still included what we would call tort. It would be some time before crime became clearly distinct from tort, if only because the principal impetus for initiating proceedings of either kind remained with the victim or his kin. And language, as usual, took even longer to adjust: as late as 1505 a chief justice could speak of a tortfeasor being 'punished' for his 'misdemeanour' in an action for damages.[10]

Felony and Trespass

It was settled in the century before the Conquest that if a wrong was particularly heinous it was 'unemendable', and the wrongdoer suffered judgment to lose everything he had: his life, his lands, and his personal goods. Wrongs of this kind were in the twelfth century called 'felonies', from an old French word meaning wicked or treacherous.[11] The concept seems originally to have been feudal. A felony was an act of such wickedness that it destroyed the bond between lord and man, so that the tenant's land was forfeited to the lord.[12] By the thirteenth century the feudal connection had disappeared from the definition but remained as a consequence, for the use of 'words of felony' in an accusation of crime indicated an offence so serious that conviction would result in forfeiture of property and of life or limb. Wrongs falling short of felony merited lesser penalties, such as imprisonment, corporal punishment, or a pecuniary fine. The generic word for these lesser wrongs was 'trespass', though in early-modern times the equally broad synonym 'misdemeanour' (corresponding to the Latin *malefactum*) was adopted to distinguish the criminal offence from the tort.[13] The division of wrongs into felonies and misdemeanours had important consequences in English law until 1967,[14] and is retained in the United States. The lesser offences were themselves subdivided into those where the wrong was alleged to be against the king's peace, so as to make them pleas of the Crown, and the remainder, which were punishable only in local courts. As a general rule, only offences involving force could be treated in the former way, and the consequence was that some offences of deceit or stealth were shut out from the common law.[15] The principal exceptions were offences committed 'to the damage and common nuisance of all the king's liege subjects'.[16]

[10] *Orwell v. Mortoft* (1505) B. & M. 448 at 450, per Frowyk CJ. For still later examples see n. 13, post.

[11] The word occurs in the Assize of Northampton (1176), cl. 1, 3, alongside murder, and in *Glanvill*. In the contemporary *Dialogue of the Exchequer*, ii. 110 (p. 147), the equivalent term is *scelera*.

[12] The Crown could have them first, for a year and a day, and commit waste: *Glanvill*, vii. 17 (p. 91); Magna Carta (1225), c. 22 (1215, cl. 32); Prerogativa Regis, c. 16. In case of treason, lands were forfeited outright to the king. In all cases, chattels went to the king. Forfeiture was not abolished until 1870. See K. Kesselring, 30 JLH 201. It is worth adding that there is no linguistic connection between feudalism (from the Latin *feodum*) and the blood-feud (a Middle English word).

[13] For 'misdemeanour' used of a civil wrong, see B. & M. 450 (1505), 453 (1532), 585, 586 (1555), and 362 (1666).

[14] Criminal Law Act 1967 (c. 58), s. 1. This does not explicitly abolish felonies and misdemeanours, but only the distinction between them.

[15] See Milsom, *HFCL*, pp. 404–5.

[16] For public nuisance see pp. 462–3, ante.

The Initiation of Criminal Proceedings

In Norman times outlaws and felons caught red-handed could be summarily executed, a practice which survived as a custom in some places well into the thirteenth century.[17] But the common-law judges restricted the extrajudicial power of executing felons to those who possessed an appropriate hundredal jurisdiction, or the franchise of 'infangthief'. Once the power became thus judicialized, at least a summary inquiry (or a confession) was expected before the offender was put to death. By the fourteenth century, pre-judicial execution was permitted only where a felon took flight and could not otherwise be arrested.[18] The development during the same period of the nation-wide gaol-delivery system reduced the role of the franchisal and hundredal jurisdictions to that of preparing accusations to be laid before royal justices.[19] Even the sheriff lost his criminal jurisdiction after Magna Carta.[20] It thus became generally necessary that someone suspected of a serious offence be formally accused and then tried in a superior royal court. The formal accusation, whether for felony or misdemeanour, could be made in one of two ways: either the victim could 'appeal' the accused, or representatives of the locality could make a sworn presentment of the offence. Until the fourteenth century it was also possible for a suspected thief, if taken with the loot (the 'mainour'), to be arraigned without either formality;[21] but this summary procedure seems to have come to an end in Edward III's time.

Appeals

The appeal was the older of the two common-law procedures. Indeed, it looks like a direct successor to the feud, a legal way of seeking revenge and emends under the aegis of royal justice. An appeal was essentially an oral accusation of crime made by someone closely affected: either by the victim[22] or by 'approvers'.[23] An approver was an accomplice whose neck was spared in return for his undertaking to prosecute some agreed number of fellow wrongdoers. The appeal procedure was regarded as inappropriate in the central courts for mere trespasses or misdemeanours, and so a complaint of a wrong without words of felony was made by writ of trespass.[24] The appeal of felony, however, continued to be a regular method of initiating criminal prosecutions throughout the medieval period and beyond. Such prosecutions were 'criminal', not in the sense that

[17] E.g. the notorious 'Halifax gibbet law', which permitted fleeing felons to be hanged upon the hue and cry: Fitz. Abr., *Prescription*, pl. 65; Baker, *Magna Carta*, p. 263. This may have been an application of the principle in the next note.

[18] *Anon.* (1321) *CPELH*, II, p. 973 n. 34; *Note* (1329) 97 SS 212, per Louth J; Pollock & Maitland, II, pp. 579–80.

[19] See J. B. Post, 4 CJH 1.

[20] Magna Carta (1225), c. 17 (1215, cl. 24).

[21] Late examples are *Anon.* (1321) *CPELH*, II, p. 973 n. 35; *Sharneye's Case* (1329) 97 SS 159. In both cases there was an accusation by summary 'inquest' but not an indictment. See also Y.B. Hil. 17 Edw. III, fo. 13, pl. 48, per Scot CJKB.

[22] In homicide cases, the widow or the heir.

[23] So called because they had to prove their accusations by doing battle. See further F. C. Hamil, 11 *Speculum* 238; J. Röhrkasten, 5 JLH 14.

[24] See pp. 67–8, ante.

they were brought by the Crown, or initiated by any form of public inquest, but in the sense that their purpose was the punishment of felony by death and forfeiture. The early procedure was for the complainant to raise the hue and cry, to inform the coroner, and then to make an oral complaint (the 'appeal') in the county court, where the appellee would be attached to answer before the justices in eyre. The appellee was not allowed bail unless he could prove to an inquest, summoned by the writ *de odio et atia*, that the appeal was brought out of hatred and spite.[25] With the decline of the eyre system it became usual to commence an appeal at the assizes or at Westminster. By the late fourteenth century about half of all appeals were begun in the King's Bench.

The appeal was a strict form of proceeding which in the thirteenth century frequently collapsed on technical grounds; and the appellor could be punished for trivial ambiguities in the count, or for withdrawing his appeal. If it went ahead, the appellee normally had the option of waging battle, unless the appellor was a woman, an infant, an old man (over 60), or disabled. An approver was in an even more dangerous position, since part of the bargain for his life was that he should confess his own part in the felony, and if he failed to prosecute the appeal with good effect he was hanged on this confession.[26] Nevertheless, the judges contrived to keep appeals in use by hedging battle around with so many restrictions that it became obsolescent. Before the middle of the thirteenth century nearly all appeals (except those by approvers) were tried by jury; and in the early fourteenth century a trial judge refused to allow battle in an appeal of robbery on the explicit ground that it would encourage the strong to rob the weak.[27] The extreme technicality required in counting was also modified.[28]

Although revenge may have been the original driving force behind the appeal procedure, there were mixed motives behind its survival. In the case of approvers the motive was obviously the saving of one's own life, while in the case of victims of theft it was often the recovery of the stolen goods.[29] But the records of criminal proceedings show that victims' appeals increasingly served only to bring defendants before a court, whereupon the appeal was dropped and either the prosecution taken over in the king's name – a step which precluded punishment for a false appeal – or the appellee simply discharged. Discharge was common, and it seems almost certain that the real object of such proceedings had become the negotiation of compensation; the ultimate threat of capital punishment was a strong bargaining factor.[30] As late as the time of Henry VII, although the procedure had all but ceased in reality to be a means of putting an accused

[25] S. Jenks, 23 JLH 1; J. Hudson, *OHLE*, II, pp. 725, 729–30. It was later unclear whether this was the writ mentioned in Magna Carta (1225), c. 26, and whether it had been repealed: Baker, *Magna Carta*, pp. 21–2. Hatred could also be pleaded in bar of an appeal.

[26] E.g. *Adam of Hereford's Case* (1249) in *Crown Pleas of the Wiltshire Eyre*, p. 172 (appeal withdrawn); *Anon.* (1327) Y.B. Trin. 1 Edw. III, fo. 16, pl. 4 (appellee absconded to Flanders); *Whippe v. Hemesby* (1342) p. 594, post.

[27] BL MS. Harley 2183, fo. 175 (*c.* 1315), per Spigurnel J.

[28] Stat. Gloucester (1278), c. 9, said appeals should not be abated as readily as in the past. But cf. 24 SS 100–1 (1313). For the forms of pleading see the 13th-century *Placita Corone* (J. M. Kaye ed., 1966).

[29] For recovery of chattels by appeal of theft see pp. 415–16, ante.

[30] Appeals could also be brought vexatiously, perhaps to the same end: see *Chamber v. Mountegomery* (1506) Port 137.

directly on trial, dozens of appeals of felony were still commenced every year.[31] Even in the 1550s, Staunford's textbook on pleas of the Crown devoted more space to appeals than to indictments, presumably because appeals involved lawyers.

In its final phase, the appeal was used chiefly for the purpose of achieving a trial where a grand jury failed to indict, or obtaining a new trial where an indictment for homicide had failed. It was on this ground that Holt CJ, as late as 1699, vigorously defended it as 'a noble prosecution, and a true badge of English liberties'.[32] Despite such support, the procedure was frequently attacked as infringing the principle that one ought not to be in jeopardy twice for the same offence, and few of the last appeals were brought from the purest of motives. The appeal was effectively obsolete by the time it was abolished in 1819.[33]

Indictments

Although the appeal was the usual method of prosecution contemplated in *Glanvill*, the indictment would overtake it later in the medieval period and then replace it. By the fourteenth century the word 'indictment' had become a technical expression for a written accusation[34] which was not an appeal by an individual but the outcome of a solemn public enquiry into recent crimes. The practice of swearing in a body of community representatives to make presentments of suspected offenders began long before the word 'indictment' was used for the outcome: perhaps in Anglo-Saxon times, and certainly by 1166, when it is mentioned in the Assize of Clarendon. Whether an accusation emanated from such a body or from an appellor seems in the twelfth century to have been relevant only to the form of proof required, and even in the early fourteenth century the two species of accusation were not consistently distinguished in the gaol-delivery rolls. In the course of the fourteenth century the legal distinction between them sharpened, and indictment by presentment of a jury became the normal way of initiating a prosecution. Prosecution on indictment was treated as a suit by the Crown and was free from the procedural restrictions which were considered necessary safeguards against misuse in the case of appeals. In particular, trial was always by jury and never battle.

The accusing juries mentioned by the Assize of Clarendon were representatives of each hundred and vill summoned before the justices in eyre and sworn to report crimes and name suspects. Much the same system was used when commissions of gaol delivery replaced the eyres as the ordinary source of criminal justice. The presenting body at the assizes or quarter sessions acquired the name 'grand jury', to distinguish it from the trial jury, which was sworn to find the truth as to an individual's guilt. The grand jury was charged to make presentments from its own knowledge, but the regular practice

[31] Some 398 appeals were entered in the KB rolls between 1485 and 1495: C. Whittick in *Law and Social Change*, p. 55.

[32] *Stout v. Cowper* (1699) 12 Mod. Rep. 375; *R. v. Toler* (1700) 1 Ld Raym. 555 at 557. The appellee acquitted in the first case, Spencer Cowper, was a barrister and became JCP in 1727.

[33] The latest reported cases are *Smith v. Taylor* (1771) 5 Burr. 2793; *Ashford v. Thornton* (1818) ante, p. 81.

[34] Some dictionaries derive 'indict' from *indicare*, to point the finger of accusation. But in law-Latin it was *indictare*, and so the sense may rather have been to put into written words ('indite' in medieval English): J. P. Collas, 81 SS lxi–lxvi.

from at least the 1360s was for draft written accusations – known as bills of indictment to be prepared in advance of the session. The grand jurors scrutinized these bills, usually hearing *ex parte* evidence from accusers. If they considered that there was a case to answer they found the bill 'true', and it was endorsed *billa vera* ('a true bill'), but if they did not it was endorsed *ignoramus* ('we do not know') and proceedings on the bill ended. The word 'true' was misleading, since it was not a verdict on the facts. The finding of a true bill by the grand jury was not a conviction, or a finding of guilt, and it required only a majority vote of twelve.[35] It was simply an accusation upon oath, the effect of which was to initiate proceedings between the king and the accused person.[36] An *ignoramus* was not a verdict either, and so a rejected bill could be laid before another grand jury later. Indictments could also be found by coroners' juries, whose principal function came to be the holding of inquests 'upon the view of the body' (*super visum corporis*) of a person dying violently or in unexplained circumstances, to ascertain the cause of death. A verdict before the coroner that a death was caused by a named person was, again, not a conviction, but an accusation which required trial by a jury of twelve.

Some early indictments were extremely vague in their wording. A man might be accused of being a 'common thief', without particulars, or even of being simply a suspected evil-doer, perhaps because he was found with more cash than he could explain or was lurking suspiciously in the dark. The judges in the fourteenth century put a stop to this practice, first by directing juries not to convict on such indictments unless they had knowledge of a specific offence,[37] and then by quashing the indictments themselves for uncertainty.[38] Accusations of being a 'common' offender might still be inserted as aggravation in an indictment for a specific offence; but they could no longer be treated as sufficient accusations of felony in themselves. The effect of this important change was that no one could be put on trial for his life except upon a specific charge, made either by appeal or indictment. This salutary rule came to be cherished as one of the greatest liberties of the subject;[39] but it did not extend to all misdemeanours.[40]

Informations

In the case of misdemeanours, a third method of initiating criminal proceedings existed in later medieval times, though it did not become common until the Tudor period. This was the criminal information, laid by a single individual rather than by a presenting jury. Informations by private persons were encouraged by legislation, from the mid-fifteenth century onwards, as a means of prosecuting economic and regulatory offences,

[35] The number of jurors was usually greater than 12, and in later times usually 23.

[36] The opening words of an indictment (until 1915) were: 'The jurors for our lord the king on their oath present that…'.

[37] E.g. *Anon.* (1313) 24 SS 141 (misleadingly translated). Cf. *R. v. Braban* (1317) *CPELH*, II, p. 975 (accused only seen roaming at night and sleeping in an empty house: acquitted of robbery).

[38] *Anon.* (1348) Y.B. 22 Edw. III, Lib. Ass. pl. 73 ('common wrongdoer'); *Anon.* (1355) Y.B. 29 Edw. III, Lib. Ass. pl. 45 ('common thief').

[39] *A.-G. v. Skynner and Catcher* (1588) as cited by Finch in Baker, *Magna Carta*, p. 520.

[40] The offences of being a common night-walker, common barrator, or common scold, lived on as misdemeanours until 1967.

the informer being allowed a share of the penalty.[41] A breed of 'common informers' arose, who made a living by prying for reward; but they did not monopolize the procedure. In the Star Chamber and conciliar courts, an *ex officio* information by the attorney-general became the regular means of commencing Crown prosecutions.[42] The information also proved useful as a way of bringing unpopular prosecutions before the King's Bench, since it saved the difficulty of first persuading a grand jury to approve the prosecution. As a result of suspected misuse, the procedure attracted considerable odium in the seventeenth century, and in 1690 its legality was challenged, albeit unsuccessfully, in the King's Bench.[43] Since the opportunity for abuse was undeniable, legislation was introduced to forbid the filing of informations in the King's Bench without leave of the court, and to make the prosecutor liable to costs if no conviction resulted. Thereafter prosecutions were commenced by information in the King's Bench only for those 'gross and serious misdemeanours which deserve the most public animadversion', such as riot or sedition.[44] The information has nevertheless remained to this day the ordinary method of initiating summary proceedings before magistrates.

The Trial

By the end of the twelfth century two modes of trial were used in criminal cases, the ordeal and judicial combat. They were not trials of the evidence but of the defendant's oath.[45] Wager of law had once been in use for accusations based merely on suspicion, but this had disappeared from the royal courts with the provision in the Assize of Clarendon (1166) that accusations by presenting juries were to be tried by ordeal.[46] Judicial combat was originally available only where there was eye-witness evidence, though this evidence may have become fictionalized in practice. The royal judges of the thirteenth century discouraged battle to the point where it remained usual only in appeals brought by approvers, and when that procedure was disused in the fourteenth century battle disappeared. Its disappearance was paralleled by the development of an alternative and more enduring method of trial.

This development was forced on the judges against their inclinations, as a result of the decision of the Lateran Council in 1215 which put paid to ordeals.[47] The end of the ordeal raised a serious practical problem, since there was no alternative method of trial available for those accused by community presentment, by females and others who could not fight battles, or in other appeals where battle was inappropriate. The royal judges were therefore placed in an awkward dilemma. They could hardly release all suspected felons in these categories on the ground that there was no way of trying them; nor could they keep them indefinitely in prison without trial. In 1219 the king's

[41] An early precedent was the Statute of Liveries 1468 (8 Edw. IV, c. 2).

[42] In the Star Chamber the law officers could initiate prosecutions orally (*ore tenus*), whereas ordinary informations were written.

[43] *R. v. Berchet* (1690) 5 Mod. Rep. 459; 1 Show. K.B. 106.

[44] Stat. 4 Will. & Mar., c. 18; Bl. Comm., IV, p. 309.

[45] See p. 7, ante.

[46] By the custom of London, freemen charged with homicide were supposed to wage their law, but since 36 compurgators were required this privilege was more prejudicial than jury trial: *R. v. Wight* (1321) 85 SS 76.

[47] See pp. 7, 80, ante.

council, unable to decide what to do, issued some ditheringly unhelpful instructions to the justices in eyre: some prisoners were to be allowed to abjure[48] and others released on bail, but those strongly suspected of serious crimes were to be remanded to prison, with no guidance as to what should be done with them. The application of these instructions was left to the justices' discretion.[49] This was evidently an interim measure; but nothing more helpful or permanent ever followed. Many other countries in Europe, faced with the same problem, chose to require a confession and to rely on judicialized torture as a means of obtaining it.[50] The English judges decided instead to make use of the local people already present in court as representatives of the hundreds and vills. Only such people could assess the strength of suspicion, and they had done much the same in deciding whether an ordeal was appropriate. But the fundamental problem, which the council had failed to solve, was how to establish guilt so that felons could receive the punishment of death as required by law. From 1220 the judges began persuading those defendants who could not be released to submit 'for good and ill' (*de bono et malo*) to the determination of a sworn panel of neighbours as to their guilt or innocence. This was the only way such defendants could gain release from what would otherwise be indefinite incarceration, but it involved a substantial risk of conviction and execution. It was no light decision for the accused, and no slight innovation in procedure, since these panels were now being called upon to do more than God had ever been asked under the ordeal. They were put on oath to speak the truth themselves and pronounce on the issue of guilt. Where the accused had already been indicted by these same people, the conclusion must often have seemed foregone; and this may explain why some thirteenth-century accused paid a fine for a 'good jury', drawn from a wider field. By the end of the thirteenth century the regularization of this procedure produced the 'petty jury' of twelve good men and true who were increasingly distinct from the grand jury. It became a matter of course for the sheriff to summon potential trial jurors before a judicial session began, and after 1351 at the latest they were required to be different from the members of the grand jury.[51]

Trial by jury rapidly became the universal form of criminal trial, both on appeal and on indictment, and it was also used in some civil actions. It was revered in centuries to come as the palladium of English liberty, enshrined in the anachronistic interpretation later placed on the provision in Magna Carta that no free man should be punished 'except by the lawful judgment of his peers'.[52] Had Magna Carta in truth sanctioned criminal trials by jury, the legal dilemma of 1219 would not have arisen. The adoption of jury trial was in truth an innovation forced upon the law by outside events; and, although it happened early enough to be received as common law, it could not be imposed upon the unwilling. Prisoners who could not be persuaded to put themselves upon a jury *de bono et malo* – and well might they not, when accused upon strong

[48] For abjuration see p. 553, post.

[49] *Patent Rolls 1216–25*, p. 186.

[50] There is a parallel in Denmark, where a jury of 12 was adopted soon after 1215: R. Bartlett, *Trial by Fire and Water* (1988), pp. 138–9.

[51] Stat. 25 Edw. III, stat. v, c. 3. For a survival of the older practice in 1313 see 24 SS 140.

[52] Magna Carta (1217), c. 32 (1215, cl. 39; 1225, c. 29). This could not, in 1217, have referred to a trial jury. A jury did not render judgment. But the connection was popularized by William Lambarde in the 1580s and generally accepted by the 17th century.

suspicion – had to be kept in prison for want of any power of compulsion. Every prisoner who pleaded Not Guilty to a capital charge was invited to say how he wished to be tried, and to this question the only correct answer was, 'by God and the country' – meaning, a jury of the neighbourhood. If the prisoner declined to accept this 'choice', either by standing mute of malice or by rejecting three proffered jury-panels of twelve,[53] he was sent back to prison *tanquam refutans legem communem* ('as one who refuses the common law'). The 1219 instructions made it clear that prisoners so remanded were not to be put in danger of their life. But perpetual imprisonment was not a practicable or acceptable alternative to hanging, and Parliament in 1275 emphasized that for this purpose the prison should be a *prison forte et dure*.[54] These words meant a harsh regime with a meagre diet, to coerce defendants into accepting jury trial, but by a grisly misunderstanding the *prison* of the statute was read as *peine*, and by the 1300s the 'hard punishment' usually involved a starvation diet and pinioning the accused under heavy weights, a punishment so severe that it often meant pressing to death.[55] Some prisoners with little hope of acquittal actually chose this horrible fate to avoid standing trial, and it is supposed that they did so in order to die unconvicted and thus save their dependants from forfeiture of their property.[56] Even when *peine forte et dure* was abolished – as late as 1772 – silence at first led to automatic conviction rather than the imposition of compulsory jury trial.[57] The jury may have been a palladium of liberty, but it was a privilege which could not be forced on anyone who was unwilling to accept it.

Trial Procedure

Little is known of the courtroom procedure used at a trial on indictment before Tudor times, because criminal trials did not often attract the attention of descriptive writers. Everyone knew more or less what happened, and there were no professional advocates to complicate things. But the procedure described in some detail in the sixteenth century had probably been in use for at least a century and perhaps, in essence, longer. The system outlined below was that observed at assizes and quarter sessions, and at the Old Bailey in London, throughout the Tudor, Stuart, and Georgian periods.[58]

When the commissions had been read and the justices were seated, the grand jury was sworn and charged, and started to examine the bills of indictment produced by the clerk. The prisoners were then brought into court, chained together at the ankles, to await arraignment. Once the indictments were produced, the prisoners named in

[53] A peremptory challenge beyond 35 heads was originally regarded as a refusal of trial: 94 SS *108*; 97 SS 179; 105 SS 180; 109 SS 6; 115 SS 6. By Hale's time it was merely disallowed, and a jury sworn.

[54] Stat. Westminster I (1275), c. 12. For expedients before the statute see H. R. T. Summerson in *Law, Litigants and the Legal Profession*, p. 116.

[55] The exact form of punishment was at first discretionary: see 24 SS 112, 125; 97 SS 179; Summerson, op. cit. in last note.

[56] But some had little or no property. And it remains unclear why instances are found in the 18th century, when forfeiture was no longer enforced: Beattie, *Crime and the Courts,* pp. 337–8. The last instance is said to have occurred at Cambridge in 1741.

[57] Stat. 12 Geo. III, c. 20. After 1827 a refusal to plead was treated as equivalent to a plea of Not Guilty: Stat. 7 & 8 Geo. IV, c. 28.

[58] For a more detailed account, based on formularies dating back to *c*. 1550, see *CPELH*, II, pp. 1041–60.

them were brought to the bar of the court, with their shackles taken off,[59] and asked to plead to the indictments. If a prisoner pleaded Not Guilty – as most did in capital cases – he put himself on the country, and twelve jurors were sworn in from the panel provided by the sheriff. The clerk then called for anyone to give evidence against the prisoner. The witnesses who came forward for the Crown were sworn to tell the truth, and in telling their story might fall into altercation with the prisoner. The jury then gave its verdict, and according to its terms the prisoner was either discharged or remanded for sentence. At the end of the session, a proclamation was made for evidence against any prisoners remaining unindicted; if no one came forward, they were discharged.

The blessing of trial by jury was favourable to the accused in some respects. He was able to challenge up to thirty-five jurors without giving any reason, and more with cause. The twelve who were selected had to be unanimous before they could convict him. If they acquitted him, however perversely, the verdict was final and unimpeachable. Yet the accused was, to modern eyes, at a considerable forensic disadvantage compared with the prosecution. Whether he had a right to call witnesses was doubted at common law, and even when defence witnesses were grudgingly allowed they were not sworn.[60] The process for compelling the attendance of prosecution witnesses, by binding them over in recognizances, was not available to the defence. The defendant could not have the assistance of counsel in presenting his case, unless there was a point of law arising on the indictment;[61] and, since the point of law had to be assigned before counsel was allowed, the unlearned defendant had little chance of professional help. These harsh rules were defended on the grounds that the evidence to convict the accused should be so clear that it could not be contradicted, and that the trial judge would both take care of that and ensure that the trial proceeded according to law.[62] There was also the fear that trials would be lengthened if advocates took part. If counsel were allowed, it was pointed out with some alarm in 1602, every prisoner would want them.[63] In fact, prosecutions were not normally conducted by counsel either,[64] and there was little of the care and deliberation of a modern trial before the mid-nineteenth century. The same jurors might have to try several cases, and keep their conclusions in their heads, before giving in their verdicts; and it was commonplace for a number of capital cases to be disposed of in a single sitting. Hearsay evidence, though mistrusted, was admitted;[65] indeed, there were few if any rules of evidence before the eighteenth century. The judge's charge was usually short and uninformative, since there was as yet no requirement that

[59] So say the books, from *Bracton* onwards, but the practice was probably discretionary. The miniature of the KB (*c.* 1450) in the Inner Temple shows a defendant with leg-irons on arraignment.

[60] *OHLE*, VI, p. 519.

[61] Counsel had always been allowed in appeals of felony (where the king was not party) and in misdemeanour cases. A statute of 1696 permitted them in treason cases also: A. Shapiro, 11 LHR 215. This made their exclusion in other cases anomalous.

[62] Co. Inst., III, p. 137. See also *CPELH*, II, pp. 1047–9; J. B. Post, 5 JLH 23.

[63] *R. v. Boothe* (1602) Coventry Rep., BL MS. Add. 25203, fo. 569v.

[64] The Treasury and Bank of England began to retain prosecuting counsel in coining and forgery cases in the 18th century, but even in the early 1800s it was rare to see counsel – on either side – in ordinary criminal trials.

[65] See *R. v. Hall* (1571) 110 SS 242 (objection to hearsay overruled). Cf. *R. v. Sherwin* (1555) ibid. 407; and Cecil's dictum (1569) 109 SS 168 ('More trust is to be placed in witnesses who are present than the evidence of those who are absent'). It was held in *Lutterell v. Reynell* (1670) Treby Rep., II, fo. 500, that although hearsay was not admissible 'as a general rule' as direct evidence, it could be admitted to corroborate direct evidence.

the evidence be summed up in detail for the jury. A trial for felony could rarely, in any period, have taken more than half an hour.[66] The unseemly hurry of Old Bailey trials seemed to unhardened observers disgraceful, and as late as the 1830s it was said that 'full two thirds of prisoners, on their return from their trials, cannot tell of any thing which has passed in court, nor even, very frequently, whether they have been tried'.[67] It is impossible to estimate how far these conditions led to wrong convictions. Many, probably most, trial judges did take pains to see that obvious injustices would not occur, and acquittal rates were high by modern standards;[68] and yet the plight of the uneducated and unbefriended prisoner was grim.

The most important reforms were put off until the eighteenth and nineteenth centuries. After the 1730s, prisoners on trial for felony were frequently allowed counsel to help them present their case, as a matter of grace, and it became a legal right in 1836.[69] Even this reform was opposed, on the ground that a dispassionate inquisitorial approach led by the judge was preferable to an adversarial contest; and it did prove problematic for trial judges at a time when defence counsel were more prevalent than prosecuting counsel. The emergent criminal Bar forced some improvements in trial practice. Rules of evidence designed to protect the prisoner, such as the exclusion of hearsay and the need for accomplices' evidence to be corroborated, were developed in the Georgian period. The defence had been allowed sworn witnesses since 1702, but not until 1867 was it given facilities, comparable to those of the prosecution, for calling witnesses to depose evidence before the trial and having them bound over to attend the trial.[70] Even so, if the defence called witnesses it lost the right of making the final speech to the jury, and this could be a serious deterrent to calling any evidence at all. After more than a century of controversy, this rule was finally changed in 1964.[71] And in 1898 defendants were accorded the dangerous privilege of giving sworn evidence themselves.[72]

Summary Trial

Trial by jury was the only permissible method of trial upon indictment, and – with the decline of battle in appeals – was almost universally used after the thirteenth century

[66] Similar estimates have been made for different periods: R. B. Pugh in *Law, Litigants and the Legal Profession*, p. 104 (10 to 30 minutes around 1300); Cockburn, *Assize Records: Introduction*, p. 110 (15 to 20 minutes around 1600); Beattie, *Crime and the Courts*, pp. 376–8 (30 minutes at most in the 1750s).

[67] Anon., *Old Bailey Experiences* (1833), pp. 59–60. See also *Reminiscences of Sir Henry Hawkins* (1904), I, p. 33.

[68] In property cases in Surrey between 1660 and 1800 the conviction-rate was just under 50%: Beattie, *Crime and the Courts*, p. 425. On the Home Circuit between 1558 and 1625, it was 56%: Cockburn, *Assize Records: Introduction*, p. 114. But in medieval times it might be as low as 20%: R. H. Helmholz, 1 LHR 20.

[69] J. H. Langbein, 45 *Univ. Chicago Law Rev.* at 307–14; J. Beattie, 9 LHR 221; Trial for Felony Act 1836 (6 & 7 Will. IV, c. 114). By the end of the 19th century the 'dock brief' enabled an indigent prisoner to obtain representation for one guinea (the smallest fee a barrister was allowed to accept).

[70] Stat. 1 Ann., sess. ii, c. 9, s. 3; Criminal Law Amendment Act 1867 (30 & 31 Vict., c. 35, s. 3). The prosecution had enjoyed such facilities since at least the 1550s.

[71] Criminal Procedure (Right of Reply) Act 1964 (c. 34).

[72] Criminal Evidence Act 1898 (61 & 62 Vict., c. 36). See G. Parker in *Law and Social Change*, p. 156. Since 1994 an adverse inference may be drawn from a defendant's silence: Criminal Justice and Public Order Act 1994 (c. 33), s. 35.

for trying alleged felons. Misdemeanours were also tried by jury when they were presented by indictment; but in certain cases they could be tried by the court itself, without indictment or jury. This summary procedure was permitted by the common law only in respect of offences (such as contempt) committed in the view of the judges sitting in open court, where the need for a jury was displaced by the judges' own eye-witnessing of the facts. The idea was extended by late-medieval statutes which gave justices of the peace the power to punish offences committed in their view out of court, just as an 'on the spot fine' might be imposed today for a traffic offence.[73] Tudor statutes gave the justices similar powers in respect of offences which, though not committed in their own presence, were discovered by 'examination'. This was summary trial proper.[74] Numerous statutory powers of summary examination and conviction were accumulated by the county magistrates in the seventeenth and eighteenth centuries. Although such powers were appropriate only for minor offences, they seemed to infringe the principle that a man should only be tried by his peers, and they were regarded with deep suspicion by the superior judges. The King's Bench therefore took upon itself to review summary convictions by means of certiorari, and would examine the justices' record carefully to ensure not only that they had pursued the relevant statute precisely but also that the accused had been served with a summons and given an opportunity to defend himself.[75] Some magistrates, however, saw this as an undue interference with their local autonomy, and Parliament when conferring summary jurisdiction sometimes expressly excluded judicial review. A common compromise after 1670 was to provide for an appeal to quarter sessions, which kept the matter within the county without denying an opportunity to correct mistakes. Since summary jurisdiction was almost entirely the outcome of piecemeal legislation, it varied in its operation according to the wording of the particular statutes which introduced it. Consistency and consolidation did not come about until 1848.[76]

The Avoidance or Mitigation of Punishment

The penal policy of the common law was superficially very simple. For misdemeanours, punishment was at the discretion of the justices, provided that it did not touch life or limb, was reasonable, and was not disproportionate to the offence.[77] Fines and whipping became the usual forms, imprisonment being expensive and relatively uncommon for this purpose before the time of George III. For felony, the convict's person was at the king's mercy. In Norman and Angevin times the king's justices had a discretion to order mutilation (such as castration or blinding) as a merciful alternative to death, but during the thirteenth century this sanguinary form of mitigation gave way to a fixed capital

[73] E.g. Stat. 15 Ric. II, c. 2 (forcible entry); 13 Hen. IV, c. 7 (riot).

[74] For the early legislative history of summary jurisdiction see Bellamy, *Criminal Law and Society*, pp. 8–53. For its operation in the Georgian period see King, *Crime, Justice, and Discretion*, pp. 82–110.

[75] *R. v. Dyer* (1703) 6 Mod. Rep. 41; 1 Salk. 181. And see p. 160, ante.

[76] Summary Jurisdiction Act 1848 (11 & 12 Vict., c. 43).

[77] Reasonableness of punishment is first mentioned in Magna Carta 1215, cl. 20 (1225, c. 14) (as to 'amercements' for trespass); Stat. Westminster I (1275), c. 6 (similar); Stat. 34 Edw. III, c. 1 (as to fines by JPs). The Bill of Rights (1689) added the further limitation that the punishment should not be 'cruel or unusual': 1 Wm & Mar., sess. ii, c. 2.

sentence.[78] For treason, it was a particularly cruel death; for murder and nearly all felonies,[79] hanging. The fixed penalty excluded undue savagery as well as undue mercy, but it was crudely relentless: the petty villain who stole a sheep shared the same fate as the multiple murderer. Clearly this inflexibility was intolerable, and it survived as law only because of the several ways which were found of avoiding the death penalty in practice. The survival of capital punishment nevertheless had a stultifying effect on the substantive law. The common-law felonies were narrowly confined within awkward boundaries; legal reasoning was devoted to elaborating evasions instead of improving the substance of the law; and legislation to fill gaps was piecemeal, ill-considered, and often poorly drafted.

The three principal modes of evasion were derived from the prerogatives of Church and Crown respectively, and the fourth from the prerogative of the jury to pronounce conclusively on the question of guilt or innocence.

Sanctuary

In medieval England, as elsewhere in Europe, there were a large number of ecclesiastical places where secular authority did not run. The underlying theory was that consecrated places should not be profaned by the use of force; but the ill consequence was that thieves and murderers could take refuge and thereby gain immunity even against the operation of criminal justice. This was the privilege called 'sanctuary'. It belonged to all parochial churches, but the common law allowed sanctuary in ordinary churches for forty days only. Before the expiration of this period, the fugitive had to choose whether to stand trial, run to another church, or 'abjure' the realm. If he chose abjuration, which was a secular institution, he was allowed to proceed on foot to a prescribed port and from thence leave the country for ever. This was permitted only if he first made a written confession to the coroner, which resulted in the forfeiture of his property as on conviction, and the sparing of his life on condition that if he ever returned to England he could be executed on the abjuration. Abjuration was common in the thirteenth century, but became largely ineffective as the machinery for ensuring that the felon reached the sea, and actually embarked, was easy to evade. It was ended in the time of Henry VIII, who had been persuaded that able-bodied English criminals were joining the French army.[80]

A more serious problem arose from the existence of private or special sanctuaries, usually in large monastic houses, where criminals could take permanent refuge. Some major churches, such as Westminster Abbey, Durham Cathedral, Beverley Minster, and Beaulieu Abbey, had substantial communities of sanctuarymen in residence. Without threat of expulsion, criminals in these sanctuaries sometimes contrived to carry on their outside activities, and in early Tudor times there was a strong reaction against

[78] Mutilation is mentioned in *Bracton*, II, p. 298; IV, p. 378. It seems not to have survived much longer, though judgment of life 'and limb' is mentioned in Stat. Westminster II (1285), c. 34.

[79] The exceptions were petty larceny (treated like a misdemeanour) and suicide (forfeiture only).

[80] Stat. 22 Hen. VIII, c. 14, which restricted abjuration to English sanctuaries; it therefore disappeared on the abolition of sanctuaries in 1540.

them.[81] Since legislative reform seemed unattainable because of Church opposition, the judges took upon themselves to rein in the privileges by tightening the evidential requirements. They held that sanctuaries could not be claimed by papal grant alone, without the king's consent, and that a valid sanctuary must have been created before 1189 and allowed before justices in eyre. This made proof of a special sanctuary dauntingly difficult.[82] In the notorious case of St John's Priory in 1516–20, several suggestions for restriction and reform were put forward. Henry VIII took part personally in the deliberations, and said that the kings and popes of old, in creating sanctuaries, never intended them to serve for murder or to become dens of thieves, and that he proposed to reform the abuses. This was agreed by the laymen present, but Cardinal Wolsey was intransigent.[83] Only after the break with Rome, and the dissolution of the monasteries, did Parliament abolish most of the sanctuaries. The last vestiges were finally eradicated in 1624.[84]

Benefit of Clergy

The privilege of clergymen to be exempt from capital punishment was settled in the reign of Henry II, after the conflict with Becket,[85] with the result that an accused person who could prove himself to be a clerk in orders would be handed over to the ecclesiastical authorities to be dealt with according to canon law. Many of those handed over escaped further punishment by undergoing purgation, a form of wager of law,[86] while others were put in Church prisons from which escape seems at times to have been notoriously easy.[87]

The original procedure was for benefit of clergy to be claimed on arraignment, in which case there was an 'inquest of office' (a compulsory jury) to investigate guilt. The purpose was to warrant the seizure of the clerk's chattels pending his purgation, or in serious cases to warrant handing him over 'without purgation'. It had the advantage that if the inquest found the clerk not guilty the handing over could be avoided.[88] This no doubt prompted what became the invariable later practice, whereby clerks accepted ordinary jury trial and only claimed clergy in the event of conviction.[89] At every gaol delivery a representative of the bishop, called the 'ordinary', was

[81] Thomas More criticized the sanctuary system in his earlier days: *The History of King Richard III* (R. S. Sylvester ed., 1963), pp. 27–33, 115–19.

[82] *Ex p. Stafford* (1486) Y.B. Trin. 1 Hen. VII, fo. 25, pl. 1; 64 SS 115; *Rollesley v. Toft* (1494) Y.B. Hil. 9 Hen. VII, fo. 20, pl. 15; Port 31; Caryll Rep. 285; *R. v. Boswell* (1513) Port 37; Caryll Rep. 708; *OHLE*, VI, pp. 546–8.

[83] *Pauncefote v. Savage* (1516) Caryll Rep. 704; 102 SS xlv, 41; *OHLE*, VI, pp. 548–51. Sir John Savage, accused of murdering John Pauncefote JP, had taken sanctuary in a house belonging to St John's Priory.

[84] Stat. 32 Hen. VIII, c. 12; 21 Jac. I, c. 28, s. 7.

[85] See p. 137, ante.

[86] Although many defendants acquitted themselves, ecclesiastical judges had more control over purgation than secular judges had over wager of law: Helmholz, 1 LHR 1; *Ius commune in England*, ch. 2.

[87] The royal courts occasionally imposed swingeing fines on ordinaries who allowed escapes. But disproportionately heavy custodial burdens fell on the abbot of Westminster (ordinary for the KB) and the bishop of London (ordinary for Newgate).

[88] E.g. *Quynzene v. Abyndon* (1317) BL MS. Egerton 2811, fo. 121; JUST 3/41/1, m. 13. For a precedent of 1342 see p. 596, post.

[89] This practice was noticed with mixed feelings by Bereford CJ in 24 SS 119 (1313) and 85 SS 82 (1321). It did not become the regular practice till later.

supposed to be in attendance to claim convicted clerks. But the judges were not disposed to trust these representatives. A claim would be disallowed – in accordance with canon law – if the prisoner was not in clerical dress and tonsured, or if he could not read.

Between 1350 and 1490 the judges' attitude to benefit of clergy changed completely, and they came to see it as a regular and permissible means of escape from the mandatory death penalty, available to laymen as well as clerks. Physical appearance was disregarded, and reading became the sole test of clerical status. When a man was convicted of felony, he would fall on his knees and 'pray the book'; he would then be tendered a passage from the psalter, known as the neck-verse, and if he could read or recite it satisfactorily his clergy was taken to be proved. Judges had the discretion to choose passages at random.[90] But it became customary to assign the same text, so that with a little preparation anyone of intelligence could save his life.[91] Strictly speaking, the decision whether the convict read 'as a clerk' was for the ordinary; but he was subject to the control of the judges, and could be fined for refusing to accept someone. By the end of the sixteenth century around half of all men convicted of felony were recorded as having successfully claimed benefit of clergy.[92]

By fiction, therefore, the judges extended the privilege of the clergy to the laity; but they were unable to extend it to persons who were incapable of ordination, such as women[93] and *bigami*.[94] In the sixteenth and seventeenth centuries Parliament cleared the fiction of its remaining ecclesiastical impediments, substituted a short term of imprisonment for delivery of the 'clerk' to the ordinary, and extended the privilege first to *bigami* and then to women.[95] The restriction of the means of escape to those who could read was another peculiarity which defied rational justification, save on the dubious social grounds that it weeded out the less intelligent misfits; but it might just as well have been argued that intelligent people were more to blame for criminal conduct and more dangerous to keep alive. No doubt the judges applied the reading test with considerable latitude. But in 1706 the pretence was abandoned and, since (as the statute said) the reading test had been 'by experience found to be of no use', it was enacted that clergy could be claimed without reciting the neck-verse.[96] Instead of doing away with the fiction, Parliament had perfected it. Anyone, whether male or female, literate

[90] For instances see *CPELH*, II, pp. 1055, 1082; Baker, *Law's Two Bodies*, pp. 39, 127–37. Thomas Kebell held that any legible book would suffice: reading in the Inner Temple (*c.* 1475) 129 SS 25. Blind defendants were given an oral Latin test.

[91] The text was the *Miserere* (Psalm 51, v. 1): 'Miserere mei Deus secundum magnam misericordiam tuam, et secundum multitudinem miserationum tuarum dele iniquitatem meam.'

[92] Cockburn, *Assize Records: Introduction*, pp. 117–21 (47% of all convicts for felony between 1559 and 1624 had clergy).

[93] A woman, however, could plead pregnancy, and here too some inattention to truth was permitted: p. 559, post.

[94] A *bigamus*, as disqualified by canon law from ordination, was not a bigamist but a man who had lawfully married twice or had married a widow. In 1527 a thief escaped death by proving that he actually was a bigamist, so that his second marriage (to a widow) was invalid and he was not a *bigamus* (as he would have been if he had married the widow first): *R. v. Dagnall* (1527) KB 27/1065, Rex, m. 9.

[95] *Bigami*: 1 Edw. VI, c. 12, s. 16. Women: Stat. 21 Jac. I, c. 6 (partial); 3 Will. & Mar., c. 9, s. 6 (general).

[96] Stat. 6 Ann., c. 9 [= 5 & 6 Ann., c. 6, in *Statutes at Large*]. Peers of the realm had been excused reading since 1547.

or illiterate, could now be deemed a clergyman for a fleeting moment to escape the gallows.[97]

The fiction was merciful, but the mercy came at an unacceptable price, since the extension of privilege of the clergy to laymen was as indiscriminate as the inexorable death sentence which occasioned it. It hardly made sense for murderers and robbers to escape all secular punishment merely because they could read. Some flexibility was needed, and yet the judges seemed powerless to undo or modify what they had done. Parliament had to step in. The first direct reform, in 1489, was an official recognition that the privilege was regularly being claimed by the laity. It was enacted that convicts who could not prove ordination could only have clergy once; and, to prevent evasion, they were to be branded M (manslayer) or T (thief) in the brawn of the left thumb. The next step was to reduce the number of offences for which clergy could be claimed. Treason had never been clergiable,[98] and one early proposal – actually implemented in Ireland in 1494[99] – was to restore the death penalty for murder by turning it into treason. But if that was within the province of Parliament, it might as well make murder itself 'non-clergiable' without adding unnecessarily the further pains imposed on traitors. In 1512 the experiment was attempted. Benefit of clergy was removed temporarily from murder and robbery in a church, highway, or dwelling house, again with a saving for those actually in orders. This provoked an angry reaction from the prelates, who took a stand on Thomas Becket's martyrdom, overlooking the fact that even Becket had limited his claims to real clergy.[100] But in 1531 the measure was reinstated permanently, and escape from the ordinary's prison was made a separate, non-clergiable felony.[101]

From 1531 until the nineteenth century most penal reforms were effected by withdrawing clergy in various circumstances and thereby reintroducing capital punishment, which could then be commuted by discretion. After 1718, transportation to America could also be ordered for thieves who were allowed clergy, as an alternative to branding on first conviction.[102] Even after 1718, clergy still provided an absolute discharge, subject to a branding, in the case of those felonies – including manslaughter – which were not within the legislative restrictions. It was usual to pardon persons of quality from the iron, and since 1547 peers had been automatically exempted from it by law. In any case, the brand was not a record, and – since it was not intended as a punishment either – the usual practice was to heat the iron so perfunctorily that the process could be described as 'a nice piece of absurd pageantry, tending neither to the reformation of the offender nor for example to others'.[103] When in 1779 the judges were given power to award fines or whipping instead of branding, the iron went out of use

[97] The allowance of clergy did not ordain the convict as a clergyman for any other purpose.

[98] *R. v. Merks, bishop of Carlisle* (1401) 88 SS 102, 104; *Anon.* (1532) Spelman Rep. 49, pl. 15.

[99] Stat. 10 Hen. VII (Irish), c. 21. An English proposal to turn sacrilege into treason had been rejected in 1467: Rot. Parl., V, p. 632, no. 17. Murder by poisoning was made high treason in 1530: Stat. 22 Hen. VIII, c. 9; *OHLE*, VI, p. 539.

[100] Stat. 4 Hen. VIII, c. 2; *Dr Standish's Case* (1515) Caryll Rep. 683.

[101] 23 Hen. VIII, cc. 1, 11. These statutes still exempted genuine clergy, but after the break with Rome it was enacted in 1536 that clerks in orders should suffer the same 'pains and dangers' as laymen.

[102] Transportation Act 1718 (4 Geo. I, c. 11). The preamble suggested that the measure would help ease the servant shortage in America.

[103] M. Foster, *Crown Law* (1762), p. 372.

altogether.[104] The weirdly distorted institution of benefit of clergy had become too bizarre to survive. It was finally abolished in 1827, and the wording of penal statutes thereby released from the tortuosities of the previous three centuries.[105]

Pardons

From an early date the king enjoyed a power to grant charters of pardon, as a matter of grace, under the great seal.[106] These could be pleaded in bar of judgment on indictment, but not in appeals of felony. In the case of homicide, this prerogative was essential to justice, because the early common law failed to distinguish between intentional and accidental killing; he who killed by misadventure (or self-defence) deserved, but still needed, a pardon.[107] As with sanctuary and clergy, the existence of this merciful prerogative served to perpetuate a legal regime which was far out of line with prevailing notions of criminal responsibility, so that what ought to have been plain questions of law remained for centuries at least nominally matters of favour.[108] Since pardoning was a prerogative power which could not be reviewed by any court, pardons were also granted for non-legal reasons with impunity. In 1328 Parliament complained that they had been given out too freely, and enacted that in future they should only be granted where a man had killed another in self-defence or by misfortune.[109] This did not, in fact, prevent the issue of other pardons for money or through influence. And there were more public-spirited uses. After the disappearance of approvers, pardons were used as a means of persuading accomplices to 'turn king's evidence' and testify against their fellow offenders at their trial.

Besides contributing directly to the law of homicide, pardoning also contributed to penal reform. Most sentences of death after the sixteenth century were not carried out;[110] but control through pardoning enabled them to be imposed frequently as a deterrent, the efficacy of which lay chiefly in their unpredictability.[111] One early form of commutation, borrowed from Continental practice, was to recruit felons for service in the galleys,[112] or on dangerous sea expeditions. In 1577 twelve prisoners were reprieved in order to serve on a voyage with Martin Frobisher 'for the discovery of new countries'.[113] In the time of James I this practice was extended to enable convicts, with their consent, to be transported to the American colonies as a form of banishment,[114]

[104] Stat. 19 Geo. III, c. 74, s. 3. An M iron may still be seen at the back of the dock in the old Crown Court in Lancaster Castle.

[105] Stat. 7 & 8 Geo. IV, c. 28. In North America benefit of clergy was abolished in the 1790s: 33 AJLH 65.

[106] In later terminology they were letters patent, not charters.

[107] Pollock & Maitland, II, p. 477.

[108] See p. 571, post.

[109] Stat. Northampton 1328 (2 Edw. III, c. 2).

[110] The proportion of reprieves increased steadily. In the 16th century around half, in the 18th century a third, and by the 1820s century fewer than 1 in 10 of those condemned were actually executed.

[111] See R. Melikan, *John Scott, Lord Eldon* (1999), pp. 256–8.

[112] E. K. Adair, 35 EHR 497 at 510; SP 12/157, fo. 181 (warrant to assize JJ to reprieve felons for galley service, *c.* 1582).

[113] KB 29/212, m. 76. Frobisher reached Labrador. In 1597 some religious dissidents (not felons) were reprieved on giving bond to go to Canada: *Acts of the Privy Council 1597–98*, p. 133.

[114] A transportation warrant of 1617 still referred to foreign discoveries and overseas service, but the first beneficiaries were sent to Virginia: *Acts of the Privy Council (Colonial Series)*, I, pp. 10–13. One took fright and escaped: *R. v. Strickland* (1617) HLS MS. 114, fo. 141.

and during the seventeenth century it became a common practice, usually on the recommendation of the trial judge, to offer pardons on condition of transportation to Virginia or the West Indies. If a convict refused to go, or came back without licence, he could be executed on the original sentence. It could be a difficult choice;[115] but the option of transportation must have seemed to many a welcome chance to make a new start in life, and it enabled the English government to establish settlements in otherwise uninviting territories. Pardons might be given on other conditions, such as imprisonment or hard labour, or even unconditionally. By 1700 the process of granting pardons had come under the routine control of trial judges, who reported at the end of every circuit or session to the secretary of state with their recommendations for mercy, and in these confidential letters may be found the first explicit judicial expressions of rational penal policy.[116] Systematic but discretionary commutation of the death sentence remained central to the penal system throughout the eighteenth century. When the loss of the American colonies frustrated the prevailing arrangements, imprisonment with hard labour, in 'penitentiary houses' or in the 'hulks', was for a time an alternative;[117] but from 1787 a new destination for convicts was found in Botany Bay, and in the 1830s the numbers transported every year rose to some 4,000. By 1868, when transportation was finally ended, over 150,000 felons had been shipped to Australia.

Pardoning also underlay a system of informal appeal. If a trial judge doubted the legal correctness of a conviction, he could refer the question to his brethren, and their decision would be given effect (if they shared the doubt) by recommending a pardon.[118] It was only in 1848 that judges were given the power to quash convictions themselves, other than for error on the face of the record. After that date, the need for pardons has greatly diminished. Their last surviving uses are to undo a conviction where the Home Secretary entertains a doubt as to its safety and all regular avenues of appeal have been exhausted,[119] or where a change of circumstances after sentence is thought to warrant the exercise of compassion.

Jury Mitigation

The fourth means of qualifying the severity of the law was unofficial. Since the jury alone could pronounce on guilt, they could with impunity ignore the evidence in order to save a defendant from the gallows. Such 'pious perjury' might take the form of finding a perverse verdict of not guilty or, alternatively, a 'partial verdict'. Only the latter is detectable on the record. A partial verdict could reduce an offence from capital to

[115] In 1614 some convicts at the Old Bailey were transported to Penguin Island (in the Straits of Magellan), but when this was offered to another batch in 1615 they chose to be hanged instead: P. della Valle, *Travels into East-India* (1665 edn), pp. 333–6.

[116] See King, *Crime, Justice, and Discretion*, pp. 297–333; Beattie, *Crime and the Courts,* pp. 430–6. From the time of George III until the accession of Victoria regular sessions of the Council were held in the king's presence to consider such reports.

[117] See Stat. 19 Geo. III, c. 74. On the emergence of imprisonment as a regular means of punishment see J. H. Langbein, 5 *Jo. Legal Studies* 35; Beattie, *Crime and the Courts*, ch. 10.

[118] See p. 149, ante; p. 564, post.

[119] In recent times pardons have sometimes been granted posthumously in notorious cases of injustice (e.g. Timothy Evans, 1966; Derek Bentley, 1993; Alan Turing, 2013). This has only symbolic effect, since the punishment has already been suffered but the conviction remains.

non-capital, as by finding simple larceny (which was clergiable) on an indictment for burglary, or petty larceny on an indictment for grand larceny.[120] Sometimes the perjury, however pious, was blatant, as when a Georgian jury valued twenty-three guineas at thirty-nine shillings,[121] but all cases of material variation from the indictment raise a strong suspicion of fiction. Instances of partial verdicts are found as early as the fourteenth century;[122] but they did not become common until the seventeenth, and became most frequent in the eighteenth, when the number of non-clergiable capital offences was increased by legislation.[123] The cases which cannot be counted are those of outright acquittal against the evidence, and against the judge's direction, though this undoubtedly occurred.[124]

A special instance of pious perjury was used in the case of female felons. A pregnant woman who had been sentenced to death could 'pray the benefit of her belly', so that sentence would be deferred until after her delivery. The privilege was intended to protect the unborn child, but because women convicts were becoming pregnant after reprieve the courts reached the harsh decision in the fourteenth century that it could only be claimed once in respect of the same sentence.[125] If the Crown contested a claim of pregnancy, the fact was tried by a jury of married women, known as 'matrons' (*legales mulieres matrones*), and juries of matrons in the seventeenth century were observed usually to find in favour of the woman however weak the evidence. Indeed, in the seventeenth century a high proportion of female convicts were found to be pregnant, this favour being tolerated as a means of escape from the automatic death penalty when women could not have benefit of clergy.[126]

Attempts were made in the Tudor and Stuart period to curtail the liberty of jurors to disregard the truth, either by fining perverse jurors after the trial or by binding them over to appear in the Star Chamber or King's Bench to be punished for perjury. Although this kind of pressure was complained of, and was eventually declared unlawful in 1670,[127] it must have cowed some juries into subservience to judges.[128] Even Lord Mansfield, in 1784, argued that government by law could not tolerate that 'the law should be in every particular case what any twelve men . . . shall be inclined to think'.[129] Nevertheless, it is clear that the power of the jury to mitigate the law served a vital role

[120] King, *Crime, Justice, and Discretion*, pp. 232–7. For petty larceny see p. 575, post.

[121] Radzinowicz and Hood, *History of English Criminal Law,* I, p. 95. Stealing goods worth 40s. from a house was made non-clergiable in 1713. A guinea was a gold coin of 21s. value, so stealing even 2 guineas from a house would have been capital.

[122] E.g. *Anon.* (1367) Fitz. Abr., *Corone,* pl. 451 (value of sheep reduced from 20d. to 10d.). The right of the jury to revalue goods was confirmed in 1554: Dalison Rep., 124 SS 57.

[123] Cockburn, in *Twelve Good Men and True,* pp. 171–6; Beattie, *Crime and the Courts,* pp. 424–30. For their rarity before the 17th century see Cockburn, *Assize Records: Introduction,* pp. 115–16, 175–81.

[124] For probable instances see King, *Crime, Justice, and Discretion*, pp. 247–9.

[125] *CPELH*, II, pp. 979, 1083; *Anon.* (1536) Bro. Abr., *Corone*, pl. 97. For legal purposes, life began at birth.

[126] See J. C. Oldham, 6 CJH 1. According to Cockburn, *Assize Records: Introduction,* p. 121, 38% of women convicts in a 17th-century sample successfully pleaded pregnancy. Clergy was extended to women at the end of the century: p. 555, ante.

[127] *Bushell's Case* (1670) Vaugh. 135; 1 Freem. 1; Treby Rep., II, pp. 669–84. An attempt by one of the jurors to sue the judges for unlawfully punishing him met with short shrift: *Hamond v. Howell* (1672) 1 Mod. 184, 2 Mod. 218.

[128] Cockburn, *Assize Records: Introduction*, pp. 70–1; Langbein, 45 *Univ. Chicago Law Rev.* at 297–300.

[129] *The Dean of St Asaph's Case, R. v. Shipley* (1784) 21 State Tr. 847 at 1040; p. 512, ante.

during periods when the criminal law itself was too harsh or too unsophisticated to take account of the variety of circumstances affecting culpability.

Abolition of Capital Punishment

The later common-law system of punishment was a compromise between terror and humanity: terror, combined with public humiliation,[130] as a means of deterring potential offenders, and humanity in modifying the operation of the fixed death penalty by discretion in suitable cases. As late as the 1780s, when fears of revolution were in the air, even serious moral philosophers advocated more terror and less discretion, and the older attitudes prevailed at least until the end of the Napoleonic war. On the other hand, it was argued that the discretionary devices for modifying punishments were only necessary because the law itself was too savage, and that the old system had not been obviously successful in deterring criminals. Perhaps a less severe but more predictable system of punishment would be more effective; and perhaps punishments such as imprisonment could be directed towards reforming offenders. Sir Samuel Romilly KC (d. 1818), who also advocated the abolition of slavery, campaigned for many years against the death penalty but succeeded in having it removed from only two offences, pick-pocketing and stealing from bleaching grounds. However, following the deliberations of a parliamentary select committee in 1819, a series of piecemeal enactments eliminated the death penalty for one offence after another until by the end of the 1860s the only ordinary offence which attracted capital punishment was murder.[131] That remained the position for a hundred years. After an unsatisfactory attempt in 1957 to limit the cases in which murder ought to remain capital, the death penalty was in 1965 abolished for murder as well.[132]

Further Reading

Plucknett, *CHCL*, pp. 421–41
Milsom, *HFCL*, pp. 403–21
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Medieval Period
Pollock & Maitland, II, pp. 448–70, 511–26
J. Hudson, 'Theft and Violence' [871–1216] (2012) in *OHLE*, II, pp. 161–99, 384–415, 709–49
R. F. Hunnisett, *The Medieval Coroner* (1961), esp. pp. 37–74
N. D. Hurnard, *The King's Pardon for Homicide* (1970)

[130] Executions were carried out in public until 1868, and attracted large crowds.

[131] The other offences were treason, certain forms of piracy, and arson in naval dockyards. The last remains of capital punishment (for treason and piracy) were abolished in 1998, as inconsistent with the modern understanding of human rights: p. 568, post.

[132] Homicide Act 1957 (5 & 6 Eliz. II, c. 11), ss. 5–7; Murder (Abolition of Death Penalty) Act 1965 (c. 71).

R. D. Groot, 'The Jury of Presentment before 1215' (1982) 26 AJLH 1–24; 'The Jury in Private Criminal Prosecutions before 1215' (1983) 27 AJLH 113–41; 'The Early-13th-Century Criminal Jury' (1988) in *Twelve Good Men and True* (ante), pp. 3–35
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W. C. Jordan, *From England to France: Felony and Exile in the High Middle Ages* (2015)

Sixteenth and Seventeenth Centuries

J. H. Baker, 'Criminal Justice at Newgate 1616–27' (1973) 8 IJ 307–22 (repr. in *CPELH*, II, pp. 1073–90); 'Criminal Courts and Procedure at Common Law' (1977) repr. in *CPELH*, II, pp. 989–1064; 'Criminal Procedure', 'Privileges and Immunities' [1483–1558] (2003) in *OHLE*, VI, pp. 511–52
J. H. Langbein, *Prosecuting Crime in the Renaissance* (1974)
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C. B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-century England* (1987)

Eighteenth and Nineteenth Centuries

Cornish & Clark, ch. 8
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J. H. Langbein, 'The Criminal Trial before the Lawyers' (1978) 45 *Univ. Chicago Law Rev.* 263–316; 'Shaping the 18th Century Criminal Law: a View from the Ryder Sources' (1983) 50 *Univ. Chicago Law Rev.* 1–136; 'Historical Foundations of the Law of Evidence: a View from the Ryder Sources' (1996) 96 *Columbia Law Rev.* 1168–202; 'The Prosecutorial Origins of Defence Counsel in the 18th Century: the Appearance of Solicitors' (1999) 58 CLJ 314–65; *The Origin of the Adversary Criminal Trial* (2003)
V. C. Edwards, 'Criminal Equity in Restoration London and Middlesex' (1984) 5 JLH 79–96
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30

Pleas of the Crown: The Substantive Criminal Law

It was shown in the previous chapter how the criminal law, for many centuries, rested more on practice than on authoritative principles laid down by the courts or by Parliament. Law of that kind, when it begins, is more akin to custom, in the sense that the principles provide guidance but may be diverged from with impunity in particular cases.[1] But it was hardly appropriate that a body of law ostensibly operating throughout the realm, and determining whether accused persons should live or die, should be applied in different ways according to the vagaries of local custom or the opinions of individual judges. Inconsistency became so insupportable that procedures had to be devised to secure conformity and to resolve doubts. When that occurred, however informally, criminal law belatedly seeped into the common learning of the legal profession.

The Means of Development

The universality, in criminal cases, of the general plea of Not Guilty prevented any legal development through the vehicle of pleading. Questions of law could nevertheless arise in other ways. They could be raised upon the wording of indictments, upon the wording of statutes controlling benefit of clergy or adding to the list of crimes, and – most important of all – upon the evidence given at trials.

The formal way of raising questions of criminal law for solemn determination was by removing proceedings into the King's Bench by certiorari, and taking exception to them for some defect. Indictments could by this means be quashed, and convictions set aside. The procedure was common enough in the year-book period, but it was confined to errors on the face of the record, and the record did not include the evidence or the reasons for the judgment. In practice, certiorari was chiefly employed to obtain discharges on purely technical grounds. There are indications that technical errors were sometimes used as pretexts for quashing convictions thought harsh or unsafe for reasons not overtly given.[2] But that was discretion, not law.

In reviewing indictments, the King's Bench could decide no more than whether the wording was in order. If the indictment was formally correct, it was for the trial judge alone to rule whether the facts as proved fitted the forms. Potential questions of criminal law must have arisen constantly at the trial, when it fell to be decided whether the evidence proffered was sufficient to support the charge in the indictment. For example, an

[1] *Glanvill*, xiv. 8 (p. 177), excluded discussion of theft because it depended on the customs of different counties.

[2] *OHLE*, VI, pp. 523–4; *CPELH*, II, pp. 1002–6, 1060–2. An explicit example is *R. v. Barbour* (1490) Caryll Rep. 22.

An Introduction to English Legal History. Fifth Edition. Sir John Baker.

indictment for theft would simply allege taking and carrying away with force and arms, but the evidence might reveal that the defendant was a bailee, or a finder, who had misappropriated goods in his own possession; it would then have to be decided whether he could be said to 'take' them 'with force and arms'. If the trial judge directed the jury on such a question he was applying rules of law to the facts. His interpretation of the law was not, however, entered on the record,[3] and if another judge on the next circuit was directing juries differently nothing could be done by way of appeal.

Had criminal trials been routinely reported, a body of written jurisprudence might have emerged in that way. In the first half of the fourteenth century reports of criminal cases from Newgate[4] and the eyres were indeed prepared for circulation, but there was no continuing demand for them and the tradition did not develop over the next two centuries. Only scattered criminal cases were included in late-medieval and Tudor reports.[5] The development of the criminal law thus depended on finding some way of providing for centralized discussion of the more detailed kind of questions which arose at trials. It could not occur in banc, because criminal cases began and ended in the country. But there were other mechanisms.

First, there was the exposition of doctrine at readings and moots in the inns of court. Criminal law was the main subject of discussion next to the land law, at least between about 1450 and 1550, presumably because its principles could not be aired in other ways. Although lectures were not given on the common law, there were enough references in the old statutes to homicide and felony to provide pretexts for helpful excursions.[6] Those who attended these discussions included benchers who were justices of the peace, and judges and serjeants returning to their former inns to lend the benefit of their experience to the discussion. It is probable that the inns of court, in refining this learning, contributed as much to the initial formulation of English criminal jurisprudence as did any court of law. The cessation of such discussions coincided with the emergence of a printed literature on criminal law in the shape of Fitzherbert's *New Boke of Justices of Peas* (1538) and Staunford's *Les Plees del Coron* (1557), both of which were influenced in form and content by the learning previously passed down at readings. The publication of Staunford, which relied heavily on *Bracton* and fourteenth-century cases, brought home the dearth of modern case-law on the subject, but it coincided with the decision by Dalison and Plowden in the 1550s to begin reporting criminal cases more fully.[7]

[3] In 1542 the very problem just mentioned was noted in a Newgate minute-book as having arisen 'upon the evidence to the jury': *OHLE*, VI, p. 525. But the minutes contained more detail than a formal record, and they are a rare survival.

[4] The gaol in the Old Bailey, where London prisoners were held and tried by commissioners of gaol delivery. Newgate prison was demolished in 1904, but the Central Criminal Court is still located in the Old Bailey.

[5] The principal cases under the title *Corone* ('Crown') in the 16th-century abridgments dated from the 14th century. For the earlier reports see *CPELH*, II, pp. 967–88.

[6] *CPELH*, I, pp. 360–1; II, pp. 1001–2, 1074–5; 132 SS lxii–lxiv. For a list of such readings see 94 SS *347–50*. Printed examples are *Early Treatises on Justices of the Peace* (B. H. Putnam ed., 1924), pp. 289–413 (Thomas Marow, 1503); 132 SS 182–6 (anon., *c.* 1525); ibid. 186–95 (Robert Brooke, 1551).

[7] Plowden's full reports of 2 cases in 1553 (and another in 1573) introduced a wholly new and more sophisticated approach: *Landmark Cases in Criminal Law*, pp. 32–4, 56–7. For Dalison's reports (1552–58) see 124 SS xxii. Cf. Dyer 99 (10 cases arising on circuit in 1554).

The second technique, which also came to the fore in the early Tudor period, was for a trial judge who encountered a difficult point to respite sentence and present the case to his brethren in Serjeants' Inn or the Exchequer Chamber the next term for their opinion. The first reported instance was in 1488, and thereafter occasional occurrences are found in the reports.[8] It was these meetings which developed over three centuries later into the Court for Crown Cases Reserved.[9] The procedure was made more formal after the mid-sixteenth century by occasionally directing special verdicts,[10] though in the eighteenth century it was found more convenient for the judge to state the case from his own notes.[11] In such cases the law was not being decided by a court: the opinion of the assembled judges took effect either as advice to the trial judge or, if conviction had already occurred, as advice to a minister on whether to grant a pardon. Unlike discussions in the inns of court, they were concerned with particular cases, and they involved more judges, but they were equally informal and the decisions usually came without reasons.

Both kinds of discussion were chiefly confined to questions relating to murder and felony. Common-law misdemeanours were generally ignored in legal sources and there was no definitive list of them, let alone a list of definitions. Whatever seemed to merit punishment was punished, and there was little concern with precedents. A limited central influence was provided by the Star Chamber; but it operated by innovation at first instance rather than by reviewing proceedings elsewhere or declaring principles, and in any case reports of its decisions did not circulate widely.[12]

Criminal Responsibility

Most recorded criminal law was concerned with the definition of felonies, and since they were capital offences (subject to benefit of clergy) the attitude of the courts tended towards restrictive exposition. The filling of gaps was left to Parliament, which had no interest in broad principles of criminal liability and legislated ad hoc to counter specific evils. One matter usually left to the judges was the extent to which moral wickedness was a necessary constituent element of criminal offences. The word 'felony' imported wickedness, and therefore ought not to have extended to blameless accident and misadventure. In the case of homicide, effect was at first given to this distinction through the use of pardons,[13] but it had a much broader application. The key to the distinction between crime and tort came to be that felony required a guilty mind (*mens rea*), whereas intention was not relevant for civil purposes in an action of trespass against the king's peace.[14] States of mind were difficult to try,[15] but that was a problem for juries. In

[8] *OHLE*, VI, pp. 526–7. [9] See p. 149, ante.

[10] See *OHLE*, VI, p. 527; *CPELH*, II, pp. 1073–4 n. 2. For the analogous civil procedure see p. 91, ante.

[11] This was analogous to the civil procedure for stating cases to the court in banc: pp. 92–3, 148–9, ante. A late example of a special verdict in a criminal case, from Ireland, is *R. v. Millis* (1844) 10 Cl. & Fin. 534; p. 522, ante.

[12] See pp. 127–8, ante. For the range of offences triable before JPs see *OHLE*, VI, p. 273.

[13] See p. 557, ante; pp. 565, 566, 571, post. As to whether killing by misadventure was properly called 'felony', contrast 105 SS 74 (not felony) with ibid. 300 (felony).

[14] See the *Case of Thorns* (1466) B. & M. 369 at 370, 372, per Fairfax sjt; p. 430, ante.

[15] Bryan CJ (in a civil case) said it was common learning that a man's intention could not be tried, 'for even the Devil does not know a man's intent': Y.B. Pas. 17 Edw. IV, fo. 1, pl. 2, at fo. 2. Cf. p. 341 n. 18, ante.

drawing this distinction between criminal and civil wrongs the common lawyers may have been following the canonist teaching – traceable to St Augustine – that mental guilt was a necessary prerequisite of criminal guilt: *reum non facit nisi mens rea*.[16]

Indictments for murder always alleged 'malice aforethought'. In other indictments, the *mens rea* was held to be implicit in the word *felonice* (feloniously). What amounted to a felonious mind could only arise upon the evidence, and therefore little is known of judicial thinking about the element of moral culpability in crimes until Serjeants' Inn conferences began to be noted in the sixteenth century.[17] Spelman J reported some questions of this kind in the 1530s: for instance, whether a suicide who cut his throat intending to die, and then vainly repented and wished to live, was guilty of felony *de se*,[18] and whether provocation furnished a defence to murder.[19] But most reported discussions, both before and after this period, concerned not so much specific states of mind as the defendant's capacity to form a felonious intent of any kind.

It was settled in medieval times that children under twelve could not be punished for felony if they were too young to bear criminal responsibility.[20] Indeed, in the thirteenth century it may have been the rule that children under twelve could not be convicted at all. The fact of infancy was usually presented specially, as in the case of misadventure, so that a pardon could be obtained.[21] In other cases, if the defendant appeared on inspection to be a child below the age of responsibility, he might be discharged without trial, or without judgment, at the judge's discretion; and this later became the usual procedure.[22] After 1300 a child under twelve could be convicted of felony if the court decided he was able to discern right from wrong, for instance where evasive behaviour revealed an awareness of guilt.[23] It is far from clear whether there was a lower limit – below which there could be no responsibility – before Hale, in the seventeenth century, adopted the ancient Roman limit of seven.[24] The same 'right from wrong' test was used for persons of unsound mind, which could include temporary insanity, and at least one fifteenth-century lawyer considered automatism to be a defence as well.[25] Drunkenness affected intention, but it was regarded more as an aggravation than an excuse, because the want of discretion was self-induced; therefore, according to an old proverb, 'he that killeth a man drunk, sober shall be hanged'.[26]

[16] *Leges Henrici Primi* (ed. Downer), v. 28b (p. 95); Pollock & Maitland, II, p. 476 n. 5. The maxim is derived from a sermon on perjury by St Augustine of Hippo (d. 430 AD). It was not familiar to English lawyers before Coke: Co. Inst., III, p. 107 ('Actus non facit reum, nisi mens rea').

[17] Here, as elsewhere, the readers in the inns of court took the lead: see 94 SS *304*, *309–10*, *323*.

[18] *Anon.* (1533) Spelman Rep. 68, 140.

[19] *R. v. Parker* (*c.* 1530) Spelman Rep. 72.

[20] Children of 12 or over were supposed to be in frankpledge and therefore legally responsible: *Anon.* (*c.* 1315) BL MS. Harley 2183, fo. 175, per Spigurnel J; *CPELH*, II, p. 977; cf. Y.B. 30–1 Edw. I (RS), pp. 511–13, per Spigurnel J.

[21] Hurnard, *Pardon for Homicide*, pp. 152–7.

[22] E.g. *R. v. Peterborough* (1317) JUST 3/41/1, m. 6; *CPELH*, II, pp. 577–8 (aged 8); *Anon.* (1456) B. & M. 368 n. 56 (aged 4); *Anon.* (1488) Caryll Rep. 7 (aged 9: case referred to all the judges). Cf. *Anon.* (1351) Y.B. Pas. 25 Edw. III, fo. 85, pl. 28 (D brought back for sentence after coming of age).

[23] *Anon.* (before 1313) recollected in 24 SS 148; Y.B. Trin. 12 Edw. III (RS), p. 627 (tr. 'by hiding [the corpse] he showed that he knew the difference between right and wrong, and so *malicia supplet aetatem*'). See also *CPELH*, II, p. 977; 24 SS 109; *Anon.* (1488) Caryll Rep. 7; readings in 94 SS *309* n. 3.

[24] Hale, *History of the Pleas of the Crown*, I, pp. 19–20, 27–8. Hale also adopted 14, rather than 12, as the upper limit for discharge on grounds of infancy, relying on authorities dating from the 1530s onwards: ibid. 25.

[25] Anonymous reading, 94 SS *309* n. 5. For two cases of temporary insanity see *CPELH*, II, p. 978.

[26] 94 SS *309*, n. 7; 1 Plowd. 19.

The defence of insanity posed a more difficult practical problem than infancy, because of what Hale called 'the easiness of counterfeiting' it. Therefore, although the earlier procedure had been for the impairment of mind to be found specially by the presenting jury, and a pardon applied for,[27] an alternative practice by the sixteenth century was to require a plea of Not Guilty so that the matter could be investigated by a trial jury,[28] or else to impanel an inquest of office to determine whether the defendant was fit to plead and stand trial.[29] For six centuries the question for the jury remained much the same, namely whether the accused was able to know right from wrong,[30] or whether his actions were more like those of a brute beast than the exercise of moral choice.[31] However, the rise of medical jurisprudence, and the consequent conflicts over the types and consequences of insanity, led to popular dissatisfaction in the nineteenth century at some acquittals of the 'partially insane', even though the acquitted lunatics were safely locked away in Bedlam,[32] and also at the very notion that the criminally insane were 'not guilty' of any wrong.[33] In 1843 the House of Lords summoned the judges to answer some abstract questions about insanity and criminal responsibility, particularly in cases of delusion, and the answers were the basis of subsequent development.[34] This unusual procedure was ill advised, since the judges' opinions were given without the benefit of argument and yet were cast in a precise form which had all the disadvantages of legislation.

Less attention was paid to mental states in relation to misdemeanours, and indeed some of them (such as public nuisance and criminal libel) were held not to require *mens rea* at all. When new offences were created by statute, Parliament sometimes used words like 'wilfully', but usually it did not indicate whether intention or knowledge were necessary ingredients. There may once have been a strong presumption that they were,[35] but in the nineteenth century it was treated simply as a matter of divining the legislative purpose. Fault was held to be irrelevant to many regulatory and welfare

[27] Hurnard, *Pardon for Homicide*, pp. 159–70. Examples are *R. v. Clipston* (1329) 97 SS 215; *R. v. Anon.* (1572) Dyer's notebook, 110 SS 453.

[28] Hale, *History of Pleas of the Crown*, I, pp. 32–3. Early instances of this are: *Anon.* (1505) Y.B. Mich. 21 Hen. VII, fo. 31, pl. 16; *R. v. Petewuse* (1535) Spelman Rep. 58 (special verdict of guilty but insane). Molda Petewuse, though guilty of homicide, was discharged by the King's Bench under a general pardon, since the act was not malicious: KB 27/1096 Rex, m. 1d.

[29] E.g. *R. v. Anon.* (1562) Dyer's notebook, 110 SS 436; *R. v. Somervile* (1583) 1 And. 104 at 107; Sav. 50.

[30] E.g. *R. v. Tibthorp* (1344) KB 27/335, Rex, m. 17d (D, accused of homicide, discharged on a special verdict that she had long suffered from dementia, lacking all sense and human reason, and that she killed the deceased 'having no sense to distinguish good from ill or what she was doing'). But in 1328 a woman who strangled her son while out of her senses had to seek a pardon, assisted by Scrope CJ: Baker, *CPELH*, II, p. 978.

[31] *R. v. Arnold* (1724) 16 State Tr. 695 at 754, 764, per Tracy J ('no more [understanding] than an infant, a brute, or a wild beast').

[32] See J. Eigen, *Witnessing Insanity: Madness and Mad Doctors in the English Court* (1995). Bedlam was the colloquial name for the Hospital of St Mary Bethlehem, a specialist London hospital for the insane since the 15th century.

[33] In 1883 a new verdict of 'guilty but insane' (cf. n. 28, ante) was introduced at the behest of Queen Victoria, who had experienced a number of assassination attempts: Trial of Lunatics Act 1883 (46 & 47 Vict., c. 38). But the 'not guilty' verdict was restored in 1964.

[34] *The M'Naghten Rules* (1843) 10 Cl. & Fin. 200. See R. Moran, *Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan* (1981); K. Smith, *OHLE*, XIII, pp. 234–57; A. Loughman in *Landmark Cases in Criminal Law* (2017), pp. 125–45. (The spelling of the name has been almost as controversial as the decision.)

[35] *Fowler v. Padget* (1798) 7 T.R. 509, per Lord Kenyon CJ (a principle of natural justice); *Hearne v. Garton* (1859) 2 E. & E. 66.

offences, and even in more serious cases the courts might discern a policy that liability should be imposed independently of criminal intention.[36]

Degrees of Participation

Felons were either principals or accessories, and accessories could be 'before the fact' or after. Although accessories received the same judgment as principals, it was necessary to distinguish between the two categories for three reasons. First and foremost, an accessory could not be convicted without a principal, and so an alleged accessory was entitled to be discharged if the principal was acquitted or pardoned, or died before conviction. Second, the felony of an accessory was deemed to be a separate felony, so that it was possible for someone who had been acquitted as an accessory to be indicted and convicted as principal in respect of the same felony. And, third, a coroner's jury could not indict someone for being an accessory after the fact to homicide.

An accessory before the fact was someone who abetted, commanded, counselled, or procured a felon to commit a felony. The person who actually did the deed was the principal. If the deed was not completed, the attempt was punishable, though not as a felony.[37] There was a difficult intermediate territory where someone procured or abetted a felony, or was in company with the principal and shared his unlawful purpose, and was present when the felonious act was committed, but did not perform the fatal act himself. In 1488 it was decided by all the judges of England that someone present at a murder and abetting it was himself a principal.[38] In the time of Fyneux CJ a different view prevailed,[39] but after his death the 1488 view was revived and liability was extended to those who shared a violent criminal purpose and supported it by their presence.[40]

The status of the secondary kind of principal was considered in some detail in 1553. Bromley CJ suggested that the rule requiring the discharge of an accessory if the principal could not be convicted ought, by parity of reasoning, to extend to principals in murder who did not deliver the mortal blow but abetted those who did. Such abettors were distinguished, in Bromley CJ's analysis, as principals 'in the second degree', or principals 'in law' (but not in fact), because their liability was contingent on the guilt of the principal in the first degree. However, the other justices held that those present were principals to all intents and purposes, and could be arraigned without the principal in

[36] Cf. *R. v. Prince* (1875) L.R. 2 C.C.R. 169 (reasonable belief that girl was over 16, no defence to abducting a minor); and *R. v. Tolson* (1889) 13 Q.B.D. 168 (bona fide belief in husband's death, a defence to bigamy). See further K. Smith, *OHLE*, XII, pp. 321–30.

[37] *R. v. Osbern* (1506) Caryll Rep. 535. An attempt to commit felony was a misdemeanour: Marow's reading of 1503 (p. 563 n. 6, ante) at 377 (unsuccessful cutpurse); W. West, *Second Part of Symbolaeographie* (1594), sig. H. vii ('indevour'). It was not settled that an attempted misdemeanour was a crime until *R. v. Scofield* (1784) Cald. 397.

[38] Y.B. Mich. 4 Hen. VII, fo. 18, pl. 10.

[39] *R. v. Anon.* (1499) Y.B. Trin. 14 Hen. VII, fo. 31, pl. 7 (indictment quashed); Marow's reading (ante, p. 563 n. 6) at 381; *R. v. Newbolt* (1512) Caryll Rep. 613 at 614 (direction to jury). See also *R. v. Salysbery* (1538) Spelman Rep. 104; *Jackson v. Stratforth* (1539) ibid. 62; 83 LQR 584; *OHLE*, VI, p. 579.

[40] *R. v. Anon.* (1534) Spelman Rep. 100; *R. v. Lord Dacre of the South* (tried by peers) and *R. v. Mauntell* (1541) Bro. Abr., *Corone*, pl. 171; *Hall's Chronicle* (1809 edn), p. 842; Staunford, *Plees del Coron* (1557), fo. 40. The law as to joint enterprise was revisited by the Supreme Court in *R. v. Jogee* [2016] UKSC 8.

the first degree, 'for the presence of the others is a terror to the one who is assaulted, and a reason that he durst not defend himself'.[41]

An accessory after the fact was someone who gave support to a felon after the felony had been committed, knowing him to have committed it. The usual cases were 'receiving' or harbouring a felon, and knowingly receiving stolen goods. Rescuing a felon in the course of arrest was an independent felony. Passive concealment of a felony was not in itself a felony, but was misprision of felony, a misdemeanour. Merely approving of a felony after it was committed, even by a person who benefited from it, did not make him a felon.[42]

Some Particular Offences

Treason

Although treason is the most serious offence known to English law,[43] its development has been less than systematic. The essence of high treason was a threat to the king's life or royal authority, and the consequences of conviction were not only a particularly horrible death but also forfeiture of the traitor's land to the king rather than the feudal lord. The limits of the offence at common law were nevertheless unclear: Hale cited a case of 1347 in which a man was indicted of treason for imprisoning another to extort money, thereby usurping or 'accroaching' the royal power.[44] An uncertain law of treason is one of the greatest possible threats to the rule of law, and that is doubtless why treason was the first major offence to be defined by statute. The Treason Act of 1351 has provided the principal definition down to the present day.[45]

The first form of high treason was compassing the death of the sovereign, or of certain members of the royal family. It was not necessary for the king actually to be killed, or even for an attempt to be made on his life, and at times the offence was so widely construed that words spoken against the king, or magical prophecies as to his life expectancy, were held to amount to constructive compassing (or plotting) of the king's death, on the grounds that his life might be shortened by the grief they caused him.[46] In most ages, however, the courts required proof of an overt act of preparation to kill, and this was acknowledged as necessary by a statute of 1487.[47]

The other principal forms of treason were levying war against the king in his realm and adhering to the king's enemies. The 'king' for this purpose was the de facto sovereign, so that in times of civil war allegiance was owed to the king in possession of the Crown.[48] This in theory exposed to prosecution the adherents of a de jure king, and so

[41] *R. v. Griffith ap David* (1553) Plowd. 97 (at Shrewsbury assizes).
[42] Port 149, pl. 30 (undated).
[43] It remained a capital offence until 1998: Crime and Disorder Act 1998 (c. 37), s. 36.
[44] Hale, *History of Pleas of the Crown*, I, p. 80. It seems, however, that accroaching the royal power was not high treason but a form of petty treason.
[45] 25 Edw. III, stat. v, c. 2. It is written in French.
[46] For pre-Tudor extensions see J. Bellamy, *The Law of Treason in England in the Later Middle Ages* (1970).
[47] Stat. 3 Hen. VII, c. 14 (compassing the king's death by a servant of the royal household, without an overt act, made felony); cf. Richard Littleton's reading (1493) Port 83–4. As to whether words could be an overt act see *R.* v. *Owen* (1615) 1 Rolle Rep. 185; *R. v. Pyne* (1628) Cro. Car. 117 (overruling numerous medieval precedents there set out).
[48] Stat. 11 Hen. VII, c. 1, which was said to declare the common law.

it was wise for an incoming king to pardon his own supporters.[49] The 'war' did not have to be a war in the international sense: indeed, alien enemies could not be convicted of treason. It meant armed rebellion against the Crown, a form of civil war. But this was another concept susceptible of extension by judicial interpretation. In Tudor times serious public demonstrations against the government were sometimes held to constitute a constructive levying of war. Thus in 1516 an insurrection against the Statute of Labourers, to demand higher wages, was held to be a levying of war against the king, because it was 'generally against the king's law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do'.[50] The following year, after the so-called Evil May Day in London, Fyneux CJ advised that a general rising by City youths to attack aliens and destroy their houses was high treason.[51] As late as 1595, another uprising by London apprentices, this time intent on breaking the gaols and sacking the City, was declared to be high treason.[52] Some of these cases seem in retrospect to have twisted the meaning of the 1351 statute beyond reason, in response to temporary alarms; but it remained the law in the eighteenth century that there could be a constructive levying of war in peace-time if three or more 'arose' to alter the established religion or law, or to effect some public purpose against all opposition.[53]

In the time of Henry VIII a number of new treasons were invented by statute in order to stifle opposition to the king's ecclesiastical reforms, and under these severe measures the mere expression of opinion could in some cases constitute high treason. Sir Thomas More was executed under the first of these statutes, in 1535, for denying the king's supremacy. The statutes have been condemned, with justice, as the most repressive body of penal legislation ever passed in England. In 1547 Protector Somerset had them all repealed by the new king, as having been 'very strait, sore, extreme, and terrible'.[54] The law officers in 1553 inveighed in Parliament against the 'cruel and bloody laws of King Henry the eighth… Draco's laws, which were written in blood'.[55] Mary I's reign was to prove equally merciless, but her preferred medium was heresy rather than treason. Treason could no longer be committed by words or thoughts alone, and the judges in the second half of the sixteenth century showed themselves more cautious than their predecessors about extending the scope of the 1351 statute by broad construction.[56] It

[49] The king himself was immune from prosecution. Henry VII, who defeated the de facto King Richard III in battle, had been attainted of treason in 1484 and was thereby arguably disabled from inheriting the crown or summoning a parliament to reverse the attainder. But the new judges brushed the difficulty aside: *OHLE*, VI, p. 58. If Henry was not king, they were not judges either.

[50] Co. Inst., III, p. 10. This is probably the undated Kentish case in Port 123 (disturbance of quarter sessions). Cf. *R. v. Bradshaw* (1597) Co. Inst., III, p. 10 (conspiracy to put down enclosures, contrary to a statute of 1571).

[51] *R. v. Lincoln and others* (1517) Port 123; Caryll Rep. 607; *OHLE*, VI, pp. 584–5. Most of the offenders, stirred up by a xenophobic hate preacher at St Paul's cross, were later pardoned.

[52] *Case of the London Apprentices* (1595) Coke's notebook, BL MS. Harley 6686, fo. 109v; Poph. 122. The 1517 case was cited, from Holinshed's chronicle.

[53] *R.* **v.** *Damaree* (1709) Foster 213; 15 State Tr. 521 (riotous gathering to demolish Nonconformist meeting-houses). East (1803), following Hawkins (1716), treated this as still good law; but it was generally rejected in the 19th century.

[54] 1 Edw. VI, c. 12. This abrogated all treasons created by statute since 1351.

[55] Quoted in *R. v. Throckmorton* (1554) 1 St. Tr. 896.

[56] See 'Treason and Public Order' in 109 SS lxii–lxvii. Note, however, the occasional use of martial law temp. Eliz. I: Baker, *Magna Carta*, pp. 430–1. And see n. 52, ante.

remained the case, however, that words could sometimes constitute an overt act of treason, as where someone confided traitorous plans to another, and some new treasons were introduced by Parliament under Elizabeth I to meet perceived new threats.

A lesser form of high treason mentioned in the 1351 statute was counterfeiting the king's great or privy seal, or his money, or importing and uttering false money imitating the coin of the realm. This was extended in 1415 to clipping, washing, and filing the money of the land.[57] It also lent itself to extensions by 'construction'. For instance, in 1540 it was held to be treason for a Chancery official to counterfeit patents of pardon by misusing the matrix of the true seal.[58] These forms of treason were reduced to felony in the nineteenth century.

Petty (or petit) treason was a lesser form of the offence, which consisted in treachery against a domestic 'sovereign' by a wife, servant, or monk. If a wife killed her husband, a servant his master, or a monk his superior, the offence was not merely murder. As a form of treason it was more ignominiously punished,[59] and punishment could not be avoided by claiming benefit of clergy.[60] But the offence was strictly confined: a husband did not commit petty treason by killing his wife, because she was not his sovereign, and parricide was only treason if the child happened to perform services for the parent.[61] Petty treason was reduced to murder in 1828.[62]

There were no accessories in treason, which was usually inchoate: anyone who participated actively in a traitorous plot was a principal. Other forms of implication in treason might constitute the distinct offence of 'misprision'. The prime meaning of misprision was bare concealment of treason, though it was also said to include a traitorous intent which was not accompanied by any overt act. Misprision of treason was not treason or felony but carried perpetual imprisonment and forfeiture of goods, chattels, and the profits of land during the offender's life.

Homicide

Early law had distinguished between concealed killing (murder) and other forms of homicide, such as those occasioned by fighting or accidents. Stealthy killings were regarded with particular suspicion, especially by foreign conquerors.[63] But the distinction did

[57] Stat. 3 Hen. V, stat. ii, c. 6. When paper money became current in the 18th century, forgery of notes was made a felony, not treason.

[58] *R. v. Egerton* (1540) as noted in *Hall's Chronicle* (1809 edn), p. 841. Cf. *Anon.* (1545) Bro. Abr., *Treason*, pl. 3; 124 SS 66 (taking a good seal off an old patent and affixing it to a new); reversed in *R. v. Overton* (1556) Dalison Rep., 124 SS 100.

[59] Men were drawn on a hurdle to the place of execution, and then hanged. Women were burned to death, as for high treason: R. Campbell, 5 JLH 44.

[60] The canon law allowed that treason was excepted from the clerical privilege. A priest was executed in 1532 for clipping nobles, without degradation: Spelman Rep. 49; cf. Yorke Rep., 120 SS 90. Whether the exception included petty treason was clarified in 1496: Stat. 12 Hen. VII, c. 7. Cf. p. 556, ante.

[61] For parricide see *Anon.* (1554) Dalison Rep., 124 SS 59, pl. 8 (said to extend to parents-in-law). Cf. Co. Inst., III, p. 20.

[62] Stat. 9 Geo. IV, c. 31, s. 2.

[63] The laws of Cnut provided for an enquiry into whether a murdered person was Danish, and William I turned it into an enquiry whether the person was Norman. By the late 12th century it was difficult to distinguish between Normans and English, so all stealthy killings were regarded as murder: *Dialogue of the Exchequer*, i. 10 (p. 81).

not immediately pass into the common law, which treated all homicides in the same way. Every death in unusual circumstances required investigation by a coroner, if only because any chattel which occasioned death was forfeited as deodand.[64] The principle of automatic liability applied not only to the chattel but to the person whose conduct killed another. His property was forfeited, and he was liable to imprisonment pending a pardon, even if he had no guilty mind. On the face of it, this was in direct conflict with the principles of criminal responsibility outlined earlier in this chapter, but it is unlikely that accidental or excusable killings ever in practice attracted the death penalty. Not only could the king pardon such an offender's life, but he was morally bound to do so. The grant of a pardon in such cases was therefore a matter of course, upon a special finding of the facts; and after 1278 the trial judge could report cases of misadventure or self-defence to the king without the need for a special enquiry.[65] But the blameless killer still in theory incurred a forfeiture, because his act was considered a tort or 'contempt' to the king in depriving him of a subject.[66] This harsh theory was felt at an early date to be anomalous, and it was not consistently put into practice: it was avoided by directing general verdicts of not guilty in cases of misadventure and self-defence.[67] Moreover, from the fourteenth century many of those found before coroners to have killed by accident were probably not arraigned at all.[68]

The law of pardons led not only to a distinction between felonious and excusable homicide, but also to a bifurcation of felonious homicide. This was attributable to the enduring horror of murder. The bifurcation followed from a measure introduced in 1390 to reduce the scope of general pardons, such as a pardon of 'all felonies'. It was enacted that such a pardon did not extend to murder or to 'killing by lying in wait, assault, or malice aforethought', and these overlapping categories became confused over the next century into a single concept of murder.[69] It therefore became important, in drawing indictments,[70] to make a distinction between murder with malice aforethought and other forms of felonious homicide, which were known by 1480 as 'manslaughter'.[71] The principal species of manslaughter was *chaude mêlée* or chance-medley,[72] a killing in the course of a sudden, spontaneous quarrel or fracas. By Tudor times the law also recognized that homicide by wanton negligence might be feloni-

[64] See pp. 412–13, ante. [65] Stat. Gloucester (1278), c. 9.

[66] Reading on Stat. Gloucester, c. 9 (*c.* 1486) Keil. 108; 105 SS 74. It was disputed whether a pardon was needed after a special verdict of misadventure.

[67] T. Green, *Verdict according to Conscience* (1985), pp. 86–93, 123–5; cf. J. Beattie, *Crime and the Courts* (1985), p. 87 (pardons still issued in the 1670s).

[68] Green, *Verdict according to Conscience,* pp. 87 and 93 n. 96.

[69] 13 Ric. II, stat. ii, c. 1; *Anon.* (1507) Caryll Rep. 556, per Fyneux CJ (rule said to be of statutory origin). In the 15th century murder had become synonymous with killing by malice aforethought: 94 SS *305* n. 4. Lying in wait was evidence of forethought.

[70] In appeals of death pardons were not allowed; but the common form was to count on a killing 'by lying in wait and premeditated assault'.

[71] Manual for JPs (*c.* 1480) BL MS. Harley 1777, fo. 87. 'Manslaughter' is the English word for *homicidium;* the technical sense resulted from transferring it from the genus to the residuary category. In *R. v. Pulter* (1531) KB 27/1079, Rex, m. 4, a Cambridge scholar indicted for murder pleaded that it was 'homicidium vocatum manslaughter, ex subito casu [by sudden chance] et non ex malicia precogitata', and relied on a general pardon.

[72] The word *chance* reflects the Latin *ex subito casu* (see previous note); but the original adjective was *chaude,* indicating hot blood.

ous.[73] After 1512 the distinction between murder and manslaughter was accentuated by statutes which removed benefit of clergy from those convicted of 'murder of malice prepensed'.[74] It was principally as a result of this legislation that the line between murder and manslaughter came to be judicially discussed and defined in the Tudor period. Parliament had thus, through a number of distinct expedients, superimposed on the common law a tripartite classification of homicides: if the killing was done out of malice, it was punished by death and forfeiture; if there was no prior malice, and it was a first offence,[75] it was clergiable and the only certain punishment was forfeiture; if the killing was accidental or excusable, it was pardonable.

Before long it was discovered that the dichotomy of malice and chance medley – of cold and hot blood – was not straightforward. Malice was not easy to define, and even harder to prove; often it was implied from the facts surrounding the killing.[76] It did not mean an intention to kill. So long as there was a general evil intent, such as an intent to injure someone or an unlawful enterprise, there was no need to prove a specific intent to kill the deceased.[77] Moreover, even a chance fight might be murderous if unprovoked. In a case of 1600 a shopkeeper became so incensed by a customer who had 'flirted' him on the nose and made faces at him from the street that he came out of his shop and hit him so hard that he died. He was indicted and convicted of manslaughter; but the widow brought an appeal of murder and the judges held it to be murder, because there was insufficient cause to start a quarrel.[78] After this, the doctrine of chance medley faded away and the test of manslaughter in such cases came to be, not the hot bloodedness, but the presence or absence of a sufficient degree of 'provocation'.[79] This development was furthered by a statute of 1604 which took away benefit of clergy for killing by stabbing, where the deceased had no weapon drawn, even in situations where at common law the killing amounted only to manslaughter by chance medley.[80]

Personal Injuries

Physical assaults which did not result in death fell only partially within the range of common-law felonies. A maiming – a serious incapacitation or loss of limb – could be

[73] E.g. throwing a stone over a house, or shooting in a city: *OHLE*, VI, p. 559. Tudor lawyers distinguished between negligence in carrying out a lawful activity and wanton negligence. But this was a departure from earlier law: Hurnard, *Pardon for Homicide*, pp. 99–108.

[74] The earliest were 4 Hen. VIII, c. 2; 23 Hen. VIII, c. 1, s. 3. It was suggested in a 15th-century reading that murder was non-clergiable at common law: CUL MS. Ee.5.19, fo. 217.

[75] See p. 556, ante.

[76] E.g. killing a minister of justice in the execution of his duty, when it was presumed conclusively: *R. v. Yong* (1586) 4 Co. Rep. 40; *R. v. Mackalley* (1611) 9 Co. Rep. 68.

[77] 94 SS *309–10*; *OHLE*, VI, pp. 555–7. See e.g. *Note* (1498) Port 86, pl. 21; *R. v. Newbolt* (1512) Caryll Rep. 613 (intention to beat); *R. v. Herbert and Mansell* (1558) Dalison Rep., 124 SS 127–31; Dyer 128 (accidental death of peacemaker in an affray); *R. v. Saunders and Archer* (1573) Plowd. 473 (transferred malice); *R. v. Walwin* (1589) BL MS. Lansdowne 1095, fo. 69v (intention to do 'any hurt'); Hale, *History of Pleas of the Crown,* I, p. 451 ('intention of doing any bodily harm'). On *Saunders and Archer*, and malice, see Baker in *Landmark Cases in Criminal Law* (2017), pp. 29–57. For joint enterprise see also p. 567, ante.

[78] *Watts v. Brains* (1600) Cro. Eliz. 778; Noy 171; BL MS. Add. 25203, fo. 216v. Cf. *R. v. Huggett* (1666) Kel. 59.

[79] *R. v. Royley* (1612) Cro. Jac. 296; 12 Co. Rep. 87; Godb. 182; *R. v. Keite* (1696) 1 Ld Raym. 138; *R. v. Mawgridge* (1707) Kel. 119.

[80] Statute of Stabbing 1603 (1 Jac. I, c. 8). See *R. v. Lord Morley* (1666) Kel. 54.

made the subject of an appeal of mayhem; but mayhem did not become an indictable felony.[81] Even violent assaults were mere trespasses,[82] until a number of offences akin to mayhem were made felonies by statute.[83] The forcible carnal knowledge of a woman against her will was treated in a similar manner to mayhem: the woman alone could treat it as unemendable by pursuing an appeal of rape, but it was not at common law an indictable felony. If the woman pressed her appeal, the offender was liable to forfeit life or limb, and until the early thirteenth century the punishment might be castration or blinding. If, however, the offence was presented by indictment, it was treated as a misdemeanour punishable only by fine or imprisonment.[84] This seeming leniency took account of the woman's own decision either to forego or to compromise her appeal; but it was considered incongruous, and by a statute of 1285 rape was made a capital felony, however prosecuted.[85] Buggery was not a felony at common law, no doubt because (if consensual) there was no element of force and arms, but also because it came within the purview of the Church courts as a sexual misdemeanour. After attempts to deal with it, bizarrely, as constructive treason, it was made a capital felony in 1534, and it remained a felony until 1967.[86]

Arson

Arson,[87] the malicious burning of a dwelling house, or of a barn containing grain, was the more serious of the two common-law felonies concerning a man's home. The criminal misuse of fire was not only destructive of the victim's property, but also a serious threat to public safety in times when most houses were constructed of timber and thatch, and the means of extinguishing large fires were primitive. For these reasons, arson was among the earliest pleas of the Crown and was a felony. Until the thirteenth century it was punished, *jure talionis*, with death by burning, and thereafter by hanging.[88] It is easy to see why arson was so seriously regarded, but it is less easy to understand why for many centuries it was the only criminal offence of causing damage to property. If a man deliberately burned property other than a house or granary, or destroyed houses (let alone movable property) otherwise than by fire, then at common law the only remedy was a civil action of trespass. The gaps were filled piecemeal by

[81] For a consequence in the law of defamation see p. 471, ante.

[82] E.g. in 1336 a fine of 20s. was imposed for blinding someone: Kaye, [1977] *Criminal Law Rev.* at 7.

[83] The first was Stat. 5 Hen. IV, c. 5 (cutting out of tongues and eyes). In 1670 it became a capital felony to cut off parts of the body or slit noses: 22 & 23 Car. II, c. 1 (known as Coventry's Act, because it resulted from Sir John Coventry MP having his nose slit in the street). The accumulated mass of offences was consolidated in the Offences against the Person Act 1861 (24 & 25 Vict., c. 100), which drew a distinction between actual bodily harm and grievous bodily harm.

[84] Fines of 10 marks were imposed in the Berkshire eyre of 1248: 90 SS 318, 351. Cf. 96 SS 258, pl. 739 (fine of only ½ mark, after an appeal was compromised, in 1256).

[85] Stat. Westminster II, c. 34, which speaks of *jugement de vie et de membre*, though in practice the judgment was death.

[86] *OHLE*, VI, p. 563; Stat. 25 Hen. VIII, c. 6; Sexual Offences Act 1967 (c. 60). Lord Hungerford was executed for this offence in 1540. It was once punished with death by burning as a form of heresy: Pollock & Maitland, II, pp. 556–7.

[87] From the French *arder,* to burn.

[88] It was made non-clergiable in 1531: Stat. 23 Hen. VIII, c. 1, s. 3.

numerous statutes which were consolidated in 1861; and in 1971 the miscellaneous offences were replaced by that of unlawfully destroying or damaging property.[89]

Burglary

The criminal invasion, as opposed to the destruction, of a dwelling house was known to the Anglo-Saxons as *hamsocn* or *husbryce* (house-breach), words which apparently also implied an element of violence to the person, as in an armed raid.[90] In appeals, and early indictments, housebreaking often appears as an element of aggravation. Though seemingly not an independent offence, it had the effect of making even a small theft into a capital felony. By the fifteenth century, however, it had become an indictable felony in itself, committed even if nothing was stolen, provided there was a felonious intent. In this form it was usually called burglary, adopting a word (*burgaria, burglaria*) which had originally connoted breaking into a walled town to carry out a raid.[91] According to some definitions, which seem to preserve the original character of *hamsocn*, it was necessary to burglary that someone should have been in the house at the time of the breaking, and this element was certainly necessary to make the offence non-clergiable under the Henrician legislation.[92] It was also settled by the 1450s that burglary could only be committed at night.[93] Nocturnal crimes were more heinous than offences in daytime, because all decent folk were supposed to be asleep and off their guard. But turning what began as an aggravating factor into an essential component of burglary had the effect that housebreaking in the daytime was excluded from the list of common-law felonies. This shortcoming was remedied by a string of statutes beginning in 1547.[94]

Having decided that burglary could only be committed at night, the judges had to define 'night'. At first it was agreed that it began at sunset and ended at sunrise, so that burglary could be committed in the twilight periods after sunset and before sunrise. It was said to be easier to try the setting and rising of the sun than the beginning and ending of daylight.[95] But this test was superseded by that of darkness: whether a man's face was discernible.[96] In 1837 an arbitrary definition of night was introduced by statute; and in 1968 the nocturnal element disappeared from the law altogether.[97]

The mental element in burglary was indicated in the indictment only by the words 'feloniously and burglariously'. These words of art did not import the actual commission

[89] Malicious Damage Act 1861 (24 & 25 Vict., c. 97); Criminal Damage Act 1971 (c. 48).

[90] See R. Colman, 25 AJLH 95. The laws of Cnut (*c.* 1020) said that *husbryce* was unemendable.

[91] Breaking town-walls was mentioned in some definitions of burglary even in the early 16th century.

[92] For variable definitions in the early 16th century see *OHLE*, VI, pp. 572–3. It was settled by 1596 that, provided the house was a dwelling house, it was not necessary that anyone should be at home when the burglary occurred: Co. Inst., III, p. 64.

[93] John Baldwin's reading in Gray's Inn, 94 SS *326* n. 2; Roger Yorke's notebook, 120 SS 183. Fitzherbert was criticized for omitting it from his definition (1538).

[94] Stat. 23 Hen. VIII, c. 1, s. 3 (robbing persons in their dwelling houses); 1 Edw. VI, c. 12, s. 10 ('breaking of any house by day or by night, any person being then in the same house [and] thereby put in fear or dread'). These did not explicitly create new felonies, but by removing clergy were taken to have done so.

[95] *Anon.* (1505) Caryll Rep. 482 at 483, per Frowyk CJ.

[96] *Anon.* (1606) BL MS. Hargrave 29, fo. 214; Co. Inst., III, p. 63.

[97] Stat. 7 Will. IV & 1 Vict., c. 86, s. 4; Theft Act 1968 (c. 60), s. 9. Although burglary was abolished in 1968, the word lives on in ordinary speech as a synonym for housebreaking.

of a distinct felony, but only a felonious and burglarious intent. Marow (1503) thought it necessary to prove either an intent to murder or the actual commission of some other felony, but Fitzherbert (1538) and later authorities took the view that a mere intention to commit any felony was sufficient. The physical *actus reus* was a breaking into a house;[98] but there was no need for a bodily entry, and the judges managed to squeeze within the definition the insertion of a hook through a window (after drawing the latch), or shooting through a hole made in the wall.[99]

Robbery and Larceny

Robbery, which in law denotes stealing from the person with violence or threats,[100] was an offence against the person and also against property. Like burglary, the original significance of robbery was that, as an element of aggravation, it could turn otherwise minor crimes such as petty larceny into capital offences; and in later times it had the effect of excluding the offender from benefit of clergy. Yet it was a discrete felony, subject to prosecution by appeal or indictment. Secret theft, on the other hand, was more an offence of dishonesty than of violence and was not recognized in the time of *Glanvill* as a felony. *Bracton*, however, mentions appeals of larceny[101] as distinct from appeals of robbery.[102] Larceny had the same ingredients as trespass *de bonis asportatis*, that is, taking and carrying away movable goods with force and arms, but with the addition of *mens rea*, in this case an intent to steal them.

Because of the fixed death penalty for felony, minor thefts were excluded from the capital felony of 'grand larceny'. Petty (or petit) larceny, the theft of money or chattels below the value of twelve pence, was usually punished with imprisonment or whipping; and we have seen how benevolent jurors sometimes valued stolen property below one shilling in the interests of mercy.[103] The judges also decided, as a matter of law, that some things were not larcenable at all. The first category to be so treated was that of things annexed to land, such as growing crops or parts of buildings. They could no more be stolen than the land itself, unless they were detached and taken away after an interval. By Tudor times a second category had been recognized in the form of objects of sport or pleasure, such as pet dogs, cats, singing birds, lutes, and even diamonds,[104] though this doctrine survived only in relation to tame animals not required for food or

[98] This could include a locked room in an inn: *Spelman's reading* (1519) 113 SS 161. Or chambers in an inn of court: *R. v. Parry* (1581) KB 27/1277, Rex, m. 16 (breaking into Hugh Hare's chambers in the Inner Temple with intent to murder and rob him).

[99] *Anon.* (1584) 1 And. 114; Sav. 59; *Anon.* (1616) *CPELH*, II, p. 1084.

[100] It did not include purse-cutting or pocket-picking, which was simple larceny. It was particularly associated with highway robbery, and in the 15th century ambush was included in some definitions: *OHLE*, VI, p. 571.

[101] Derived from *latrocinium*, though in classical Latin this denoted robbery. The word was not used in indictments for larceny, the proper phrase being 'feloniously stole' (*felonice furatus fuit*).

[102] *Bracton*, II, pp. 413, 426.

[103] See p. 559, ante. As to whether stealing goods worth exactly 12d. was petty or grand larceny see *OHLE*, VI, p. 570. In 1313 two men who stole 12½d. between them were sentenced to death, whereas a man who stole l0d. received but 3 weeks' imprisonment: 24 SS 90, 145.

[104] Trees: Y.B. 12 Edw. III, Lib. Ass., pl. 32. Fixtures: *R. v. Gardiner* (1533) Spelman Rep. 99; *CPELH*, II, pp. 1009–12. Harps and lutes: 119 SS 16, per Pollard J. Diamonds: *Anon.* (1553) Dalison Rep., 124 SS 39, per

work.[105] Wild animals, such as deer and game, could not be stolen in their natural state, but for the different reason that they were not owned by anyone.[106] Numerous statutes were passed to fill some of these lacunae.

More serious restrictions of larceny arose from its trespassory character. Many forms of dishonesty could not be treated as felonious because they did not include a taking with force and arms. Thus the bailee, agent, factor, or trustee who appropriated property or funds entrusted to him could not be convicted of larceny, because the owner had voluntarily parted with possession, or had never been in possession, and so there was no taking *vi et armis*. If this gap in the criminal law needed a justification, it was that in all these cases the owner knew whom to call to account and could sue in detinue or conversion. The essence of larceny was a taking by stealth, against which it was more difficult to guard. Nevertheless, its narrow scope became less justifiable once simple theft ceased to be capital, as a result of benefit of clergy. The requirement of a forcible taking was regarded even in the fifteenth century as an inconvenient restriction, and various inroads were made on the doctrine. First, in 1473, it was held at a meeting of all the judges that a carrier could be guilty of theft if he 'broke bulk' by opening a package entrusted to him and appropriating the separate contents. This was on the strained reasoning that he was a bailee of the whole package only, so that with respect to the contents he could be said to act with force and arms.[107] The second extension was directed against servants. It was already law that a person having merely the temporary use of a thing was not in legal possession, so that a guest who stole the bedclothes from an inn was guilty of felony.[108] Towards the end of the fifteenth century it was held that a servant attending his master likewise did not have a separate possession of goods in his keeping: a man did not part with the possession of the wine in his cellar by giving the keys to his butler.[109] The doctrine was rapidly extended from servants to independent contractors and innkeepers.[110] But this was as far as the common law would go in the direction of making servants liable for theft. A servant sent on an errand away from the master's household did have possession of the goods he took with him, and therefore could not steal them feloniously except by breaking bulk.[111] Parliament closed this gap partially in 1529 by making it felony for a servant to abscond with or 'imbezil' goods worth more than forty shillings which he had received from his master to look after.[112] The offence of embezzlement as later understood, where a servant appropriated money or goods received from third parties to the master's use, was a more difficult case.

Hales J. Cf. things beyond worldly value: *OHLE*, VI, p. 565 (holy relics, as distinct from the silver reliquaries which contained them).

[105] Hale, *History of Pleas of the Crown,* I, p. 512 (e.g. tame bears, foxes, and ferrets); E. H. East, *Pleas of the Crown* (1803), II, p. 614.

[106] See p. 406, ante; *OHLE*, VI, p. 569. Deer in a park were considered to be wild and at large, but whether it was felony to fish in a private pond had to be cleared up by statute in 1539.

[107] *The Carrier's Case* (1473) 64 SS 30; I. Williams in *Landmark Cases in Criminal Law* (2017), pp. 9–28. For other cases see *OHLE*, VI, pp. 566–70. For breaking bulk as trespass see *Bourgchier v. Cheseman* (1504) B. & M. 579.

[108] *Anon.* (1353) Y.B. 27 Edw. III, Lib. Ass., pl. 39; cf. *The Carrier's Case* (previous note), at 33, per Nedeham J (taking a piece of plate from a tavern).

[109] *OHLE*, VI, p. 567.

[110] *OHLE*, VI, p. 568.

[111] *R. v. Armysby* (1533) Spelman Rep. 50; 94 SS 280.

[112] Stat. 21 Hen. VIII, c. 7.

Although judges may at times have turned a blind eye to the legal difficulty, it was not clearly recognized as a felony until 1799.[113]

In the eighteenth century some further judicial extensions of larceny were made by qualifying in other ways the scope of legal possession. Possession ceased to be treated as a physical fact, and became an abstract legal concept in which there was a mental element. This was an extension of the old notion that one could hand over goods without passing possession. Possession did not pass, as we have seen, to customers in a shop or inn who were merely using or handling goods which remained in the owner's immediate control. The next step was to reason that when physical possession was handed over for a specific purpose, which the recipient had no intention of carrying out, true possession did not pass in law. Thus the hirer of a horse who rode off, never to return, could be convicted of larceny if it could be proved that he had the intention of stealing from the moment when the horse was delivered to him.[114] This was perhaps the point at which the practical requirements of the law caused it to part company with logic, because whether possession passed was made to depend not on the actual intention of the owner but on the guilty intent of the receiver. In such a case the 'taking' was constructive, or fictitious.

This new concept of constructive taking, where an apparently voluntary parting with possession could be negatived, proved fertile. It became possible to convict of felony those who obtained goods by a trick, on the theory that if the owner did not truly consent to part with possession – because he did not know the true facts – then it did not pass. By the early nineteenth century, even finders could be convicted of felony if they kept what they found, on the principle that the loser remained in constructive possession. Of course, the word 'finding' is open to abuse in this context. A thief will say he 'found' goods merely because they were out of the owner's sight. An intruder who takes a coin mislaid under a bed, or a coachman who appropriates goods left in his coach, is not truly a finder.[115] But the doctrine was extended even to those who came upon goods by genuine finding. And in 1873 constructive taking reached its furthest point when a majority of the judges held that a man who had been overpaid by mistake could be convicted of stealing the surplus feloniously, even though the payer intended to pass the property as well as the possession and the payee practised no deceit at the time he accepted it.[116] Meanwhile, Parliament had been moving in a similar direction, by introducing various new statutory offences of dishonesty, such as embezzlement, fraudulent conversion, receiving stolen goods, obtaining property by false pretences, and obtaining credit by fraud. Since larceny was not obviously more serious in its nature than these other forms of self-enrichment, the idea began to take root that he who was as bad as a thief should be treated as a thief. That idea became law in 1968, when the classical notion of larceny was done away with, and a broad but troublesome concept of dishonesty put in its place.[117]

[113] *R. v. Penley* (1542) 94 SS *301* n. 1, *320* (conviction); *R. v. Bazeley* (1799) 2 Leach 835 (doubts prevail); Stat. 39 Geo. III, c. 85. Trustees and bailees were not reached until 1857: Stat. 20 & 21 Vict., c. 54.

[114] *R. v. Tunnard* (1729) and *R. v. Pear* (1779) 1 Leach 213; East, *Pleas of the Crown* (1803), II, p. 685. The other cases are examined fully in East, pp. 635–98.

[115] See *R. v. Armsby* (1533) Spelm. Rep. 50, where a servant said he 'found' money in a pannier of poultry. Cf. the elastic nature of trover: pp. 419, 424, ante.

[116] *R. v. Middleton* (1873) L.R. 2 C.C.R. 38. The obligation to repay money paid by mistake sounded in quasi-contract, not tort: pp. 388, 395, 396 n. 63, ante.

[117] Theft Act 1968 (c. 60).

Further Reading

Pollock & Maitland, II, pp. 478–511
Milsom, *HFCL*, pp. 421–28
K. Smith, 'Criminal Law' [1820–1914] (2014) in *OHLE*, XIII, pp. 180–463
P. Handler, H. Mares and I. Williams (ed.), *Landmark Cases in Criminal Law* (2017)
M. Hale, *History of the Pleas of the Crown* (written in the 1670s but first printed in 1736; repr., with an introduction by P. R. Glazebrook, 1971), 2 volumes
J. H. Beale, 'The Borderland of Larceny' (1892) 6 HLR 244–56
F. B. Sayre, 'Mens Rea' (1932) 45 HLR 974–1026
J. M. Kaye, 'Early History of Murder and Manslaughter' (1967) 83 LQR 365–95, 569–601
N. Walker, *Crime and Insanity in England. Volume One: the Historical Perspective* (1968)
N. D. Hurnard, *The King's Pardon for Homicide before 1307* (1969), esp. pp. 68–170, 251–97
J. G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (1970); *The Tudor Law of Treason* (1979)
P. Fletcher, 'The Metamorphosis of Larceny' (1976) 89 HLR 469–530
J. H. Baker, 'Pleas of the Crown' (1978) 94 SS *299–350*; 'The Refinement of English Criminal Jurisprudence' (1981) repr. with corrections in *CPELH*, II, pp. 989–1014; 'The Law Relating to Felonies' [1483–1558] (2003) in *OHLE*, VI, pp. 553–79; 'Treason and Offences against Public Order', ibid. 581–94; '*R.* v. *Saunders and Archer* (1573)' (2017) in *Landmark Cases in Criminal Law*, pp. 29–57
J. Horder, *Provocation and Responsibility* (1992); 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113 LQR 95–119
I. Williams, '*The Carrier's Case* (1473)' (2017) in *Landmark Cases in Criminal Law*, pp. 9–28
See also the list at the end of ch. 29.

APPENDICES

APPENDIX I

Specimen Writs

Note that in both appendices the Latin spellings have been standardized for ease of interpretation.[1]

Original Writs

A: 'PRAECIPIMUS TIBI' FORMS

i) Writ of right patent[2]

Edwardus Dei gratia Rex Angliae, dominus Hiberniae, et dux Aquitaniae, Edwardo comiti Lancastriae salutem. Praecipimus tibi quod sine dilatione plenum rectum teneas A. de B. de uno mesuagio et viginti acris terrae cum pertinentiis in I., quae clamat tenere de te per liberum servitium unius denarii per annum, pro omni servitio, quod W. de T. ei deforciat. Et nisi feceris, vicecomes Nottingham faciat, ne amplius inde clamorem audiamus pro defectu recti. Teste meipso apud Westmonasterium octavo die Octobris anno regni nostri duodecimo.

ii) Replegiare facias[3]

Rex vicecomiti Nottingham salutem. Praecipimus tibi quod juste et sine dilatione replegiari facias B. quendam equum suum quod D. cepit et injuste detinet, ut dicitur, et postea eum inde juste deduci facias, ne amplius inde clamorem audiamus pro defectu justitiae. Teste etc.

iii) De nativo habendo[4]

Rex vicecomiti S. salutem. Praecipimus tibi quod juste et sine dilatione facias habere A. B. nativum et fugitivum suum cum omnibus catallis suis et tota sequela sua ubicumque inventus fuerit in balliva tua nisi sit in dominico nostro, qui fugit de terra sua post coronationem domini Henrici Regis filii Regis Johannis. Et prohibemus super forisfacturam nostram ne quis eum injuste detineat. Teste etc.

iv) Justicies for mill-suit[5]

Rex vicecomiti N. salutem. Praecipimus tibi quod justicies A. quod juste et sine dilatione faciat sectam suam ad molendinum E. in C. quam ad illud debet et solet, ut dicit, sicut rationabiliter monstrare poterit quod eam ad illud facere debet, ne amplius inde clamorem audiamus pro defectu justitiae. Teste etc.

B: 'PRAECIPE' FORMS

i) Praecipe in capite[6]

Rex vicecomiti N. salutem. Praecipe A. quod juste et sine dilatione reddat B. unum mesuagium cum pertinentiis in D. quod clamat esse jus et haereditatem suum et tenere de nobis in capite, et unde quaeritur quod praedictus A. ei injuste deforciat etc. Et nisi fecerit et praedictus B. fecerit te securum de clamore suo prosequendo, tunc summone per bonos summonitores praedictum A. quod sit

[1] In this book, the usual printed form of the Latin diphthong 'ae' is used, though in writs and other legal documents it would be written 'e': e.g. 'Precipimus'. In the printed *Registrum omnium Brevium* (1531, and later editions) it is 'æ'.

[2] Fitzherbert, *Natura Brevium,* fo. 1G, but with full royal style and *teste* inserted from 87 SS 108. In the remaining precedents below, the full style and *teste* are omitted.

[3] Ibid., fo. 68D. [4] Ibid., fo. 77E. [5] Ibid., fo. 123A. [6] Ibid., fo. 5I.

APPENDIX I

Specimen Writs (Translations)

Original Writs

A: 'PRAECIPIMUS TIBI' FORMS

i) Writ of right patent[1]

Edward, by the grace of God king of England, lord of Ireland, and duke of Aquitaine, to Edward earl of Lancaster, greeting. We command you that without delay you do full right[2] to A. of B. in respect of one messuage and twenty acres of land with the appurtenances in J. which he claims to hold of you by the free service of one penny a year for all service, and of which W. of T. deforces him. And if you will not do so, let the sheriff of Nottingham do it, that we may hear no more complaint about this for want of right. Witness my self at Westminster on the eighth day of October in the twelfth year of our reign.

ii) Replegiare[3] *facias*

The king[4] to the sheriff of Nottingham, greeting. We command you that justly and without delay you cause to be replevied to B. a certain horse of his which D. took and unjustly detains, as it is said, and afterwards cause him to be justly dealt with therein, that we may hear no more complaint about this for want of justice. Witness etc.

iii) De nativo habendo

The king to the sheriff of S., greeting. We command you that justly and without delay you cause A. to have B., his villein and fugitive, with all his chattels and all his brood, wheresoever he may be found in your bailiwick except in our demesne, who fled from his land since the coronation of the lord King Henry [III], son of King John. And we prohibit, upon our forfeiture, that anyone detain him unjustly. Witness etc.

iv) Justicies for mill-suit[5]

The king to the sheriff of N., greeting. We command you to justice A. that justly and without delay he do his suit to E.'s mill in C., which he owes and is accustomed to do thereto, as C. says, as C. can reasonably show that he ought to do it thereto, that we may hear no more complaint of this for want of justice. Witness etc.

B: 'PRAECIPE' FORMS

i) Praecipe in capite

The king to the sheriff of N., greeting. Command A. that justly and without delay he render to B. one messuage with the appurtenances in D., which he claims to be his right and inheritance and to hold of us in chief, and whereof he complains that the aforesaid A. unjustly deforces him. And if he will not do so, and if the aforesaid B. shall give you security for pursuing his claim, then summon

[1] Cf. B. & M. 10, 14. [2] Or justice.
[3] This is the usual spelling, but the sense is passive and the passive infinitive should be *replegiari*.
[4] Real writs always began with the full name and style of the king: see note 2 on opposite page.
[5] This is a viscontiel writ, conferring jurisdiction on the sheriff himself.

coram justiciariis nostris apud Westmonasterium [*tali die*] ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste etc.

ii) Entry in the per and cui[7]

Rex vicecomiti N. salutem. Praecipe A. quod juste et sine dilatione reddat B. unum gurgitem cum pertinentiis in D. quod clamat esse jus et haereditatem suam et in quem idem A. non habet ingressum nisi per C. cui praedictus B. illud dimisit ad terminum qui praeteriit etc. Et nisi fecerit etc.

iii) Formedon in the descender[8]

Rex vicecomiti M. salutem. Praecipe A. quod juste et sine dilatione reddat B. manerium de N. cum pertinentiis quod C. dedit D. et E. uxori ejus et haeredibus de corporibus ipsorum D. et E. exeuntibus et quod post mortem praedictorum D. et E. praefato B. filio et haeredi praedictorum D. et E. descendere debet per formam donationis praedictae, ut dicit. Et nisi fecerit etc.

iv) Debt[9]

Rex vicecomiti N. salutem. Praecipe A. quod juste et sine dilatione reddat B. centum solidos quos ei debet et injuste detinet ut dicit. Et nisi fecerit etc.

v) Detinue for bonds[10]

Rex vicecomiti N. salutem. Praecipe A. quod juste et sine dilatione reddat B. unam pixidem cum tribus scriptis obligatoriis in eadem pixide contentis sub sigillo praedicti B. consignatam,[11] quam ei injuste detinet, ut dicit. Et nisi fecerit etc.

vi) Account against a receiver[12]

Rex vicecomiti N. salutem. Praecipe A. quod reddat B. rationabilem compotum de tempore quo fuit receptor denariorum ipsius [B]. Et nisi fecerit etc.

vii) Covenant[13]

Rex vicecomiti L. salutem. Praecipe B. quod juste et sine dilatione teneat A. conventionem inter eos factam de quodam granario sumptibus ipsius B. apud N. de novo construendo. Et nisi fecerit etc.

viii) Quod permittat for pasture[14]

Rex vicecomiti M. salutem. Praecipe A. quod juste et sine dilatione permittat B. habere communiam pasturam in N. et quadraginta acris bosci, quam habere debet, ut dicit. Et nisi fecerit etc.

C: PETTY ASSIZES

i) Novel disseisin[15]

Rex vicecomiti N. salutem. Quaestus est nobis A. quod B. injuste et sine judicio disseisivit eum de libero tenemento suo in C. post primam transfretationem domini Henrici Regis filii [Regis] Johannis in Vasconia. Et ideo tibi praecipimus quod si praedictus A. fecerit te securum de clamore suo prosequendo, tunc facias tenementum illud reseisiri de catallis quae in ipso capta fuerunt et ipsum tenementum cum catallis esse in pace usque ad primam assisam cum justiciarii nostri in partes illas

[7] Ibid., fo. 201E. [8] Ibid., fo. 212D. [9] Ibid., fo. 119L. [10] Ibid., fo. 138B.
[11] Abbreviated as *consignat'*, but presumably agreeing with *pixidem* rather than *scriptis*.
[12] Ibid., fo. 117E. [13] *Registrum Omnium Brevium* (1531), fo. 166.
[14] Fitzherbert, *Natura Brevium*, fo. 123G. [15] Ibid., fo. 177F.

the aforesaid A. by good summoners that he be before our justices at Westminster[6] [*on such a day*] to show why he has not done it. And have there the summoners, and this writ. Witness etc.

ii) Entry in the per and cui

The king to the sheriff of N., greeting. Command A. that justly and without delay he render to B. one water-gulf with the appurtenances in D., which he claims to be his right and inheritance and into which the same A. has no entry except through C., to whom the aforesaid B. demised it for a term which has expired. And if he will not do so etc.

iii) Formedon in the descender[7]

The king to the sheriff of M., greeting. Command A. that justly and without delay he render to B. the manor of N. with the appurtenances, which C. gave to D. and E. his wife, and the heirs of the bodies of the selfsame D. and E. issuing, and which after the death of the aforesaid D. and E. ought to descend to the aforesaid B. the son and heir of the aforesaid D. and E. by the form of the aforesaid gift, as he says. And if he will not do so etc.

iv) Debt

The king to the sheriff of N., greeting. Command A. that justly and without delay he render to B. one hundred shillings which he owes to him and unjustly withholds, as he says. And if he will not do so etc.

v) Detinue for bonds

The king to the sheriff of N., greeting. Command A. that justly and without delay he render to B. one box marked with the seal of the aforesaid B., with three written bonds contained in the same box, which he unjustly detains, as he says. And if he will not do so etc.

vi) Account against a receiver

The king to the sheriff of N., greeting. Command A. that justly and without delay he render to B. a reasonable account of the period when he was receiver of the said B.'s money. And if he will not do so etc.

vii) Covenant

The king to the sheriff of L., greeting. Command B. that justly and without delay he keep with A. the covenant between them made for a certain granary to be new built at N. at the expense of him the said B. And if he will not do so etc.

viii) Quod permittat for pasture

The king to the sheriff of M., greeting. Command A. that justly and without delay he permit B. to have common of pasture in N. and in forty acres of wood, which he ought to have, as he says. And if he will not do so etc.

C: PETTY ASSIZES

i) Novel disseisin

The king to the sheriff of N., greeting. A. has complained to us that B. unjustly and without judgment disseised him of his free tenement in C. after the first passage of the lord King Henry [III], son of King John, into Gascony.[8] And therefore we command you that if the aforesaid A. shall give you security for pursuing his claim, then cause the tenement to be reseised of the chattels which were taken therein and cause the same tenement with the chattels to be in peace until the first assize when our justices shall come into those parts. And in the mean time cause twelve free and lawful men of that neighbourhood to view the tenement, and cause their names to be put onto the writ,

[6] I.e. in the Common Bench. [7] See the Statute *De donis* 1285, B. & M. at 53.
[8] For the limitation period see p. 256, ante.

venerint. Et interim facias duodecim liberos et legales homines de visneto illo videre tenementum illud, et nomina illorum imbreviari, et summone eos per bonos summonitores quod sint coram praefatis justiciariis ad praefatam assisam parati inde facere recognitionem. Et pone per vadium et salvos plegios praedictum B., vel ballivum suum si ipse inventus non fuerit, quod tunc sit ibi ad audiendum illam recognitionem etc. Et habeas ibi summonitores, nomina plegiorum, et hoc breve. Teste etc.

ii) Mort d'ancestor[16]

Rex vicecomiti S. salutem. Si A. fecerit te securum de clamore suo prosequendo, tunc summone per bonos summonitores duodecim liberos et legales homines de visneto de N. quod sint coram justiciariis nostris ad primam assisam cum in partes illas venerint, parati sacramento recognoscere si W. pater praedicti A. fuit seisitus in dominico suo ut de feodo de uno mesuagio et una virgata terrae cum pertinentiis in N. die quo obiit, et si obiit post coronationem domini Henrici Regis, et si idem A. propinquior haeres ejus sit. Et interim praedictum mesuagium et terram videant. Et nomina eorum imbreviari facias. Et summone per bonos summonitores B. qui praedicta mesuagium et terras nunc tenet, quod sit ibi ad audiendum illam recognitionem. Et habeas ibi summonitores et hoc breve. Teste etc.

D: 'OSTENSURUS QUARE' FORMS

i) Trespass vi et armis, for battery[17]

Rex vicecomiti S. salutem. Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. quod sit coram nobis in octabis Sancti Michaelis ubicumque fuerimus tunc in Anglia ostensurus quare vi et armis in ipsum A. apud N. insultum fecit et ipsum verberavit, vulneravit, et male tractavit, ita quod de vita ejus desperabatur, et alia enormia ei intulit, ad grave damnum ipsius A. et contra pacem nostram etc. Et habeas ibi nomina plegiorum et hoc breve. Teste etc.

ii) Ejectment[18]

Rex vicecomiti N. salutem. Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. quod sit coram justiciariis nostris apud Westmonasterium [*tali die*] ostensurus quare vi et armis manerium de I., quod T. praefato A. dimisit ad terminum quod nondum praeteriit, intravit, et bona et catalla ejusdem A. ad valenciam [. . .] in eodem manerio inventa cepit et asportavit, et ipsum A. a firma sua praedicta ejecit, et alia enormia ei intulit, ad grave damnum ipsius A. et contra pacem nostram. Et habeas ibi nomina plegiorum et hoc breve. Teste etc.

iii) Waste against a tenant for years[19]

Rex vicecomiti N. salutem. Si A. fecerit te securum de clamore suo prosequendo, tunc summoneas per bonos summonitores B. quod sit coram justiciariis nostris apud Westmonasterium [*tali die*] ostensurus quare, cum de communi consilio regni nostri Angliae provisum sit quod non liceat alicui vastum, venditionem, seu destructionem facere de terris, domibus, boscis, seu gardinis, sibi dimissis ad terminum vitae vel annorum: idem B. de terris, domibus, boscis, et gardinis in L., quae praedictus A. ei dimisit ad terminum annorum, fecit vastum, venditionem, et destructionem, ad exhaeredationem ipsius A. et contra formam provisionis praedictae, ut dicit. Et habeas ibi summonitores et hoc breve. Teste etc.

iv) Trespass on the case against a farrier[20]

Rex vicecomiti L. salutem. Si J. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios R. quod sit etc. ostensurus quare, cum idem J. quendam equum prefato R. ad bene et competenter ferrandum apud N. tradidisset: idem R. quendam clavum in vivo pedis

[16] Ibid., fo. 195E. [17] Ibid., fo. 86I. [18] Fitzherbert, *Natura Brevium*, fo. 220G.
[19] *Registrum Omnium Brevium*, fo. 73. [20] Ibid., fo. 106.

and summon them by good summoners that they be before the said justices at the said assize ready to make recognition thereon. And put by gage and safe pledges the aforesaid B., or if he shall not be found his bailiff, that he may be there then to hear the recognition. And have there the summoners, the names of the pledges, and this writ. Witness etc.

ii) Mort d'ancestor

The king to the sheriff of S., greeting. If A. shall give you security for pursuing his claim, then summon by good summoners twelve free and lawful men of the neighbourhood of N. that they be before our justices at the first assize when they shall come into those parts, ready to make recognition by oath whether W., father of the aforesaid A., was seised in his demesne as of fee of one messuage and one yard-land with the appurtenances in N. on the day he died, and whether he died after the coronation of the lord King Henry, and whether the same A. is his nearest heir. And in the mean time let them view the said messuage and land. And cause their names to be put on the writ. And summon by good summoners B., who now holds the aforesaid messuage and land, that he may be there to hear the recognition. And have there the summoners, and this writ. Witness etc.

D: 'OSTENSURUS QUARE' FORMS

i) Trespass vi et armis, for battery[9]

The king to the sheriff of S., greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before us on the octave of Michaelmas, wheresoever we shall then be in England,[10] to show why with force and arms he made assault on the selfsame A. at N., and beat, wounded and ill treated him so that his life was despaired of, and offered other outrages against him, to the grave damage of the selfsame A. and against our peace. And have there the names of the pledges, and this writ. Witness etc.

ii) Ejectment[11]

The king to the sheriff of N., greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before our justices at Westminster [*on such a day*] to show why, with force and arms, he entered into the manor of I., which T. demised to the said A. for a term which has not yet expired, and took and carried away the goods and chattels of the same A. to the value of […] found in the same manor, and ejected him the said A. from his farm[12] aforesaid, and offered other outrages against him, to the grave damage of the selfsame A. and against our peace. And have there the names of the pledges, and this writ. Witness etc.

iii) Waste against a tenant for years

The king to the sheriff of N., greeting. If A. shall give you security for pursuing his claim, then summon B. by good summoners that he be before our justices at Westminster [*on such a day*] to show why, whereas it is enacted by the common council of our realm of England[13] that it is unlawful for anyone to make waste, sale, or destruction of lands, houses, woods, or gardens demised to him for a term of life or of years: the same B. has made waste, sale, and destruction of the lands, houses, woods, and gardens in L. which the aforesaid A. demised to him for a term of years, to the disherison of him the said A. and against the form of the aforesaid enactment. And have there the summoners, and this writ. Witness etc.

iv) Trespass on the case against a farrier

The king to the sheriff of L., greeting. If J. shall give you security for pursuing his claim, then put by gage and safe pledges R. that he be etc. to show why, whereas the same J. delivered a certain horse

[9] For a specimen declaration in trespass to chattels, cf. p. 592, post.

[10] I.e. in the King's Bench.

[11] For the full record in such an action, see Bl. Comm., III, Appendix II. For the declaration and rules, see B. & M. 201–3

[12] Farm (*firma*), primarily meaning rent, here means land demised for a term.

[13] Stat. Gloucester 1278, c.5.

equi praedicti intantum infixit quod equus ille multipliciter deterioratus fuit, ad damnum ipsius J. centum solidorum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Teste etc.

v) Assumpsit for negligence by a carrier[21]

Rex vicecomiti L. salutem. Si N. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios T. quod sit etc. ostensurus quare, cum idem T. ad quandam pipam vini ipsius N. a villa de S. usque villam de F. salvo et secure cariandam apud praedictam villam de S. assumpsisset: praedictus T. pipam illam tam negligenter et improvide cariavit quod pipa illa in defectu ipsius T. confracta fuit, sicque idem N. magnam partem vini praedicti amisit, ad damnum ipsius N. decem marcarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Teste etc.

vi) Assumpsit for nonfeasance[22]

Rex vicecomiti L. salutem. Si W. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios J. quod sit etc. ostensurus quare, cum idem J., pro quadam pecuniae summa sibi per praefatum W. prae manibus soluta, quandam crucem de lapidibus apud R. infra certum terminem de novo construere ibidem assumpsisset: praedictum J. crucem illam infra terminum praedictum construere non curavit, ad damnum ipsius W. viginti librarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Teste etc.

Judicial Writs

i) Common Pleas mesne process: capias ad respondendum

Rex vicecomiti W. salutem. Praecipimus tibi quod capias A. si inventus fuerit in balliva tua et eum salvo custodias ita quod habeas corpus ejus coram justiciariis nostris apud Westmonasterium in octabis Sanctae Trinitatis ad respondendum B. de placito quare vi et armis clausum et domum ipsius B. fregit et alia enormia ei intulit ad damnum ipsius B. quinquaginta librarum, ut dicit. Et habeas tunc ibi hoc breve. Teste etc.

ii) King's Bench mesne process: latitat[23]

Rex vicecomiti S. salutem. Cum vicecomiti nostro Midd' nuper praecipimus quod caperet C. si inventus fuisset in balliva sua et eum salvo custodiret ita quod haberet corpus ejus coram nobis apud Westmonasterium ad certum diem jam praeteritum ad respondendum A. de placito transgressionis, acetiam separali billae ipsius A. versus praefatum C. pro decem libris de debito secundum consuetudinem curiae nostrae coram nobis exhibendae, dictusque vicecomes noster Midd' ad diem illum nobis retornavit quod praedictus C. non est inventus in balliva sua, super quo ex parte praedicti A. in curia nostra coram nobis sufficienter testatum est quod praedictus C. latitat et discurrit in comitatu tuo: ideo tibi praecipimus quod capias eum si inventus fuerit in balliva tua et eum salvo custodias ita quod habeas corpus ejus coram nobis apud Westmonasterium die Mercurii proximo post tres septimanas Sanctae Trinitatis ad respondendum praefato A. de placito et billa praedictis. Et habeas ibi tunc hoc breve. Teste Johanne Holt milite, apud Westmonasterium, nono die Junii anno regni nostri undecimo.

iii) Exchequer mesne process: quominus[24]

Regina vicecomiti M. salutem. Praecipimus tibi quod non omittas propter aliquam libertatem comitatus tui quin eam ingrediaris et capias H. ubicumque inventus fuerit in balliva tua et eum salvo custodias ita quod habeas corpus ejus coram baronibus de scaccario nostro apud Westmonasterium

[21] Ibid., fo. 110. [22] Ibid., fo. 109v. [23] *Instructor Clericalis* (3rd edn, 1700), p. 39.
[24] From the writ file for Hilary term 1590, E5/39/4.

to the said R. at N. to be well and sufficiently shod: the same R. fixed a certain nail in the quick of the foot of the aforesaid horse in such a way that the horse was in many ways impaired, to the damage of the selfsame J. one hundred shillings, as he says. And have there the names of the pledges, and this writ. Witness etc.

v) Assumpsit for negligence by a carrier

The king to the sheriff of L., greeting. If N. shall give you security for pursuing his claim, then put by gage and safe pledges T. that he be etc. to show why, whereas the same T. at the vill of S. had undertaken to carry a certain pipe of wine belonging to the selfsame N. safely and securely from the aforesaid vill of S. to the vill of F.: the aforesaid T. carried the pipe so carelessly and improvidently that in default of the selfsame T. the pipe was cracked, so that the same N. lost the great part of the aforesaid wine, to the damage of the selfsame N. ten marks, as he says. And have there the names of the pledges, and this writ. Witness etc.

vi) Assumpsit for nonfeasance[14]

The king to the sheriff of L., greeting. If W. shall give you security for pursuing his claim, then put by gage and safe pledges J. that he be etc. to show why, whereas the same J., for a certain sum of money paid to him beforehand by the aforesaid W., had undertaken at R. to rebuild a certain stone cross there within a certain time: the aforesaid J. did not take care to build the said cross within the aforesaid time, to the damage of the selfsame W. twenty pounds, as he says. And have there the names of the pledges, and this writ. Witness etc.

Judicial Writs

i) Common Pleas mesne process: capias ad respondendum

The king to the sheriff of W., greeting. We command you that you take A. and safely keep him so that you may have his body before our justices at Westminster in the octave of the Holy Trinity to answer B. in a plea why with force and arms he broke the close and house of the selfsame B. and offered other outrages against him, to the damage of the selfsame B. fifty pounds, as he says. And have there then this writ. Witness etc.[15]

ii) King's Bench mesne process: latitat

The king to the sheriff of S., greeting. Whereas we lately commanded our sheriff of Middlesex that he should take C., if he could be found in his bailiwick, and safely keep him so that he might be before us at Westminster at a certain day now past, to answer unto A. in a plea of trespass, and also[16] to a separate bill of the him said A. to be exhibited before us, according to the custom of our court, against the said C. for ten pounds of debt; and our said sheriff of Middlesex at that day returned to us that the aforesaid C. has not been found in his bailiwick; whereupon, on behalf of the aforesaid A., it has been sufficiently attested in our court before us that the aforesaid C. lurks and roams about in your county: therefore we command you that you take him, if he can be found in your bailiwick, and safely keep him so that you may have his body before us at Westminster on the Wednesday next after three weeks of the Holy Trinity, to answer to the aforesaid A. in respect of the plea and bill aforesaid. And have there then this writ. Witness John Holt, knight,[17] the ninth day of June [1699] in the eleventh year of our reign.

iii) Exchequer mesne process: quominus

The queen to the sheriff of M., greeting. We command you that you omit not by reason of any liberty in your county but that you enter the same and take H., wheresoever he shall be found in your bailiwick, and safely keep him so that you may have his body before the barons of our Exchequer at

[14] For other specimens see B. & M., ch. 15.
[15] Name of the chief justice of the Common Pleas.
[16] The *ac etiam* clause.
[17] Chief justice of the King's Bench.

in crastino Purificationis Beatae Mariae Virginis ad respondendum W. debitori nostro de quodam placito transgressionis, quominus praedictus W. nobis satisfacere valeat de debitis quae nobis debet ad dictum scaccarium nostrum, ad grave damnum ipsius W. ut dicit, sicut rationabiliter monstrare poterit quod inde respondere debet. Et habeas ibi hoc breve. Teste Rogero Manwood milite apud Westmonasterium xxviij° die Novembris anno regni nostri tricesimo secundo.

iv) Chancery mesne process: subpoena ad respondendum[25]

Rex C. D. armigero salutem. Quibusdam certis de causis coram nobis in Cancellaria nostra propositis tibi praecipimus firmiter injungentes quod omnibus aliis praetermissis et excusatione quacunque cessante in propria persona tua sis coram nobis in dicta Cancellaria nostra a die Sancti Michaelis proximo futuro in tres septimanas ubicumque tunc fuerimus, ad respondendum super iis quae tibi objicientur tunc ibidem, et ad faciendum ulterius et recipiendum quae dicta curia nostra consideraverit in hac parte. Et hoc sub poena centum librarum nullatenus omittas. Et habeas tunc ibi hoc breve. Teste etc.

v) Final process: ca. sa. for damages in trespass

Rex vicecomiti S. salutem. Praecipimus tibi quod capias B. si inventus fuit in balliva tua et eum salvo custodias ita quod habeas corpus ejus coram nobis apud Westmonasterium die Lunae proximo post quindenam Sancti Martini ad satisfaciendum J. de quindecim libris pro damnis suis quae sustinuit tam occasione cujusdam transgressionis eidem J. per praefatum defendentem illatae quam pro misis et custagiis suis per ipsum circa sectam suam in hac parte appositis, unde convictus est sicut nobis constat de recordo. Et habeas ibi tunc hoc breve. Teste etc.

Prerogative Writs

i) Error[26]

Rex dilecto et fideli suo A.B. militi salutem. Quia in recordo et processu ac etiam in redditione judicii loquelae quae fuit in curia nostra coram vobis et sociis vestris justiciariis nostris de Banco per breve nostrum inter X. et Y., de quodam debito ducentarum librarum quod idem X. in eadem curia nostra coram vobis et sociis vestris praedictis recuperavit versus eum, error intervenit manifestum ad grave damnum ipsius Y., sicut ex querela sua accepimus: nos, errorem si quis fuerit modo debito corrigi et partibus praedictis plenam et celerem justiciam fieri volentes in hac parte, vobis mandamus quod si judicium inde redditum sit tunc recordum et processum loquelae praedictae cum omnibus ea tangentibus nobis sub sigillo vestro distincte et aperte mittatis, et hoc breve, ita quod habeamus a die Sanctae Trinitatis in tres septimanas ubicumque tunc fuerimus in Anglia, ut, inspectis recordo et processu praedictis, ulterius inde pro errore illo corrigendo fieri faciamus quod de jure et secundum legem et consuetudinem regni nostri Angliae fuerit faciendum. Teste etc.

ii) Certiorari to commissioners of sewers[27]

Rex dilectis et fidelibus suis A., B., C., et D., justiciariis nostris ad wallias, fossata, gutteras, seweras, pontes, calceta, et gurgites per costeram maris et marisci in partibus de M. inter aquas de E., F., G., et H. in comitatu L. supervidenda assignatis, et eorum cuilibet, salutem. Volentes certis de causis certiorari super omnibus et singulis praesentationibus coram vobis versus J. S., quocumque nomine censeatur, factis sive praesentatis ut dicitur: vobis mandamus quod tenores praesentationum praedictorum nobis in cancellariam nostram [*tali die*] ubicumque fuerit sub sigillis vestris vel unius vestrum distincte et aperte mittatis, et hoc breve. Teste etc.

[25] *The Compleat Clerk in Court* (1726), p. 10.
[26] Based on Coke's *Entries*, fo. 246; Bl. Comm., III, Appendix III(6).
[27] *Registrum Omnium Brevium,* fo. 287.

Westminster on the morrow of the Purification of the Blessed Virgin Mary to answer W. our debtor in a certain plea of trespass, whereby he is the less able to satisfy us in respect of the debts which he owes us at our said Exchequer, to the grave damage of the selfsame W. as he says, as he can reasonably show that he ought to answer therein. And have there this writ. Witness Roger Manwood, knight,[18] at Westminster, the 28th day of November [1589] in the thirty-second year of our reign.

iv) Chancery mesne process: subpoena ad respondendum

The king to C. D., esquire, greeting. For certain causes set forth before us in our Chancery, we firmly enjoining command you that, laying aside all other things and all excuses whatsoever, you be in your own person before us in our said Chancery in three weeks from Michaelmas day next following, wheresoever we may then be, to answer there upon those matters that shall then be charged against you, and further to do and receive whatever our said court shall award in that behalf. And this in no wise omit, upon pain of one hundred pounds. And have there then this writ. Witness etc.

v) Final process: ca. sa. for damages in trespass

The king to the sheriff of S., greeting. We command you that you take B., if he can be found in your bailiwick, and keep him safely so that you may have his body before us at Westminster on the Monday next after the quindene of St Martin, to satisfy J. in respect of fifteen pounds for his damages which he sustained both by reason of a certain trespass committed by the said defendant against the same J. and also for his outlay and costs laid out by him about his suit in that behalf, wherein he is convicted, as appears to us of record. And have you there then this writ. Witness etc.

Prerogative Writs

i) Error

The king to his trusty and beloved A. B., knight,[19] greeting. Because manifest error has intervened in the record and process, and also in the giving of judgment, of the suit which was in our court before you and your fellows our justices of the Bench, by our writ, between X. and Y., in respect of a certain debt of two hundred pounds which the same X. has recovered in our same court before you and your aforesaid fellows, to the great damage of him the said Y., as we from his complaint are fully informed: we, being willing that the error, if any there be, should be duly corrected, and that full and speedy justice should be done to the aforesaid parties in that behalf, do command you that, if judgment has been given therein, then under your seal you do distinctly and openly send the record and process of the suit aforesaid, with all things concerning them, and this writ, so that we may have them in three weeks from the day of the Holy Trinity wheresoever we shall then be in England, so that, the record and process aforesaid having been inspected, we may cause to be done thereupon whatever of right and according to the law and custom of our realm of England ought to be done in correcting that error. Witness etc.

ii) Certiorari to commissioners of sewers[20]

The king to his trusty and beloved A., B., C. and D., our justices assigned to survey the banks, dykes, channels, sewers, bridges, causeys, and weirs by the coast of the sea and marsh in the parts of M. between the waters of E., F., G., and H. in the county of L., and to each of them, greeting. We, wishing for certain reasons to be informed concerning all and singular the presentments made or presented before yourselves, as it is said, against J. S., by whatever name he is charged, do command you that under the seals of yourselves, or of one of you, you do distinctly and openly send the tenors of the aforesaid presentments, and this writ, unto us in our Chancery [*at such a day*] wheresoever it should then be. Witness etc.

[18] Chief baron of the Exchequer.

[19] In this instance the chief justice of the Common Pleas.

[20] This form is for removal into the Chancery, but a similar form was used by the King's Bench for reviewing summary convictions and justices' orders.

iii) Habeas corpus ad subjiciendum[28]

Rex J. L. militi, gardiani prisonae nostrae de le Fleet, salutem. Praecipimus tibi quod corpus W. E. militis in prisona nostra sub custodia tua detentum, ut dicitur, una cum die et causa detentionis suae, quocumque nomine praedictus W. E. censeatur in eadem, habeas coram nobis [*tali die*] ubicumque tunc fuerimus in Anglia, ad subjiciendum et recipiendum ea quae curia nostra de eo adtunc et ibidem ordinare contigerit in hac parte. Et hoc nullatenus omittatis, periculo incumbente. Et habeas ibi hoc breve. Teste etc.

[28] Based on 3 State Tr. 11 (1628).

iii) Habeas corpus ad subjiciendum

The king to J. L., knight, warden of our prison of the Fleet, greeting. We command you that you have the body of W. E., knight, who (as it is said) is detained in our prison under your custody, by whatever name the aforesaid W. E. is charged, before us [*at such a day*] wheresover we shall then be in England, together with the day and the cause of his detention, to undergo and receive whatever our court should then and there happen to order concerning him in this behalf. And this in no wise omit, upon the peril that may befall. And have there this writ. Witness etc.

Writ of Summons (1832)

This form was to be used for personal actions commenced after 1 November 1832.[21]

William the fourth by the grace of God etc. to C. D. of Y. in the county of Z., greeting. We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our court of… in an action on promises *[or as the case may be]*[22] at the suit of A. B.; and take notice, that in default of your so doing the said A. B. may cause an appearance to be entered for you and proceed therein to judgment and execution. Witness etc.

[21] Uniformity of Process Act (2 & 3 Will. IV, c. 39), s. 1 and Sch. I. With slight changes, the same form was in use until 1980. The 1832 Act also introduced (Sch. IV) a form of *capias* to be used in actions where it was intended to hold the defendant to special bail.

[22] This statement of the cause of action was omitted after 1852. See the Common Law Procedure Act 1852, 15 & 16 Vict., c. 76, Sch. A.

APPENDIX II

Specimen Entries

The forms of pleading used before 1852 were so different from those of today that it may be instructive to read these specimen entries from the plea and Crown sides of the King's Bench. The words have been extended from the original court-hand, and punctuation introduced. The diphthong printed here as ae, for consistency with Appendix I and for ease of understanding, is written as e in all legal records.

An Action of Trespass

BELHOUS v. CLAVERYNG (1341)

Public Record Office, KB 27/324, m. 22.

Essex'. Johannes filius Johannis de Claveryng, Thomas de Eppeford et Radulfus frater ejus, Johannes Munchanesy, Johannes Illeye de Wytham, Ricardus Plantyng de Hatfeld, Johannes Knyght Jonesservaunt Claveryng, et Walterus le Sadeler de Branketre, attachiati fuerunt ad respondendum Isoldae de Belhous de placito quare ipsi simul cum Roberto le Ismanger de Mymmes, Willelmo Baiser, Ricardo Baiser, et Johanne Barber clerico, vi et armis triginta et unam vaccas, octo boviculos, et decem juvencas ipsius Isoldae pretii triginta librarum apud Ramesdene Belhous inventos ceperunt et abduxerunt et alia enormia etc. ad grave damnum etc. et contra pacem etc.

Et unde eadem Isolda, per Simonem de Kegworth attornatum suum, queritur quod praedicti Johannes filius Johannis de Claveryng et alii, simul cum praefato Roberto le Ismanger de Mymmes et aliis, die Sabati proxima[1] post festum Omnium Sanctorum anno regni Regis Edwardi nunc tertio decimo, vi et armis, videlicet gladiis etc., triginta et unam vaccas, octo boviculos, et decem juvencas ipsius Isoldae pretii triginta librarum apud Ramesden Belhous inventos ceperunt et abduxerunt contra pacem etc. Unde dicit quod deteriorata est et damnum habet ad valenciam sexaginta librarum. Et inde producit sectam etc.

Et praedicti Johannes filius Johannis de Claveryng et alii, per Rogerum de Horkesleye attornatum suum, veniunt et defendunt vim et injuriam quando etc. Et dicunt quod ipsi in nullo sunt culpabiles de transgressione praedicta. Et de hoc ponunt se super patriam. Et praedicta Isolda similiter. Ideo veniat inde jurata coram domino rege in octabis Sanctae Trinitatis ubicumque etc. et qui nec etc. ad recognoscendum etc. quia tarn etc.

Postea continuato hic inde processu inter partes praedictas per juratas inter eas positas in respectum usque in octabis Sancti Michaelis anno regni regis nunc quinto decimo ubicumque etc. nisi W. Scot prius die Martis proximo ante festum Sancti Michaelis apud Reylegh venisset etc. Ad quem diem venit coram domino rege praedicta Isolda per praedictum attornatum suum et praedicti Johannes filius Johannis, Thomas, Radulfus, Johannes, Johannes, Ricardus, Johannes, et Walterus non veniunt. Et praedictus W. Scot coram quo praedicta jurata capta fuit tulit hic recordum veredicti juratae praedictae in haec verba:

[1] *Sic*. In this entry, as in others, *dies* occurs in both feminine and masculine forms. Clerks often hid their uncertainty by writing *prox'*.

APPENDIX II

Specimen Entries (Translations)

The following two precedents have been taken at random from the King's Bench rolls of Edward III. Various other precedents of entries in civil and criminal cases will be found in Selden Society volumes; and there are some English translations of civil pleadings in B. & M.

An Action of Trespass

BELLHOUSE v. CLAVERING (1341)

From the plea roll for Easter term, 15 Edw. III.

Essex. [*Note of attachment by writ:*] John son of John of Clavering, Thomas of Eppeford and Ralph his brother, John Munchensey, John Illey of Witham, Richard Planting of Hatfield, John Knight the servant of John Clavering, and Walter the Saddler of Braintree, were attached to answer Isot of Bellhouse in a plea why they, together with Robert the Ironmonger of Mimms, William Baiser, Richard Baiser, and John Barber, clerk, with force and arms took and led away thirty-one cows, eight bullocks, and ten heifers of the selfsame Isot's, worth thirty pounds, found at Ramsden Bellhouse, and other outrages [offered against her], to the grave damage [of the selfsame Isot] and against the peace [of the lord king].

[*Declaration:*] And thereupon the same Isot, by Simon of Kegworth her attorney, complains that the aforesaid John son of John of Clavering and the others, together with the said Robert the Ironmonger of Mimms and the others, on the Saturday [6 Nov. 1339] next after the feast of All Saints in the thirteenth year of the reign of the present King Edward, with force and arms, namely with swords etc., took and led away thirty-one cows, eight bullocks, and ten heifers of the selfsame Isot's, worth thirty pounds, found at Ramsden Bellhouse, against the peace [of the lord king]. Whereby she says she is the worse and has damage to the extent of sixty pounds. And thereof she produces suit etc.

[*Defence:*] And the aforesaid John son of John de Clavering and the others, by Roger of Horkesley their attorney, come and deny the force and wrong whenever [and wherever they ought]. [*Plea and joinder of issue:*] And they say that they are not guilty of the trespass aforesaid. And thereof they put themselves upon the country. And the aforesaid Isot likewise. [*Venire facias:*] Therefore let a jury come thereon before the lord king on the octave of the Holy Trinity wheresoever [he shall then be in England], who neither [to the plaintiff nor the defendants have any affinity], to make recognition [upon their oath whether the defendants are guilty of the trespass or not], because both [the plaintiff and the defendants have put themselves upon that jury].

[*Respite with nisi prius clause:*] Afterwards, the process therein was continued here between the parties aforesaid by the juries between them being put in respite until the octave of Michaelmas in the fifteenth year of the reign of the present king, unless William Scot[1] should first have come to Rayleigh on the Tuesday [25 Sept. 1341] next before Michaelmas, [by the form of the statute]. At which day [6 Oct. 1341] the aforesaid Isot comes before the lord king by her aforesaid attorney; and the aforesaid John son of John, Thomas, Ralph, John, John, Richard, John, and Walter do not come. And the aforesaid William Scot, before whom the aforesaid jury was taken, has sent here the record of the verdict of the aforesaid jury in these words:

[1] Chief justice of the King's Bench.

Postea ad praefatum diem Martis apud Reylegh coram praefato Willelmo Scot, associato sibi Johanne Bray, venit praedicta Isolda per praedictum attornatum suum. Et praedicti Johannes filius Johannis, Thomas dwe Eppeford et Radulfus frater ejus, Johannes Munchanesy, Johannes Illeye de Wytham, Ricardus Plantyng, Johannes Knyghte et Walterus le Sadeler, per praedictum attornatum suum, veniunt. Et similiter juratores veniunt qui dicunt super sacramentum suum quod praedicti Johannes filius Johannis, Thomas de Eppeford et Radulfus frater ejus, Johannes Illeye, Ricardus Plantyng, Johannes Knyghte et Walterus le Sadeler culpabiles sunt de transgressione praedicta ad damnum ipsius Isoldae sexaginta librarum, et quod praedictus Johannes Munchanesy in nullo est inde culpabilis.

Ideo consideratum est quod eadem Isolda recuperet versus praedictos Johannem filium Johannis, Thomam, Radulfum, Johannem Illeye. Ricardum, Johannem Knyght, et Walterum damna sua praedicta et iidem Johannes filius Johannis et alii capiantur. Et praedicta Isolda in misericordia pro falso clamore suo versus praedictum Johannem Munchanesy et idem Johannes eat inde sine die etc. Et super hoc praedicta Isolda asserit se nolle ulterius prosequi versus praefatum Robertum le Ismanger, Willelmum Baiser, Ricardum Baiser, et Johannem Barber, qui nondum placitaverunt etc. Ideo cesset executio de damnis quousque etc.

Proceedings at a Gaol Delivery

DELIVERY OF THE MARSHALSEA PRISON AT NORWICH (1342)

Public Record Office, KB 27/328, Rex, m. 33.

[1] Johannes Pertrik de Topcroft, indictatus coram domino rege de morte Adae de Nethergate de Shelton in villa de Biskele die Sabati in festo Nativitatis Beatae Mariae anno regni regis nunc quinto decimo felonice interfecti, venit per vicecomitem ductus. Et allocutus qualiter se velit de morte et felonia praedictis acquietare dicit quod in nullo est inde culpabilis et de bono et malo ponit se super patriam etc. Ideo fiat inde jurata etc. – Juratores de visneto de Biskele ad hoc electi et triati veniunt, qui dicunt super sacramentum suum quod praedictus Johannes Pertrik in nullo est culpabilis de morte seu felonia praedictis sibi impositis. Ideo ipse eat inde quietus etc. Catalla ejusdem Johannis forisfacta quia subtraxit se, ij s. iiij d., unde villata de Topcroft respondebit etc.

[2] Agnes de Hemesby de Lenne Episcopi, capta per appellum Ricardi Whippe de Ormesby probatoris, qui coram Rogero Breton uno coronatorum comitatus praedicti devenit probator et appellavit praedictam Agnetam de eo quod ipsa scienter receptavit ipsum Ricardum Whippe apud Lenne Episcopi cum duabus supertunicis et cum una tela panni lanuti pretii viginti solidorum quas idem Ricardus furatus fuerat in villa Cantebrigiae die Martis proxima post festum Sancti Martini Episcopi anno regni regis nunc undecimo, sciens ipsum esse latronem et praedicta bona esse furata, quod quidem appellum praedictus coronator praesens hic in curia recordatur, venit per marescallum ducta. Et praedictus probator similiter venit per marescallum ductum. Et quaesitum est ab eo si prosequi velit appellum suum versus praefatam Agnetam nec ne. Qui dicit quod sic. Per quod eadem Agnes allocuta qualiter se velit de receptamento praedicto acquietare dicit quod in nullo est inde culpabilis et de bono et malo ponit se super patriam. Et praedictus probator similiter. Ideo fiat inde jurata etc. – Juratores de visneto praedicto ad hoc electi et triati veniunt, qui dicunt super sacramentum suum quod praedicta Agnes in nullo est culpabilis de [receptamento seu] felonia praedictis sibi impositis nec unquam ea occasione se retraxit. Ideo ipsa eat inde quieta etc. Et praedictus probator suspendatur etc.

[*Postea:*] Afterwards on the aforesaid Tuesday, at Rayleigh before the said William Scot, John Bray being associated unto him, the aforesaid Isot comes by her aforesaid attorney. And the aforesaid John son of John, Thomas of Eppeford and Ralph his brother, John Munchensey, John Illey of Witham, Richard Planting, John Knight, and Walter the Saddler, come by their aforesaid attorney. [*Verdict:*] And the jurors likewise come, who say upon their oath that the aforesaid John son of John, Thomas of Eppeford and Ralph his brother, John Illey, Richard Planting, John Knight, and Walter the Saddler are guilty of the aforesaid trespass, to the damage of the selfsame Isot sixty pounds, and that the aforesaid John Munchensey is not guilty thereof.

[*Judgment:*] Therefore it is awarded that the same Isot do recover her aforesaid damages against the aforesaid John son of John, Thomas, Ralph, John Illey, Richard, John Knight, and Walter; and let the same John son of John and the others be taken. And the aforesaid Isot is in mercy for her false claim against the aforesaid John Munchensey; and let the same John go therein without day etc. [*Nonsuit against the absent defendants:*] And thereupon the aforesaid Isot stated that she did not wish to sue further against the said Robert the Ironmonger, William Baiser, Richard Baiser, and John Barber, who have not yet pleaded etc. Therefore let execution in respect of the damages be stayed until etc.

Proceedings at a Gaol Delivery

DELIVERY OF THE MARSHALSEA PRISON AT NORWICH (1342)

The first three cases from the King's Bench gaol delivery at Norwich, 13 May 1342.

[1] [*Arraignment upon an indictment for manslaughter:*] John Partridge of Topcroft, having been indicted before the lord king for the death of Adam of Nethergate, of Shelton, feloniously slain in the vill of Bixley on Saturday the feast of the Nativity of the Blessed Mary [8 Sept. 1341] in the fifteenth year of the reign of the present king, comes led by the sheriff. [*Allocutus and plea:*] And, being asked how he will acquit himself of the death and felony aforesaid, he says that he is in no way guilty thereof and puts himself for good and ill upon the country etc. Therefore let a jury thereon be made etc. – [*Verdict:*] The jurors of the venue of Bixley, chosen and tried for that purpose, come and say upon their oath that the aforesaid John Partridge is in no way guilty of the death or felony aforesaid laid against him. [*Judgment:*] Therefore let him go quit thereof etc. The chattels of the same John are forfeited because he ran away; [they are appraised at] 2s. 4d., for which the vill of Topcroft shall answer.

[2] [*Arraignment upon an approver's appeal for receiving:*] Agnes of Hemsby, of Bishops Lynn, having been arrested by reason of the appeal of Richard Whip of Ormsby, approver, who became an approver before Roger Breton one of the coroners of the aforesaid county and appealed the aforesaid Agnes for that she knowingly received the selfsame Richard Whip at Bishops Lynn with two surcoats and a piece of woollen cloth worth two shillings which the same Richard had stolen in the vill of Cambridge on the Tuesday [18 Nov. 1337] next after the feast of St Martin the Bishop in the eleventh year of the reign of the present king, knowing him to be a thief and knowing the aforesaid goods to be stolen, which appeal the aforesaid coroner records here in court, comes led by the marshal. And the aforesaid approver likewise comes led by the marshal. And he is asked whether he will prosecute his appeal against the said Agnes, or not; and he says he will. [*Allocutus and plea:*] Wherefore the same Agnes, being asked how she will acquit herself of the aforesaid receiving, says that she is in no way guilty thereof and puts herself for good and ill upon the country. And the aforesaid approver likewise. Therefore let a jury thereon be made etc. – [*Verdict:*] The jurors of the venue aforesaid, chosen and tried for that purpose, come and say upon their oath that the aforesaid Agnes is in no way guilty of the receiving or felony aforesaid laid against her, and that she never ran away on that account. [*Judgment:*] Therefore let her be quit thereof etc. And let the aforesaid approver be hanged etc.

[3] Thomas Bannes de Foxton, captus per ballivos civitatis Norwici pro suspectione latrocinii et cum manuopere trium corporalium, quinque manutergiorum, et unius sudarii, apud ecclesiam de Merkeshale in festo Sancti Bartholomei Apostoli anno regni regis nunc quinto decimo felonice furatorum, venit per praedictos ballivos ductus. Et allocutus qualiter se velit de felonia et latrocinio praedictis acquietare dicit quod clericus est et membrum sacrae ecclesiae et non potest sine ordinariis suis inde respondere. Et super hoc venit Robertus decanus capellae Beatae Mariae in campis Norwici, gerens vices Antonii Norwici episcopi per litteras ipsius episcopi patentes quas protulit hie in curia hoc idem testificantes ad clericos petendos etc., et petit ipse tanquam clericum etc. Et ut sciatur pro quali etc. inquiratur inde veritas per patriam etc. Ideo fiat inde jurata etc. – Juratores de visneto praedicto super hoc onerati dicunt super sacramentum suum quod praedictus Thomas culpabilis sit de latrocinio et felonia praedictis sibi impositis. Ideo idem Thomas tanquam clericus convictus liberatur ordinario ad salvo custodiendum periculo quod incumbit etc. Et sciendum quod pelfrum praedictum traditur Edwardo de Cretyng vicecomiti ad sacros usus capellae domini regis infra castrum Norwici imperpetuum remanendum etc. Et idem Thomas Bannes nulla habet atalla.

[3] [*Arraignment upon an arrest for larceny, with the mainour:*] Thomas Bannes of Foxton, having been arrested by the bailiffs of the city of Norwich on suspicion of larceny, and with mainour[2] of three corporal cloths, five towels, and one maniple (*sudarium*), stolen at the church of Markshall on the feast of St Bartholomew the Apostle [24 Aug. 1341] in the fifteenth year of the reign of the present king, comes led by the aforesaid bailiffs. [*Allocutus and prayer of clergy:*] And, being asked how he will acquit himself of the felony and larceny aforesaid, he says that he is a clerk and a member of Holy Church and that he cannot answer therein without his ordinaries. [*Ordinary claims him:*] And thereupon comes Robert, dean of the chapel of the Blessed Mary in the Fields of Norwich, bearing the authority of Anthony [Bek], bishop of Norwich, for claiming clerks etc., by letters of the selfsame bishop which he puts forward here in court and which witness the same; and he claims him as a clerk etc. [*Inquest of office:*] And so that it may be known in what [capacity he should be delivered], let the truth thereof be inquired into by the country etc. Therefore let a jury thereon be made etc. – [*Verdict:*] The jurors of the venue aforesaid, charged upon this, say upon their oath that the aforesaid Thomas is guilty of the larceny and felony aforesaid laid against him. [*Judgment:*] Therefore let the same Thomas be delivered to the ordinary as a clerk convict, to be safely kept upon the peril which may befall etc. And it is to be known that the pelf aforesaid is delivered to Edward of Creeting, the sheriff, to remain for ever to the sacred uses of the lord king's chapel within Norwich castle etc. And the same Thomas Bannes has no chattels.

[2] Suspected stolen goods found on the prisoner's person. A suspect found with the mainour could at this date be arraigned without indictment: p. 543, ante.

Index

This index includes words which are explained in the text, so that (in conjunction with the text) it may also be used in lieu of a glossary.